January 2013

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Recommended Citation

Paul B. Linton, *Religious Freedom Claims and Defenses under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103 (2013).

Available at: <https://ir.stthomas.edu/ustjlpp/vol7/iss2/1>

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RELIGIOUS FREEDOM CLAIMS AND DEFENSES UNDER STATE CONSTITUTIONS

PAUL BENJAMIN LINTON*

INTRODUCTION

Do state constitutions accord greater protection to religious freedom than does the Free Exercise Clause of the First Amendment? The answer to that question has taken on greater significance since the United States Supreme Court decided *Employment Division, Dep't of Human Resources of Oregon v. Smith*,¹ more than twenty years ago. In *Smith*, the Supreme Court considered the case of two men who were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church.² The men applied for unemployment compensation, but their applications were denied on the basis of a state law disqualifying employees discharged for work-related “misconduct.”³ Although the State of Oregon did not exempt the religious use of peyote from its controlled substances law, the Oregon Supreme Court held that to deny the men unemployment compensation benefits because of their religious use of peyote would violate their rights under the Free Exercise Clause of the First Amendment.⁴ The

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

2. *Id.* at 874.

3. *Id.*

4. *Id.* at 876 (citing *Smith v. Employment Division*, 763 P.2d 146 (Ore. 1988)). The First Amendment provides, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I. Under the incorporation doctrine, the Free Exercise Clause applies to the States through Section 1 of the Fourteenth Amendment (“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”). U.S. CONST. amend. XIV, §

Supreme Court granted the State's petition for *certiorari* and reversed the judgment of the Oregon Supreme Court.

The Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁵ The Court noted that the only decisions in which it had held that the Free Exercise Clause

bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children.⁶

In such cases, the Court required the State to show that the burden imposed on the rights affected by the law in question was the least restrictive means available to promote a compelling state interest, a standard (known as "strict scrutiny") which was not met in the cases cited and seldom (if ever) is met elsewhere. "The present case," however, "does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."⁷

The respondents argued in the alternative "that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)."⁸ Under that test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."⁹ The Court, however, rejected this argument, noting that "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."¹⁰ Even if the Court "were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require

1. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

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

6. *Id.* (citing, *inter alia*, *Cantwell*, 310 U.S. 296 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school beyond the eighth grade)).

7. *Id.* at 882.

8. *Id.* at 882-83.

9. *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963)).

10. *Id.*

exemptions from a generally applicable criminal law.”¹¹ “The *Sherbert* test,” the Court noted “was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct,” specifically, “consideration of the particular circumstances behind an applicant’s unemployment.”¹² The Court’s decisions in the unemployment cases “stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”¹³ Such cases “have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.”¹⁴

The Court cautioned that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”¹⁵ Accordingly, “[t]o make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’ – permitting him, by virtue of his beliefs, ‘to become a law unto himself,’ . . . – contradicts both constitutional tradition and common sense.”¹⁶

Requiring a “compelling government interest . . . before the government may accord different treatment on the basis of race” or “before the government may regulate the content of speech” ensures “equality of treatment and an unrestricted flow of contending speech,” but imposing such a requirement with respect to laws that incidentally burden the free exercise of religion (essentially “a private right to ignore generally applicable laws”) would be “a constitutional anomaly.”¹⁷

In direct response to the Supreme Court’s decision in *Employment Division v. Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).¹⁸ RFRA prohibited government from “substantially burden[ing]” a person’s exercise of religion, even if the burden resulted from a rule of general applicability, unless the government was able to demonstrate that the burden, first, “is in furtherance of a compelling governmental interest,” and, second, “is the least restrictive means of furthering that compelling governmental interest.”¹⁹ In *City of Boerne v. Flores*,²⁰ the

11. *Id.* at 884.

12. *Id.*

13. *Id.* (citation omitted).

14. *Id.*

15. *Id.* at 885 (citation and internal quotation marks omitted).

16. *Id.* (citation omitted).

17. *Id.* at 885-86.

18. 107 Stat. 1488, 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

19. *Id.* § 2000bb-1.

20. 521 U.S. 507 (1997).

Supreme Court considered whether RFRA, insofar as it applies to the States, was authorized by Congress' power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation," the provisions of the Amendment (which, as noted, has been interpreted to incorporate the Free Exercise Clause of the First Amendment).²¹ The Court concluded that RFRA was not authorized by Section 5, which confers upon Congress the power to enact remedial or preventative measures to enforce the Fourteenth Amendment, but not the power to change the substantive meaning of the Constitution itself.²²

In light of *City of Boerne v. Flores*, the Supreme Court's decision in *Employment Division v. Smith* remains the law of the land with respect to claims and defenses raised under the Free Exercise Clause of the First Amendment. To many, both at the time and since, *Employment Division v. Smith* represented a marked retreat from the Court's former free exercise jurisprudence.²³ Whether *Smith* actually sounded a retreat or simply refused to advance to a position it never occupied is certainly debatable.²⁴ But there is a widespread *perception* that the Court abandoned positions it had held in the past. Because of that perception, the interpretation and application of religious freedom guarantees under state constitutions have taken on new importance. To what extent do state courts follow federal free exercise analysis, including *Employment Division v. Smith*, in interpreting their own guarantees of religious freedom? That question acquires a particular urgency given the current debate over a variety of controversial state laws, including laws mandating contraceptive coverage in employee group medical plans that provide drug prescription coverage, laws prohibiting discrimination on

21. U.S. CONST. amend. XIV, § 5.

22. *City of Boerne*, 521 U.S. at 516-36.

23. See, e.g., Justice O'Connor's opinion concurring in the judgment in *Smith*, 494 U.S. at 892-903 (O'Connor, J., concurring in the judgment), her dissent in *City of Boerne*, 521 U.S. at 548-64 (O'Connor, J., dissenting), Justice Blackmun's dissent in *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting) (stating that *Smith* "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution"), Justice Souter's opinion concurring in part and concurring in the judgment in *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 564-77 (1993) (Souter, J., concurring in part and concurring in the judgment); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J. L. & RELIGION 99 (1990); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259 (1993); Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Mark G. Yudof, *Religious Liberty in the Balance*, 47 S.M.U. L. REV. 353 (1994).

24. See Justice Scalia's opinion concurring in part in *City of Boerne*, 521 U.S. at 537-44 (Scalia, J., concurring in part) (responding to Justice O'Connor's critique of *Smith*); Philip A. Hamburger, *Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that historical evidence supports *Smith's* interpretation of free exercise); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (defending the result, but not the reasoning in *Smith*); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L., ETHICS & PUB. POL'Y 591 (1990).

account of marital status and sexual orientation, and laws regulating parochial schools and home schools. This article attempts to answer that question by surveying the principal cases decided under each state's religious freedom guarantee, whether expressed as "free exercise of religion," "freedom of worship," "liberty of conscience," "rights of conscience," or some other formulation.²⁵

25. For an excellent overview of the issues discussed herein, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW[:] LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES*, Vol. 1, ch. 4, esp. § 4.06 (4th ed. 2006).

STATE-BY-STATE ANALYSES

Alabama

Article I, section 3, of the Alabama Constitution provides, in part, "the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles."²⁶ In response to the United States Supreme Court's decision in *City of Boerne v. Flores*, the people of the state of Alabama adopted the Alabama Religious Freedom Amendment in 1998.²⁷ The Alabama Religious Freedom Amendment, a detailed, seven-part amendment to the Alabama Constitution, provides greater protection for religious freedom than that guaranteed by the Free Exercise Clause of the First Amendment. Under section V of the amendment, government may not "burden a person's freedom of religion even if the burden results from a rule of general applicability," unless application of the burden to the person promotes a "compelling governmental interest" and is the "least restrictive means" of promoting that interest.²⁸ Section 3.01 has not yet been interpreted by the Alabama reviewing courts.

Alaska

Article I, section 4, of the Alaska Constitution provides "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."²⁹ Prior to the Supreme Court's decision in *Employment Division v. Smith*, the Alaska Supreme Court construed article I, section 4, consistently with its understanding of the requirements of the Free Exercise Clause. For example, in *Frank v. State*,³⁰ the Alaska Supreme Court upheld a state and federal free exercise defense to a criminal charge of unlawful transportation of game, where the game in question (a freshly shot moose) was considered an indispensable part of an Athabascan "funeral potlatch, a ceremony of several days' duration culminating in a feast, eaten after burial of the deceased, which is shared by members of the [Athabascan] village and others"³¹ Citing *Sherbert v. Verner*,³² Alaska's Supreme Court held that "[t]he freedom to act on one's religious beliefs is . . . protected, but such

26. ALA. CONST. art. I, § 3.

27. *Id.* art. I, § 3.01. The complete text of section 3.01 is set out in the Appendix. By its express terms, the Alabama Religious Freedom Amendment is not intended "to affect, interpret, or in any way address . . . those provisions of Article I, Section 3, of the Constitution of Alabama of 1901, regarding the establishment of religion." *Id.* § 3.01, sec. VI(c).

28. *Id.* art. I, § 3.01, sec. V.

29. ALASKA CONST. art. I, § 4.

30. 604 P.2d 1068 (Alaska 1979).

31. *Id.* at 1069.

32. 374 U.S. 398 (1963).

protection may be overcome by compelling state interests.”³³ “[R]eligiously impelled actions can be forbidden only where they pose some substantial threat to public safety, peace or order ... or where there are competing governmental interests that are of the highest order and ... [are] not otherwise served”³⁴ Thus, “in certain cases the free exercise clause requires government to accommodate religious practices by creating exemptions from general laws.”³⁵

A free exercise claim or defense is evaluated under a two-part test. In order to invoke the free exercise clause, a claimant must first show that a religion is involved, that his conduct is religiously-based, and that his religious beliefs are sincere.³⁶ If this showing is made, then it is incumbent upon the state to demonstrate that it has a “compelling state interest” in the challenged law, which “will suffer if an exemption is granted to accommodate the religious practice at issue.”³⁷ In *Frank*, the court determined that the defendant had properly raised a free exercise defense and that the State had failed to show that granting an exemption to “Athabascans needing moose meat for a funeral potlatch [would] result in so many moose taken as to jeopardize” the State’s “compelling state interest in maintaining a healthy moose population.”³⁸ Accordingly, the defendant’s conviction was reversed.³⁹

In *Seward Chapel, Inc. v. City of Seward*,⁴⁰ the Alaska Supreme Court applied its analysis in *Frank* to a zoning dispute, but with a different result. In *Seward Chapel*, a church and its members sought declaratory and injunctive relief against enforcement of a zoning restriction imposed on non-public schools. The court upheld the restriction because, first, the members of the church did not show that they had a religious belief which would *require* them to locate their church in the area from which they had been excluded and, second, they chose to build their church in the restricted area despite being given notice prior to acquiring the property that a parochial school would not be permitted.⁴¹ The court recognized, however, that a different question would have been presented if the city had “attempted a wholesale exclusion of parochial schools from its confines,” or if a zoning ordinance was changed to exclude the use for which the property had been

33. *Frank*, 604 P.2d at 1070.

34. *Id.* (citations and internal quotation marks omitted).

35. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). See also, *id.* at 1071 (stating that “in order to protect religiously based conduct,” “exceptions to facially neutral laws” may be required).

36. *Id.* at 1071.

37. *Id.* at 1073.

38. *Id.* at 1073-74.

39. *Id.* at 1075.

40. *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982).

41. *Id.* at 1302.

originally (and lawfully) developed.⁴² However, “[w]here, as here, a zoning scheme as a whole provides adequate areas in which religious uses may locate . . . the exclusion of such a use from a given parcel is permissible if it furthers a legitimate land use objective,” such as “providing a quiet residential area free of the distractions which a school may cause”⁴³

Subsequent to the Supreme Court’s decision in *Employment Division v. Smith*, the Alaska Supreme Court continued to adhere to its pre-*Smith* analysis in evaluating state free exercise claims and defenses. In *Swanner v. Anchorage Equal Rights Commission*,⁴⁴ the state supreme court considered a state free exercise defense to a municipality’s equal rights commission order determining that a landlord’s policy of not renting apartments to unmarried couples constituted unlawful discrimination based on marital status. The order was based upon both state and local anti-discrimination laws. The court agreed that “a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution” and declined to follow the Supreme Court’s decision in *Employment Division v. Smith* in interpreting article I, section 4, preferring, instead, to apply its decision in *Frank v. State* “to determine whether the anti-discrimination laws violate [the landlord’s] right to free exercise under the Alaska Constitution.”⁴⁵

In *Swanner*, the state supreme court held that the landlord satisfied the first part of the two-part test adopted in *Frank* – that “a religion is involved,” that “the conduct in question is religiously based,” and that “the claimant is sincere in his/her religious beliefs.”⁴⁶ The court, however, held that the equal rights commission met its burden under the second part of the *Frank* test.⁴⁷ The government has an interest in eliminating housing discrimination based on “irrelevant characteristics” such as marital status, an interest which, in the court’s view, “is of the highest order. . . .”⁴⁸ “Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one’s opportunities results in harming the government’s . . . interest in preventing such discrimination.”⁴⁹ Because that interest would “clearly ‘suffer if an exemption is granted to accommodate the religious practice at issue,’” the court concluded that enforcement of the anti-discrimination provisions of state and municipal law against the landlord would not violate

42. *Id.* at 1301-02.

43. *Id.* at 1301 n.31.

44. 874 P.2d 274 (Alaska 1994).

45. *Id.* at 280-81.

46. *Id.* at 281-82. (holding that state “free exercise rights” are not limited “only to actions rooted in religious rituals, ceremonies, or practices,” but extend to conduct that is “religiously based,” i.e., that it has some “arguable basis” in the tenets of one’s religion.)

47. *Id.* at 282-84.

48. *Id.* at 282-83.

49. *Id.* at 283.

his right to free exercise of religion under the state constitution.⁵⁰

In its opinion in *Swanner*, the court emphasized that the burden placed on the landlord's religion by the government's interest in eliminating housing discrimination "falls on his conduct and not his beliefs," and, more specifically, "his commercial activities."⁵¹ For that reason, the court rejected the landlord's argument that denying him a free exercise of religion exemption from the law would present him with a "'Hobson's choice' – to give up his economic livelihood or act in contradiction to his religious beliefs."⁵² The landlord "has made no showing of a religious belief which requires that he engage in the property-rental business," thus the "Hobson's choice" of which he complains "is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws."⁵³ The state statute and municipal ordinance in question "regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status."⁵⁴ Conversely, "voluntary commercial activity does not receive the same status accorded to directly religious activity."⁵⁵

In one other post-*Smith* decision, the Alaska Supreme Court held that a correctional center's contact visitation rules, which prohibited all physical contact between inmates and visitors other than a short embrace at the beginning and the end of the visit, did not violate an inmate's free exercise of religion rights under article I, section 4, of the state constitution.⁵⁶ Assuming that the inmate's request that he be allowed to hold his wife's hand during prayer at contact visitations satisfied the first part of the *Frank* test, the correctional institution was able to show, under the second part of the test, that accommodating his request "would require significant resource outlays to mitigate against the increased risk of contraband smuggling," which outlays "would result from increased searches, monitoring, or both."⁵⁷

Arizona

Article II, section 12, of the Arizona Constitution provides, in part, "[t]he liberty of conscience secured by the provisions of this Constitution shall not be so construed to excuse acts of licentiousness, or justify practices

50. *Id.* at 283-84 (quoting *Frank v. State*, 604 P.2d 1068 (Alaska 1979)).

51. *Id.* at 283.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (quoting *Frank*, 604 P.2d 1068). In *Thomas v. Anchorage Equal Right Comm'n*, 102 P.3d 937, 943-47 (Alaska 2004), *Swanner* was reaffirmed on *stare decisis* grounds.

56. *Larson v. Cooper*, 90 P.3d 125 (Alaska 2004).

57. *Id.* at 132-33.

inconsistent with the peace and safety of the this State.”⁵⁸ The Arizona Court of Appeals has held that the “plain language” of the first sentence of article II, section 12, “provides limitations on the liberty of conscience protected by the Arizona Constitution by defining what it does not protect.”⁵⁹ It is, therefore, “a limitation on the judiciary’s authority to ‘say what the law is’ ... but does not limit the legislature’s authority to enact statutes that provide greater protections to individual liberty of conscience than those provided in the constitution.”⁶⁰ As a result, the first sentence of article II, section 12, does not create judicially enforceable rights.⁶¹

Article XX, paragraph 1, of the Arizona Constitution provides “[p]erfect toleration of religious sentiment shall be secured to every inhabitant of this State, and no inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship, or lack thereof.”⁶² The Arizona Supreme Court has not decided whether the Supreme Court’s free exercise analysis in *Employment Division v. Smith* applies to claims and defenses based on article XX, paragraph 1.⁶³ And research has not disclosed any cases in which either the Arizona Supreme Court or the Arizona Court of Appeals has consciously and deliberately departed from the Supreme Court precedent interpreting the Free Exercise Clause of the First Amendment in interpreting article XX, paragraph 1.

In an old decision, the Arizona Supreme Court held that a Sunday closing law did not interfere with “religious freedom or liberty of conscience, but is based upon the undoubted right of the Legislature to pass laws for the preservation of health and the protection of the public welfare.”⁶⁴ More recently, the Arizona Court of Appeals has suggested that to state a claim under article XX, paragraph 1, a person must establish, at a minimum, that he was “required to do or refrain from doing” something that his religion prohibited or commanded.⁶⁵ Such a requirement would necessarily exclude at least *some* claims based on religious freedom or liberty of conscience, specifically, those not based on a claim of coercion. Nevertheless, as previously noted, it remains undetermined whether the Arizona Supreme Court would follow *Employment Division v. Smith* in interpreting article XX, paragraph 1.

58. ARIZ. CONST. art. II, § 12.

59. *Planned Parenthood Arizona, Inc. v. American Ass’n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 197 (Ariz. Ct. App. 2011).

60. *Id.*

61. *Id.*

62. ARIZ. CONST. art. XX, § 1.

63. See *State v. Hardesty*, 214 P.3d 1004, 1006 n.6 (Ariz. 2009) (rejecting a *statutory* free exercise defense in a prosecution for possession of marijuana).

64. *Elliott v. State*, 242 P. 340, 341 (Ariz. 1926). (striking down the law on other grounds (privileges and immunities)).

65. *Wagenseller v. Scottsdale Mem’l Hosp.*, 714 P.2d 412, 415 (Ariz. Ct. App. 1984), *vacated and remanded on other grounds*, 710 P.2d 1025 (Ariz. 1985).

Arkansas

Article 2, section 24, of the Arkansas Constitution provides:

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 or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.⁶⁶

The Arkansas Supreme Court has construed the “right to worship” and the “right of conscience” language of article 2, section 24, and the Free Exercise Clause of the First Amendment together.⁶⁷ That common construction suggests the Arkansas Supreme Court would follow *Employment Division v. Smith* in evaluating claims and defenses based on article 2, section 24, although the state supreme court has not yet had occasion to cite *Smith*.

California

Article I, section 4, of the California Constitution provides, in part, “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.”⁶⁸

The California Supreme Court has not yet decided whether it will follow the Supreme Court’s decision in *Employment Division v. Smith* in evaluating free exercise claims and defenses under article I, section 4, of the California Constitution.⁶⁹ In all three of these cases, the court determined that the challenged statute *would* withstand review even under the strict scrutiny standard.

In *North Coast Women’s Care Medical Group*, the California Supreme Court considered whether article I, section 4, entitles physicians to refuse on

66. ARK. CONST. art. 2, § 24.

67. *Viravonga v. Samakitham*, 279 S.W.3d 44, 48-49 (Ark. 2008); *see also* *Cude v. State*, 377 S.W.2d 816, 818-20 (Ark. 1964) (upholding law mandating vaccination of school age children).

68. CAL. CONST. art. I, § 4.

69. *See* *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct. (Women’s Care)*, 189 P.3d 959, 968-69 (Cal. 2008); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 90-91 (Cal. 2004); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 929-31 (Cal. 1996) (plurality); *id.* at 976 (Baxter, J., concurring and dissenting).

religious grounds to provide fertility treatment to lesbian patients in violation of the Unruh Civil Rights Act.⁷⁰ At the time, the Unruh Civil Rights Act had been interpreted to prohibit discrimination on the basis of, *inter alia*, a person's sexual orientation,⁷¹ an interpretation that was later expressly incorporated into the Act.⁷² The state supreme court held that the physicians could not rely upon section 4 as a basis for refusing to provide the requested treatment.⁷³ The court stated that the state civil rights act "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal."⁷⁴ The court suggested that, to avoid any conflict between their religious beliefs and the anti-discrimination provisions of the state civil rights act, the physicians could simply refuse to perform the fertility treatment (intrauterine insemination) on *any* patient or, alternatively, refer lesbian patients to other physicians in their practice group who do not share their religious objections.⁷⁵ The court's resolution of the physicians' free exercise claim, however, was not predicated upon the availability of such options.⁷⁶

In the *Catholic Charities* case, the court considered whether religious entities that object to contraception on moral grounds could challenge, on the basis of article I, section 4, provisions in the Women's Contraception Equality Act that require employers who provide group health care and disability insurance prescription coverage for their employees to include coverage for prescription contraceptives.⁷⁷ The court held that they could not.⁷⁸ Without deciding which standard of review applies to free exercise claims and defenses under article I, section 4, the court held that the Women's Contraception Equality Act "serves the compelling interest of eliminating gender discrimination," and no "less restrictive (or more narrowly tailored) means" are "readily available for achieving the state's interest in eliminating [such] discrimination."⁷⁹ The court opined that Catholic Charities could avoid the burden placed on their religious beliefs by the expedient of "not offering coverage for prescription drugs" in its benefits package.⁸⁰ As in *North Coast Women's Care Medical Group*, however, the court's resolution of the free

70. *Women's Care*, 189 P.3d at 968-69.

71. See *Hubert v. Williams*, 184 Cal. Rptr. 161, 162-64 & n.1 (Cal. Ct. App. 1982) (interpreting CAL. CIV. CODE § 51).

72. CAL. CIV. CODE § 51(b).

73. *Women's Care* 189 P.3d at 968-69.

74. *Id.* at 968.

75. *Id.* at 968-69.

76. *Id.*

77. *Catholic Charities of Sacramento*, 85 P.3d 67. The two provisions of the Act at issue have been codified at CAL. HEALTH & SAFETY CODE § 1367.25 and CAL. INS. CODE § 10123.196.

78. *Catholic Charities of Sacramento*, 85 P.3d at 90-91.

79. *Id.* at 92-94.

80. *Id.* at 91.

exercise claim did not turn on whether Catholic Charities could or would avail itself of this option.

Finally, in *Smith v. Fair Employment*,⁸¹ the court considered an apartment owner's state free exercise defense to a complaint charging her with refusing to rent an apartment to a cohabiting unmarried couple in violation of the State's Fair Employment & Housing Act's prohibition of discrimination on the basis of marital status.⁸² The court rejected the defense.⁸³ Incorporating by reference its earlier discussion of the federal Religious Freedom Restoration Act, the court determined that the anti-discrimination language in the Fair Housing & Employment Act did not "substantially burden [the apartment owner's] religious exercise" because "[her] religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital."⁸⁴ Moreover, "to grant the requested accommodation would not affect [the apartment owner] alone, but would necessarily impair the rights and interests of third parties."⁸⁵

The California Court of Appeal has followed the lead of the California Supreme Court in evaluating free exercise claims and defenses under article I, section 4. Without deciding which standard of judicial review applies, the court of appeal rejected a state free exercise challenge to subpoenas *duces tecum* issued by a grand jury investigating sexual abuse of minors by priests.⁸⁶

As the foregoing cases indicate, the California Supreme Court has not decided whether it will follow *Employment Division v. Smith* in interpreting article I, section 4, of the California Constitution. Nevertheless, the court's apparent readiness to recognize "compelling state interests," and its equal readiness to conclude that no less restrictive means will achieve those interests, may suggest that free exercise claims and defenses under article I, section 4, will be hard to sustain. As Justice Brown stated in her dissent in *Catholic Charities*, "[s]trict scrutiny is not what it once was," described as "strict in theory and fatal in fact," but "has mellowed in recent decades" to the point where "a state's interest is compelling if the state says it is."⁸⁷ Thus, "compelling interest now seems more or less coextensive with the state's asserted exercise of police power."⁸⁸

81. *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996).

82. CAL. GOV'T CODE § 12955.

83. *Smith v. Fair Emp't*, 913 P.2d at 929-31.

84. *Id.* at 928-29.

85. *Id.* at 929.

86. *Roman Catholic Archbishop of Los Angeles v. Super. Ct.*, 131 Cal. Rptr. 4th 209, 224-26 (Cal. Ct. App. 2006).

87. *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 105 (Cal. 2004) (Brown, J., dissenting) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

88. *Id.*

Colorado

Article II, section 4, of the Colorado Constitution provides:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of religious worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.⁸⁹

The Colorado Supreme Court has observed that “the provisions of Article II, Section 4 ... embody the same values of free exercise and governmental noninvolvement secured by the religious clauses of the First Amendment.”⁹⁰ Because the state and federal provisions “embody the same values,” the court “look[s] to the body of law that has developed in the federal courts with respect to the meaning and application of the First Amendment for useful guidance” in interpreting article II, section 4.⁹¹ Although “determination of a first amendment challenge will not necessarily be dispositive of the state constitutional issue,”⁹² the Colorado reviewing courts have consistently relied upon the interpretation given the federal Free Exercise Clause in construing the state free exercise clause⁹³ and upon the interpretation given the federal Establishment Clause in construing the state “Preference

89. COLO. CONST. art. II, § 4.

90. *Am. United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982).

91. *Conrad v. City & Cnty. of Denver*, 656 P.2d 622, 670-71 (Colo. 1983); *see also* *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 91 n.5 (Colo. 1986) (noting that “[t]here is no reason to believe that the limiting effect of article II, section 4, on the judicial resolution of church property disputes will differ from that of the first amendment”).

92. *Bishop & Diocese of Colo.*, 716 P.2d at 91 n.5.

93. *In re E.L.M.C.*, 100 P.3d 546, 563 (Colo. App. 2004) (stating that free exercise provisions of state and federal constitutions “are subject to similar analysis”) (citing *Young Life v. Div. of Emp’t Training*, 650 P.2d 515, 525-26 (Colo. 1982)); *People in Interest of D.L.E.*, 645 P.2d 271, 275-76 (Colo. 1982) (construing Free Exercise Clause of First Amendment and article II, section 4, together); *In re Marriage of McSoud*, 131 P.3d 1208, 1215 (Colo. App. 2006) (same). *See also* *Sanderson v. People*, 12 P.3d 851 (Colo. App. 2000) (stating that there is no free exercise right to assistance in committing suicide); *People v. LaPorte Church of Christ*, 830 P.2d 1150, 1152, (Colo. App. 1992) (stating that there is no free exercise right for non-attorney pastor to represent church in legal proceeding).

Clause.”⁹⁴ This reliance suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article II, section 4, either.

Connecticut

Article first, section 3, of the Connecticut Constitution provides:

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.⁹⁵

The Connecticut reviewing courts have generally interpreted article first, section 3, consistently with Supreme Court precedent interpreting the Free Exercise Clause of the First Amendment.⁹⁶ In a fairly recent case, the Connecticut Supreme Court treated federal precedent interpreting the scope of the Free Exercise Clause of the First Amendment as “persuasive” in holding that article first, section 3, protects the free exercise rights of religious institutions, as well as those of individuals.⁹⁷ The decisions of the Connecticut reviewing courts suggest that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article first, section 3, either, although, given the few cases that have interpreted section 3,⁹⁸ that conclusion may not be entirely free from doubt.

94. “In interpreting our Preference Clause we have looked to the Establishment Clause of the First Amendment to the United States Constitution and the body of federal cases that have construed it.” *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1019 (Colo. 1995) (citing *Conrad*, 656 P.2d at 1313).

95. CONN. CONST. art. I, § 3.

96. See *First Church of Christ, Scientist v. Historic Dist. Comm’n of the Town of Ridgefield*, 737 A.2d 989, 990 (Conn. App. Ct. 1999), *adopting op.* in 738 A.2d 224, 231 (Conn. Super. Ct. 1998); *Grimm v. Grimm*, 844 A.2d 855, 859 (Conn. App. Ct. 2004), *aff’d in part, rev’d in part on other grounds and remanded with directions*, 886 A.2d 391 (Conn. 2005) (stating that the statute allowing divorce did not violate either the state or federal free exercise guarantee) (citing *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)).

97. *Cambodian Buddhist Soc’y of Conn. v. Planning & Zoning Comm’n of the Town of Newton*, 941 A.2d 868, 881-82 (Conn. 2008).

98. As one commentator has noted, the Connecticut Supreme Court “has given § 3 no significant independent meaning.” Wesley W. Horton, *THE CONNECTICUT STATE CONSTITUTION* [:] A REFERENCE GUIDE 44 (Westport, Conn. 1993).

Delaware

Article I, section 1, of the Delaware Constitution provides, in part, that “no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. . . .”⁹⁹ The Delaware Supreme Court has interpreted the “rights of conscience” language of article I, section 1, consistently with Supreme Court precedent interpreting the Free Exercise Clause of the First Amendment.¹⁰⁰ That consistency of interpretation suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 1, either, although, given the paucity of case law interpreting section 1, that conclusion is not entirely free from doubt.

Florida

Article I, section 3, of the Florida Constitution provides, in part, “[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety.”¹⁰¹ Although the Florida Supreme Court has not expressly held that the “free exercise” guarantee of article I, section 3, is to be construed consistently with the Supreme Court’s construction of the Free Exercise Clause of the First Amendment, it has noted with approval decisions of the Florida District Court of Appeals so holding. In *Warner v. City of Boca Raton*,¹⁰² the state supreme court observed that “other Florida courts have ‘treated the protection afforded under the state constitutional provision as coequal to the federal [provision], and have measured government regulations against it accordingly.’”¹⁰³ The state supreme court also cited “a commentary on the

99. DEL. CONST. art. I, § 1.

100. See *E. Lake Methodist Episcopal Church, Inc. v. Trs. of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798, 805 n.2 (Del. 1999) (“[a]lthough the controlling standards of judicial deference to religious disputes have evolved primarily from interpretations of the First Amendment to the United States Constitution, art. I, § 1 of the Delaware Constitution, enjoining ‘any magistrate . . . in any case’ from interfering with the free exercise of religious worship is of equal force”). See also *Boyer v. Irvin*, No.3304-VCN, 2007 Del. Ch. LEXIS 146 at *13-15 & n.13 (Del. Ch. Oct. 19, 2007) (stating that a statute requiring the issuance of a marriage license as a condition of entering into a valid marriage was a facially-neutral law of general applicability which did not violate either the Free Exercise Clause or art. I, § 1) (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

101. FLA. CONST. art. I, § 3.

102. 887 So.2d 1023 (Fla. 2004).

103. *Id.* at 1030 (quoting *Toca v. State*, 834 So.2d 204, 208 (Fla. Dist. Ct. App. 2002). In *Toca*, the Florida District Court of Appeals applied *Employment Division v. Smith* to conclude that requiring the signing of pleadings did not violate petitioner’s rights under article I, section 3, of the

1968 revision of this provision explain[ing] that the language of the Florida section ‘parallels the First Amendment of the U.S. Constitution’ and that ‘cases under the First Amendment of the United States Constitution are of great value in evaluating the status of religious freedoms.’”¹⁰⁴ The state supreme court distinguished earlier cases in which it had applied the “compelling interest” test to state free exercise claims as involving “hybrid” claims (free exercise and privacy).¹⁰⁵

The Florida Supreme Court’s opinion in *Warner* strongly suggests that the court would follow the Supreme Court’s free exercise jurisprudence, as set forth in *Employment Division v. Smith*, in evaluating claims and defenses based on the free exercise guarantee in the state constitution.

Georgia

Article 1, section I, paragraph III, of the Georgia Constitution provides: “Each person has the natural and inalienable right to worship God, each according to the dictates of that person’s own conscience; and no human authority should, in any case, control or interfere with such right of conscience.”¹⁰⁶ Article 1, section I, paragraph IV, provides:

No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.¹⁰⁷

In *Jones v. City of Moultrie*,¹⁰⁸ the Georgia Supreme Court recognized that under both state and federal constitutional guarantees of freedom of religion, “the right to adopt, profess, entertain, or advocate any religious views, or to fail or refuse so to do, is unlimited, and cannot be controlled by any law.”¹⁰⁹ “[A] person’s sentiments and opinions upon this subject are controlled entirely by his own judgment and conscience,” and, therefore,

Florida Constitution. In *Warner*, 887 So.2d at 1030, the Florida Supreme Court also cited *Allen v. Allen*, 622 So.2d 1369 (Fla. Dist. Ct. App. 1993), in which the District Court of Appeals determined that a post-dissolution order prohibiting a wife from attending the same church attended by her former husband violated the free exercise clauses of both the state and federal constitutions.

104. *Id.* (quoting Talbot D’Alemberte, Commentary to 1968 Revision, Art. I, § 3, Fla. Const., 25A Fla. Stat. Ann. 106-07 (West 2004)).

105. *Id.* at 1031 n.6 (distinguishing *Pub. Health Trust v. Wons*, 541 So.2d 96, 98 (Fla. 1989), and *In re Dubreuil*, 629 So.2d 819, 828 (Fla. 1993)).

106. GA. CONST. art. 1, § 1, ¶ III.

107. *Id.* art. 1, § 1, ¶ IV.

108. 27 S.E.2d 39 (Ga. 1943).

109. *Id.* at 42.

"[t]he courts will ever guard the right to a full and unlimited exercise of one's religious beliefs."¹¹⁰ Nevertheless, "[w]hile there is no power to control what a person may believe about religion or the type of religion he may adopt or profess, yet there is a power under the law to limit his acts, even though to do such acts may be part of his religious belief."¹¹¹ The court then elaborated on this theme:

The constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society. Under the claim of a religious privilege one could not practice promiscuous sexual intercourse, or offer up a human sacrifice, or practice public nudeness; because the laws of society, designated to secure its peace, prosperity, and the morals of its people are affected. All of the foregoing are plain and well-recognized instances of curtailment of activities in furtherance of religious beliefs, and are so well implanted in the minds of our people that statutes prohibiting these acts may well be denominated as being based upon moral law. Yet limitations upon religious activities are not confined to instances where such acts are in contravention of moral law; as the right to exercise these activities ends where the rights of others begin. A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. Every one's rights must be exercised with due regard for the rights of others. . . . To construe this constitutional right as being unlimited, and to hold as privileged any act if based upon religious belief, would be to make the professed doctrine of religious faith superior to the law of the land, and in effect would permit every citizen to become a law unto himself.¹¹²

In *Jefferson v. Griffin Spalding County Hospital Authority*,¹¹³ the Georgia Supreme Court unanimously denied the request for a stay of a superior court order authorizing a county hospital authority to perform a caesarian section and any necessary blood transfusions upon a woman in the thirty-ninth week of pregnancy, in the event that she presented herself to the hospital for delivery of her unborn child, despite the woman's (and her husband's) religious objections to surgery and blood transfusions. The basis for the order was that, given the woman's medical condition (placenta previa and the unborn child's presentation), there was a 99% certainty that the child could not survive natural birth and the chances of the mother surviving vaginal

110. *Id.*

111. *Id.*

112. *Id.*

113. 274 S.E.2d 457 (Ga. 1981).

delivery were no better than 50%.¹¹⁴ If the baby were delivered by caesarian section prior to the commencement of labor, there would be “an almost 100% chance of preserving the life of the child, along with that of defendant.”¹¹⁵ The court determined that the State’s authority, as *parens patriae*, overrode the religious objections of the pregnant woman and her husband, who were Jehovah’s Witnesses.¹¹⁶ And in *Anderson v. State*,¹¹⁷ the Georgia Court of Appeals rejected a state freedom of religion challenge to a statute requiring the vaccination of school-age children.

The religious freedom guarantees of the Georgia Constitution have not been the subject of much litigation and neither the Georgia Supreme Court nor the Georgia Court of Appeals have had occasion to cite or apply *Employment Division v. Smith* in a case arising under the state constitution. Accordingly, it cannot be determined whether the Georgia Supreme Court will follow *Smith* in evaluating claims and defenses based on article I, section 1, paragraphs III or IV.

Hawaii

Article I, section 4, of the Hawaii Constitution provides, in part, “[n]o law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”¹¹⁸ Although, without discussion of article I, section 4, the Hawaii Supreme Court has applied the Supreme Court’s decision in *Employment Division v. Smith* to similar facts,¹¹⁹ it has not yet decided whether it will follow *Employment Division v. Smith* in interpreting article I, section 4.¹²⁰ In *State v. Adler*,¹²¹ the state supreme court applied the pre-*Smith* standard, but held that the defendant had failed to show that he had been substantially burdened in the exercise of his religious freedom.¹²² Accordingly, it cannot be determined whether the Hawaii Supreme Court will follow *Smith* in evaluating claims and defenses based on article I, section 4.

114. *Id.* at 458.

115. *Id.*

116. *Id.* at 460.

117. 65 S.E.2d 848 (Ga. Ct. App. 1951).

118. HAW. CONST. art. I, § 4 (LexisNexis, LEXIS through Jan. 2013 Regular Sess.).

119. *See State v. Sunderland*, 168 P.3d 526, 531-34 (Haw. 2007).

120. *See Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 953 P.2d 1315, 1344 n.31 (last paragraph) (Haw. 1998) (not reaching issue).

121. 118 P.3d 652 (Haw. 2005).

122. *Id.* at 659-61 (holding that the state did not have to prove that it has a “compelling interest” in prohibiting the possession or cultivation of fifty or more marijuana plants where defendant failed to demonstrate that his religion required possession or cultivation of marijuana plants in such quantities).

Idaho

Article I, section 4, of the Idaho Constitution provides:

The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace and safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.¹²³

The Ninth Circuit Court of Appeals has observed that the provisions of article I, section 4, “bear no resemblance to those found in the First Amendment and appear to be the product of Idaho’s unique religious history.”¹²⁴ The Idaho Supreme Court has suggested that, at least in certain contexts, article I, section 4, provides “an even greater guardian of religious liberty” than the First Amendment.¹²⁵ The state supreme court, however, has not yet upheld a state “free exercise” claim or defense that would not have been upheld under the Free Exercise Clause of the First Amendment. More recent cases clearly imply that the Idaho courts apply a “*Smith*-like” standard to state free exercise claims and defenses.

In *Hyde v. Fischer*,¹²⁶ the Idaho Court of Appeals held that, “by prohibiting government from imposing any substantial burden on a prison inmate’s religious exercise unless the burden is justified by a compelling, and not just a legitimate, governmental interest, RLUIPA¹²⁷ accords greater

123. IDAHO CONST. art. I, § 4.

124. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 450 (9th Cir. 1994). Presumably, the court was referring to the struggle to suppress polygamy in Idaho.

125. *Osteraas v. Osteraas*, 859 P.2d 948, 953 (Idaho 1993) (“[D]enying a parent custody because of certain entertained religious beliefs, or lack thereof, clearly would be denying that parent a civil right because of such religious opinions or beliefs” which would violate article I, section 4, even if it did not violate the First Amendment.).

126. 203 P.3d 712 (Idaho Ct. App. 2009).

127. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

protection to an inmate than the Free Exercise Clause of both the Idaho and federal constitutions.”¹²⁸ The unmistakable implication of this statement is that article I, section 4, does *not* generally require a compelling interest to justify a burden on the free exercise of religion. In *State v. Fluewelling*,¹²⁹ the Idaho Supreme Court considered both a federal and a state free exercise of religion defense in a prosecution for possession of marijuana. After disposing of the former argument on the basis of the Supreme Court’s decision in *Employment Division v. Smith*,¹³⁰ the court rejected the latter argument on virtually identical grounds:

This provision in the Constitution [referring to art. I, § 4] does not protect against prosecution for conduct that violates a neutral criminal statute of general applicability simply because such conduct may be engaged in for religious reasons. It was intended, in part, to permit the criminalization of bigamy and polygamy even if it was engaged in as a religious practice. This section expressly provides that “the liberty of conscience hereby secured shall not be construed . . . to permit any person . . . to directly or indirectly aid or abet, counsel or advise any person to commit . . . any other crime.” ““Laws are made for the government of action; and while they cannot interfere with mere religious belief and opinions, they may with practices.””¹³¹

The opinion in *Fluewelling* does not preclude the possibility that the Idaho Supreme Court will give a broader reading to article I, section 4, than the Supreme Court has given to the Free Exercise Clause, at least outside the context of criminal laws, but it does suggest that a claim or defense that would not prevail under the Free Exercise Clause is not likely to prevail under article I, section 4, either.

Illinois

Article I, section 3, of the Illinois Constitution provides:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby

128. *Hyde*, 203 P.3d at 732.

129. 249 P.3d 375 (Idaho 2011).

130. *Id.* at 377-78.

131. *Id.* at 378 (quoting *Toncray v. Budge*, 95 P. 26, 35, 37 (Idaho 1908)).

secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.¹³²

The Illinois reviewing courts have held that the rights secured by article I, section 3, are no broader than those secured by the Free Exercise and Establishment Clauses of the First Amendment.¹³³ Because of this equivalency of interpretation, a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under the free exercise guarantee of article I, section 3, either.

Indiana

Article 1, section 2, of the Indiana Constitution provides: "All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences."¹³⁴ Additionally, article 1, 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."¹³⁵ Sections 2 and 3 of article 1 have been the subject of relatively little litigation. In an old case, the Indiana Supreme Court upheld a local board of health's emergency order excluding children who had not been vaccinated for smallpox from school.¹³⁶ In a more recent case, the state supreme court held that a statute requiring a driver's license to bear a photograph of the licensee could not be constitutionally applied to members of a Pentecostal church who objected on religious grounds to the requirement where alternative means of identifying the driver were available to the State.¹³⁷ It was not until 2001, however, that the court clearly and unequivocally held that the religion clauses of the state constitution were not to be construed in conformity with the Free Exercise and Establishment Clauses of the First Amendment.¹³⁸

132. ILL. CONST. art. I, § 3 (West, Westlaw through 2013).

133. *People v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000) ("[A]ny statute which is valid under the first amendment is also valid under the Constitution of Illinois.") (Establishment Clause); *Mefford v. White*, 770 N.E.2d 1251, 1260 (Ill. App. Ct. 2002) (Free Exercise Clause).

134. IND. CONST. art. 1, § 2 (LexisNexis, LEXIS through 2013).

135. *Id.*, art. 1, § 3. Section 4 of article 1 prohibits religious preferences and compelled religious support.

136. *Vonnegut v. Baun*, 188 N.E. 677 (Ind. 1934).

137. *Bureau of Motor Vehicles v. Pentecostal House of Prayer*, 380 N.E.2d 1225, 1229 (Ind. 1978).

138. *City Chapel of Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001).

In *City Chapel Evangelical Free, Inc. v. City of South Bend*,¹³⁹ the Indiana Supreme Court held that, in a proceeding brought by a municipality to condemn a building owned by a church and used for religious ministry, the church was entitled to a hearing on its objections to the condemnation based on asserted violations of the religious liberty guarantees of the state constitution. As a threshold matter, the state supreme court rejected the city's contention "that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees."¹⁴⁰ Given the number of provisions in the state constitution relating to religious liberty and their phrasing, the court concluded that "the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment."¹⁴¹ The court also rejected the city's argument that the "core values" of sections 2 and 3 "encompass only the 'personal devotional aspect' of worship."¹⁴²

From the literal text of Sections 2 and 3, the discussions at the Constitutional Convention, and the surrounding circumstances, we conclude that the framers and ratifiers of the Indiana Constitution's religious liberty clauses did not intend to afford only narrow protection for a person's internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.¹⁴³

Finally, the court quickly disposed of the city's argument that "the only constitutional inhibition on the taking of private property for public use is the requirement of just compensation."¹⁴⁴ The constitutional requirement of just compensation "does not authorize the State to ignore other provisions of the constitution when acting pursuant to its powers of eminent domain."¹⁴⁵

Relying upon its earlier decision in *Price v. State*,¹⁴⁶ the court in *City Chapel* held that "the police power of the State is limited and may not

139. *Id.*

140. *Id.* at 446.

141. *Id.*

142. *Id.* at 448.

143. *Id.* at 450.

144. *Id.*

145. *Id.*

146. 622 N.E.2d 954 (Ind. 1993).

materially burden one of the core values embodied within each provision of the Bill of Rights of Indiana's Constitution."¹⁴⁷ "The power of eminent domain is a police power subject to this limitation."¹⁴⁸ Accordingly, City Chapel was entitled to an opportunity to present its claim that South Bend's condemnation of its property would "materially burden its rights embodied in the core values" of the religion clauses of the state constitution.¹⁴⁹ On remand, "the condemnation procedure will be presumed to be constitutional," a presumption City Chapel would have the burden of overcoming, "with all doubts to be resolved against it."¹⁵⁰ City Chapel would have to demonstrate that "the taking of its church building by condemnation, under the circumstances presented in this case, materially burdens its members' right to worship according to the dictates of conscience ... the right freely to exercise religious opinions and rights of conscience," or "the right to be free from a government preference for a particular religious society or mode of worship."¹⁵¹ A burden is not "material," the court explained, unless "the right, as impaired, would no longer serve the purpose for which it was designed. . . ."¹⁵² In determining whether a burden is "material," the court in the eminent domain proceeding should "exclud[e] any consideration for the social utility of the proposed condemnation. . . ."¹⁵³ Although City Chapel "carries a very substantial burden of proof," it was "entitled to an opportunity to present its claim for judicial determination."¹⁵⁴

The Indiana Supreme Court's opinion in *City Chapel* makes it clear that the court will not apply federal free exercise analysis to claims and defenses raised under the religious freedom guarantees of the state constitution. Whether the court's "material burden" standard, which presumes that the governmental action is constitutional and places a "substantial burden of proof" on the challenger to show that his "right, as impaired, would no longer serve the purpose for which it was designed," will result in outcomes significantly different from those that would have been reached under the Free Exercise Clause, however, remains to be determined. No case decided since *City Chapel* sheds any light on this question.

147. *City Chapel*, 744 N.E.2d at 450.

148. *Id.*

149. *Id.*

150. *Id.* at 451.

151. *Id.* (referring to article 1, sections 2, 3 and 4). In addition to its claims under §§ 2 and 3 of art. 1, City Chapel argued that the city had violated § 4 by "permitting another church located in a redevelopment district to remain." *Id.* at 445.

152. *Id.* at 451 (quoting *Price v. State*, 622 N.E.2d 954, 960 n.7 (Ind. 1993)).

153. *Id.* Under the analysis set forth in *Price*, there is no "balancing" or "weighing" of the competing private and state interests at stake. The only question is whether a "core value" embodied in the state constitution has been "materially burdened." If it has been, the burden is unconstitutional. *Price*, 622 N.E.2d at 960-61 & n.7.

154. *City Chapel*, 744 N.E.2d at 451.

Iowa

Article I, section 3, of the Iowa Constitution provides, in part, “[t]he general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”¹⁵⁵ The establishment and free exercise provisions set forth in the first clause of article I, section 3, generally have been interpreted consistently with Supreme Court precedent interpreting the Establishment and Free Exercise Clauses of the First Amendment.¹⁵⁶ “To the extent [art. I, § 3] differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church.”¹⁵⁷ Although the Iowa Supreme Court has not yet relied upon *Employment Division v. Smith* in interpreting the state free exercise of religion guarantee,¹⁵⁸ the court’s interpretation of article I, section 3, suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 3, either.

Kansas

Section 7 of the Kansas Bill of Rights provides, in part:

The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode

155. IOWA CONST. art. I, § 3 (West, Westlaw through 2013).

156. See, e.g., *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 406 (Iowa 2003) (analyzing the Establishment Clauses of the state and federal constitutions simultaneously); *Hope Evangelical Lutheran Church v. Iowa Dep’t of Revenue and Finance*, 463 N.W.2d 76, 79-82 (Iowa 1990) (same with respect to Free Exercise Clauses).

157. *Rudd v. Ray*, 248 N.W.2d 125, 132 (Iowa 1976).

158. In *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012), the Iowa Supreme Court upheld a First Amendment free exercise of religion defense to a charge of operating a tractor with steel-cleated wheels on a hard surface roadway in violation of a road protection ordinance. The defendant was a member of the Old Order Groffdale Conference Mennonite Church which forbids its members from driving tractors unless their wheels are equipped with steel cleats. In a thoughtful and exhaustive opinion, the court determined, first, that, although the ordinance was facially neutral, it was “too underinclusive to be of general applicability, thus requiring strict scrutiny” review; and, second, that the “ordinance was not narrowly tailored to serve an asserted compelling interest in protecting the integrity of the county’s roads.” *Id.* The court expressly did not reach the question as to whether the defendant’s “rights under article I, section 3 of the Iowa Constitution have also been violated.” *Id.* at 18. See also *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991) (citing *Smith* in rejecting a federal free exercise defense to an action brought to enjoin the defendant from interfering with access to an abortion clinic).

of worship.¹⁵⁹

In *State ex rel. Pringle v. Heritage Baptist Temple*,¹⁶⁰ the Kansas Supreme Court, commenting upon the state and federal religion clauses, stated:

The First Amendment to the U.S. Constitution and Section 7 of the Kansas Bill of Rights embrace two concepts: the prohibition of establishment of religion by government, and the guarantee of the free exercise of religion by all persons. It thereby prevents state compulsory religion and also safeguards the free exercise of religion.¹⁶¹

That the state and federal constitutions “embrace” the same two concepts – the prohibition of the establishment of a religion and the guarantee of the free exercise of religion – does not necessarily mean that they will be construed in a consistent manner. In fact, the case law is mixed on whether the Kansas courts will follow the Supreme Court’s decision in *Employment Division v. Smith* in interpreting the freedom of worship and rights of conscience secured by § 7 of the Kansas Bill of Rights.

In *Stinemetz v. Kansas Health Policy Authority*,¹⁶² the Kansas Court of Appeals considered a claim by a Medicaid patient that the Kansas Health Policy Authority wrongfully refused to authorize and reimburse her for the cost of a surgical procedure. The patient, who needed a liver transplant, was a Jehovah’s Witness who objected to any surgical procedure that would require a blood transfusion.¹⁶³ The procedure she was willing to undergo – a “bloodless liver transplant” – was not performed at any medical facility in the State, but was available in other states.¹⁶⁴ The state agency would have authorized and reimbursed the patient for the cost of the procedure if it had been available in Kansas, but it had a policy of not reimbursing procedures performed outside of the state.¹⁶⁵ The state court of appeals held that the denial of reimbursement violated both the patient’s free exercise rights under the First Amendment and her rights of conscience under section 7 of the state bill of rights, but on different grounds.¹⁶⁶

159. KAN. CONST., BILL OF RIGHTS, § 7.

160. 693 P.2d 1163 (Kan. 1985).

161. *Id.* at 1165. *See also* Lower v. Bd. of Dir. of the Haskell Cnty. Cemetery Dist., 56 P.3d 235, 245-46 (Kan. 2002) (construing Free Exercise Clause and section 7 of the Kansas Bill of Rights together); Corder v. Kansas Bd. of Healing Arts, 889 P.2d 1127, 1137 (Kan. 1994) (same).

162. 252 P.3d 141 (Kan. Ct. App. 2011).

163. *Id.* at 144.

164. *Id.* at 145.

165. *Id.*

166. *Id.* at 161.

With respect to the patient's federal free exercise claim, the court of appeals acknowledged that the state agency's regulations not allowing Medicaid patients to be reimbursed for out-of-state medical procedures did not single out Jehovah's Witnesses, but were "neutral and generally applicable" and had only an "incidental effect of burdening . . . her religious beliefs."¹⁶⁷ Thus, under the general principle enunciated in *Employment v. Smith*, the regulations did not have to be justified by a compelling governmental interest.¹⁶⁸ The court, however, determined that the patient's federal free exercise claim fell within an exception recognized in *Smith* for those statutes or regulations that create a system of individual exemptions.¹⁶⁹ Because the state Medicaid regulations allowed for individual exemptions on a case-by-case basis, the state agency could not refuse to extend the exemption to cover the patient's religious hardship without providing a compelling reason to do so.¹⁷⁰ The agency was unable to advance any such interest, however, and, therefore, its refusal to authorize and reimburse the patient for the out-of-state surgical procedure violated the Free Exercise Clause.¹⁷¹ Although the court could have ended its discussion at that point, it proceeded to evaluate the patient's claim under section 7 of the state bill of rights.¹⁷²

With respect to the patient's state "rights of conscience" claim, the court of appeals began its analysis by citing two cases in which the state supreme court and the court of appeals had departed from federal free exercise analysis in interpreting section 7.¹⁷³ In the first case, *State v. Smith*, the state supreme court, relying upon section 7, struck down, as applied to Jehovah's Witnesses, a public school board's directive that teachers exclude from school any children who refuse to salute the flag, which would have made the children truants.¹⁷⁴ *Smith* was decided after the Supreme Court had upheld a statute mandating flag-saluting,¹⁷⁵ but before the Court reversed course and struck down a similar statute in another case.¹⁷⁶ In the second case, *State v. Evans*,¹⁷⁷ the court of appeals threw out, as conditions of probation, a requirement that a convicted defendant attend a church and also provide 1,000 hours of maintenance work at that church. Those "religious conditions" unreasonably restricted the probationer's constitutional freedom because

167. *Id.* at 151.

168. *Id.*

169. *Id.* at 152-55.

170. *Id.* at 155.

171. *Id.* at 155-56.

172. *Id.* at 156.

173. *Id.* at 156-57 (citing *State v. Smith*, 127 P.2d 518 (1942), and *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990)).

174. *Smith*, 127 P.2d at 522-23.

175. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

176. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

177. *Evans*, 796 P.2d at 179-80.

they would require him “to continue association with a specific church for a five-year period, regardless of whether he continues to accept its religious beliefs and doctrines.”¹⁷⁸ It was not apparent how the conditions requiring church attendance and maintenance work at the church “could be characterized as bearing a reasonable relationship to the protection of the public or the offense committed,” nor could it be concluded that they were necessary to promote “a compelling state interest. . . .”¹⁷⁹ Accordingly, the conditions of probation were reversed and the case was remanded for resentencing before a different judge.¹⁸⁰ In *Stinemetz*, the court of appeals noted that *Evans* “could have followed the more permissible analysis in *Employment v. Smith* had it wanted to do so,”¹⁸¹ and purported to derive some significance from the fact that the state supreme court later cited *Evans* in support of the general proposition that “a district court does not have discretion to impose probationary conditions that violate a probationer’s constitutional rights, absent a compelling state interest.”¹⁸²

The court of appeals reliance on *Evans* and *Bennett* in support of a broader reading of the “rights of conscience” language of section 7 of the Kansas Bill of Rights than the Supreme Court has given the Free Exercise Clause of the First Amendment may be questioned. Both *Evans* and *Bennett* involved conditions of probation, which quintessentially involve the kind of individual assessment that the Supreme Court recognized in *Employment v. Smith* as an exception to its rule regarding general laws of neutral applicability. Moreover, *Evans* and *Bennett* held that the probation conditions challenged in those cases violated *both* the state *and* the federal constitutions.¹⁸³ Although the Kansas Supreme Court’s 1942 decision in *State v. Smith* tends to support the *Stinemetz* holding that section 7 is broader in scope than the Free Exercise Clause, *Stinemetz* overlooked a far more recent opinion of the Kansas Supreme Court suggesting otherwise.

In *Lower v. Board of Directors of the Haskell County Cemetery District*,¹⁸⁴ the Kansas Supreme Court, construing the Free Exercise Clause of the First Amendment and section 7 of the Kansas Bill of Rights together, and relying upon the Supreme Court’s decision in *Employment v. Smith*, held that a county cemetery board could rely upon a statute limiting the uses of

178. *Id.*

179. *Id.* at 180.

180. *Id.*

181. *Stinemetz v. Kansas Health Policy Auth.*, 252 P.3d 141, 157 (Kan. Ct. App. 2011).

182. *State v. Bennett*, 200 P.3d 455, 459 (Kan. 2009) (cited in *Stinemetz*, 252 P.3d at 157).

183. *Evans*, 796 P.2d at 178 (agreeing with defendant that the “religious conditions” imposed as conditions of probation “violate his right to the free exercise of religion as guaranteed by the United States Constitution and the Kansas Constitution”); *Bennett*, 200 P.3d at 463 (requiring probationer to submit to random, suspicionless searches violated the search and seizure provisions of both the state and federal constitutions).

184. 56 P.3d 235 (Kan. 2002).

cemetery lots to purposes of sepulture to compel the owners of a cemetery lot to remove a monument they had erected memorializing all unborn children.¹⁸⁵ In several other cases, the Kansas Supreme Court and the Kansas Court of Appeals have relied upon *Employment v. Smith* in rejecting federal free exercise defenses, without, however, addressing section 7 of the state Bill of Rights.¹⁸⁶

In *Stinemetz*, the court of appeals determined that the language of section 7 of the Kansas Bill of Rights is similar to article I, section 16, of the Minnesota Constitution and article I, section 7, of the Ohio Constitution and, therefore, should be interpreted in a similar manner.¹⁸⁷ In *Stinemetz*, the court of appeals adopted a four-part test that had been developed by the Ohio Supreme Court and the Minnesota Court of Appeals in applying their “liberty of conscience” provisions.¹⁸⁸ Under that test, the person raising a religious freedom claim or defense has the burden of demonstrating that he has a sincerely held religious belief and that the state action in question burdens him in the exercise of his beliefs. Once that demonstration has been made, the burden shifts to the state to show that it has a compelling interest at stake and that no less restrictive means is available to achieve its interest.¹⁸⁹ For the same reasons the court of appeals relied upon in holding that the state’s non-reimbursement policy violated the Free Exercise Clause of the First Amendment, the court held that the policy also violated section 7 of the Kansas Bill of Rights.¹⁹⁰

The Kansas Court of Appeals opinion in *Stinemetz* is not necessarily an accurate predictor that state rights of conscience claims and defenses will be treated differently than federal free exercise claims and defenses. The state constitutional analysis in *Stinemetz* was *dictum*, as the court itself recognized; the result in the case was the same under either state or federal analysis; two of the Kansas cases the court cited (*Evans*, *Bennett*) do not support an

185. *Id.* at 245-46. See also *Harrison v. Tauheed*, 256 P.3d 851, 862 (Kan. 2011) (“[A]ll individuals in Kansas have the right to religious freedom, protected by both the First and Fourteenth Amendments of the Constitution of the United States and the Kansas Bill of Rights.”) (citing *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 876 (1990)).

186. See, e.g., *Corder v. Kansas Bd. of Healing Arts*, 889 P.2d 1127, 1137 (Kan. 1994) (rejecting free exercise of religion defense in disciplinary proceeding temporarily suspending physician’s license to practice because physician was “psychotic” and his “delusions [regarding UFOs] might influence his medical practice”); *State v. McBride*, 955 P.2d 133, 138 (Kan. Ct. App. 1998) (“A state may pass a law of general applicability that incidentally burdens the practice of religion without violating the First Amendment.”) (rejecting free exercise defense in prosecution for cultivation of marijuana).

187. *Stinemetz*, 252 P.3d at 157-160. The text of those provisions is set forth in the Minnesota and Ohio sections of this article, *infra*. The Kansas Constitution was based in large part on the Ohio Constitution. *Id.* at 158 (citing proceedings of the Wyandotte Constitutional Convention of 1859).

188. *Id.* at 160 (citing *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000), and *Shagalow v. State of Minnesota, Dep’t of Human Services*, 725 N.W.2d 380 (Minn. Ct. App. 2006)).

189. *Id.*

190. *Id.* at 160-61.

independent interpretation of section 7 because they concerned individualized assessments (conditions of probation), which are not subject to the general rule enunciated in *Employment v. Smith*; and the court overlooked a Kansas Supreme Court decision (*Lower*) that interpreted section 7 consistently with the Free Exercise Clause and rejected both state and federal claims in an opinion that relied upon *Employment v. Smith*. At this point, therefore, it cannot be determined whether the Kansas Supreme Court will follow *Smith* in evaluating claims and defenses based upon section 7.

Kentucky

Section 1 of the Kentucky Constitution provides in part, "All men. . . have certain inherent and inalienable rights, among which may be reckoned: . . . [t]he right of worshipping Almighty God according to the dictates of their consciences."¹⁹¹ Section 5 provides, in part, "No human authority shall, in any case whatever, control or interfere with the rights of conscience."¹⁹²

In *Triplett v. Livingston County Board of Education*,¹⁹³ the Kentucky Court of Appeals, relying principally upon Supreme Court authorities, including *Employment Division v. Smith*, rejected both state and federal free exercise claims challenging an educational statute requiring all school age children to take standardized examinations.¹⁹⁴ Citing *Triplett* and other state court decisions,¹⁹⁵ a federal district court has noted that "Kentucky courts have looked to the United States Supreme Court for guidance in interpreting provisions of the Kentucky Constitution that deal with religious freedom."¹⁹⁶ In light of that practice, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under section 1 or section 5, either.

191. KY. CONST. § 1.

192. *Id.* § 5.

193. 967 S.W.2d 25 (Ky. Ct. App. 1997).

194. *Id.* at 31-33. In its discussion of the state freedom of religion claims, the court stated that the Commonwealth had a "compelling" interest in the education of its children and that in order to "measure performance in terms of educational equality and progress," it was necessary for all students to take the standardized examinations. *Id.* at 33.

195. In *Mosier v. Barren County Board of Health*, 215 S.W.2d 967, 969 (Ky. 1948), the Kentucky Court of Appeals (now the Kentucky Supreme Court) rejected a state free exercise challenge to a school board resolution requiring school children to be vaccinated for smallpox.

196. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539 (W.D. Ky. 2001) (citations omitted). In *Hyman*, the district court rejected state and federal claims challenging ordinances prohibiting discrimination in employment on the basis of sexual orientation and gender identity. *Id.* at 536-40.

Louisiana

Article I, section 8, of the Louisiana Constitution provides, “No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.”¹⁹⁷ Section 8 is a “paraphrase” of the Religion Clauses of the First Amendment to the United States Constitution and was intended to “adopt the federal standard.”¹⁹⁸ This intention is confirmed by the case law interpreting section 8,¹⁹⁹ as well as its constitutional history.²⁰⁰ Given the intention to “adopt” the federal standard, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 8, either.

Maine

Article I, section 3, of the Maine Constitution provides, in part:

All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshiping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship;—and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law²⁰¹

197. LA. CONST. art. I, § 8.

198. Lee Hargrave, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 33 (Westport, Conn. 1991).

199. *Seegers v. Parker*, 241 So.2d 213, 216 (La. 1970) (predecessor section to LA. CONST. article I, section 8, “embodies . . . in full” the “establishment and free exercise clauses of the First Amendment”). *See also* Op. Att’y Gen., No. 75-1731, Jan. 9, 1976 (because the language of LA. CONST. article I, section 8, is virtually identical to the parallel provision in the Federal Constitution, the two constitutional provisions should be interpreted in a like manner, and decisions of the United States Supreme Court construing the Religion Clauses of the First Amendment are applicable in determining the limitations section 8 imposes on the state legislature).

200. VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPT 1126. Delegate Weiss remarked that what is now section 8 is a “reiteration of the first two lines of the Bill of Rights of the Federal Constitution and is a streamlining of the old Louisiana Constitution.” He further remarked the framers intended that in interpreting section 8, the Louisiana Supreme Court would follow federal jurisprudence in interpreting the Religion Clauses of the First Amendment. *Id.* at 1126-27.

201. ME. CONST. art. I, § 3.

The Maine Supreme Judicial Court has held that analysis under the “anti-subordination” and “anti-preference” language of article I, section 3, and the Establishment Clause of the First Amendment is the same.²⁰² In interpreting the “right to worship” language of section 3, however, the state supreme court has departed from the Supreme Court’s interpretation of the Free Exercise Clause as set forth in *Employment Division v. Smith*, preferring, instead, to adhere to the pre-*Smith* jurisprudence.

Prior to the Supreme Court’s decision in *Smith*, the Maine Supreme Judicial Court applied federal free exercise analysis in evaluating what it characterized as state “free exercise” challenges, and declined to give article I, section 3, a broader reading than the Supreme Court had given to the Free Exercise Clause.²⁰³

Supreme Court decisions over the last quarter-century have yielded a four-stage framework for analysis of claims of violations of the Free Exercise Clause of the First Amendment. Initially, the burden of proof is on the person raising the constitutional challenge to the government regulation in question. The challenger must initially demonstrate:

- 1) that the activity burdened by the regulation is motivated by a sincerely held religious belief; and
- 2) that the challenged regulation restrains the free exercise of that religious belief.

If the challenger meets that two-fold threshold requirement, the burden shifts and the State can prevail only by proving both:

- 3) that the challenged regulation is motivated by a compelling public interest; and
- 4) that no less restrictive means can adequately achieve that compelling public interest.²⁰⁴

In *Blount*, the court rejected a free exercise challenge to a statute requiring the State’s approval of alternatives to attendance at public school, including home schooling. The court agreed with the parents of home schooled children that the challenged statute burdened them in the exercise of their sincerely held religious belief that children should be educated at home and their belief that “to apply for state approval for their home

202. *Bagley v. Raymond School Dep’t*, 728 A.2d 127, 132 (Me. 1999). *See also Squires v. Inhabitants of City of Augusta*, 153 A.2d 80, 87-88 (Me. 1959) (state and federal separation of church and state principles are the same).

203. *Blount v. Dep’t of Educ. & Cultural Services*, 551 A.2d 1377, 1385 (Me. 1988).

204. *Id.* at 1379.

schooling program, or in any way to acknowledge the State's authority to approve or to disapprove alternatives to compulsory public education, would be an act of apostasy."²⁰⁵ The court, however, determined that the State has a compelling public interest in educational quality which could not be met by any less restrictive means.²⁰⁶ None of the alternatives proposed by the parents, even the use of standardized tests, would have recognized the State's regulatory authority over education.²⁰⁷ "[N]o reasonable compulsory education system can accommodate that last, irreconcilable objection."²⁰⁸

In its first post-*Smith* decision interpreting the "free exercise" guarantee of article I, section 3, the Maine Supreme Judicial Court adhered to the "four-stage framework" it had followed in *Blount*. In *Rupert v. City of Portland*,²⁰⁹ the state supreme court rejected a free exercise of religion claim to recover a marijuana pipe seized by the police as drug paraphernalia. Assuming that the plaintiff had used the pipe in the exercise of a sincerely held religious belief, the court held that the State had a "compelling public interest in preventing the distribution and use of illegal drugs," which interest could be "adequately protected only by rules of general application."²¹⁰ To allow a religious exemption of the breadth sought by the plaintiff, "would severely hamper the public's effort to control the amount of marijuana in circulation in Maine."²¹¹

In *Bagley v. Raymond School Dep't*,²¹² the state supreme court rejected a state and federal free exercise challenge to a tuition reimbursement program which excluded religious schools from the receipt of state funds. The court determined that the plaintiffs, the parents of children enrolled in parochial schools, were not burdened in the exercise of their religion merely because the State did not reimburse them for the cost of sending their children to parochial schools in those school districts where nonsectarian private schools were eligible for such reimbursement.²¹³ In *Bagley*, the plaintiffs did not argue that the Maine Constitution afforded them any greater protection than the United States Constitution. Accordingly, the state supreme court addressed their claims "with the understanding that the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive."²¹⁴

In *Fortin v. Roman Catholic Bishop of Portland*,²¹⁵ the Maine Supreme

205. *Id.* at 1380.

206. *Id.* at 1381-85.

207. *Id.* at 1384.

208. *Id.*

209. 605 A.2d 63 (Me. 1992).

210. *Id.* at 67.

211. *Id.*

212. 728 A.2d 127 (Me. 1999).

213. *Id.* at 134-35.

214. *Id.* at 132. The holding in *Bagley* was reaffirmed in *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), without discussion of ME. CONST. art I, § 3.

215. 871 A.2d 1208 (Me. 2005).

Judicial Court finally clarified that it would continue to apply pre-*Smith* analysis to free exercise claims and defenses under article I, section 3.²¹⁶ In *Fortin*, the court held that a common law action for negligent supervision could be brought against a religious organization based on tortious acts committed by a member of the clergy involving a child.²¹⁷ In so holding, the court rejected the Catholic Diocese's argument that recognition of such a cause of action violated article I, section 3. The Diocese "failed to identify a specific religious activity that [would] be burdened" by allowing the action to proceed, and its pleadings did not "establish whether, or the extent to which, the adoption of a duty of care under the circumstances of the present case [would] restrain the free exercise of the Diocese's activities or beliefs. . . ."²¹⁸ Apart from the Diocese's failure to meet its burden under the first two factors of the *Blount* analysis, the State has a "compelling interest" in protecting children from "physical and sexual abuse."²¹⁹ The court was unable to determine whether any less restrictive means could adequately achieve the State's compelling public interest because "we cannot identify with any specificity the religious belief burdened by the challenged state action."²²⁰

The Maine Supreme Judicial Court has not yet upheld a free exercise claim or defense based on the pre-*Smith* standard, but its selection of the strict scrutiny standard of judicial review suggests that at least some free exercise claims and defenses that would not prevail under the Supreme Court's test in *Employment Division v. Smith* might prevail under article I, section 3.

Maryland

Article 36 of the Maryland Declaration of Rights provides, in part:

[A]ll persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights. . . .²²¹

216. *Id.* at 1227-31 (citing, *inter alia*, *Blount* and *Rupert*).

217. *Id.* at 1215-19.

218. *Id.* at 1228-29.

219. *Id.* at 1230.

220. *Id.*

221. MD. DECL. OF RIGHTS art. 36.

In *Archdiocese of Washington v. Moersen*,²²² the Maryland Court of Appeals held that “The Free Exercise Clause, as embodied in the U.S. Constitution and Article 36 of the Maryland Declaration of Rights, does not provide ‘a constitutional right to ignore neutral laws of general applicability,’ even when such laws have, as an incidental effect, the burdening of a particular religious activity. . . .”²²³ Although “laws targeting particular religious practices, or selectively imposing burdens on conduct motivated by religious belief, are subject to strict scrutiny [review], and ‘must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest,’”²²⁴ “religious *activities* may ordinarily be subject to neutral laws of general applicability.”²²⁵

The Maryland Court of Appeals’ reliance on *Employment Division v. Smith* in interpreting the religious freedom guarantee of the Maryland Declaration of Rights suggests that a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article 36, either.

Massachusetts

Part 1, article 2 of the Massachusetts Constitution provides:

It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no 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.²²⁶

The first sentence of amendment XLVI (replacing amendment XVIII) of the Massachusetts Constitution provides, “No law shall be passed prohibiting the free exercise of religion.”²²⁷

222. 925 A.2d 659 (Md. 2007).

223. *Id.* at 661 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) and citing *Employment Division v. Smith*, 494 U.S. 872 (1990)).

224. *Montrose Christian School Corp. v. Walsh*, 770 A.2d 111, 123 (Md. 2001) (quoting *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-32 (1993)).

225. *Id.* (emphasis in original).

226. MASS. CONST. pt. 1, art. 2.

227. *Id.* amend. XLVI, section 1 (amendment XLVI replaced amendment XVIII). The Massachusetts Supreme Judicial Court refers to amendment XLVI as “art. 46” in its opinions, which is how it will be cited hereafter.

The Massachusetts Supreme Judicial Court has observed that part 1, article 2, protects both religious *beliefs* (one's "religious profession or sentiments") and religious *practices* ("no subject shall be hurt, molested, or restrained . . . for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience").²²⁸ With respect to the former, "this protection of religious beliefs is substantially absolute. . . ."²²⁹ With respect to the latter, which concerns the "manner and season" of worshipping God, such conduct may involve one or both of the exceptions in article 2, to wit, "that the conduct must 'not disturb the public peace or obstruct others in their religious worship.'"²³⁰ If neither exception applies, then, by its own terms, article 2 "gives absolute protection to the manner in which one worships God" and "[n]o balancing of interests, the worshiper's on the one hand, and the government's on the other, is called for"²³¹

In *Commonwealth v. Nissenbaum*,²³² the state supreme court held that a defense to a prosecution for possession of marijuana with intent to distribute could not be based on article 2. Given its historical understanding, the exception in article 2 for conduct that "disturb[s] the public peace" was not limited to breaches of the peace but extended to all criminal offenses, statutory or common law.²³³ As a consequence, when a defendant raises article 2 as a defense in a criminal prosecution, the court must weigh the State's interest in preventing the crime with which the defendant has been charged against the burden that the statute may impose on the free exercise of the defendant's religion.²³⁴ In *Nissenbaum*, the court noted that in cases decided under the Free Exercise Clause of the First Amendment, "the courts have uniformly determined that the First Amendment does not protect the possession of controlled substances from the reach of criminal statutes."²³⁵ The court found these cases to be "instructive", and "perceive[d] nothing in the language or history" of article 2 that suggests that article 2 "affords more protection in connection with the use of mari[j]uana and hashish than does

228. Attorney General v. Desilets, 636 N.E.2d 233, 242 (Mass. 1994).

229. *Id.*

230. *Id.* In *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990), the state supreme court held that the Boston Landmarks Commission could not rely upon either exception in support of their designation of the interior of a church as a historical landmark, thereby severely restricting what renovations could be made to the church interior. "[T]he religious conduct burdened by the State (the reconfiguration of the interior of a church) neither disturbs the public peace nor obstructs the religious worship of others." *Id.* at 574. Because "the challenged action fits neither of the escape provisions in art. 2, and cannot evade the sweep of art. 2's categorical prohibition against government restraints on religious worship," the landmark designation of the church interior "unconstitutionally restrains religious worship." *Id.*

231. *Desilets*, 636 N.E.2d at 242.

232. 536 N.E.2d 592 (Mass. 1989).

233. *Id.* at 595-96.

234. *Id.* at 594.

235. *Id.* (citations omitted).

the First Amendment.”²³⁶ In balancing the competing interests, the court accepted the legislature’s determination that “the possession, distribution, and cultivation of mari[j]uana and hashish disturb the public order” and held that such conduct is not protected by article 2, “even if motivated by sincere religious purpose.”²³⁷ “We agree with the unanimous precedent that recognizes both an overriding governmental interest in regulating such substances and the practical impossibility of doing so and at the same time accommodating religious freedom.”²³⁸ The court concluded that article 2 “does not protect the possession of hashish for sincere religious purposes nor does it protect the possession of mari[j]uana with intent to distribute it or the cultivation of mari[j]uana, even for religious purposes.”²³⁹

The Massachusetts Supreme Judicial Court’s opinion in *Nissenbaum* did not foreclose the possibility that there might be circumstances in which article 2 “provides protection for religious practices not protected by the First Amendment, as construed and applied by [f]ederal courts,”²⁴⁰ but it has not recognized any such circumstances to date.

Prior to the Supreme Court’s decision in *Employment Division v. Smith*, the Massachusetts Supreme Judicial Court interpreted the free exercise guarantee of the first sentence of article 46 consistently with the Free Exercise Clause of the First Amendment.²⁴¹ Subsequent to *Smith*, however, the state supreme court decided “to adhere to the standards of earlier First Amendment jurisprudence” in interpreting article 46.²⁴²

At issue in *Desilets* was whether, despite a state statute prohibiting discrimination on account of marital status, landlords could refuse to lease one of their apartments to an unmarried couple because, on religious grounds, they believed that “they should not facilitate sinful conduct, including fornication.”²⁴³ In an action brought on behalf of the cohabiting couple by the Commonwealth against the landlords, the superior court granted the landlords’ motion for summary judgment and denied the Attorney General’s motion for summary judgment. The court ruled that the defendant landlords had violated the anti-discrimination statute, but that application of the statute to the defendants in the circumstances of the case would be unconstitutional.²⁴⁴ The Attorney General appealed.

In evaluating the landlords’ article 46 defense to the discrimination complaint, the state supreme court applied a four-part test. Under that test,

236. *Id.* at 593, 595.

237. *Id.* at 596.

238. *Id.*

239. *Id.*

240. *Id.* at 595.

241. *Petitions of Goldman*, 121 N.E.2d 843, 846 (Mass. 1954).

242. *Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994).

243. *Id.* at 235.

244. *Id.*

[i]n order to gain the exemption [from the application of a legal requirement], the claimant must show (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement. Once the claimant has made that showing, the burden shifts to the state. The state can prevail only by demonstrating both that (3) the requirement pursues an unusually important [*i.e.*, compelling] governmental goal, and that (4) an exemption would substantially hinder the fulfillment of the goal.²⁴⁵

In *Desilets*, the court held that the defendant landlords had made the showing necessary to shift the burden of demonstrating the necessity of the law to the State. First, “defendants sincerely believe that their behavior must in all respects conform to their religious beliefs and that, in their view, the operation of rental housing is not independent of those beliefs.”²⁴⁶ Second,

the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendant to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation. Moreover, both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants’ religion.²⁴⁷

The defendants were not barred from advancing a free exercise defense by the fact that their conduct arose “in a commercial context,” which, “although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened.”²⁴⁸ The court emphasized that “[t]his is not a case in which a claimant is seeking a financial advantage by asserting religious beliefs,” and concluded that the defendants’ right to free exercise of religion was “substantially burdened” by application of the anti-discrimination statute.²⁴⁹ The court then turned to an examination of the record to determine whether “the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal.”²⁵⁰

The state supreme court noted that although article 1 of the

245. *Id.* at 236–37 (citation and quotation marks omitted).

246. *Id.*

247. *Id.* at 237–38.

248. *Id.* at 238.

249. *Id.*

250. *Id.*

Massachusetts Declaration of Rights prohibits discrimination on the basis of “sex, race, color, creed or national origin,” it does not prohibit discrimination on the basis of marital status.²⁵¹ Accordingly, “marital status discrimination is of a lower order than those discriminations to which article 1 refers.”²⁵² Moreover, by statute and judicial decision, “the law has not promoted cohabitation and has granted a married spouse rights not granted to a man or woman cohabiting with a member of the opposite sex.”²⁵³ In the absence of a more complete record, the court was “unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the State has such a substantial interest in eliminating that form of housing discrimination that, on a balancing test, the substantial burden on the defendants’ free exercise of religion must be disregarded.”²⁵⁴ “On the other hand, discrimination of the sort challenged here may present a significant housing problem if a large percentage of units [in a given area] are unavailable to cohabitants.”²⁵⁵ Because there may have been a genuine issue of material fact on the strength of the State’s interest in eradicating discrimination based on marital status and whether granting a religious exemption would substantially hinder achieving that goal, the supreme court reversed the order granting summary judgment to the defendants and remanded the cause to the superior court for further proceedings.²⁵⁶ Three justices dissented, arguing that the order granting summary judgment to the defendants should have been affirmed.²⁵⁷

In *Society of Jesus of New England v. Commonwealth*,²⁵⁸ the Massachusetts Supreme Judicial Court applied the state free exercise test adopted in *Desilets* to evaluate a challenge to a subpoena *duces tecum* issued by the Commonwealth in a pending criminal prosecution. The defendant in the case and the religious order to which he belonged (the Jesuits) were able to demonstrate that “confidentiality in their communications and in their internal review of priests is based on a religious belief, and that a subpoena requiring them to divulge those materials would conflict with that belief.”²⁵⁹ The court explained:

Their view, supported by logic as well as religious belief, is that confidentiality helps ensure that a priest will make honest disclosures to his superiors (as required by the tenets of their religious beliefs)

251. *Id.* at 239.

252. *Id.*

253. *Id.* at 239-40.

254. *Id.* at 240.

255. *Id.*

256. *Id.* at 240-41, 243.

257. *Id.* at 246-47 (O’Connor, with whom Nolan, and Lynch, JJ., join, dissenting).

258. 808 N.E.2d 272 (Mass. 2004).

259. *Id.* at 279-80.

and to his treatment providers (who are in turn keeping the priest's superiors informed of his treatment program). There can be no question that confidentiality assists that process, and that depriving [the defendant priest] and the Jesuits of that confidentiality would thus conflict with, and burden, the methods chosen to foster and preserve their relationship within a religious order.²⁶⁰

Under the balancing test set forth in *Desilets*, the court then turned to the "countervailing interests asserted by the Commonwealth."²⁶¹ The court noted that the Commonwealth's interest in prosecuting the charges against the defendant (which included rape, assault with intent to rape and assault and battery) is "strong," and the crimes "were allegedly committed against high school students by a person in authority over them at the school."²⁶² "The Commonwealth's interest in preventing sexual abuse of students ranks as exceptionally high."²⁶³ Although the defendant and his religious order did not dispute the strength of that interest, they suggested that "production of documents from religious organizations" was not necessary "in pursuit of the Commonwealth's law enforcement goals" and that, instead, the Commonwealth should rely upon "good police work" to secure convictions in criminal cases.²⁶⁴ The supreme court rejected this argument, noting that, while the defendant had not made "any statement or confession to the police," the subpoenaed documents might contain "damaging admissions" by the defendant, which would be useful "not solely for purposes of persuading a jury to convict," but could also lead to "plea negotiations, with the potential that two young victims of sexual abuse might be spared the ordeal of testifying at trial."²⁶⁵ Because "the Commonwealth has a compelling interest in obtaining [the subpoenaed] documents" and "there are no other avenues by which the Commonwealth could obtain the equivalent of these documents," "those interests outweigh the claimed interest of keeping these communications confidential."²⁶⁶

In *Rasheed v. Comm'r of Corrections*,²⁶⁷ the Massachusetts Supreme Judicial Court again applied the analysis in *Desilets* to claims by a prison inmate who belonged to the Nation of Islam (a subset of the Muslim faith)

260. *Id.* at 280.

261. *Id.*

262. *Id.* at 281.

263. *Id.*

264. *Id.*

265. *Id.* at 281-82.

266. *Id.* at 282. Not before the supreme court were any issues regarding whether any of the defendant's communications were protected by either the statutory "priest-penitent" privilege or the statutory psychotherapy privilege. *Id.* at 282 n.13.

267. 845 N.E.2d 296 (Mass. 2006).

alleging deprivation of religious liberty under the state constitution.²⁶⁸ The superior court granted summary judgment to the defendants on all of the plaintiff's claims.

On appeal, the state supreme court determined that most of the inmate's claims were insubstantial and did not require any justification by the prison authorities.²⁶⁹ The superior court's order granting defendants' motion for summary judgment was affirmed with respect to those claims.²⁷⁰ Significantly, the court stated that a burden on the free exercise of religion cannot be considered to be "substantial," and thereby require a compelling justification, unless the burden in question has the tendency "to coerce an individual into acting contrary to [his] religious beliefs. . . ."²⁷¹ It is not enough to show that the "incidental effects" of a government policy or program "may make it more difficult to practice [one's] religion. . . ."²⁷²

In *Rasheed*, the court did determine that the inmate's complaint that he was denied access to "Islamic festival meals" prevented him "from acquiring the food that he believes he must consume to comply with his faith," which "has the tendency to coerce him to eat [food] that does not [comply with his faith]."²⁷³ Although the correctional facility had strong reasons for limiting the number of vendors who provided food to the facility, specifically, "to control food quality better, increase efficiencies, ensure a consistent food supply, reduce burdens on staff required to process and search incoming food items, and reduce opportunities for contraband to be introduced into prisons through such items,"²⁷⁴ the record did not reflect whether the foods the inmate wanted were available from the facility's principal vendor.²⁷⁵ For that reason, the court reversed the superior court's order granting summary judgment to the defendants on that claim and remanded the case for further proceedings.²⁷⁶

As the foregoing decisions illustrate, the Massachusetts Supreme Judicial Court does not follow the Supreme Court's decision in *Employment Division*

268. Section 4 of article 46 provides that inmates of publicly controlled penal institutions are not to be deprived of the "opportunity of religious exercises therein of [their] own faith." MASS. CONST. amend. XLVI, section 4. Article 46, together with article 2 of the Massachusetts Declaration of Rights, were intended to guarantee "the free exercise of religion by every citizen, especially protecting the religious liberty of the inmates of penal and charitable institutions." R.L. Bridgman, MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917 34 (1923) (statement of the committee on the Declaration of Rights in support of the adoption of article 46).

269. *Rasheed*, 845 N.E.2d at 306-07 (discussing the inmate's requests to use a certain brand of shaving powder, to keep a "foot pan" in his cell, to have a "prayer rug" rather than a "prayer towel" in his cell, to have access to a larger variety and quantity of "prayer oil," and to be excused from having to stand during the four brief daily prison counts).

270. *Id.* at 310.

271. *Id.* at 306 (citation and internal quotation marks omitted).

272. *Id.* (citation and internal quotation marks omitted).

273. *Id.* at 307.

274. *Id.* at 304.

275. *Id.* at 308.

276. *Id.* at 310.

v. Smith in evaluating free exercise of religion claims and defenses raised under article 46 of the Massachusetts Constitution. Whether the state supreme court will give article 2 of the state constitution a broader reading than the federal Free Exercise Clause remains to be decided, but may not be of any importance given the court's interpretation of article 46.

Michigan

Article I, section 4, of the Michigan Constitution provides:

Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.²⁷⁷

"Taken together," the Michigan Supreme Court has explained, "these sentences are an expanded and more explicit statement of the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution, the first and fourth sentences constituting the Free Exercise Clause, and the second and third sentences constituting the Establishment Clause."²⁷⁸ "They are," accordingly, "subject to similar interpretation."²⁷⁹

There is no indication in Michigan case law that the Michigan Supreme Court would not follow Supreme Court precedent interpreting the Establishment Clause in the second and third sentences of article I, section 4.²⁸⁰ However, in interpreting the first and fourth sentences of section 4, the Michigan Supreme Court does not follow Supreme Court precedent interpreting the Free Exercise Clause, as set forth in *Employment Division v. Smith*. The test to evaluate religious freedom claims under section 4 has five

277. MICH. CONST. art. I, § 4.

278. Advisory Opinion re Constitutionality of 1970 Pa. 100, 180 N.W.2d 265, 274 (Mich. 1970).

279. *Id.*

280. See, e.g., *Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 868 (Mich. Ct. App. 2005) (citing *Advisory Opinion supra* note 278, at 274); *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 503 F. Supp. 2d 845, 854 n.8 (E.D. Mich. 2007), *aff'd*, 567 F.3d 278, 301 (6th Cir. 2009) (following *Scalise*).

elements:

(1) whether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct; and (5) whether there is a less obtrusive form of regulation available to the state.²⁸¹

A burden may be shown, the supreme court explained, if the "affected individuals [would] be coerced by the Government's action into violating their religious beliefs [or if] governmental action [would] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."²⁸² Hence, "[a] claimed burden on religious beliefs may be deemed constitutionally insignificant, but only (1) if the claimant's beliefs do not create an irreconcilable conflict between the mandates of law and religious duty, or (2) if the legal requirement does not directly coerce the claimant to act contrary to religious belief"²⁸³ Thus, if the conduct prohibited by a statute or policy is not fundamental to the practice of one's religion, then the statute or policy is not subject to strict scrutiny review and may be upheld if it is reasonably related to a legitimate state interest. For example, attending Muslim prayer services on Friday is not a fundamental tenet of Islam.²⁸⁴ Nor is participating in extracurricular interscholastic athletic events a fundamental tenet of Christianity.²⁸⁵ On the other hand, in *DeJonge*, the Michigan Supreme Court held that parents who home schooled their children in order to provide them with a "Christ centered education" could not be forced to comply with the requirement that all teachers, including parents who home schooled their children, be certified by the State.²⁸⁶ The certification requirement was not, in itself, a compelling state interest, nor was it "essential" to the State's interest in ensuring that the "aims of compulsory education" be met.²⁸⁷

Finally, in *Champion v. Secretary of State*,²⁸⁸ the Michigan Court of Appeals held that a person could not refuse, on the basis of the freedom of

281. *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *vacated in part*, 593 N.W.2d 545 (Mich. 1999).

282. *People v. DeJonge*, 501 N.W.2d 127, 136 (Mich. 1993) (quoting Dep't of Social Services v. Emmanuel Baptist Preschool 434 Mich. 380, 393 (1990)).

283. *Id.* at 136 (internal citations omitted) (emphasis in original).

284. *Abdur-Ra'oof v. Dep't of Corr.*, 562 N.W.2d 251 (Mich. Ct. App. 1997).

285. *Reid v. Kenowa Hills Public Schools*, 680 N.W.2d 62 (Mich. Ct. App. 2004).

286. *DeJonge*, 501 N.W.2d at 140.

287. *Id.* at 137-44.

288. 761 N.W.2d 747, 750 (Mich. Ct. App. 2008).

religion guarantees of article I, section 4, to provide his social security number as a condition precedent to being able to renew his driver's license. Acknowledging that the plaintiff had satisfied the first two elements of the five-part test set forth in *McCready v. Hoffius*,²⁸⁹ the court determined that the State had satisfied its burden under the last two elements of the test (the court did not address the third element— whether the requirement that the plaintiff disclose his social security number imposed a burden on him in the exercise of his religious beliefs and related conduct).²⁹⁰

The requirement that an applicant for a driver's license (or its renewal) provide his social security number is intended to facilitate enforcement of child support obligations. The court of appeals held that "there is a strong and compelling state interest in preserving and promoting the welfare of children relative to their financial health, which affects their overall well-being, by means of child support legislation."²⁹¹ Such legislation includes "enactments providing for court filiation and support orders, support enforcement and collection mechanisms, and other provisions securing the support of children."²⁹² More narrowly defined, "the government has a compelling interest in the establishment of paternity, the tracking and locating of parents legally obligated to pay child support, the enforcement of support obligations, and the collection of support payments, and doing so in a timely fashion," as well as having in place "a data-collection mechanism and network to assist in locating individuals, establishing paternity, and enforcing support obligations with respect to future births and parental responsibilities."²⁹³ Requiring applicants for driver's licenses to furnish their social security numbers

greatly assists in promoting these interests, and thus helps to successfully accomplish the broad compelling interest ... of providing for the welfare of children, where a social security number can be used as an important and practical tool to collect necessary information and data for support and paternity purposes.²⁹⁴

Because a social security number is a "unique federal identifier that can be effectively utilized to locate absent parents and withhold wages, all in the name of supporting children," the court concluded that "there are no less restrictive or obtrusive means available to promote the compelling state

289. *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *vacated in part*, 593 N.W.2d 545 (Mich. 1999).

290. *Champion*, 761 N.W.2d at 753-58.

291. *Id.* at 754.

292. *Id.*

293. *Id.* at 755.

294. *Id.*

interests at stake here and that the reporting of social security numbers on license applications is essential to accomplishing these interests.”²⁹⁵ Moreover, “[g]ranteeing exemptions for plaintiff and other religious objectors would defeat the goals and interests sought to be promoted by the legislation.”²⁹⁶ The plaintiff’s claim for an exemption from the requirement under article I, section 4, was therefore rejected.

Minnesota

Article I, section 16, of the Minnesota Constitution provides, in part:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed; ... nor shall any control of or interference with the rights of conscience be permitted, ... but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. . . .²⁹⁷

Prior to the Supreme Court’s decision in *Employment Division v. Smith*, the Minnesota Supreme Court generally applied First Amendment free exercise analysis to “liberty of conscience” claims and defenses raised under article I, section 16.²⁹⁸ Subsequent to *Smith*, however, the state supreme court began to interpret section 16 independently of federal free exercise analysis.

In *State by Cooper v. French*,²⁹⁹ a plurality of the court declined to follow the recently decided *Smith* case in evaluating a landlord’s article I, section 16 defense to a charge of housing discrimination involving a cohabiting couple.³⁰⁰ Given the prominence and history of religious liberty in Minnesota, section 16 imposes “a more stringent burden on the state” than is required by the Free Exercise Clause of the First Amendment.³⁰¹ The “plain language” of section 16 “commands this court to weigh the competing interests at stake

295. *Id.* at 755-56.

296. *Id.* at 756.

297. MINN. CONST. art. I, § 16.

298. *See, e.g.,* In re State of Minnesota by McClure v. Sports and Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) (holding that application of anti-discrimination provisions of state human rights act did not violate the state or federal free exercise rights of the club or its owners because “the government has an overriding compelling interest in prohibiting discrimination in employment and public accommodation” that “could be substantially frustrated if employers . . . could discriminate against the protected classes” on the basis of sincerely held religious beliefs).

299. 460 N.W.2d 2 (Minn. 1990).

300. A majority of the court determined that the landlord had not violated the anti-discrimination statute. *Id.* at 4-8.

301. *Id.* at 9.

whenever rights of conscience are burdened.”³⁰² Under section 16, “the state may interfere with the rights of conscience only if it can show that the religious practice in question is ‘licentious’ or ‘inconsistent with the peace or safety of the state.’”³⁰³ Because the State did not make such a showing,³⁰⁴ the landlord’s defense to the anti-discrimination charge had to be sustained even if the human rights act applied to conduct in refusing to rent his house to a cohabiting couple.³⁰⁵

In a case decided later in 1990, a majority of the Minnesota Supreme Court agreed that article I, section 16, provides greater protection to “rights of conscience” than does the federal Free Exercise Clause, as interpreted in *Employment Division v. Smith*. In *State v. Hershberger*,³⁰⁶ the state supreme court considered a challenge by members of the Old Order Amish religious community to a statute requiring operators of slow-moving vehicles (which would include the horse-drawn buggies driven by the Amish) to display a fluorescent triangular “slow-moving vehicle” (“SMV”) symbol on their vehicles. On religious grounds, the Amish objected to the display of the SMV symbol.

The supreme court noted that the language of article I, section 16, is “of a distinctly stronger character than the federal counterpart,” and stated that it precludes not only “prohibiting the exercise of religion,” but also “even an *infringement* on or an *interference* with religious freedom.”³⁰⁷ “Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices,” thereby violating article I, section 16.³⁰⁸ Moreover, unlike the federal Free Exercise Clause, section 16 “expressly limits the governmental interests that may outweigh religious liberty” to “practices inconsistent with the peace or safety of the state,” or “acts of licentiousness.”³⁰⁹ But even where one of those interests exists, it must be balanced against the freedom of conscience conferred by section 16. Thus, when a question of public safety is presented, “once a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.”³¹⁰ “Specifically, if freedom of

302. *Id.*

303. *Id.*

304. In the plurality’s view, this would have been a formidable task, given that fornication was a criminal offense. The author of the opinion asked: “How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?” *Id.* at 10.

305. *Id.* at 9-11.

306. 462 N.W.2d 393 (Minn. 1990).

307. *Id.* at 397 (emphases in original).

308. *Id.*

309. *Id.* (quoting MINN. CONST. art. I, § 16).

310. *Id.* at 398.

conscience and public safety can be achieved through use of an alternative to a statutory requirement that burdens freedom of conscience, in this case the SMV symbol, section 16 requires an allowance for such alternative.”³¹¹ On the basis of the record presented, the State had failed to demonstrate that the alternative proposed by the Amish, “use of reflective tape and a lighted red lantern,” would provide “an insufficient warning to other drivers.”³¹² Accordingly, the order of the trial court denying the defendant Amish their motion to dismiss the pending charges was vacated and the charges were dismissed.³¹³

In *Hill-Murray Federation of Teachers v. Hill-Murray High School*,³¹⁴ the Minnesota Supreme Court restated the test for evaluating freedom of conscience claims and defenses under article I, section 16. That test, the court explained, “has four prongs: whether the objector’s belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means.”³¹⁵ At issue in *Hill-Murray* was whether, pursuant to state labor law, a union could organize and represent the lay employees of a Catholic high school. The court acknowledged that the school had a sincerely held religious belief, objecting to the State interfering with its authority as an employer through application of the labor laws that created a mechanism for recognizing a bargaining agent for its employees.³¹⁶ The court, however, determined that allowing a union to represent the lay employees of the school would not “excessively burden [the school’s] religious beliefs.”³¹⁷ This determination was based on the court’s holding that “matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore nonnegotiable” under the State’s labor laws.³¹⁸ Although normal “terms and conditions of employment,” such as those relating to hours of employment, compensation and personnel policies affecting working conditions would be negotiable, the school would retain the power “to hire employees who meet their religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth” by the school.³¹⁹

In *Hill-Murray*, the court also considered the third and fourth prongs of its test. The court determined that the State had “overriding and compelling”

311. *Id.* at 399.

312. *Id.*

313. *Id.*

314. 487 N.W.2d 857 (Minn. 1992).

315. *Id.* at 865 (citing, *inter alia*, *Hershberger*, 462 N.W.2d 393).

316. *Id.* at 865-66.

317. *Id.* at 866.

318. *Id.*

319. *Id.*

interests in “promoting the peace and safety of industrial relations, the recognition of the statutory guarantees of collective association and bargaining, and the first amendment protection of the right of association.”³²⁰ Finally, the court held that the school’s proposal for a “less restrictive alternative” to recognition of a bargaining agent, a “voluntary grievance procedure,” was unacceptable because it would not “effectuate the strength of collective action” that “allows the individual ‘David’ to negotiate against the employer ‘Goliath.’”³²¹

In *Odenthal v. Minnesota Conference of Seventh-Day Adventists*,³²² the Minnesota Supreme Court considered whether a member of a church could bring a negligence action against a minister of the church and the church conference, alleging that the minister had engaged in improprieties in counseling the member’s wife. The state supreme court held that adjudicating the member’s negligence claim against the minister, based upon neutral standards of conduct set forth in the statutes governing the conduct of unlicensed mental health practitioners, violated neither the Religion Clauses of the First Amendment nor the “rights of conscience” protected by article I, section 16.³²³ With respect to the latter issue, the Supreme Court applied the four-pronged test it had developed in *Hill-Murray*. The court assumed that the defendants had a “sincerely held religious belief,” but held that the exercise of their religious beliefs was not impermissibly burdened by state standards “regulating unlicensed mental health professionals” where those standards merely “establish a floor of acceptable conduct for mental health professionals,” but “allow[] for incorporation of spiritual or religious aspects to the treatment or counseling.”³²⁴ The court held further that, “[g]iven the frequently vulnerable nature of those receiving mental health services, the state’s interest in their safety and well-being is compelling.”³²⁵ Finally, the court held that the statute “appears to be tailored in a non-restrictive manner” because it “regulates only conduct that meets the definition of mental health services,” and not “any spiritual advice or guidance from a clergy member. . . .”³²⁶

Article I, section 16, has also been discussed in many decisions of the Minnesota Court of Appeals. Most of the claims or defenses based on section 16 have been rejected. In *Black v. Snyder*,³²⁷ the court of appeals held that article I, section 16 did not bar a sexual harassment claim brought by a former associate pastor against her church. In a brief discussion of section 16, the

320. *Id.* at 867.

321. *Id.*

322. 649 N.W.2d 426 (Minn. 2002).

323. *Id.* at 434-43.

324. *Id.* at 442.

325. *Id.* at 443.

326. *Id.*

327. 471 N.W.2d 715 (Minn. Ct. App. 1991).

court stated that to allow such a claim to proceed would not burden the church's religious practices, "in light of the church's own policy against such conduct."³²⁸ Even on the assumption that the state statute prohibiting sexual harassment would "incidentally burden religious activity or belief," the plaintiff was entitled to assert her claim because the State has a "compelling" interest "in eradicating sexual harassment in the work place," and "no adequate, less restrictive alternative to enforcement" is available.³²⁹

In *Mrozka v. Archdiocese of St. Paul and Minneapolis*,³³⁰ the court of appeals held that article I, section 16, did not bar an award of punitive damages against a church based on the sexual abuse of a child by a priest because the church's actions in repeatedly placing an abusive priest in parishes without restriction "arguably condoned acts of licentious behavior and justified practices inconsistent with the peace and safety of the state" within the meaning of the exclusion in section 16 for such acts and practices.³³¹

In *State v. Pedersen*,³³² the court of appeals held that the defendant had failed to demonstrate that she had a "sincerely held religious belief in the medicinal use of marijuana," and, therefore, failed to meet the threshold requirement of a valid religious freedom claim or defense under section 16.³³³ In *State v. Schwartz*,³³⁴ the defendant had been convicted of two counts of second-degree sexual conduct and had been placed on probation with the condition that he be admitted to and successfully complete a sex-offender treatment program. No such treatment program would accept the defendant, however, because he refused to admit that he had committed the offenses of which he had been found guilty.³³⁵ In a proceeding to revoke his probation, the defendant sought to invoke section 16 as a defense, in that he could not be required to "lie" as a condition of being admitted to a treatment program.³³⁶ The court of appeals rejected his defense. There was no evidence that the defendant's refusal to "lie" (by admitting his guilt) was grounded in any principles of general morality, much less any religious belief, but appeared to be more of a "pragmatic, cost-benefit principle" that telling the truth was a better way of "stay[ing] out of trouble."³³⁷

In *Shagalow v. State of Minnesota, Dep't of Human Services*,³³⁸ the court

328. *Id.* at 721.

329. *Id.*

330. 482 N.W.2d 806 (Minn. Ct. App. 1992).

331. *Id.* at 812.

332. 679 N.W.2d 368 (Minn. Ct. App. 2004).

333. *Id.* at 372-77.

334. 598 N.W.2d 7 (Minn. Ct. App. 1999).

335. *Id.* at 9.

336. *Id.* at 9-10.

337. *Id.* at 10.

338. 725 N.W.2d 380 (Minn. Ct. App. 2006).

of appeals considered a claim by a mildly retarded Jewish Orthodox woman, who was Medicaid-eligible, that she was entitled to "habilitation" services in Jerusalem, Israel,³³⁹ because no such services, consistent with her Orthodox faith, requiring "gender segregation, strict observance of the Sabbath, and food preparation and consumption," was available in Minnesota.³⁴⁰ The court held that the Department of Human Services' ("DHS") refusal to fund habilitation services in Israel did not deny the plaintiff her rights under article I, section 16.³⁴¹ Under the second prong of the *Hill-Murray* test, the State's refusal to pay for habilitation services in Israel did not force the applicant "to choose between criminal sanctions and her free exercise of religion," "does not penalize her by reducing her . . . benefits," "does not prohibit her exercise of religion," and "does not directly infringe on her religious autonomy or require conduct inconsistent with her religious beliefs," and the "indirect effect on religion [by making it more expensive for her to attend the residential facility in Jerusalem] is not motivated by an intent to affect religious practices and is not unique to religion."³⁴²

In applying the third and fourth prongs of the *Hill-Murray* test, the court also determined that the State had a compelling interest "in protecting mentally or physically vulnerable persons," and that no less restrictive means (other than not funding the out-of-country services) would enable the State "to monitor the quality of . . . services, to ensure [that] services are provided in a safe and healthy environment, and to investigate reports related to the vulnerability of recipients or misuse of public funds."³⁴³ To require the State to provide the applicant with habilitation services in Israel "would create untold complexities."³⁴⁴

Others seeking benefits at remote locations would claim discrimination if their requests were rejected. Of necessity, DHS would become involved with evaluating the character of the parents, programs in distant parts of the world, and ad hoc monitoring arrangements. Stating [applicant's] dramatic demand reveals its weakness: unless DHS pays for enrollment in a faith-based program in Israel, it violates her religious freedom. The location is the subject of recurring military conflict half way around the world. If the state must make this accommodation, it is hard to imagine an

339. Habilitation services "assist persons to develop skills to live in society." *Id.* at 383.

340. *Id.*

341. *Id.* at 389-92.

342. *Id.* at 391. In fact, the applicant had developed an alternative plan, which was approved for payment by the State that included payment "for day and evening staff, an eight-week summer camp, music lessons, and adaptive sports lessons." *Id.* at 389 n.2.

343. *Id.*

344. *Id.* at 392.

accommodation that would not be constitutionally mandated.³⁴⁵

The court concluded that the State's decision not to authorize payment for habilitation services in Israel did not violate the applicant's rights under article I, section 16, of the Minnesota Constitution.³⁴⁶

In a few cases, the Minnesota Court of Appeals upheld claims or defenses based on article I, section 16. In *In the Matter of the Welfare of T.K. and W.K., Children*,³⁴⁷ the court of appeals held that the removal of minor children from the custody and care of their parents because of the parents' refusal on religious grounds to allow them to attend public school and/or to take standardized, norm-referenced achievement examinations was "premature" and not the "least restrictive alternative" in promoting the State's compelling interest in an educated citizenry.³⁴⁸ The court pointed out that "additional statutory remedies" were available "to determine whether [the parents] were providing an adequate home school education for their children."³⁴⁹ In a coda to its opinion, the court cautioned that "[t]hese children should not be put in a position where they can only receive an acceptable education outside their parental home or, alternatively, only remain at home by sacrificing the opportunity to receive an education. They deserve both an education and a nurturing, loving parental home."³⁵⁰

In *Rasmussen v. Glass*,³⁵¹ the court of appeals held that a municipal civil rights commission had improperly imposed a civil sanction against a restaurant and the restaurant's owner who, for reasons of "moral conscience," had refused to deliver food to an abortion clinic.³⁵² Even assuming that the owner's refusal fell within the scope of the ordinance, enforcement of the ordinance against the owner and his restaurant would violate article I, section 16. Under the ordinance, the restaurant owner was faced with the choice of either "associat[ing] with an entity that engages in conduct which he finds to be morally offensive, thus compromising his conscience, or he can refuse and be found guilty of discrimination and be fined."³⁵³ The City of Minneapolis did not have a "compelling or overriding interest" in the enforcement of its anti-discrimination ordinance where the restaurant owner's conduct did not create a threat "to either peace or safety," nor did it constitute an act of "licentiousness."³⁵⁴ Accordingly, the commission's finding that the restaurant

345. *Id.*

346. *Id.*

347. 475 N.W.2d 88 (Minn. Ct. App. 1991).

348. *Id.* at 93.

349. *Id.*

350. *Id.* at 94.

351. 498 N.W.2d 508 (Minn. Ct. App. 1993).

352. *Id.* at 514-16.

353. *Id.* at 515-16.

354. *Id.* at 516 (citing *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (restricting the

and its owner had violated the anti-discrimination ordinance was reversed and the fine rescinded.³⁵⁵

Mississippi

Article III, section 18, of the Mississippi Constitution provides, in part, “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state. . . .”³⁵⁶ In *Mabus v. St. James Episcopal Church*,³⁵⁷ the Mississippi Supreme Court, citing *Employment Division v. Smith*, characterized article III, section 18, as “a counterpart to the First Amendment.”³⁵⁸ The state supreme court’s characterization of article III, section 18, and its reliance upon *Smith* suggest that it would not likely give the state’s guarantee of religious rights any broader reading than the Supreme Court has given the Free Exercise Clause, but, given the paucity of case law on the matter, that conclusion is not entirely free of doubt.

Missouri

Article I, section 5, of the Missouri Constitution provides, in part:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; . . . but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.³⁵⁹

reasons for which religious liberty may be limited to “acts of licentiousness” and “practices inconsistent with the peace or safety of the state”).

355. *Id.*

356. MISS. CONST. art. III, § 18.

357. 884 So.2d 747 (Miss. 2004).

358. *Id.* at 754.

359. MO. CONST. art. I, § 5. In 2012, article I, section 5, was substantially amended to include language protecting voluntary individual and corporate prayer in public or private settings “so long as such prayer does not result in disturbance of the peace or disruption of a public meeting or assembly,” permitting voluntary prayer on “government premises and public property” on the same terms as other free speech would be allowed under similar circumstances, conferring upon students the right to express their religious beliefs in their course work “free from discrimination based on the religious content of their work,” and prohibiting students from being compelled “to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs.” *Id.*

Article I, section 7, provides, in part, that “no preferences shall be given to, nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.”³⁶⁰

Apart from school aid issues,³⁶¹ the religion clauses of the Missouri Constitution have generally been construed in a manner similar to that of the Free Exercise and Establishment Clauses of the First Amendment.³⁶² Nevertheless, the Missouri reviewing courts have not yet decided whether “Missouri would adopt the United States Supreme Court’s interpretation of the Free Exercise Clause in [*City of*] *Boerne* [*v. Flores*, 521 U.S. 507 (1997)], which reaffirmed *Employment Division v. Smith*] in interpreting the Missouri Constitution’s free exercise provision. . . .”³⁶³ As a result, it cannot be determined whether the Missouri Supreme Court would follow *Employment Division v. Smith* in evaluating claims and defenses under article I, section 5.

Montana

Article II, section 5, of the Montana Constitution provides “The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”³⁶⁴ In a trio of post-*Employment Division v. Smith* decisions, the Montana Supreme Court has rejected free exercise claims brought under both article II, section 5, and the Free Exercise Clause of the First Amendment, using the same analysis to dispose of both the state and federal constitutional claims.

In *Valley Christian School v. Montana High School Ass’n*,³⁶⁵ the state supreme court considered the constitutionality of a state high school association bylaw that prohibited unaccredited schools from participating in tournaments or activities with two or more other schools. In order to be accredited by the state, all of the teachers had to be certified by the Office of Public Instruction.³⁶⁶ When a private religious school hired a teacher who was

360. *Id.* art. I, § 7.

361. See *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974) (noting, with reference to school aid issues, that “the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause [of the First Amendment] of the United States Constitution”). See also *Oliver v. State Tax Comm’n of Missouri*, 37 S.W.3d 243, 251 (Mo. Ct. App. 2001) (identifying “the focus on prohibiting state resources to the promotion of religion [in the first clause of art. I, § 7]” as “[o]ne point of difference in particularity with the United States Constitution”).

362. See *Boone v. State*, 147 S.W.3d 801, 805-06 (Mo. Ct. App. 2004) (upholding state sexual offender registration program); *Oliver*, 37 S.W.3d at 247-52 (upholding requirement that state tax returns be signed under oath or affirmation); *Clayton v. Clayton v. Place*, 884 F.2d 376, 381 (8th Cir. 1989) (construing Establishment Clause and article I, section 7, together).

363. *State v. Pride*, 1 S.W.3d 494, 507 n.2 (Mo. Ct. App. 1999).

364. MONT. CONST. art. II, § 5.

365. 86 P.3d 554 (Mont. 2004).

366. *Id.* at 555.

not certified by the state because he was deemed morally unfit for the profession due to a prior conviction for cruelty to animals, the school lost its state accreditation and the right to compete in certain interscholastic competitions.³⁶⁷ The school, certain students enrolled in the school, and their parents, sued the state high school association, alleging that its “free exercise of religion” was being infringed upon in violation of article II, section 5, and the Free Exercise Clause.³⁶⁸ The supreme court affirmed the district court’s denial of preliminary injunctive relief.

Quoting from the Supreme Court’s decision in *Thomas v. Review Board of the Indiana Employment Security Division*,³⁶⁹ the Montana Supreme Court stated that “a burden upon religion” is created “[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . .”³⁷⁰ The state high school association bylaw did neither. The requirement for membership in the association that all teachers be certified by the state was not “proscribed by religious faith,” as evidenced by the fact that the school had been a member of the association for fifteen years, nor was the hiring of uncertified teachers “mandated by religious belief.”³⁷¹ Even though the bylaw arguably “limit[ed] [the school’s] pool of potential teacher candidates and thereby makes it more difficult for [the school] to offer a Christian education,” it “[did] not have a tendency to coerce individuals into acting contrary to their religious beliefs.”³⁷² Under the Free Exercise Clause, the “incidental effects of government programs which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs,” need not be justified by a compelling interest.³⁷³

In *Cape v. Crossroads Correctional Center*,³⁷⁴ the state supreme court considered claims by a Catholic prison inmate that the correctional facility in which he had been incarcerated had violated his First Amendment right to freedom of religion by failing to provide him with “religious meals” during Lent and by denying him the ability to observe Lent by eating fish and unleavened bread on Ash Wednesday and all Fridays during Lent.³⁷⁵ The Supreme Court affirmed the district court’s dismissal of the inmate’s claims

367. *Id.*

368. *Id.* at 555-56.

369. 450 U.S. 707 (1981).

370. *Valley Christian School*, 86 P.3d at 556 (quoting *Thomas*, 450 U.S. at 717-18).

371. *Id.* at 557.

372. *Id.*

373. *Id.* (citing *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450-51 (1988)).

374. 99 P.3d 171 (Mont. 2004).

375. *Id.* at 174.

in an opinion which construed together both the Free Exercise Clause of the First Amendment and article II, section 5 of the Montana Constitution.³⁷⁶

In order to be protected as a constitutional right, the court explained, “a dietary request must be essential to the practice of a particular religion.”³⁷⁷ The inmate, however, “failed to allege that his dietary requests of fish and unleavened bread are essential requirements of a Catholic’s diet during Lent.”³⁷⁸ The correctional facility presented affidavits from the Catholic chaplain for both the Montana State Prison and the Montana State Hospital and the warden of the Crossroads Correctional Center. The chaplain stated, “the Catholic religion does not require fish to be consumed on days of abstinence from red meat,” nor are Catholics “required to consume unleavened bread during Lent.”³⁷⁹ The warden stated that the facility had implemented a program where “meatless meals are provided to Catholic inmates on Ash Wednesday, Good Friday, and all Fridays during Lent.”³⁸⁰ According to the chaplain, “a vegetarian diet is acceptable,” and the new meal program “does comply with the requirements of the Catholic faith.”³⁸¹ The inmate presented no evidence to contradict either the chaplain’s statements or the warden’s.³⁸² Because the inmate’s “minimal general allegations” did not establish a claim upon which relief could be granted, the supreme court affirmed the dismissal of his claims.³⁸³

In *Griffith v. Butte School District No. 1*,³⁸⁴ the State Supreme Court considered a former public high school student’s claim that her high school violated her state and federal rights under article II, section 5, and the Free Exercise and Free Speech Clauses of the First Amendment when it refused to allow her to deliver a valedictory speech which contained references to God and Jesus Christ. Although the Supreme Court accepted the student’s free speech claim, it rejected her free exercise claim, relying upon its analysis in *Valley Christian School v. Montana High School Ass’n*.

In evaluating the student’s free exercise claim, the court stated that the issue was whether the student’s intended conduct (to express her personal religious views in her valedictory speech) was “‘proscribed by a religious faith’ or ‘mandated by a religious belief.’”³⁸⁵ Nothing in the record, however, “indicates either that [the student’s] religious faith mandates [that] she

376. *Id.* at 175.

377. *Id.*

378. *Id.* at 175-76.

379. *Id.* at 175.

380. *Id.*

381. *Id.*

382. *Id.* at 175-76.

383. *Id.* at 176.

384. 244 P.3d 321 (Mont. 2010).

385. *Id.* at 336 (quoting *Valley Christian School v. Montana High School Ass’n*, 86 P.3d 554 (Mont. 2004)).

include personal religious expressions in a speech or that her faith proscribes delivering a speech devoid of personal expression.”³⁸⁶ Moreover, “[her] personal belief that she could not speak without mention of God and Christ during her speech is not equivalent to a mandate by her religious faith that she do so.”³⁸⁷ Because the student could not demonstrate that the school district’s request that she omit references to “God” and “Christ” from her speech was incompatible with the tenets of her religious faith, her constitutional right to freedom of religion was not violated.³⁸⁸

The Montana Supreme Court’s decisions in *Valley Christian School, Cape*, and *Griffith* all purported to equate state and federal free exercise analysis and reached a result in each case which is consistent with current Supreme Court free exercise jurisprudence. Nevertheless, the state supreme court has not yet had occasion to apply *Employment Division v. Smith* to an otherwise valid and neutral law of general applicability that proscribes (or prescribes) conduct that a person’s religion prescribes (or proscribes). Whether such a law would withstand review under article II, section 5, thus remains undetermined.

Nebraska

Article I, section 4, of the Nebraska Constitution provides, in part, “All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . [N]or shall any interference with the rights of conscience be permitted.”³⁸⁹ The Nebraska Supreme Court has held that the rights secured by article I, section 4, are no broader than those secured by the Religion Clauses of the First Amendment.³⁹⁰ Because of this equivalency of interpretation, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not prevail under article I, section 4, either.

Nevada

Article 1, section 4, of the Nevada Constitution provides, in part, “The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State”³⁹¹ Apart from one case involving a dying declaration,³⁹² there are no cases

386. *Id.*

387. *Id.*

388. *Id.*

389. NEB. CONST. art. I, § 4.

390. *In re Interest of Anaya*, 758 N.W.2d 10, 17-20 (Neb. 2008).

391. NEV. CONST. art. I, § 4.

392. *Wilson v. State*, 468 P.2d 346 (Nev. 1970).

interpreting article 1, section 4,³⁹³ and that single case sheds no light on the meaning of the state free exercise guarantee. Until the Nevada Supreme Court has occasion to consider a post-*Smith* state free exercise claim or defense, it cannot be determined whether article 1, section 4, has any significance independent of the Free Exercise Clause of the First Amendment.

New Hampshire

Part I, Article 5, of the New Hampshire Constitution provides:

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and reason most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.³⁹⁴

In *State v. Perfetto*,³⁹⁵ the New Hampshire Supreme Court, in interpreting part I, article 5, applied the Supreme Court's decision in *Employment Division v. Smith*. The state supreme court held that a person convicted of multiple counts of possession of child pornography could be prohibited from attending church services at which children would be present.³⁹⁶ In an earlier case, the court also relied upon *Smith* in rejecting a defense based on part I, article 5, in a professional disciplinary proceeding.³⁹⁷ In *Petition of Smith*, the court held, "the holder of a license [to practice medicine] cannot rely on her religious views to excuse failures to comply with state medical licensing requirements."³⁹⁸

In light of the New Hampshire Supreme Court's reliance upon *Smith* in interpreting part I, article 5, of the New Hampshire Constitution, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under part I, article 5, either.

393. In *Blandino v. State*, 914 P.2d 624 (Nev. 1996), the Nevada Supreme Court held, without discussion of article 1, section 4, that a criminal defendant has no First Amendment free exercise right to represent himself on appeal.

394. N.H. CONST. pt. I, art. 5.

395. 7 A.3d 1179 (N.H. 2010).

396. *Id.* at 1181-83.

397. *Petition of Smith*, 652 A.2d 154 (N.H. 1994).

398. *Id.* at 160-61.

New Jersey

Article I, section 3, of the New Jersey Constitution provides, in part, “No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience. . . .”³⁹⁹ There is relatively little case law interpreting article I, section 3. The New Jersey Supreme Court, however, has noted that the state constitution “contains no reference to the ‘free exercise’ of religion,”⁴⁰⁰ and has held that the state constitutional prohibition of establishment of religion⁴⁰¹ is no broader in scope than the Establishment Clause of the First Amendment.⁴⁰² Without discussing article I, section 3, the Appellate Division has applied *Smith* in rejecting a free exercise claim.⁴⁰³

The lack of any independent analysis under article I, section 3, the New Jersey Supreme Court’s acknowledgment that the state constitution does not include a free exercise guarantee, and the New Jersey courts’ frequent citation of and reliance upon *Employment Division v. Smith* in evaluating federal free exercise claims all tend to suggest that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not prevail under article I, section 3, either.

New Mexico

Article II, section 11, of the New Mexico Constitution provides, in part, “Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship.”⁴⁰⁴ In *Elane Photography, LLC v. Willock*,⁴⁰⁵ the New Mexico Court of Appeals applied the analysis set forth in *Employment Division v. Smith* in holding that a commercial photographer had no right under article II, section 11, to refuse to photograph a same-sex “commitment” ceremony in violation of the anti-discrimination mandate of the State’s human rights act.⁴⁰⁶ In light of the New Mexico Court of Appeals’ reliance

399. N.J. CONST. art. I, § 3.

400. *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1358 (N.J. 1992).

401. “There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.” N.J. CONST. art. I, § 4.

402. *Ran-Dav’s County Kosher*, 608 A.2d at 1358.

403. *S.D. v. M.J.R.*, 2 A.3d 412, 420-26 (N.J. Super. Ct. App. Div. 2010) (regardless of husband’s religious views, he had no right to rape his wife).

404. N.M. CONST. art. II, § 11.

405. 284 P.3d 428 (N.M. Ct. App. 2012), *aff’d*, No. 33,687, 2013 N.M. WL 4478229 (N.M. Aug. 22, 2013).

406. *Id.* at 440-42. In the state supreme court, the photographer did not make any argument

upon Smith in interpreting article II, section 11, of the New Mexico Constitution, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article II, section 11, either.

New York

Article I, section 3, of the New York Constitution provides, in part:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.⁴⁰⁷

In *Catholic Charities of the Diocese of Albany v. Serio*,⁴⁰⁸ the New York Court of Appeals announced that its methodology for evaluating free exercise of religion and liberty of conscience claims and defenses under article I, section 3, would not follow either the Supreme Court's interpretation of the Free Exercise Clause in *Employment Division v. Smith* or the Court's pre-*Smith* free exercise jurisprudence, which employed the "strict scrutiny" standard of review.⁴⁰⁹ At issue in *Catholic Charities* was the constitutionality of New York's Women's Health and Wellness Act, which requires employers providing group insurance coverage for medical prescriptions to include prescription contraceptives in that coverage.⁴¹⁰ Ten faith-based social service organizations challenged the contraceptive coverage mandate, arguing that it violated their rights under the Free Exercise Clauses of the state and federal constitutions and the Establishment Clause of the First Amendment. The court of appeals rejected all three arguments.⁴¹¹

In addressing the plaintiffs' state free exercise of religion claim, the court noted that, in interpreting article I, section 3, "we have not applied, and we do not now adopt, the inflexible rule of [*Employment Division v.*] *Smith* that no person may complain of a burden on religious exercise that is imposed by

based on article II, section 11, of the New Mexico Constitution. See also *Friedman v. Bd. of County Comm'rs of Bernalillo Cnty.*, 781 F.2d 777, 792 (10th Cir. 1985) ("[T]he goals of N.M. Const. art. II, § 11 are the same as those secured by the Establishment and Free Exercise Clauses of the First Amendment.").

407. N.Y. CONST. art. I, § 3.

408. 859 N.E.2d 459 (N.Y. 2006).

409. *Id.* at 465-68.

410. The two provisions at issue have been codified at N.Y. INS. LAW § 3221(l)(16) (McKinney 2006), § 4303(cc) (McKinney 2007).

411. 859 N.E.2d at 463-69.

a generally applicable, neutral statute.”⁴¹² Instead, “we have held that when the State imposes ‘an incidental burden on the right to free exercise of religion’ we must consider the interest advanced by the legislation that imposes the burden, and that ‘[t]he respective interests must be balanced to determine whether the incidental burdening is justified.’”⁴¹³ In performing that balancing, “substantial deference is due the Legislature, and . . . the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom.”⁴¹⁴ “This test,” the court explained, “while more protective of religious exercise than the rule of *Smith*, is less so than the rule stated (though not always applied) in a number of other federal and state cases.”⁴¹⁵

In interpreting article I, section 3, of the New York Constitution, the court of appeals declined to apply the pre-*Smith* “strict scrutiny” standard which, it said, “is not the right approach to constitutionally-based claims for religious exemptions.”⁴¹⁶ The court explained,

[W]here the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation. . . [requiring] the State to demonstrate a ‘compelling’ interest in response to every claim by a religious believer to an exemption from the law . . . would give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government. . . . Rather, the principle stated by the United States Supreme Court in *Smith*—that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets—should be

412. *Id.* at 466.

413. *Id.* (citing *La Rocca v. Lane*, 338 N.E.2d 606, 612-13 (N.Y. 1975), (citing *People v. Woodruff*, 272 N.Y.S.2d 786, 789 (N.Y. App. Div. 1966), *aff’d*, 236 N.E.2d 159 (N.Y. 1968))). In *La Rocca*, the court of appeals has held that, because of the potential for bias or prejudice on the part of jurors, an attorney who was also a Roman Catholic priest did not have a right under the free exercise clauses of the state and federal constitutions to represent a criminal defendant in a jury trial while he was dressed in clerical garb. 338 N.E.2d at 612-13. In *Woodruff*, the supreme court, appellate division, affirmed an order of contempt entered against a grand jury witness who, despite being given a grant of immunity, refused to testify regarding the use of illegal drugs on the ground that her religious beliefs (similar to Hinduism) prohibited her from testifying “where harm would thereby result to others, including her coreligionists.” 272 N.Y.S.2d at 788. The appellate division held that, under the circumstances of the case, “[t]he state’s interest in enforcing the power of Grand Jury to inquire into the commission of crime is paramount to the contemner’s religious right. . . .” *Id.* at 789.

414. *Catholic Charities*, 859 N.E.2d at 466.

415. *Id.* (referring to the “strict scrutiny” standard of judicial review under which burdens imposed on the free exercise of religion may be upheld only if the burden is the least restrictive means of promoting a compelling state interest).

416. *Id.* at 467.

the usual, though not the invariable, rule.⁴¹⁷

Under the standard adopted by the court of appeals for evaluating claims and defenses raised under article I, section 3, “[t]he burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption.”⁴¹⁸ The court cautioned, however, that “[t]he burden should not be impossible to overcome.”⁴¹⁹ For example, under the court’s balancing test, it would be clearly unconstitutional for the state, even through the device of neutral laws of general application, to “abrogate the confidentiality of the confessional,” “make the Christian sacrament of communion illegal,” “put kosher slaughterhouses out of business,” and “end the male celibate priesthood.”⁴²⁰ “[E]ven in much less extreme cases, parties claiming an exemption from generally applicable and neutral laws will be able to show that the State has interfered unreasonably with their right to practice their religion.”⁴²¹ The court of appeals determined, however, that the plaintiffs in *Catholic Charities* had fallen short of making such a showing.

The court recognized that the burden the Women’s Health and Wellness Act places on plaintiffs’ religious practices is “a serious one,” but noted that the Act “does not literally compel them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all.”⁴²² In response to the plaintiffs’ argument that they feel obligated to provide such coverage “because, as religious institutions, they must provide just wages and benefits to their employees,” the court said that “it is surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.”⁴²³ The court also placed importance on the fact that “many of plaintiffs’ employees do not share their religious beliefs.”⁴²⁴ “The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees’ legitimate interests in doing what their own beliefs

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.* (quoting Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418-19 (1990)).

421. *Id.*

422. *Id.* at 468 (emphasis in original).

423. *Id.*

424. *Id.*

permit.”⁴²⁵ The court acknowledged that “[t]his would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception.”⁴²⁶

Weighed against the plaintiffs’ interest “in adhering to the tenets of their faith,” the court took into account the “State’s substantial interest in fostering equality between the sexes, and in providing women with better health care.”⁴²⁷ “The Legislature had extensive evidence before it that the absence of contraceptive coverage for many women was seriously interfering with both of these important goals” and “decided that to grant the broad religious exemption that plaintiffs seek would leave too many women outside the statute, a decision entitled to deference from the courts.”⁴²⁸ Although “the Legislature might well have made another choice, ... we cannot say the choice the Legislature made has been shown to be an unreasonable interference with plaintiffs’ exercise of their religion.”⁴²⁹ Accordingly, the court rejected plaintiffs’ claim based upon the free exercise of religion and liberty of conscience language of article I, section 3.⁴³⁰

The court of appeals decision in *Catholic Charities* suggests that it will be difficult, although perhaps not impossible, for parties to succeed in raising free exercise of religion or liberty of conscience claims and defenses under article I, section 3, with respect to neutral laws of general application. For example, in *St. Joseph Hospital of Cheektowaga v. Novello*,⁴³¹ the appellate division considered a challenge to legislation that authorizes a state commission to recommend the revocation of the operating certificate of any general hospital or nursing home when the commission determines that such revocation is necessary “to align bed supply with regional and local needs.”⁴³² The court held that the legislation did not violate the free exercise rights of a Catholic hospital whose certificate of operation had been revoked because it “did not target Catholic hospitals for closing” and nothing in the legislation itself “imposes any restrictions on religious freedom.”⁴³³

The litigation interpreting article I, section 3, before the *Catholic Charities* decision presents a mixed picture. In addition to the cases already discussed,⁴³⁴ in *In re Miller*,⁴³⁵ the appellate division held that an Amish man who had applied for a pistol permit could not refuse, on state and federal free

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. 840 N.Y.S.2d 263 (N.Y. App. Div. 2007).

432. *Id.* at 266.

433. *Id.* at 269.

434. *See supra*, note 413.

435. 684 N.Y.S.2d 368 (N.Y. App. Div. 1998).

exercise grounds, to submit a photograph of himself with his application. The court noted that the applicant sought the permit for deer hunting and that “[d]eer hunting does not implicate a tenet of the Amish faith,” particularly where other options not requiring a license with a photograph were available.⁴³⁶ In a pair of cases, the appellate division has held that welfare recipients could not refuse, on religious grounds, to participate in an “identity verification procedure known as finger imaging in order to remain eligible for public assistance benefits.”⁴³⁷ On the other hand, in *Rivera v. Smith*,⁴³⁸ the court of appeals held that it violated article I, section 3, to subject a male Muslim inmate to a pat frisk by a female correctional officer. And in *Rourke v. New York State Dep’t of Correctional Services*,⁴³⁹ the appellate division held that the correctional department’s termination of a Native American’s employment as a correctional officer because of his refusal to cut his hair in conformity with the department’s hair-length requirement violated his state free exercise rights. The enforcement of the regulation could not be justified on any penological basis where female correctional officers were allowed to wear their hair long, where male officers hired before 1990 were permitted to grow beards, and where the petitioner himself had been allowed to wear his hair long for fourteen months without incident.⁴⁴⁰

North Carolina

Article I, section 13, of the North Carolina Constitution provides, “All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”⁴⁴¹ And article I, section 19, prohibits “discrimination by the State because of ... religion.”⁴⁴² Although section 13 does not contain express language prohibiting the establishment of a religion, it has been construed, along with the anti-discrimination language of section 19, to include such a prohibition, similar to the Establishment Clause of the First Amendment.⁴⁴³

The North Carolina Supreme Court has held that the freedom protected by the “rights of conscience” language of article I, section 13, “is no more extensive than the freedom to exercise one’s religion, which is protected by

436. *Id.* at 371.

437. *Medvedev v. Wing*, 671 N.Y.S.2d 806, 807 (N.Y. App. Div. 1998); *Buchanan v. Wing*, 664 N.Y.S.2d 865, 867 (N.Y. App. Div. 1997).

438. 472 N.E.2d 1015, 1016-22 (N.Y. 1984).

439. 615 N.Y.S.2d 470 (N.Y. App. Div. 1994).

440. *Id.* at 471-73.

441. N.C. CONST. art. I, § 13.

442. *Id.* art. I, § 19.

443. *See Heritage Village Church & Missionary Fellowship, Inc. v. State*, 263 S.E.2d 726, 730 (N.C. 1980).

the First Amendment to the Constitution of the United States.”⁴⁴⁴ More generally, the state supreme court has stated that, “[t]aken together, these provisions [referring to art. I, § 13, the anti-discrimination language of art. I, § 19, and the Free Exercise and Establishment Clauses of the First Amendment] may be said to coalesce into a singular guarantee of freedom of religious profession and worship, as well as an equally firmly established principle of separation of church and state.”⁴⁴⁵ Although “the differences in terminology in the relevant North Carolina and federal constitutional provisions may support in some cases differences in scope of their application,”⁴⁴⁶ the North Carolina Supreme Court’s identification of the protections afforded by article I, section 13, and the anti-discrimination language of article I, section 19, with those afforded by the Free Exercise and Establishment Clauses suggests that a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 13, either.

North Dakota

Article I, section 3, of the North Dakota Constitution provides, in part, “The free exercise and enjoyment of religious profession and worship, without discrimination or preference[,] shall be forever guaranteed in this state,” but “the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.”⁴⁴⁷ The North Dakota Supreme Court has held that the Free Exercise and Establishment Clauses of the First Amendment are “[t]o the same effect” as article I, section 3 (formerly article I, section 4).⁴⁴⁸ This equivalency of interpretation suggests that a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 3, either.⁴⁴⁹

444. *In re Williams*, 152 S.E.2d 317, 325 (N.C. 1967).

445. *Heritage Village Church*, 263 S.E.2d at 730 (citation and internal quotation marks omitted). *See also* *Harris v. Matthews*, 643 S.E.2d 566, 569 (N.C. 2007) (referring to state and federal provisions as “comparable”).

446. *Heritage Village Church*, 263 S.E.2d at 730 n.1.

447. N.D. CONST. art. I, § 3.

448. *Bendewald v. Ley*, 168 N.W. 693, 696 (N.D. 1917). *See also* *State ex rel. Heitkamp v. Family Life Services, Inc.*, 616 N.W.2d 826, 838-41 (N.D. 2000) (quoting *Bendewald* and applying the same standards); *State v. Burckhard*, 579 N.W.2d 194, 196 (N.D. 1998) (same); *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982) (construing Free Exercise Clause and article I, section 3, *in pari materia*); *Martian v. Martian*, 328 N.W.2d 844 (N.D. 1983) (granting wife a civil divorce did not violate the husband’s rights under the free exercise guarantees of the state and federal constitutions).

449. That suggestion is strengthened by the defeat of a citizen-initiated measure in June 2012 that would have amended the North Dakota Constitution to impose a more rigorous standard for evaluating religious freedom claims and defenses. Initiated Constitutional Measure No. 3 would have provided:

Ohio

Article I, section 7, of the Ohio Constitution provides, in part, “All men have a natural and infeasible right to worship Almighty God according to the dictates of their own conscience . . . ; nor shall any interference with the rights of conscience be permitted.”⁴⁵⁰ The Ohio Supreme Court has developed its own test for evaluating state right to worship and rights of conscience claims. Under article I, section 7, “the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person’s right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest.”⁴⁵¹ “To state a *prima facie* free exercise claim [under art. I, § 7], the plaintiff must show that his religious beliefs are truly held and that the governmental enactment has a coercive affect [sic] against him in the practice of his religion.”⁴⁵²

A *prima facie* case is not made out unless there is a clear conflict between the requirements of law and the requirements of one’s religion. For example, in *State v. Bontrager*,⁴⁵³ the Ohio Court of Appeals upheld the conviction of a member of the Old Order Amish faith for failure to wear hunter orange apparel while hunting during deer gun-hunting season as required by state law. Although the Old Order Amish faith prohibits the wearing of bright colors (which would include hunter orange), the religion does not require its members to engage in the hunting of deer.⁴⁵⁴ The court determined that “hunting is not an aspect central to the Amish religion in which one must engage to practice the religion properly.”⁴⁵⁵

Oklahoma

Article I, section 2, of the Oklahoma Constitution provides, in part,

Government may not burden a person’s or religious organization’s religious liberty. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be burdened unless the government proves it has a compelling government interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A burden includes indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

450. OHIO CONST. art. I, § 7.

451. *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000).

452. *Id.* at 1045.

453. *See* 683 N.E.2d 126 (Ohio Ct. App. 1996).

454. *Id.* at 128.

455. *Id.* at 130. *See also* *State v. Swartzentruber*, 556 N.E.2d 531, 534 (Ohio Mun. Ct. 1989) (“[N]othing in the defendant’s religion compels him to hunt deer in order to follow the dictates of his church.”).

"Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship. . . ." ⁴⁵⁶

Oklahoma courts have not explicitly equated article I, section 2, with the Free Exercise Clause of the First Amendment, but their decisions reflect a close congruence between First Amendment analysis and analysis under article I, section 2. ⁴⁵⁷ That congruence of interpretation may suggest that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 2, either, though that conclusion is not entirely free from doubt.

Oregon

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." ⁴⁵⁸ Article I, section 3, provides: "No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience." ⁴⁵⁹

The Oregon Supreme Court has held that "[t]he guaranty of religious freedom by the First Amendment of the Federal Constitution is identical in meaning with the constitutional provisions of this state relative to the same right although expressed in different language." ⁴⁶⁰ The identity in meaning does not preclude state courts from interpreting the religion clauses in the Oregon Constitution independently of analysis conducted under the First Amendment; ⁴⁶¹ however, the Oregon Supreme Court usually has interpreted those clauses consistently with Supreme Court precedent interpreting the Free Exercise and Establishment Clauses of the First Amendment. ⁴⁶²

In interpreting article I, sections 2 and 3, the Oregon Supreme Court has

456. OKLA. CONST. art. I, § 2.

457. See *Lewellyn v. State*, 592 P.2d 538, 539-40 & nn.2, 3 (Okla. Crim. App. 1979) (no free exercise right to distribute a controlled substance); *Wahid v. State*, 716 P.2d 678, 680 (Okla. Crim. App. 1986) (same); *State ex rel. Roberts v. McDonald*, 787 P.2d 466, 468-69 (Okla. Civ. App. 1989) (statute requiring licensing of all child care facilities did not violate free exercise rights of church operating "boys ranch"); *Emch v. City of Guymon*, 127 P.2d 855, 859 (Okla. Crim. App. 1942) (holding that municipal ordinance prohibiting distribution of newspapers, handbills, tracts or books within the city limits without first securing a permit from the city clerk could not be applied to the distribution of religious literature by Jehovah's Witnesses) (following *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

458. OR. CONST. art. I, § 2.

459. *Id.* § 3.

460. *City of Portland v. Thornton*, 149 P.2d 972, 974 (Or. 1944).

461. *Cooper v. Eugene School District No. 4J*, 723 P.2d 298, 306-07 (Or. 1986) (citing cases).

462. See, e.g., *Emp't Div. v. Rogue Valley Youth for Christ*, 770 P.2d 588, 592-93 (Or. 1989) (Free Exercise); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 342 (Or. 1976) (Establishment Clause).

held:

A law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.⁴⁶³

The Oregon Supreme Court's interpretation of the state constitution's religion clauses suggests a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, sections 2 and 3, either.

Pennsylvania

Article I, section 3, of the Pennsylvania Constitution provides:

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 establishment or modes of worship.⁴⁶⁴

The "rights of conscience" and anti-preference language of article I, section 3, have generally been interpreted consistently with Supreme Court precedent interpreting the Free Exercise and Establishment Clauses of the First Amendment.⁴⁶⁵ For example, in *Commonwealth v. Barnhart*,⁴⁶⁶ the Pennsylvania Superior Court affirmed the involuntary manslaughter convictions of parents who, on religious grounds, had refused to obtain life-saving treatment for their infant son. The court rejected their defenses based on article I, section 3, and the Free Exercise Clause.⁴⁶⁷ Over the religious objections of the child's parents, in *Matter of Cabrera*,⁴⁶⁸ the superior court

463. *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 361 (Or. 1995).

464. PA. CONST. art. I, § 3.

465. See, e.g., *Christian Sch. Ass'n v. Commonwealth*, Dep't of Labor & Indus. 423 A.2d 1340, 1343-47 & n.3 (Pa. Commw. Ct. 1980) (Free Exercise); *Bishop Leonard Regional Catholic Sch. v. Unemployment Comp. Bd. of Review*, 593 A.2d 28, 32-34 (Pa. Commw. Ct. 1991) (Establishment Clause).

466. 497 A.2d 616 (Pa. Super. Ct. 1985).

467. *Id.* at 620-25.

468. 552 A.2d 1114 (Pa. Super. Ct. 1989).

held that a state trial court had the authority to appoint a hospital as guardian ad litem for the purpose of consenting to a course of blood transfusion therapy (to prevent a stroke) for a six-year old with sickle cell anemia.⁴⁶⁹ The court held that the State's *parens patriae* authority to protect vulnerable children overrode the parents' rights under article I, section 3, and the Free Exercise Clause.⁴⁷⁰

In *Wiest v. Mt. Lebanon School District*,⁴⁷¹ the Pennsylvania Supreme Court held that "[t]he protection of rights and freedoms secured by this section of our Constitution [referring to article I, section 3] does not transcend the protection of the First Amendment of the United States Constitution."⁴⁷² In a very old case, the state supreme court also recognized that:

[T]he religious freedom and the rights of conscience guaranteed by the [state] [c]onstitution do not necessarily stand in the way of the enforcement of laws commanding or prohibiting the commission of acts even by those who conscientiously believe it to be their religious or moral duty to do or refrain from doing them.⁴⁷³

In light of these decisions, a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 3, either, although that conclusion is not entirely free from doubt.⁴⁷⁴

Rhode Island

Article I, section 3, of the Rhode Island Constitution provides, in part:

[W]e . . . declare that no person shall be . . . enforced, restrained, molested, or burdened in body or goods; . . . nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no

469. *Id.* at 1115.

470. *Id.* at 1118-20.

471. 320 A.2d 362 (Pa. 1974).

472. *Id.* at 366-67 (alteration in original). *See also* *St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 989 A.2d 52, 54 n.1 (Pa. Commw. Ct. 2010) (citing *Wiest*, 320 A.2d 362).

473. *Commonwealth v. Herr*, 78 A. 68, 72 (Pa. 1910).

474. *See St. Elizabeth's Child Care Center*, 989 A.2d at 55 n.4 (not addressing argument that "the decision in [*Employment Division v. Smith* does not diminish the protection afforded by Article I, Section 3 of the Pennsylvania Constitution").

wise diminish, enlarge, or affect the civil capacity of any person.⁴⁷⁵

There is very little case law interpreting the religious freedom language of article I, section 3. The Rhode Island Supreme Court has held, however, that section 3, “is no more restrictive as to religious freedoms than the language of the Federal Constitution.”⁴⁷⁶ The court’s statement may suggest that if a free exercise claim or defense would not prevail under the Free Exercise Clause of the First Amendment, it is not likely to prevail under article I, section 3, either.

South Carolina

Article I, section 2, of the South Carolina Constitution provides:

The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.⁴⁷⁷

The South Carolina Supreme Court has observed that the “language of the first amendment to the Constitution of the United States and the language of Article 1, Section 4 [now Section 2], of the Constitution of South Carolina are, for all intents and purposes, the same.”⁴⁷⁸ Thus, the same reasoning “is applicable to both constitutional provisions.”⁴⁷⁹ Given this equivalence of language and interpretation, a free exercise claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 2, either. Although, given the paucity of case law on the matter, that is not entirely free of doubt.

South Dakota

Article VI, section 3, of the South Dakota Constitution provides:

475. R.I. CONST. art. I, § 3.

476. *In re Palmer*, 386 A.2d 1112, 1114 n.1 (R.I. 1978) (citing *Bowerman v. O'Connor*, 247 A.2d 82 (R.I. 1968)). See also *In re Philip S.*, 881 A.2d 931, 935 n.9 (R.I. 2005) (noting “[s]imilar protection” under article I, section 3).

477. S.C. CONST. art. I, § 2.

478. *Hunt v. McNair*, 187 S.E.2d 645, 648 (S.C. 1972) (alteration in original) (interpreting state and federal free exercise and establishment clauses).

479. *Id.*

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.

No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.⁴⁸⁰

While a number of school-aid cases have been decided under the second paragraph of article VI, section 3, relatively few cases have been decided under the first paragraph; no case decided under article VI, section 3 has cited *Employment Division v. Smith*.

The South Dakota Supreme Court has held that the second paragraph of article VI and similar language in article VIII, section 16, of the South Dakota Constitution (prohibiting any unit of government from appropriating funds to be used for "sectarian purposes") "are not mere reiterations of the Establishment Clause of the United States Constitution but are more restrictive as prohibiting aid 'in every form.'"⁴⁸¹ The state supreme court, however, has interpreted the liberty of conscience language of the first paragraph consistently with Supreme Court precedent interpreting the Free Exercise Clause of the First Amendment.⁴⁸² Nevertheless, the lack of case law interpreting the liberty of conscience guarantee in article VI, section 3, especially after *Smith*, make it unclear whether the South Dakota Supreme Court would follow *Smith* in evaluating claims and defenses based on section 3.

480. S.D. CONST. art. VI, § 3.

481. *McDonald v. Sch. Bd. of Yankton*, 246 N.W.2d 93, 98 (S.D. 1976) (quoting *Synod of Dakota v. State*, 50 N.W. 632, 635 (S.D. 1891)). In *McDonald*, the court struck down a statute authorizing the loaning of textbooks to private, including parochial, schools. *Id.*

482. See, e.g., *In re Northwestern Lutheran Acad.*, 290 N.W.2d 845, 849-51 (S.D. 1980) *rev'd on other grounds sub nom.* (holding that article VI, section 3, and Free Exercise Clause did not excuse teachers in Lutheran school from obligation to pay unemployment compensation tax); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *State v. Van Daalan*, 11 N.W.2d 523 (S.D. 1943) (holding that Jehovah's Witnesses who were distributing religious literature which was sold on some occasions and given away free of charge on others could not be compelled to pay retail sales tax on such sales of religious literature, and, therefore, could not be convicted of engaging in business as retailers without a permit by the director of taxation or of failing to make sales tax returns as required by law).

Tennessee

Article I, section 3, of the Tennessee Constitution provides in part, “That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience,” and “that no human authority can, in any case whatever, control or interfere with the rights of conscience”⁴⁸³

In *State ex rel. Commissioner of Transportation v. Medicine Bird*,⁴⁸⁴ the Tennessee Court of Appeals considered state and federal free exercise defenses when the Department of Transportation brought proceedings to discontinue the use of property containing ancient Native American graves as burial ground in order to widen an intersection. In a careful review of the applicable authorities, the court noted that the Tennessee Supreme Court has not held that “the right of conscience” and “free exercise of religion” protections under article I, section 3, “are more expansive than the Free Exercise Clause of the First Amendment.”⁴⁸⁵ “To the contrary, the Court has consistently construed and applied the free exercise protections in TENN. CONST. art. I, § 3 using the same principles employed by the United States Supreme Court to interpret the Free Exercise Clause of the First Amendment.”⁴⁸⁶ The court concluded that “the degree of protection that TENN. CONST. art. I, § 3 provides for the religious freedoms of the Native Americans is the same as that provided by the Free Exercise Clause of the First Amendment.”⁴⁸⁷ Because the statutes on which the Department of Transportation relied to discontinue the use of property are “facially neutral and uniformly applicable,” and “only incidentally burden the Native Americans’ religious practices and rights of conscience,” the court concluded that the statutes would be upheld as applied, so long as they were “a reasonable means to promote a legitimate public interest.”⁴⁸⁸ The court determined that the closure of the burial ground and the relocation of the graves and remains were a reasonable means to promote a legitimate public interest, because the completed construction project would reduce traffic

483. TENN. CONST. art. I, § 3.

484. 63 S.W.3d 734 (Tenn. Ct. App. 2001).

485. *Id.* at 761.

486. *Id.*

487. *Id.* at 761-62.

488. *Id.* at 765-66 (relying upon, *inter alia*, *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)). See also *Tenn. Dep’t of Human Servs. v. Priest Lake Cmty. Baptist Church*, No. M2006-00302-COA-R3-CV, 2007 Tenn. App. LEXIS 391, at 23-26 & n.9 (Tenn. Ct. App. June 25, 2007) (following *Medicine Bird* in holding that a state law requiring day care centers to be licensed by the State could be applied to a church operating a day care center in connection with its Bible studies without violating either article I, section 3, or the Free Exercise Clause).

congestion.⁴⁸⁹

In a slightly earlier case, the Tennessee Court of Appeals held that excluding persons with religiously motivated objections to the death penalty from jury service in capital cases did not violate their rights of conscience under article I, section 3.⁴⁹⁰ While such exclusion “affects their ability to translate their religious beliefs into action,” article I, section 3, “does not prevent the State from controlling religiously motivated actions for the good of society.”⁴⁹¹ “[T]he State has an important interest in obtaining juries that do not contain members who, because of their religious beliefs, are unable to follow the law or the trial court’s instructions.”⁴⁹²

The Tennessee Court of Appeals opinion in *Medicine Bird* suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 3, of the Tennessee Constitution, either.

Texas

Article I, section 6, of the Texas Constitution provides in part:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.⁴⁹³

Texas courts of review have not explicitly equated article I, section 6, with the Free Exercise and Establishment Clauses of the First Amendment, but their decisions reflect a close congruence between analysis under the Religion Clauses of the First Amendment and analysis under section 6.⁴⁹⁴ The

489. *Medicine Bird*, 63 S.W.3d at 766.

490. *Wolf v. Sundquist*, 955 S.W.2d 626, 630-31 (Tenn. Ct. App. 1997).

491. *Id.* at 631.

492. *Id.*

493. TEX. CONST. art. I, § 6.

494. See *Scott v. State*, 80 S.W.3d 184, 191 (Tex. App. 2002) (holding that article I, section 6, is “comparable” to the Free Exercise Clause); *State v. Corpus Christi People’s Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984) (requiring church operated child care facilities to be licensed and regulated does not violate the religion clauses of either the state or federal constitution); *In re Marriage of Knighton*, 723 S.W.2d 274, 278 (Tex. App. 1987) (“[T]he State cannot prefer the religious views of one parent over the other in deciding the best interest of a child” in a child custody dispute.) (relying on both state and federal religion clauses); *Watts v. Watts*, 563 S.W.2d 314, 316-17 (Tex. Civ. App. 1978) (same); *Salvaggio v. Barnett*, 248 S.W.2d 244 (Tex. Civ. App. 1952)

Texas Court of Appeals has repeatedly cited and relied upon the Supreme Court's decision in *Employment Division v. Smith* in rejecting freedom of religion claims brought under article I, section 6, against neutral laws of general application.⁴⁹⁵ For example, in *Ramos*, the court held that "[r]eligious freedoms are not implicated by neutral laws governing activities the government has the right to regulate merely because some religious groups may be disproportionately affected."⁴⁹⁶ Similarly, in *Voice of Cornerstone Church Corp. v. Pizza Property Partners*,⁴⁹⁷ the court noted that "Texas courts have routinely rejected the notion that a facially neutral, otherwise valid restrictive covenant violates constitutional religious freedom protections if applied against a church."⁴⁹⁸ The Texas Supreme Court, however, has not yet decided "whether to construe article I, section 6 of the Texas Constitution as [*Employment Division v. Smith* construed the federal Free Exercise Clause]."⁴⁹⁹ Accordingly, it cannot be determined whether *Smith* will ultimately control the analysis of claims and defenses based on article I, section 6.

Utah

Article I, section 4, of the Utah Constitution provides in part, "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."⁵⁰⁰

The Utah Supreme Court has recognized that "the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution are repeated almost verbatim in article I, section 4,"⁵⁰¹ but the court has not yet decided "whether the [state] free exercise clause . . . provides protection over and above that provided by the First Amendment to the

(same).

495. See *Mauldin v. Tex. State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867, 872 (Tex. App. 2002) (holding that state licensing board could require plumbers to provide social security numbers as a condition of licensure); *Ramos v. State*, 934 S.W.2d 358, 367-68 (Tex. Crim. App. 1996) (excusing jurors who are opposed to the death penalty on moral or religious grounds does not violate their religious freedom).

496. 934 S.W.2d at 367.

497. 160 S.W.3d 657 (Tex. App. 2005).

498. *Id.* at 672.

499. *Barr v. City of Sinton*, 295 S.W.3d 287, 296 n.37 (Tex. 2009) (deciding case under the Texas Religious Freedom Restoration Act). See also *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Board*, 235 S.W.3d 627 (Tex. 2007) (not deciding issue).

500. UTAH CONST. art. I, § 4.

501. Soc'y of Separationists v. Whitehead, 870 P.2d 916, 935 n.43 (Utah 1993) (citing Brad C. Smith, Comment, *Be No More Children: An Analysis of Article I, Section 4 of the Utah Constitution*, 1992 Utah L. Rev. 1431, 1457 ("[T]he 1895 Constitution incorporated the religion clauses of the Federal Constitution.")).

United States Constitution.”⁵⁰² Accordingly, it cannot be determined whether the Utah Supreme Court will follow *Smith* in evaluating claims and defenses based on article I, section 4.

Vermont

Chapter I, article 3, of the Vermont Constitution provides in part:

That all persons 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 regulated by the word of God; . . . 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.⁵⁰³

The Vermont Supreme Court has not yet decided whether to adopt, as a matter of state constitutional interpretation, federal free exercise analysis, as set forth in *Smith*.⁵⁰⁴ In cases decided both before and after *Brady v. Dean*, however, the state supreme court has applied the Supreme Court’s First Amendment free exercise jurisprudence.⁵⁰⁵ In *Brady*, the court held that, even under the pre-*Smith* jurisprudence, town clerks could not refuse on religious grounds to issue marriage licenses to same-sex couples where the clerks had the option of delegating the task to assistant town clerks who did not share their reservations.⁵⁰⁶ In the court’s opinion, the alleged burden on the town clerks’ rights of conscience (in delegating the task to an assistant clerk) was simply too “indirect and attenuated” to be given constitutional protection.⁵⁰⁷ The Vermont Supreme Court’s decisions interpreting chapter I, article 3, suggest that a claim or defense that would not prevail under the Free Exercise Clause of the United States Constitution would not likely prevail under chapter I, article 3, either.

502. *Jeffs v. Stubbs*, 970 P.2d 1234, 129 (Utah 1998). *See also* *State v. Holm*, 137 P.3d 726, 738 (Utah 2006) (quoting *Jeffs*).

503. VT. CONST. ch. I, art. 3.

504. *See Brady v. Dean*, 790 A.2d 428, 433 (Vt. 2001).

505. *See State v. De La Bruere*, 577 A.2d 254, 268-72 & n.15 (Vt. 1990) (concluding that chapter I, article 3, of the Vermont Constitution did not afford any greater protection to parents prosecuted for violating truancy law than does the Free Exercise Clause of the First Amendment); *Turner v. Roman Catholic Diocese of Burlington, Vermont*, 987 A.2d 960, 972-73 & n.6 (Vt. 2009) (holding that under *Smith*, Free Exercise Clause did not bar application of common law tort of negligent hiring to Catholic diocese). *But see Hunt v. Hunt*, 648 A.2d 843, 852-53 (Vt. 1994) (holding that chapter I, article 3, does not provide “any greater protection [to religious freedom] than that afforded by strict scrutiny” under the federal Religious Freedom Restoration Act).

506. 790 A.2d at 34-35.

507. *Id.*

Virginia

Article I, section 16, of the Virginia Constitution provides in part, “all men are equally entitled to the free exercise of religion, according to the dictates of conscience” and “the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination.”⁵⁰⁸ The Virginia Supreme Court has not expressly equated the “free exercise” and anti-establishment clauses of article I, section 16, with the Free Exercise and Establishment Clauses of the First Amendment. Nevertheless, Professor Howard, a leading commentator on the Virginia Constitution, has observed, “Virginia’s courts, in interpreting § 16, follow the federal approach closely.”⁵⁰⁹ The case law supports Professor Howard’s observation.⁵¹⁰

In *Horen v. Commonwealth*,⁵¹¹ the Virginia Court of Appeals construed article I, section 16, and the Free Exercise Clause of the First Amendment together. The court held that a state statute proscribing possession of wild bird parts was not religiously neutral, because it made exceptions for some sectarian uses but not religious ones. The state statute could not be applied to a Native American couple that had been prosecuted for possession of owl feathers for religious use, unless the State proved that it had selected the least restrictive means of promoting a compelling state interest.⁵¹² “Where the state creates a mechanism for legitimate individualized exceptions but fails to include religious uses among those legitimate exceptions, discriminatory intent may be inferred.”⁵¹³ The court determined that the State failed to meet its burden and reversed the defendants’ convictions.⁵¹⁴

Although *Horen* concerned a law that was *not* religiously neutral, the court of appeals cited *Smith* for the proposition that “a religiously neutral law of general application that substantially burdens the free exercise of religion

508. VA. CONST. art. I, § 16.

509. A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 296 (1974).

510. *Cha v. Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515 (Va. 2001) (“The Free Exercise Clause of the First Amendment to the Constitution of the United States and Article I, § 16 of the Commonwealth of Virginia do not permit a circuit court to substitute its secular judgment for a church’s judgment when the church makes decisions regarding the selection or retention of its pastor.”); *Habel v. Indus. Dev. Auth. of the City of Lynchburg*, 400 S.E.2d 516, 518 (Va. 1991) (treating the Supreme Court’s construction of the Establishment Clause of the First Amendment as “helpful and persuasive . . . in construing the analogous state constitutional provision.”). The Commission on Constitutional Revision, which drafted the present state constitution, noted that “in American constitutional law, state and federal, religious freedom has two independent aspects: free exercise of religion, and no establishment of religion.” COMM’N ON CONSTITUTIONAL REVISION, THE CONSTITUTION OF VIRGINIA[:] REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 101 (1969).

511. 479 S.E.2d 553 (Va. Ct. App. 1997).

512. *Id.* at 557.

513. *Id.* (citation omitted).

514. *Id.* at 560.

will survive free exercise challenge where the law rationally advances a legitimate state interest.”⁵¹⁵ The court of appeals’ reliance on *Smith* to construe the state and federal free exercise guarantees together, and the state supreme court’s practice of relying upon federal precedent in interpreting the state free exercise guarantee, suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 16, either.

Washington

Article I, section 11, of the Washington Constitution provides in part:

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.⁵¹⁶

In interpreting the “freedom of conscience” guarantee of article I, section 11, the Washington Supreme Court does not follow the Supreme Court’s interpretation of the Free Exercise Clause of the First Amendment, as set forth in *Smith*.⁵¹⁷ The state supreme court has held that in any case brought under the first sentence of section 11, “the complaining party must first prove [that] the government action has a coercive effect on the practice of religion.”⁵¹⁸ “Once a coercive effect is established, the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective.”⁵¹⁹ “If no compelling state interests exist,” or if the restrictions are not “the least restrictive means” available to achieve the government objective, “the

515. *Id.* at 557.

516. WASH. CONST. art. I, § 11.

517. See *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1993) (“A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion.”). See also *id.* at 189 (“Article 1, section 11, of our state constitution, which absolutely protects the free exercise of religion, extends broader protection than the First Amendment of the federal constitution.”); *Open Door Baptist Church v. Clark Cnty.*, 995 P.2d 33, 38-44 (Wash. 2000) (same) (upholding requirement that church apply for a non-conforming use).

518. *First United Methodist Church of Seattle, Inc. v. Hearing Exam’r for the Seattle Landmarks Pres. Bd.*, 916 P.2d 374, 378 (Wash. 1996) (stating that city’s landmark designation of church building violated church’s right to free exercise of religion). See also *First Covenant Church of Seattle*, 840 P.2d at 183 (same).

519. *First United Methodist Church of Seattle, Inc.*, 916 P.2d at 378.

restrictions are unconstitutional.”⁵²⁰

The threshold inquiry in a free exercise case under article I, section 11, is whether the enactment in question has a “coercive effect” upon a person “in the practice of his religion.”⁵²¹ The challenged state action “must somehow compel or pressure the individual to violate a tenet of his religious belief.”⁵²² If it does not, then the challenge fails.⁵²³

In *State v. Balzer*,⁵²⁴ the Washington Court of Appeals rejected a free exercise defense in a prosecution for illegal possession of marijuana.⁵²⁵ The court said, “We will not create a constitutional safe harbor for marijuana use because there is no realistic or sensible less restrictive means [other than criminal prohibition] to enforce or regulate the use of marijuana.”⁵²⁶

The Washington Supreme Court’s selection of the strict scrutiny standard of judicial review suggests that at least some claims and defenses that would not prevail under the Supreme Court’s test in *Smith* might prevail under article I, section 11.

West Virginia

Article III, section 15, of the West Virginia Constitution provides in part:

[N]or shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument, to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil capacities⁵²⁷

520. *Id.* In addition to the landmark designation cases cited above, the Washington Supreme Court has held that an ordinance authorizing an administrative delay of up to fourteen months in issuing a demolition permit for any structure more than fifty years old, or “places of historic value,” could not constitutionally be applied to a Catholic bishop who sought a permit to demolish an old school building and replace it with a new pastoral center. *Munns v. Martin*, 930 P.2d 318 (Wash. 1997).

521. *First Covenant Church of Seattle*, 840 P.2d at 187 (Wash. 1992) (citation and internal quotation marks omitted).

522. *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989) (citation and internal quotation marks omitted).

523. In *Witters*, the court determined that denying vocational assistance funds to a disabled person who wanted to study for the clergy did not require the applicant for such funds “to violate any tenet of his religious beliefs,” nor did it deny him any benefits “because of conduct mandated by religious belief.” 771 P.2d at 1123 (citation and internal quotation marks omitted).

524. 954 P.2d 931 (Wash. Ct. App. 1998).

525. *Id.* at 935-42.

526. *Id.* at 941.

527. W. VA. CONST. art. III, § 15.

The freedom of "religious opinions or belief" guarantee of article III, section 15, which was based upon Thomas Jefferson's Virginia Statute of Religious Freedom of 1785, has not been the subject of much litigation. In its most recent decision interpreting section 15, the West Virginia Supreme Court of Appeals held that freedom of religion language of section 15 did not require a county school board to provide free bus transportation or a stipend in lieu thereof to children attending a parochial school.⁵²⁸ The decision in *Cooper v. Board of Education of Summers County*, does not shed much light on whether the state supreme court would interpret section 15 independently of the Free Exercise Clause of the First Amendment, nor do the court's other cases interpreting section 15.

In a decision that predates the Supreme Court's decision in *Smith*, the West Virginia Supreme Court rejected a free exercise challenge to the constitutionality of a statute requiring a standard serological (blood) test as a condition to the issuance of a marriage license.⁵²⁹ Applying the strict scrutiny standard of review, the court held that a serological test is a "minimally intrusive means" of achieving the State's compelling interests in "detect[ing] syphilis, protect[ing] the health interests of prenuptial couples and protect[ing] the future children of the married couple."⁵³⁰ In an older case, the state supreme court held that under article III, section 15, a person who had a religious objection to serving on a jury could not be held in contempt of court for his refusal.⁵³¹ The court found that the sincerity of the defendant's position was "given credence by his indication that he would rather go to jail than serve on a grand jury."⁵³² In the court's view, "under the modern consideration of the freedom of religion provisions of the Federal and State Constitutions, the defendant's refusal . . . to serve as a juror, when considered in light of conditions now prevailing, would be considered justified."⁵³³ In referring to the "conditions now prevailing," the court apparently meant that the defendant's refusal to serve would not "affect the peace and safety of the state" or prevent the State from being assured of obtaining "an adequate number of competent jurors. . . ."⁵³⁴

Given the paucity of cases interpreting the freedom of religion guarantee of article III, section 15, especially any cases decided after *Smith*, it cannot be determined whether the West Virginia Supreme Court of Appeals would follow *Smith* in evaluating claims and defenses based on section 15.

528. State ex. rel *Cooper v. Bd. of Educ. of Summers Cnty.*, 478 S.E.2d 341 (W. Va. 1996) (citing *Janasiewicz v. Bd. of Educ.*, 299 S.E.2d 34 (W. Va. 1982)).

529. *In re Kilpatrick*, 375 S.E.2d 794 (W. Va. 1988).

530. *Id.* at 797-98.

531. *State v. Everly*, 146 S.E.2d 705 (W. Va. 1966).

532. *Id.* at 708.

533. *Id.*

534. *Id.*

Wisconsin

Article I, section 18, of the Wisconsin Constitution provides in part, "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted" ⁵³⁵ The Wisconsin Supreme Court continues to apply the pre-*Smith* federal standard in evaluating right to worship and rights of conscience claims under the state constitution. To challenge a statute under article I, section 18, a party must prove:

(1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative. ⁵³⁶

If the challenger meets his burden under the first two elements of the test and the State fails to meet its burden under either of the latter two elements, the challenge succeeds.

In *Miller*, the state supreme court recognized that requiring members of the Old Order Amish religious community to display a red and orange triangular "slow-moving vehicle" (SMV) emblem on their horse-drawn buggies would burden their sincerely held religious beliefs. ⁵³⁷ Although the State has a "compelling interest in public safety on the highways," it failed to demonstrate "that its interest [could not] be met by alternative means that are less restrictive of the challengers' free exercise of religion." ⁵³⁸ As an alternative to the objectionable SMV emblem, the Amish proposed that they place white reflective tape around the perimeter of their buggies and, at night or during inclement weather, carry an illuminated red lantern attached to the rear lower left of their buggies. ⁵³⁹ Based upon expert testimony that white reflective tape is more visible than the red and orange SMV emblem required by state law, the supreme court held that the State had failed to meet its burden that its compelling interest in highway safety could not be secured by a less restrictive alternative. ⁵⁴⁰

In *Noesen v. State of Wisconsin Department of Regulation and*

535. WIS. CONST. art. I, § 18.

536. *State v. Miller*, 549 N.W.2d 235, 240 (Wis. 1996).

537. *Id.* at 241.

538. *Id.*

539. *Id.* at 237 & n.2, 241.

540. *Id.* at 241-42.

Licensing,⁵⁴¹ the Wisconsin Court of Appeals upheld an order of the circuit court affirming the Pharmacy Examining Board's decision reprimanding a pharmacist for refusing to fill or transfer a prescription for contraceptives based on his sincerely held religious beliefs. The court of appeals determined that when a pharmacist is merely required "to make the extent of his religious belief and objections known to his employer before the commencement of his practice at the pharmacy,"⁵⁴² he has failed to meet his burden. That requirement would "facilitate, rather than burden, [his] ability to exercise his conscientious objection in the future."⁵⁴³

Wyoming

Article 1, section 18, of the Wyoming Constitution provides in part:

The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state ... 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.⁵⁴⁴

There is relatively little case law discussing article 1, section 18, but what little there is indicates that the Wyoming Supreme Court would not interpret the "free exercise" and "liberty of conscience" guarantees of section 18 more broadly than the Supreme Court has interpreted the Free Exercise Clause of the First Amendment.

In *Trujillo v. State*,⁵⁴⁵ a defendant convicted of possession with intent to deliver psilocybin mushrooms argued that his trial counsel was ineffective for not seeking to dismiss the charge on the grounds that "the statutes criminalizing drug possession with intent to deliver violate his constitutional right to freely exercise his religion" under article 1, section 18, and the Free Exercise Clause of the First Amendment.⁵⁴⁶ Relying upon the Supreme Court's decision in *Smith*, the Wyoming Supreme Court rejected the defendant's argument. Even assuming that the defendant could establish that he used drugs pursuant to his religious beliefs (which, in any event, would not explain his possession *with intent to deliver* the drugs), he could not demonstrate that the challenged laws were "anything other than valid and

541. 751 N.W.2d 385 (Wis. Ct. App. 2008).

542. *Id.* at 393 (quoting Decision of Feb. 3, 2006, Case No. 05CV 212, Barron County (Wisconsin) Circuit Court, p. 15 (circuit court opinion affirming disciplinary order)).

543. *Id.* (quoting Decision of Feb. 3, 2006 (circuit court opinion)).

544. WYO. CONST. art. 1, § 18.

545. 2 P.3d 567 (Wyo. 2000).

546. *Id.* at 575.

neutral laws of general applicability.”⁵⁴⁷ Under the analysis set forth in *Smith*, the defendant was “bound to obey [those laws] regardless of his religious beliefs.”⁵⁴⁸ Because a motion to dismiss relying on defendant’s free exercise claim “would have been without merit,” the court concluded that “trial counsel’s performance was not deficient.”⁵⁴⁹

The Wyoming Supreme Court’s reliance on *Smith* in addressing a state free exercise defense suggests that a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article I, section 18, either.

OTHER MATTERS

“Hybrid Rights” Claims and Defenses

As was noted in the Introduction,⁵⁵⁰ in *Smith*, the Supreme Court distinguished cases in which a free exercise of religion claim or defense was combined with the assertion of another federal constitutional right (e.g., free speech or the right of parents to control the upbringing of their children) from those in which only a free exercise claim or defense was at stake. Whether the Court cited such cases as examples of a recognized exception or simply to explain why they did not dictate the outcome in *Smith* is unclear. What is clear is that, with very few exceptions,⁵⁵¹ no state court has upheld a “hybrid rights” claim or defense under the Free Exercise Clause in conjunction with some other federal constitutional right that did not involve the rights of

547. *Id.* at 577.

548. *Id.*

549. *Id.*

550. See *supra* text accompanying notes. 6-7.

551. See, e.g., *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 181-82 (Wash. 1992) (recognizing “hybrid rights” claim involving free exercise and free speech in the context of a municipality’s authority to confer “landmark status” on churches, and agreeing with the plaintiff that “when the State controls the architectural ‘proclamation’ of religious belief inherent in [a] church’s exterior it effectively burdens religious speech.”); *Scott v. State*, 80 S.W.3d 184, 193, 197 (Tex. App. 2002) (free exercise and free speech claims) (holding that indigent defendant could not be required to “swear or affirm” under penalties of perjury that he was impecunious for purposes of obtaining a free transcript and appointed counsel on appeal from his criminal conviction where defendant, who had religious objections to oaths and affirmations, was willing to “vow” that he would tell the truth and that he would do so under any penalties that were the equivalent to the penalties for perjury for those whose statements were given under oath or on affirmation). Most attempts (in state court) to create a “hybrid rights” issue by combining a federal free exercise claim or defense with a federal free speech claim or defense have been rejected. See, e.g., *Thomas v. Anchorage Equal Rights Comm’n*, 102 P.3d 937, 943-44 & n.38 (Alaska 2004); *North Coast Women’s Care Med. Group, Inc. v. Superior Court*, 189 P.3d 959, 967-68 (Cal. 2008); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 194-95 (Cal. Ct. App. 2001), *aff’d*, 85 P.3d 67, 87-88 (Cal. 2004); *Elane Photography, LLC v. Willock*, 284 P.3d 428, 443 (N.M. Ct. App. 2012), *aff’d*, No. 33,687, 2013 WL 4478229, at *21 (N.M. 2013); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 464-65 (N.Y. 2006); *Church at 295 S. 18th St., St. Helen’s v. Emp’t Dep’t*, 28 P.3d 1185, 1192-94 (Ore. Ct. App. 2001).

parents.⁵⁵² No state court has upheld a “hybrid rights” claim or defense that combined a federal free exercise of religion claim or defense with a federal freedom of association claim or defense.⁵⁵³

Individualized Exemptions

In addition to distinguishing cases in which a free exercise of religion claim or defense was combined with the assertion of another federal constitutional right, the Supreme Court in *Smith* also distinguished cases (all involving the denial of unemployment compensation benefits) “where the State has in place a system of individualized exemptions. . . .”⁵⁵⁴ In such cases, the State “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”⁵⁵⁵ Although one or two state courts, applying federal constitutional analysis, have upheld a free exercise claim where the State or municipality had in place a “system of individualized exemptions,”⁵⁵⁶ most such claims and defenses have been rejected as not falling within the limited scope of that exception.⁵⁵⁷ In *Catholic Charities*,

552. “Hybrid rights” claims or defenses involving federal free exercise and parental rights were sustained in *People v. DeJonge*, 501 N.W.2d 127, 134-44 (Mich. 1993) (home schooling). See also *Shepp v. Shepp*, 906 A.2d 1165, 1172-74 (Pa. 2006) (holding that divorced father could not be prohibited from teaching his minor child about polygamy, plural marriage, or multiple wives in the absence of evidence that his advocacy of such religious beliefs would jeopardize the physical or mental health of the child); *Zummo v. Zummo*, 574 A.2d 1130, 1138-39 (Pa. Super. Ct. 1990) (holding that in custody dispute between divorced parents, father could not be barred from taking his children to religious services contrary to the mother’s faith during periods of lawful custody or visitation). Parental rights may not be asserted by third persons, however, in order to create a “hybrid rights” issue. See, e.g., *Hill-Murray Fed’n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 863 (Minn. 1992); *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 721-22 (N.J. 1997); *Health Services Div. v. Temple Baptist Church*, 814 P.2d 130, 136 (N.M. Ct. App. 1991); *In re N.Y. State Emp’t Relations Bd. v. Christ the King Reg’l High Sch.*, 682 N.E.2d 960, 964 (N.Y. 1997).

553. See *City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443, 454-55 (Ind. 2001) (Shepard, C.J., concurring and dissenting) (Boehm, J., dissenting); *Hill-Murray*, 487 N.W.2d at 862-62; *State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990) (“hybrid rights” defense was “arguable,” but case was decided on other grounds); *S. Jersey Catholic Sch. Teachers Org.*, 696 A.2d at 721-22; *Catholic Charities of the Diocese of Albany*, 859 N.E.2d at 464-65.

554. 494 U.S. 872, 884 (1990).

555. *Id.* (citation omitted).

556. See *Stinemetz v. Kansas Health Care Policy Auth.*, 252 P.3d 141, 152-56 (Kan. Ct. App. 2011) (applying exception to strike down state agency’s refusal to reimburse Medicaid-eligible patient for an out-of-state “bloodless liver transplant”); *First Covenant Church*, 840 P.2d at 181 (overturning landmark designation).

557. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 192-93 (Cal. Ct. App. 2001), *aff’d*, 85 P.3d 67 (Cal. 2004); *Shagalow v. State, Dep’t of Human Services*, 725 N.W.2d 380, 388-89 (Minn. Ct. App. 2006); *Health Services Div. v. Temple Baptist Church*, 814 P.2d 130, 135-36 (N.M. Ct. App. 1991); *Henley v. City of Youngstown Bd. of Zoning Appeals*, 1999 Ohio App. LEXIS 3171, at *11-12 (Ohio Ct. App. Jun. 30, 1999); *Shumaker v. Ohio Dep’t of Human Services*, 691 N.E.2d 690, 700-01 (Ohio Ct. App. 1996); *Church at 295 S. 18th Street*, 28 P.3d at 1191-92; *Tenn. Dep’t of Human Services v. Priest Lake Cmty. Baptist Church*, 2007 Tenn.

the California Court of Appeal explained that under the established case law, the strict scrutiny standard of judicial review does not apply “any time statutory exemptions of any kind are enacted by the Legislature,” but does apply where “there is a mechanism of exemptions open to unfettered discretionary interpretation,” and “the bureaucratic discretion is enforced in a discriminatory manner against religion.”⁵⁵⁸

State Constitutional Limitations on Religious Freedom

In twenty states, the constitutional provisions guaranteeing religious freedom (however expressed), by their own terms, do not “excuse acts of licentiousness” or “justify practices inconsistent with the peace and[or] safety” of the State.⁵⁵⁹ An interesting question that has seldom been addressed is whether such language not only limits the *reach* of religious freedom, but also the State’s authority to *restrict* religious freedom. In other words, is the State’s authority to restrict religious freedom (including conduct based upon beliefs) in these states limited to preventing “acts of licentiousness” and “practices inconsistent with the peace and safety” of the State? Two state courts have held that the State’s authority is so limited,⁵⁶⁰ while one state court has held otherwise.⁵⁶¹ No state court has defined “acts of

App. LEXIS 391, at *42-48 (Tenn. Ct. App. June 25, 2007). *See also* Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1344-47 & n.31 (Haw. 1998) (holding that city’s variance law “clearly creates a ‘system of individualized exemptions’ from the general zoning law,” but concluding that height restrictions on structures did not substantially burden the temple’s free exercise of religion and, therefore, did not need to be justified by a narrowly tailored compelling interest) (quoting *Smith*, 494 U.S. at 884).

558. 109 Cal. Rptr. 2d at 192.

559. Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, South Dakota, Washington and Wyoming. The text of the provisions, the precise language of which varies (some religious freedom guarantees may exclude “injuries to morals” or acts that “interfere” with the worship of others) may be found in the respective state analyses, *supra* State by State Analyses.

560. Attorney General v. Desilets, 636 N.E.2d 233, 242 (Mass. 1994) (stating that if a person’s religiously motivated conduct does “not disturb the public peace or obstruct others in their religious worship,” then part 1, article 2, of the Massachusetts Constitution “gives absolute protection to the manner in which one worships God” and “[n]o balancing of interests, the worshiper’s, on the one hand, and the government’s, on the other, is called for . . .”); Soc’y of Jesus of New England v. Boston Landmarks Comm’n, 564 N.E.2d 571, 574 (Mass. 1990) (same); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (explaining that religious liberty language of state constitution “expressly limits the governmental interests that may outweigh religious liberty” to “practices inconsistent with the peace or safety of the state” or “acts of licentiousness”) (quoting MINN. CONST. art. I, § 16); Rasmussen v. Glass, 498 N.W.2d 508 (Minn. Ct. App. 1993) (same).

561. North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct., 189 P.3d 959, 969 (Cal. 2008) (rejecting argument that such language “indicates that religious objectors are free to disregard a particular state law unless doing so compromises the peace or safety of the state or is licentious” and interpreting CAL. CONST. art. I, § 4).

licentiousness,” as used in its religious freedom guarantee,⁵⁶² and only one has stated whether “practices inconsistent with the peace and safety” of the state (or equivalent language) refers only to breaches of the peace or has a broader meaning.⁵⁶³

CONCLUSION

As the foregoing survey indicates, in slightly more than one-half of the states (twenty-six), state courts follow or may be expected to follow the Supreme Court’s decision in *Smith* in interpreting the religious freedom guarantees of their state constitutions.⁵⁶⁴ In seven states (Arizona, California, Hawaii, Missouri, Texas, Utah, and Vermont), the courts expressly stated that they have not decided whether to follow *Smith*. In six states, (Georgia, Kansas, Montana, Nevada, South Dakota, and West Virginia), it cannot be determined whether state courts will follow *Smith* in interpreting their religious freedom guarantees, either because of a paucity of case law construing those guarantees, or conflicting decisions (Kansas). In ten states (Alaska, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin), the courts have refused to follow *Smith* in interpreting their state religious freedom guarantees. In one state (Alabama), the state constitution has been amended to establish the pre-*Smith* federal standard. Although phrased somewhat differently, the eleven states refusing to follow *Smith* generally apply a four-part test for evaluating religious freedom claims and defenses based on state constitutional provisions. Initially, the person (or entity) raising such a claim or defense must demonstrate that: first, he or she (or the entity) has a sincerely held religious belief, and second, the belief is being burdened (or substantially

562. In modern usage, “acts of licentiousness” usually would be understood to mean “lacking or ignoring moral or legal restraint, esp. in sexual activity,” BLACK’S LAW DICTIONARY 1005 (9th ed. 2009), but as Justice Scalia has noted, in early American usage the word “licentiousness” may have had a much broader meaning, to wit, “[e]xceeding the limits of law.” *City of Boerne v. Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part) (quoting 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 5 (1828)).

563. In *Commonwealth v. Nissenbaum*, 536 N.E.2d 592, 595-596 (Mass. 1989), the Massachusetts Supreme Judicial Court held that the exception in part 1, article 2, of the Massachusetts Constitution for conduct that “disturb[s] the public peace” was not limited to breaches of the peace but extended to all criminal offenses, whether statutory or common law. See also *City of Boerne*, 521 U.S. at 540 (Scalia, J., concurring in part) (arguing that provisos in certain state constitutions that religious freedom does not extend to acts that “disturb the public peace” or interfere with the “peace [and] safety” of the State “‘apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions’”) (quoting Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 919 (1992)).

564. Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and Wyoming.

burdened) by the state action in question. Once that showing has been made, the burden of proof shifts to the state to demonstrate that: third, the state has a compelling interest in the matter being regulated (or prohibited), and fourth, no less restrictive means will suffice to achieve that interest. Indiana and New York, however, apply somewhat different tests that, while more protective of religious liberty than the *Smith* standard, are less protective than the pre-*Smith* federal standard followed by Alabama, Alaska, Maine, Massachusetts, Minnesota, Michigan, Ohio, Washington, and Wisconsin. Obviously, these categories are somewhat fluid. Some state courts that have not decided whether to follow *Smith* will choose to do so, some will not. Even in those states where the courts appear to follow *Smith*, it is not certain that they will do so in the future. The law is dynamic, not static.

The range of issues presented under state religious freedom guarantees is very broad. State courts have considered the constitutionality of statutes and ordinances: prohibiting discrimination in housing and public accommodations on the basis of marital status and/or sexual orientation; mandating contraception coverage in prescription insurance benefits packages; prohibiting possession of controlled substances and prohibiting assisted suicide; regulating the medical profession; requiring photographic or other means of identification as a condition for the issuance of state driver's licenses and hunting licenses, or receiving public assistance benefits; mandating certain equipment to be used on motor vehicles; regulating hunting; and mandating vaccination of school age children. State courts have also considered statutes and administrative rules regulating private and home schools; ordinances governing zoning and land use (including "landmark" designations); and rules regulating the operation of prisons. In areas of particular contemporary public controversy (mandating contraception coverage, prohibiting discrimination on the basis of marital status and/or sexual orientation, and regulating private (including parochial) education and home schools), the record has been decidedly mixed. Neither of the challenges to statutes mandating contraception coverage in employee benefit packages offering prescription drug coverage has succeeded even though, in both cases, the California Supreme Court and the New York Court of Appeals applied a standard of review that is *less* deferential to state regulation and *more* protective of religious freedom than the one adopted in *Smith*.⁵⁶⁵ Occasionally, a challenge to an anti-discrimination statute or ordinance has succeeded,⁵⁶⁶ but usually such challenges have not prevailed.⁵⁶⁷ Case law

565. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

566. *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *Rasmussen v. Glass*, 498 N.W.2d 508 (Minn. Ct. App. 1993).

567. *Swanner v. Anchorage Equal Rights Comm'n*, 847 P.2d 271 (Alaska 1994); *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937 (Alaska 2004); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008); *Smith v. Fair Emp't & Hous.*

involving one of the country's oldest religious minorities, the Old Order Amish, is also mixed; the challenges prevailing in some cases⁵⁶⁸ and failing in others,⁵⁶⁹ even under a more rigorous standard of review. State religious freedom guarantees have presented no bar to civil suits and criminal investigations into the tortious or criminal actions of members of the clergy.⁵⁷⁰ Finally, at least one state court has upheld a religious freedom-based challenge to the regulation of a home school,⁵⁷¹ but most challenges to the regulation of private and home schools have been rejected.⁵⁷²

Even in the minority of states that continue to follow the pre-*Smith* standard for evaluating religious freedom claims and defenses, most such claims and defenses have been rejected. Whether that suggests that "[s]trict scrutiny is not what it once was," but "has mellowed in recent decades" to the point where "a state's interest is compelling if the state says it is,"⁵⁷³ is a

Comm'n, 913 P.2d 909 (Cal. 1996); *Hyman v. City of Louisville*, 132 F. Supp.2d 528 (W.D. Ky. 2001) (applying both state and federal law); *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, No. 33,687, 2013 WL 4478229 (N.M. 2013); *Brady v. Dean*, 790 A.2d 438 (Vt. 2001).

568. *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (striking down requirement that horse-drawn buggies display brightly colored "slow moving vehicle" emblem where other alternatives consistent with traffic safety were available); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (same).

569. *In re Miller*, 684 N.Y.S.2d 368 (N.Y. App. Div. 1998) (upholding requirement to submit a photograph with application for a hunting license); *State v. Bontrager*, 683 N.E.2d 126 (Ohio Ct. App. 1996) (upholding requirement that hunters wear bright orange apparel while hunting deer); *State v. Swartzentruber*, 556 N.E.2d 531 (Ohio Mun. Ct. 1989) (same).

570. *See Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005) (civil action for negligent supervision); *Archdiocese of Wash. v. Moersen*, 925 A.2d 659 (Md. 2007) (allowing civil action for breach of contract, wrongful discharge, and intentional infliction of emotional distress based, in part, on sexual abuse to proceed); *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002) (negligence); *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991) (sexual harassment); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992) (entering punitive damage award against archdiocese in case involving sexual abuse of a child by a priest); *Turner v. Roman Catholic Diocese of Burlington, Vermont*, 987 A.2d 960 (Vt. 2009); *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 32 Cal. Rptr. 3d 209 (Cal. Ct. App. 2006) (issuing grand jury subpoena *duces tecum* in the course of grand jury investigation of clerical sexual abuse of minors); *Soc'y of Jesus of New England v. Commonwealth*, 808 N.E.2d 272 (Mass. 2004) (same).

571. *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993). *See also In re Welfare of T.K.*, 475 N.W.2d 88 (Minn. Ct. App. 1991) (removing children from parents' custody because of their refusal to allow children to take standardized educational tests was "premature").

572. *Triplett v. Livingston Cnty. Bd. of Educ.*, 967 S.W.2d 25 (Ky. Ct. App. 1997); *Blount v. Dep't of Educational & Cultural Services*, 551 A.2d 1377 (Me. 1988); *Hill-Murray Fed'n. of Teachers v. Hill-Murray High School*, 487 N.W.2d 857 (Minn. 1992); *Valley Christian School v. Mont. High School Ass'n*, 86 P.3d 554 (Mont. 2004); *State v. De La Bruere*, 577 A.2d 254 (Vt. 1990). *See also St. Elizabeth's Child Care Ctr. v. Dep't of Public Welfare*, 989 A.2d 52 (Pa. Commw. Ct. 2010); *Tenn. Dep't of Human Services v. Priest Lake Cmty. Baptist Church*, No. M2006-00302-COA-R3-CV, 2007 Tenn. App. LEXIS 391 (Tenn. Ct. App. June 25, 2007) (preventing operation of daycare center/Bible school hybrid by church).

573. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 105 (Cal. 2004) (Brown, J., dissenting).

matter of dispute. To the extent that the interpretation and application of state constitutions fails to protect religious freedom adequately, the people of those states may wish to amend their state constitutions, as Alabama has, to provide greater protection, or to enact or strengthen state statutory religious freedom restoration acts.

Appendix

Alabama Religious Freedom Amendment, Ala. Const. art. I, § 3.01:

Section I.

The amendment shall be known as and may be cited as the Alabama Religious Freedom Amendment.

Section II.

The Legislature makes the following findings concerning religious freedom:

(1) The framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, and the framers of the Constitution of Alabama of 1901, also recognizing this right, secured the protection of religious freedom in Article I, Section 3.

(2) Federal and state laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

(3) Governments should not burden religious exercise without compelling justification.

(4) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.

(5) The compelling interest test as set forth in prior court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests in areas ranging from public education (pedagogical interests and religious rights, including recognizing regulations necessary to alleviate interference with the education process versus rights of religious freedom) to national defense (conscription and conscientious objection, including the need to raise an army versus rights to object to individual participation), and other areas of important mutual concern.

(6) Congress passed the Religious Freedom Restoration Act, 42 U.S.C., § 2000bb, to establish the compelling interest test set forth in prior federal court rulings, but in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the United States Supreme Court held the act unconstitutional stating that the right to regulate was retained by the states.

Section III.

The purpose of the Alabama Religious Freedom Amendment is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government.

Section IV.

As used in this amendment, the following words shall have the following meanings:

(1) DEMONSTRATES. Meets the burdens of going forward with the evidence and of persuasion.

(2) FREEDOM OF RELIGION. The free exercise of religion under Article I, Section 3, of the Constitution of Alabama of 1901.

(3) GOVERNMENT. Any branch, department, agency instrumentality, and official (or other person acting under the color of law) of the State of Alabama, any political subdivision of a state, municipality, or other local government.

(4) RULE. Any government statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatsoever.

Section V.

(a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:

(1) Is in furtherance of a compelling governmental interest; and

(2) Is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose religious freedom has been burdened in violation of this section may assert that violation as a claim or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.

Section VI.

(a) This amendment applies to all government rules and implementations thereof, whether statutory or otherwise, and whether adopted before or after the effective date of this amendment.

(b) Nothing in this amendment shall be construed to authorize any government to burden any religious belief.

(c) Nothing in this amendment shall be construed to affect, interpret, or in any way address those portions of the First Amendment of the United States Constitution permitting the free exercise of religion or prohibiting laws respecting the establishment of religion, or those provisions of Article I, Section 3, of the Constitution of Alabama of 1901, respecting the establishment of religion.

Section VII.

(a) This amendment shall be liberally construed to effectuate its remedial and deterrent purposes.

(b) If any provision of this amendment or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this amendment.