Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject *Employment Division v. Smith* and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution

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ABSTRACT: In 1990, the United States Supreme Court decided Employment Division v. Smith. *The* Smith *decision dismantled the Supreme Court's prior free-exercise jurisprudence that applied a "compelling state interest" strict scrutiny standard of review to facially neutral, generally applicable laws that allegedly interfered with a plaintiff's free-exercise rights by replacing it with a rational-basis test. As a result of* Smith*, free-exercise plaintiffs—fearing their chance of success under the First Amendment to be dismal—began bringing their claims under the free-exercise provisions of their state constitutions as well as the Free Exercise Clause of the First Amendment. Since most state constitutional free-exercise provisions had never been interpreted by their respective supreme courts, state supreme courts have broad discretion in deciding what standard of scrutiny to apply. Consequently, some state supreme courts restored the "compelling state interest" standard for free-exercise claims brought under their state constitutions. This provides citizens of these states with greater individual protection of religious liberty than what is currently available under the First Amendment. Iowa has yet to take a position on this issue. Through the evaluation of the Iowa Constitution's textual similarities to the Free Exercise Clause, the doctrine of* stare decisis*, the public policy favoring individual religious rights, and the original intent of Iowa's framers, this Note explains why the Iowa Supreme Court should adopt a strict scrutiny standard under Article 1, Section 3 of the Iowa Constitution.*

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I. INTRODUCTION

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[1] The framers used this absolute language in proclaiming a citizen's right to religious liberty because the Free Exercise Clause was intended to secure for the people a government that could not interfere with an individual's ability to practice his or her religion.[2] For decades, the United States Supreme Court was stalwart in its protection of individual religious liberty against laws that interfered with the "free exercise thereof," unless the government could show the infringing law was necessary to accomplish a "compelling state interest."[3] In 1990, however, this enduring shield of protection was displaced when the United States Supreme Court decided *Employment Division v. Smith*.[4] In *Smith*, the Court departed from analyzing generally applicable, facially neutral laws that allegedly infringed on an individual's ability to practice his or her religion under strict scrutiny by replacing the analysis with a rational-basis test.[5]

As a result, the *Smith* decision infuriated a significant portion of the American public.[6] Reactions from state supreme courts, however, were mixed. Some state supreme courts, when analyzing free-exercise claims brought under their state constitution's free-exercise provisions, adopted

1. U.S. CONST. amend. I (emphasis added).

2. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443 (1990) (describing the framers decision to use the words "free exercise" over "toleration" of religious freedom, because the former was broader and more encompassing than the latter).

3. *See infra* note 27 and accompanying text.

4. Emp't Div. v. Smith, 494 U.S. 872 (1990).

5. *See id.* at 885 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (internal quotation marks omitted)). Rational-basis review is the standard of review applied by appellate courts to rights that are least-deserving of protection from government interference. Alternatively, rights that are deemed "fundamental" are granted strict scrutiny—a standard of review that demands the government show a "compelling state interest" in order to interfere with such rights. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 946–47 (3d. ed. 2009).

6. *See infra* notes 64–67 and accompanying text.

Smith's rational-basis test.[7] Other state supreme courts flatly rejected *Smith* and interpreted their state constitution's free-exercise provisions as providing greater individual protection for the free exercise of religion.[8] Still other states, such as Iowa, have yet to address this question. This Note argues that the Iowa Supreme Court should reject *Smith*'s rational-basis standard of review and adopt the strict scrutiny standard as originally articulated in *Sherbert v. Verner* for free-exercise claims that arise under Iowa's free-exercise provision, as stated in Article I, Section 3 of the Iowa Constitution.

Part II of this Note begins by summarizing the history of the Supreme Court's free-exercise jurisprudence.[9] Part II then addresses Congress's response to *Smith* and the current standard of review for free-exercise claims brought under the Free Exercise Clause of the First Amendment.[10] To understand the factors state supreme courts weigh when deciding whether to adopt or reject *Smith*, Part III tracks the various rationales state supreme courts have employed to arrive at their conclusions. The factors considered in Part III include the textual differences or similarities between a state constitution's free-exercise provision and the Free Exercise Clause, a state supreme court's application of the doctrine of *stare decisis*, the public policies favoring strict scrutiny, and the original intent of a state's constitutional framers. Part IV analyzes these factors in relation to Iowa's free-exercise provision and case law to determine which, if any, provide a basis to reject *Smith*. Part IV then considers the public policy grounds and original intent of Iowa's framers to aid this inquiry. Finally, Part V argues that the weight of these factors support the conclusion that the Iowa Supreme Court should adopt a strict scrutiny standard of review for free-exercise claims arising under Article I, Section 3 of the Iowa Constitution.

II. BACKGROUND

Prior to analyzing the various legal factors state supreme courts weigh when deciding to reject *Smith* and adopt strict scrutiny, it is important to understand the historical context out of which this issue was borne. The historical development of the Supreme Court's free-exercise jurisprudence provides this context. Subpart A discusses how the Supreme Court's treatment of free-exercise claims has changed over time. Subpart B highlights the magnitude of the Court's departure from strict scrutiny by detailing the negative response the *Smith* decision elicited from Congress in particular and from society as a whole. Subpart B then demonstrates the difficulties a free-exercise plaintiff faces by reviewing the current standard of

7. *See infra* note 89 and accompanying text.
8. *See infra* note 90 and accompanying text.
9. *See infra* Part II.A.
10. *See infra* Part II.B.

review for free-exercise claims brought under the Free Exercise Clause of the First Amendment.

A. *DEVELOPMENT OF MODERN CONSTITUTIONAL FREE-EXERCISE JURISPRUDENCE: THE RISE AND FALL OF THE* SHERBERT *TEST*

The United States Supreme Court's free-exercise jurisprudence is marked by two shifts in ideology: one that occurred in *Sherbert v. Verner*, the other in *Employment Division v. Smith*. Thus, this Subpart discusses the Court's treatment of free-exercise claims pre-*Sherbert*, the *Sherbert* test, the weakening of the *Sherbert* test, and finally, *Smith*'s rational-basis regime, in turn.

1. Pre-*Sherbert* Interpretation of the Free Exercise Clause

In 1878, the Supreme Court first interpreted the First Amendment's Free Exercise Clause[11] in *Reynolds v. United States*.[12] In *Reynolds*, a grand jury indicted George Reynolds, a resident of the Utah territory and member of the Mormon Church, for bigamy in violation of the United States Code.[13] Reynolds appealed the indictment, arguing that his religious beliefs imposed a duty on him to marry multiple women.[14] In finding the statute to be constitutional, the Court based its decision partly on the assertion that world history showed that the practice of polygamous societies has led to "odious" results and partly on the fact that Congress was endowed with the power to pass laws that promote "peace and good order" for society, and that bigamy violated the "peace and good order" of the United States.[15] In deciding the case, the Court articulated the bedrock principle of free-exercise jurisprudence: the distinction between an individual's religious *belief*, on one hand, and an individual's religious *conduct*, on the other. The Court ruled that the First Amendment provides an individual absolute protection for the former, but that the latter may be subject to regulation by the government.[16] In holding that the Free Exercise Clause permits the government to

11. *See* U.S. CONST. amend. I ("Congress 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 for a redress of grievances." (emphasis added)).

12. Reynolds v. United States, 98 U.S. 145 (1878).

13. *Id.* at 146.

14. *Id.* at 161.

15. *Id.* at 163–64 (quoting 12 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 84–86 (Richmond, George Cochran 1823)).

16. *See id.* at 164 ("Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions . . . ." (quoting Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, A Comm. of the Danbury Baptist Ass'n, in the State of Conn. (Jan. 1, 1802), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 113, 113 (H. A. Washington, ed.) (1854) (internal quotation marks omitted)).

interfere with an individual's ability to practice his or her religion as long as the individual's *conduct* and not his or her *belief* is being regulated, the *Reynolds* decision defined the scope of all free-exercise cases that followed.

After *Reynolds*, the Court did not hear another free-exercise case until more than sixty years later when it decided *Cantwell v. Connecticut* in 1940.[17] In *Cantwell*, a Jehovah's Witness named Jesse Cantwell stopped two men on a public street in New Haven, Connecticut and asked their permission to play a recording.[18] After consenting to the request, the two men, who were Catholics, became "incensed" over the content of the recording because it attacked the Catholic religion.[19] As a result of this incident, Cantwell was arrested and convicted of violating a Connecticut statute for soliciting the general public without the approval of the Secretary of the Public Welfare Council who had the sole, independent authority to permit or deny a religious organization the ability to engage in such acts.[20] Cantwell challenged the statute, arguing that complying with the law created a prior restraint on his ability to freely exercise his religion under the First Amendment.[21] The Court agreed.

In striking down the statute, the Court determined that the Free Exercise Clause is applicable to the states under the Due Process Clause of the Fourteenth Amendment.[22] The Court held that even though the statute subjected the Secretary's decision to judicial review, application of the doctrine of prior restraint "upon the exercise of [a] guaranteed freedom by judicial decision . . . is as obnoxious to the Constitution as . . . providing for like restraint by administrative action."[23] By expanding the reach of the Free Exercise Clause beyond federal laws to state and local laws under the Due Process Clause of the Fourteenth Amendment, the Court's holding in *Cantwell* broadened the scope of the Free Exercise Clause and significantly strengthened protection of religious liberty for individuals under the Constitution.[24]

Together, *Reynolds* and *Cantwell* established the basic principles upon which the Supreme Court analyzes modern free-exercise claims: (1) only religious conduct, and not religious belief, may be regulated by the government, and (2) the Free Exercise Clause applies to state and local laws

17. Cantwell v. Connecticut, 310 U.S. 296 (1940).

18. *Id.* at 302–03.

19. *Id.* at 303.

20. *Id.* at 300–03.

21. *Id.* at 300, 302.

22. *Id.* at 303.

23. *Id.* at 306.

24. *See* RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 15 (Terry Eastland ed., 1993) ("*Cantwell* opened the door to federal litigation over religion-clause claims against the states, and most of the religion-clause cases decided by the Supreme Court since 1940 have involved such claims.").

as well as federal laws. Neither case, however, specified a consistent standard of review.[25] The Court resolved this problem twenty-three years later in *Sherbert v. Verner*.[26]

2. The *Sherbert* Test for Analyzing Free-Exercise Claims

In 1963, the Supreme Court created a framework to evaluate free-exercise claims. In *Sherbert v. Verner* the Court established the "compelling state interest" standard of review for all free-exercise claims arising under the Free Exercise Clause.[27] In *Sherbert*, Adell Sherbert sued South Carolina's Employment Security Commission for denying her unemployment compensation benefits because she refused to accept a job that required her to work on Saturdays, which conflicted with her religious beliefs.[28] The Court ruled that South Carolina did not show a "compelling state interest" justifying its unemployment-compensation-benefit-eligibility scheme; therefore, the statute violated Sherbert's free-exercise rights under the First Amendment.[29]

The *Sherbert* decision marked the Court's first application of what became known as the "*Sherbert* test." The *Sherbert* test requires a plaintiff seeking a religious exemption from a statute to show: (1) that he or she holds a sincere religious belief and (2) a law prohibits him or her from exercising his or her belief.[30] If the plaintiff can satisfy these two elements the burden shifts to the government to prove that the allegedly infringing law: (1) acts in the furtherance of a "compelling state interest," (2) is narrowly tailored to achieve the state's interest, and (3) is the least restrictive means of achieving the state's interest.[31] If the government succeeds in proving these elements, the plaintiff is subjected to the law regardless of his

25. *See* RONALD B. FLOWERS, MELISSA ROGERS & STEVEN K. GREEN, RELIGIOUS FREEDOM AND THE SUPREME COURT 110 (2008) ("Before *Cantwell*, the test was the 'belief/action' distinction of *Reynolds* . . . . Now [the] government had to demonstrate that religious action presented a clear and present danger . . . to individuals or society before it could curtail or prevent religious activity.").

26. Sherbert v. Verner, 374 U.S. 398 (1963).

27. *See id.* at 403 ("If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

28. *Id.* at 399–401.

29. *See id.* at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

30. *See* McConnell, *supra* note 2, at 1416–17.

31. *See id.*

or her religious exercises.[32] If the government fails to meet its burden, then the plaintiff is granted an exemption from the infringing law.[33]

The Supreme Court strictly applied the *Sherbert* test from its inception until the early 1980s. Two cases during this time represent the expansion and height of the Court's application of the *Sherbert* test: *Wisconsin v. Yoder* in 1972 and *Thomas v. Review Board of Indiana* in 1981.

In *Wisconsin v. Yoder*, an Amish couple challenged a Wisconsin criminal statute that imposed sanctions on parents whose children under the age of sixteen did not attend a formal high school after completion of the eighth grade.[34] The Yoder family argued that compliance with the statute conflicted with their free-exercise rights because Amish religious beliefs require adolescents to dedicate substantial time interacting within their community during their formative years to become fully-integrated members of the Amish community.[35] By concluding that Wisconsin's interest in mandating compulsory education for students beyond the eighth grade was not a compelling state interest,[36] the Court expanded the reach of the *Sherbert* test beyond state unemployment compensation laws into the arena of criminal law.[37]

In *Thomas v. Review Board*, the Supreme Court again applied the *Sherbert* test to religious liberties. Eddie Thomas was denied unemployment benefits because he refused his employer's request to transfer his employment from a department at a manufacturing company that produced steel for industrial use to a department that produced turrets for the military.[38] Thomas refused his employer's request because his pacifist religious beliefs as a Jehovah's Witness required him to refrain from engaging in activities that produced instruments of war.[39] As a result of his refusal, Thomas voluntarily left his job and was denied unemployment benefits because he was not fired with "good

32. *See* Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion*, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 21, 27 (James E. Wood, Jr. & Derek Davis eds., 1993).

33. *See id.*

34. Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972).

35. *See id.* at 211 ("Formal high school education beyond the eighth grade is contrary to Amish beliefs . . . because it takes [Amish adolescents] away from their community . . . .").

36. *Id.* at 215. ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.").

37. *See* Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1443–45 (1991) (recognizing *Yoder* as an expansion of the *Sherbert* test because the constitutionality of the law at issue was a criminal law, rather than simply another unemployment compensation case that had previously defined the scope of *Sherbert*).

38. *See* Thomas v. Review Bd., 450 U.S. 707, 709 (1981).

39. *See id.*

cause."[40] Deciding in favor of Thomas, the Supreme Court applied the *Sherbert* test and relied on its reasoning in *Yoder* to conclude that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true . . . that only those interests *of the highest order* . . . can overbalance legitimate claims to the free exercise of religion."[41]

Taken together, *Yoder* and *Thomas* represent the height of the Supreme Court's strict application of the *Sherbert* test.[42] This high point of strict application by the Court, however, was short-lived.

3. Weakening of the *Sherbert* Test

Shortly after *Thomas* was decided, it became increasingly difficult for free-exercise plaintiffs to prove that an allegedly infringing law burdened their ability to freely practice their religions, and it became increasingly easy for the government to show the superiority of its interests.[43] In 1982, one year after its decision in *Thomas*, the Court began its departure from strictly adhering to the *Sherbert* test. For example, in *United States v. Lee*, an Amish employer, Edwin Lee, refused to pay social security tax on behalf of his employees because it violated his religious beliefs.[44] In applying the *Sherbert* test, the Court denied Lee an exemption from paying social security tax on behalf of himself and his employees because it reasoned that "it would be difficult [for the government] to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[45]

Following *Lee*, the Court continued down its long road of weakening the application of the *Sherbert* test for neutral laws of general applicability. In *Bowen v. Roy*, decided in 1986, the Court imprecisely restated the *Sherbert* test to mean that the government satisfies "its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform

40. *See id.* at 712 (internal quotation marks omitted).

41. *Id.* at 718 (final alteration in original) (emphasis added) (quoting *Yoder*, 406 U.S. 215) (internal quotation marks omitted).

42. *See* CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE 30 (2001) ("*Wisconsin v. Yoder* has been called the high water mark of the compelling state interest test." (citation omitted)); GREGG IVERS, REDEFINING THE FIRST FREEDOM: THE SUPREME COURT AND THE CONSOLIDATION OF STATE POWER 136 (1993) ("The highwater mark for the protection of individual religious rights came in 1981. Then, the Supreme Court, in *Thomas v. Review Board of Indiana*, articulated its most imposing standard required of the government to date in order to justify an infringement on religious practices." (citation omitted)).

43. *See* Carmella, *supra* note 32, at 27.

44. *See* United States v. Lee, 455 U.S. 252, 257 (1982) ("The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.").

45. *Id.* at 259–60.

in its application, is a reasonable means of promoting a legitimate public interest."[46] In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, decided in 1988, the Court again retreated from its strict application of the *Sherbert* test in stating that "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, [do not] require [the] government to bring forward a compelling justification."[47] These cases demonstrate the steady decline of the Court's adherence to the *Sherbert* test, eventually resulting in the Court's full departure from strict scrutiny when it decided *Employment Division v. Smith* in 1990.[48]

4. Rejection of *Sherbert*: *Smith*'s Rational-Basis Test

In *Smith*, plaintiffs Alfred Smith and Galen Black were fired from their jobs as counselors at a private drug rehabilitation facility because they admitted to consuming peyote as a part of their religious practices as members of the Native American Church.[49] Smith and Black brought their action after Oregon's Employment Division of the Department of Human Resources denied their request for unemployment compensation benefits because they were fired for "work-related 'misconduct.'"[50] The plaintiffs claimed that the Employment Division violated their free-exercise rights by declaring them ineligible to receive unemployment benefits.[51] In deciding the case, the Court distinguished *Smith* from such cases as *Yoder* and *Lee*—and thus, the application of the *Sherbert* test—on the basis that the plaintiffs' claims in those cases alleged infringement of not only their right to the free exercise of religion, but to at least one other constitutional right as well.[52] Because *Yoder* and *Lee* concerned the infringement of more than one constitutional right, the Court reasoned that a greater level of protection was warranted, and thus, they were properly adjudicated under the *Sherbert* test.[53]

In contrast, because the plaintiffs in *Smith* were simply alleging an infringement of their free-exercise rights and no other constitutional right, the Court concluded that the application of *Sherbert*'s "compelling state

46. Bowen v. Roy, 476 U.S. 693, 707–08 (1986).

47. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

48. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

49. *Id.* at 874.

50. *Id.*

51. *Id.* at 875–76.

52. *See id.* at 880–85 (noting that the Court has only barred application of facially neutral, generally applicable laws to cases where free exercise of religion rights were tied to other constitutional rights, such as a parent's right to make decisions regarding his or her child's education).

53. *Id.* at 881–82.

interest" test was impractical.[54] Instead, the Court reversed the Oregon Supreme Court's ruling that granted the plaintiffs an exemption from Oregon's law prohibiting the ingestion of peyote and declared that the application of a strict scrutiny test to *Smith* would be "courting anarchy" due to the vast diversity of religions and religious practices within the United States.[55] Such a standard, the Court determined, "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[56] By rejecting the *Sherbert* test and analyzing the plaintiff's free-exercise rights in regard to the "unavoidable consequence of democratic government [that] must be preferred to a system in which each conscience is a law unto itself," the Supreme Court supplanted its three-decades-old standard of strict scrutiny with the rational-basis test in one fell swoop.[57]

Following *Smith*, the extent to which the Court would apply its holding was unclear. The Court provided clarity in 1993 when it decided *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*.[58] In *Lukumi*, the Supreme Court reversed the Eleventh Circuit's ruling that upheld the constitutionality of Hialeah's ordinance that made the slaughter of animals for ritual purposes illegal because Hialeah could not show its interests were "compelling."[59]

Justice Kennedy, writing for the majority, explained that the *Smith* holding only applies to laws that are "neutral" and of "general applicability."[60] The Court went to great lengths in detailing what constitutes a "neutral"[61] law of "generally applicability"[62] in concluding that Hialeah's

54. *See id.* at 888 ("If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

55. *Id.*

56. *Id.*

57. *Id.* at 890.

58. Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

59. *See id.* at 546–47 ("Respondent has not demonstrated . . . its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

60. *Id.* at 531.

61. *See id.* at 540–42 ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

62. *See id.* at 542–43 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

ordinance violated these requirements and was therefore unconstitutional. Importantly, the Court explicitly embraced *Smith*'s rational-basis test and reiterated *Sherbert*'s limited application to cases where the plaintiff's free-exercise rights are tied to at least one other constitutional right, or to laws that are not deemed "generally applicable" or "facially neutral."[63]

As a result of *Smith*, the Court's departure from the *Sherbert* test infuriated a significant portion of the population, including a diverse assortment of interest groups,[64] legal scholars,[65] and Congress.[66] In 1993, in a direct attempt to retaliate against the Court's decision in *Smith*, Congress responded by enacting, with vast majorities in both houses of Congress,[67] the Religious Freedom Restoration Act ("RFRA").[68]

B. THE RELIGIOUS FREEDOM RESTORATION ACT AND THE CURRENT STANDARD

This Subpart discusses Congress's response to *Smith* with its passage of the Religious Freedom Restoration Act of 1993. To understand the position free-exercise plaintiffs find themselves in today, this Subpart then briefly reviews the current standard for free-exercise claims brought under the Free

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63. *See id.* at 546.

64. *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html?scp=8&sq=%22religious+freedom+restoration+act%22&st=nyt ("[A]n unusual coalition of liberal, conservative and religious groups . . . had pressed for the new law. The coalition included the National Association of Evangelicals, the Southern Baptist Convention, the National Council of Churches, the American Jewish Congress, the National Conference of Catholic Bishops, the Mormon Church, the Traditional Values Coalition and the American Civil Liberties Union.").

65. After the *Smith* decision, scores of legal articles denouncing the Court's ruling sprang into publication. *See generally, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing the *Smith* decision's use of legal sources and the theoretical argument underlying the Court's decision); Edwin Meese III, *Religious Exercise: How Free?*, 15 HARV. J.L. & PUB. POL'Y 163 (1992) (introducing the facts and holding of the *Smith* decision and proposing potential solutions to the Court's holding, including congressional legislation); Randy T. Austin, Note, Employment Division v. Smith: *A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 BYU L. REV. 1331 (1991) (analyzing various public policy concerns resulting from *Smith* and advocating for a comprehensible standard); Vance M. Croney, Note, *Secondary Right: Protection of the Free Exercise Clause Reduced by* Oregon v. Smith, 27 WILLAMETTE L. REV. 173 (1991) (tracing the history of the Supreme Court's free-exercise jurisprudence and criticizing the Court's handling of *Smith* in light of precedent); Leslie L. Dollen, Casenote, *The Free Exercise Clause Redefined: The Eradication of Religious Liberties in* Employment Div., Dept. of Human Res. of Oregon v. Smith, 12 HAMLINE J. PUB. L. & POL'Y 143 (1991) (arguing that the *Smith* decision effectively eliminated the protections of the Free Exercise Clause).

66. *See infra* note 76.

67. *See* 139 CONG. REC. H2363 (daily ed. May 11, 1993) (casting voice votes, the House of Representatives passed RFRA with the necessary two-thirds margin); 139 CONG. REC. S14470–71 (daily ed. Oct. 27, 1993) (casting roll call votes, the Senate passed RFRA by a margin of 97 yeas to 3 nays).

68. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb(4) (2006 & Supp. V 2011).

Exercise Clause of the First Amendment as a result of the Supreme Court cases discussed above and Congress's passage of RFRA.

1. A Limited Response to *Smith*: The Religious Freedom Restoration Act

In early 1993, Representative Charles Schumer, a Democrat from New York, on behalf of himself and 170 cosponsors, introduced RFRA into the House of Representatives.[69] The bill's "[c]ongressional findings" lambasted the rational-basis test that resulted from *Smith* and *Lukumi* and accused the Supreme Court of "eliminat[ing] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[70] Furthermore, the bill's stated "declaration of purposes" was to restore the *Sherbert* test[71] and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[72]

The bill was popularly received. Dozens of newspaper and magazine articles recognized RFRA as a remedy to the erosion of religious legal rights resulting from *Smith*.[73] Two months following its introduction into the House, on May 11, 1993, RFRA passed the House of Representatives by voice vote[74] and five months later, on October 27, 1993, passed the Senate by a margin of 97 yeas to 3 nays.[75] Resembling the votes themselves, the debates on the floors of both chambers displayed robust approval by both Democrats and Republicans in support of the bill.[76] With the passage of RFRA, Congress restored individual liberty to free-exercise claims arising under the First Amendment to the pre-*Smith* standard of the *Sherbert* test.[77] Citizens of every state could again expect a greater degree of protection for their religious liberties from government interference.

The expansion guaranteed under RFRA, however, was short-lived. After only four years of enactment, the Supreme Court struck down RFRA's

69. *See* 139 CONG. REC. H2356–57 (daily ed. May 11, 1993) (statement of Rep. Brooks) (thanking Rep. Schumer for sponsoring and generating great support for "[a] bill to protect the free exercise of religion").

70. 42 U.S.C. § 2000bb(a)(4).

71. *See id.* § 2000bb(b)(1) ("[T]o restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened." (citations omitted)).

72. 42 U.S.C. § 2000bb(b)(2).

73. *See, e.g.*, Op-ed., *Congress Defends Religious Freedom*, N.Y. TIMES (Oct. 25, 1993), http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html; Mark Silk, *New Law Overturns Supreme Court, Expands Freedom to Practice Religion*, ATLANTA J. & ATLANTA CONST., Nov. 20, 1993, at E/8; Steinfels, *supra* note 64; *The 'Religious Freedom' Bill*, WASH. TIMES, Nov. 16, 1993, at A16.

74. *See supra* note 67 and accompanying text.

75. 139 CONG. REC. S14470 (daily ed. Oct. 27, 1993).

76. *See* 139 CONG. REC. S14461–71 (daily ed. Oct. 27, 1993) (several senators from both parties spoke out in support of RFRA including: Democratic Senators Edward Kennedy of Massachusetts, Harry Reid of Nevada, Joe Lieberman of Connecticut, and Republican Senators Dan Coats of Indiana, Alan Simpson of Wyoming, and Orrin Hatch of Utah).

77. *See supra* note 71.

application to the states in *City of Boerne v. Flores*.[78] In *City of Boerne*, a local zoning board in Texas denied a Catholic church from constructing an expansion of its structure in order to accommodate for its growing number of parishioners.[79] In response, the church brought an action under RFRA, claiming that the City of Boerne interfered with its right to freely exercise religion by denying its construction application.[80] The District Court for the Western District of Texas found RFRA to be unconstitutional on the basis that it violated the Enforcement Clause[81] of the Fourteenth Amendment.[82] The Fifth Circuit reversed.[83] The Supreme Court agreed with the District Court and ruled that Congress can only utilize the Enforcement Clause as a mechanism for enforcing other provisions listed in the Fourteenth Amendment and cannot use it to independently determine what actions constitute a violation of other constitutional provisions, such as the Free Exercise Clause.[84] After *City of Boerne*, with RFRA's application to the states invalidated, free-exercise plaintiffs were again subject to the rational-basis test established in *Smith*.

2. The Current Standard for Free-Exercise Claims Under the Free Exercise Clause

In light of the development of the Supreme Court's free-exercise jurisprudence detailed above and with RFRA's restricted application to federal laws[85] as a result of *City of Boerne*, the rational-basis test espoused in

78. City of Boerne v. Flores, 521 U.S. 507 (1997).

79. *Id.* at 512.

80. *Id.*

81. *See* U.S. CONST. amend. XIV, § 5 ("Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

82. Flores v. City of Boerne, 877 F. Supp. 355, 357–58 (W.D. Tex. 1995); *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd sub nom.* City of Boerne v. Flores, 521 U.S. 507 (1997).

83. Flores v. City of Boerne, 73 F.3d 1352, 1364–65 (5th Cir. 1996), *rev'd sub nom.* City of Boerne v. Flores, 521 U.S. 507 (1997).

84. *City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

85. The constitutionality of RFRA's application to federal laws is an issue up for debate. *See* Frank J. Ducoat, Comment, *Clarifying the Religious Freedom Restoration Act:* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 8 RUTGERS J.L. & RELIGION 6, 8 (2006) ("That the Court addressed [in *O Centro*] the RFRA claim on the merits should quell the debate (at least temporarily) amongst lower courts as to whether RFRA is still applicable to the federal government."). The Supreme Court has, however, applied RFRA to federal laws. *See generally* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) (enjoining the federal government from enforcing the Controlled Substances Act against a religious organization's use of hoasca, a hallucinogenic tea, in its religious ceremonies because the federal government failed to establish a "compelling interest" under RFRA).

Smith is the current standard of review for an allegedly infringing statute that is facially neutral and generally applicable.[86]

The surviving application of the *Sherbert* test is twofold. First, the *Sherbert* test applies to "hybrid" cases, such as *Yoder* and *Lee*, where a plaintiff's claim of an infringement of his or her right to the free exercise of religion is brought in conjunction with an alleged violation of at least one other constitutional right. Second, the *Sherbert* test applies to cases where a court has found the allegedly infringing statute to not be facially neutral or generally applicable.[87]

Today, free-exercise plaintiffs seeking greater protection than that provided under *Smith* must rely on their state constitution's free-exercise provisions to provide a greater level of protection. Since state supreme courts have long been regarded as bastions of individual liberty, entrusting them to provide added protection for individual religious liberty is appropriate.[88]

III. STATE SUPREME COURTS' REACTIONS TO *SMITH*

The *Smith* decision triggered mixed reactions from state supreme courts. This is evidenced by the fact that some state supreme courts have chosen to adopt *Smith*'s rational-basis test,[89] while other states have flatly rejected *Smith* and have opted for a heightened or strict scrutiny standard for free-exercise claims arising under their state constitution's free-exercise

86. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. Rev. 275, 278 (1993) ("Thus, a bright-line test has been chosen over *Sherbert*'s balancing test; a minimum rationality standard of judicial review has replaced strict scrutiny; and any general law that is formally neutral satisfies the minimum rationality test.").

87. *See* Marin, *supra* note 37, at 1470 ("[A] state may enforce generally applicable laws that criminalize religious conduct, as long as the law does not impair any rights in addition to the individual's free exercise rights.").

88. *See generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986) (noting that vast expansion of the federal Bill of Rights to the states via the Fourteenth Amendment throughout the 1960s led many state supreme courts to step in and provide greater protection for its citizens through the interpretation of state constitutional provisions); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989) (noting the substantial difference in the language used between the First Amendment's Free Exercise Clause and various state constitutional provisions providing for the free exercise of religion, and the potential implications of such differences should state supreme courts begin to interpret their state constitutions rather than simply follow the Supreme Court's First Amendment jurisprudence).

89. Six state supreme courts have adopted *Smith*'s rational-basis test. *See* State v. Fluewelling, 249 P.3d 375 (Idaho 2011); People v. Falbe, 727 N.E.2d 200 (Ill. 2000); Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012); Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111 (Md. 2001); *In re* Interest of Anaya, 758 N.W.2d 10 (Neb. 2008); State v. Perfetto, 7 A.3d 1179 (N.H. 2010).

provisions.[90] In deciding whether to adopt or reject *Smith*, state supreme courts weigh four primary factors: (1) the textual differences or similarities between the Free Exercise Clause and a state constitution's free-exercise provision, (2) the doctrine of *stare decisis*—both as a legal principle and as a tradition, (3) the various public policies favoring strict scrutiny, and (4) the original intent of a state constitution's framers.

A. TEXTUAL BASIS FOR ADOPTION OR REJECTION OF SMITH

Every state supreme court that has rejected *Smith*'s rational-basis test in favor of adopting a heightened or strict scrutiny standard of review has compared the text of its state constitution's free-exercise provision to the Free Exercise Clause.[91] Although more-strongly-worded free-exercise language of a state constitution's free-exercise provision would seem to indicate greater protection of individual religious liberty, it is not dispositive.[92] In fact, as this Subpart shows, the language a state's free-exercise provision utilizes indicates absolutely nothing.

This Subpart begins by providing examples of state supreme courts that have relied on the textual differences between their state constitution's more-strongly-worded free-exercise provisions and the Free Exercise Clause in deciding to adopt strict scrutiny. Next, this Subpart provides examples of state supreme courts that have ignored the more-strongly-worded free-exercise provisions of their state's constitution in deciding to adopt *Smith*'s rational-basis test. Finally, this Subpart examines one state whose state constitution's free-exercise provision is identical to the Free Exercise Clause,

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90. Twelve state supreme courts have rejected *Smith* and adopted a greater standard of scrutiny for free-exercise claims. Of the twelve states, eight states have adopted a strict scrutiny standard. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); Hunt v. Hunt, 648 A.2d 843 (Vt. 1994); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc); State v. Miller, 549 N.W.2d 235 (Wis. 1996). The remaining four states have adopted a heightened scrutiny standard. *See* State v. Van Winkle, 889 P.2d 749 (Kan. 1995); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992); Catholic Charities v. Serio, 859 N.E.2d 459 (N.Y. 2006). State legislatures have also reacted negatively toward *Smith*. As of 2010, sixteen states have passed state versions of RFRA. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 n.67 (2010) (listing sixteen states' statutes that require their state courts to apply heightened or strict scrutiny to free-exercise claims).

91. *See Swanner*, 874 P.2d at 280–81; *City Chapel*, 744 N.E.2d at 445–46; *Van Winkle*, 889 P.2d at 754; *Desilets*, 636 N.E.2d at 235–36; *Hershberger*, 462 N.W.2d at 397; *St. John's Lutheran Church*, 830 P.2d at 1276; *Humphrey*, 728 N.E.2d at 1043–44; *Hunt*, 648 A.2d at 852; *First Covenant Church*, 840 P.2d at 185–88; *Miller*, 549 N.W.2d at 239.

92. This Note defines "more-strongly-worded" as language used in a state constitution's free-exercise provision that is more specific than the Free Exercise Clause or generally seems to be more encompassing than the Free Exercise Clause.

but whose supreme court rejected *Smith* and adopted a strict scrutiny standard nonetheless.

1. States Using Textual Differences in Adopting Strict Scrutiny

Minnesota and Washington provide examples of state supreme courts that have relied on the textual differences between their state constitutions' more-strongly-worded free-exercise provisions and the Free Exercise Clause as a basis to reject *Smith* and adopt strict scrutiny.

In 1990, Minnesota became one of the first states to reject *Smith*. In *State v. Hershberger*, fourteen Amish farmers were cited for driving tractors onto a public highway in violation of a Minnesota law that requires slow-moving vehicles to affix brightly-colored, triangular emblems to the back of their vehicles.[93] In interpreting the Minnesota Constitution's free-exercise provision,[94] the Minnesota Supreme Court concluded that the Minnesota Constitution affords its citizens "greater protection for religious liberties against governmental action . . . than under the first amendment of the federal constitution."[95] Specifically, the court noted that while the "first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, [the Minnesota Constitution] precludes even an *infringement* on or an *interference* with religious freedom."[96] Following this determination, the Minnesota Supreme Court applied *Sherbert*'s strict scrutiny test and ruled that the government did not have a compelling interest in mandating the usage of slow-moving vehicle signage, thereby granting the Amish plaintiffs an exemption from the infringing law.[97]

In 1992, the Washington Supreme Court came to the same conclusion as the *Hershberger* court when it decided *First Covenant Church v. City of Seattle*.[98] In comparing the text of the Washington Constitution's free-

93. *See Hershberger*, 462 N.W.2d at 395–96.

94. MINN. CONST. art. I, § 16.

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state . . . .

Id.

95. *Hershberger*, 462 N.W.2d at 397.

96. *Id.*

97. *Id.* at 399.

98. First Covenant Church v. City of Seattle, 840 P.2d 174, 188–89 (Wash. 1992).

exercise provision[99] to the language of the Free Exercise Clause, the Washington Supreme Court concluded that "[t]he language of our state constitution is significantly different and stronger than the federal constitution."[100] The court noted that while the text of the Free Exercise Clause "limits government action that 'prohibits' free exercise," the Washington free-exercise "provision 'absolutely' protects freedom of worship and bars conduct that merely 'disturbs' another on the basis of religion."[101] Although subtle, the Washington Supreme Court found the textual difference to be a sufficient basis by which to reject *Smith*'s rational-basis test and adopt strict scrutiny.[102]

2. States Ignoring Textual Differences in Adopting Rational Basis

A state constitution's free-exercise provision that utilizes more-strongly-worded free-exercise language than the First Amendment, however, does not dictate that a state supreme court must grant greater protection for individual religious practices.

In 2008, the Nebraska Supreme Court chose to ignore the more-strongly-worded language of its state constitution's free-exercise provision[103] in its decision to adopt *Smith*'s rational-basis test.[104] In *In re Interest of Anaya*, the Nebraska Supreme Court noted that, "[w]ith respect to the textual argument, we recognize that the language of the state and federal provisions at issue differs; however, we are not prepared to accord these textual

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99. WASH. CONST. art. I, § 11.

> 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.

Id.

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

101. *Id.*

102. *Id.* at 189.

103. NEB. CONST. art. I, § 4.

> All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . [N]o preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. . . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship . . . .

Id.

104. *See In re* Interest of Anaya, 758 N.W.2d 10, 19 (Neb. 2008) ("[B]ecause the free exercise provisions of the Nebraska Constitution protect the same rights as the Free Exercise Clause of the federal Constitution, we will review the newborn screening statutes under the same standard . . . rational basis review . . . .").

differences weight in terms of their constitutional significance."[105] Instead, the court ruled that "[w]here state and federal constitutional provisions contain similar language and protect similar rights, we may conclude and indeed have concluded that they should be interpreted in congruence."[106]

Similarly, the supreme courts of Idaho, Maryland, and Kentucky, despite the more-strongly-worded language of each of its state constitution's free-exercise provisions,[107] also adopted *Smith*'s rational-basis test.[108] The Kentucky Supreme Court even noted that while its state constitution's free-exercise provision is more specific in regard to religious liberty for its citizens, it "offers no more protection than the same or similar section of the federal constitution."[109]

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105. *Id.* at 18.

106. *Id.* at 19.

107. IDAHO CONST. art. I, § 4.

> 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 or 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.

Id.; KY. CONST. § 5.

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Id.; MD. CONST. art. XXXVI.

> [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; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry . . . .

Id.

108. *See* State v. Fluewelling, 249 P.3d 375, 377–78 (Idaho 2011); Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 123 (Md. 2001).

109. Gingerich v. Commonwealth, 382 S.W.3d 835, 839 (Ky. 2012).

3. States Ignoring Textual Similarities in Adopting Strict Scrutiny

Finally, Alaska provides an example of a state supreme court that ignored the textual similarities between its state constitution's free-exercise provision and the Free Exercise Clause in deciding to adopt strict scrutiny.

In *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court explained that although the Alaska Constitution's free-exercise provision[110] is identical to the Free Exercise Clause, it was "not required to adopt and apply the *Smith* test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution."[111] In part on that basis—and in part on its pre-*Smith* holdings that adopted strict scrutiny[112]—the Alaska Supreme Court chose to reject *Smith* and adopt strict scrutiny.[113]

Taken together, as the above cases make clear, the text of a state constitution's free-exercise provision is not determinative of how a state supreme court will decide what standard of review to apply under the free-exercise provision of its state constitution. In deciding to reject *Smith*, a state supreme court must, therefore, look to other legal factors for alternative bases.

B. PRIOR PRECEDENT & STARE DECISIS

A state supreme court may, for example, choose to rely upon the doctrine of *stare decisis* to determine the level of protection provided for individual religious liberty under its state constitution.[114] Such analysis includes looking to a state's prior holdings in regard to the interpretation of its state constitution's free-exercise provision and to the legal tradition of the state's civil rights jurisprudence. This Subpart first looks to the supreme courts of Alaska, Vermont, and Massachusetts to provide examples of state supreme courts that have relied on their precedent to reject *Smith*'s rational-basis test. This Subpart then examines several state supreme courts that have simply ignored prior precedent in deciding to adopt *Smith*'s rational-basis test. This analysis illustrates how, like the textual analysis described above, the application of the doctrine of *stare decisis* does not demand one particularized outcome.

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110. *See* ALASKA CONST. art. I, § 4 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.").

111. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–81 (Alaska 1994).

112. *See infra* Part III.B.1.

113. *Swanner*, 874 P.2d at 280–81.

114. *See* BLACK'S LAW DICTIONARY 1537 (9th ed. 2009) (defining *stare decisis* as "[Latin 'to stand by things decided'] . . . The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.").

1. States Relying on *Stare Decisis* in Adopting Strict Scrutiny

In deciding to adopt a strict scrutiny standard of review for free-exercise claims arising under its state constitution's free-exercise provision, a state supreme court may rely on its prior cases to determine the appropriate standard of review under the provision. The supreme courts of Alaska, Vermont, and Massachusetts have taken such an approach.

In 1994, Alaska joined Minnesota and Washington in deciding to reject *Smith* and establish a strict scrutiny standard for free-exercise claims brought under its state constitution's free-exercise provision. In *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court noted that although the Alaska Constitution's free-exercise provision is identical to the Free Exercise Clause, the court did not need to rely on a textual basis to reject *Smith*.[115] Instead, the court relied on a 1979 case, *Frank v. State*,[116] in which it adopted a version of the *Sherbert* test, to conclude that the Alaska free-exercise provision provides greater protection than the First Amendment.[117]

Similarly, the supreme courts of Vermont and Massachusetts relied on the doctrine of *stare decisis* in deciding to reject *Smith*. In *Attorney General v. Desilets*, the Massachusetts Supreme Court—recognizing that the text of Massachusetts's free-exercise provision[118] was the same as the Free Exercise Clause—relied on its precedent to conclude that it was barred, *stare decisis*, from adopting a standard in line with *Smith*.[119] In *Hunt v. Hunt*, the Vermont Supreme Court, in addition to acknowledging the textual differences between Vermont's free-exercise provision[120] and the Free Exercise

115. *See Swanner*, 874 P.2d at 280–81.

116. *See generally* Frank v. State, 604 P.2d 1068 (Alaska 1979) (applying the *Sherbert* test to a free-exercise claim brought under the Alaska Constitution).

117. *See Swanner*, 874 P.2d at 280–81 (relying on *Frank v. State*, which adopted the *Sherbert* test, to determine whether the Alaska Constitution's free exercise provision should be interpreted to allow for exemptions in regard to facially neutral laws that interfere with an individual's religious practice).

118. *See* MASS. CONST. art. XLIII, § 1 ("No law shall be passed prohibiting the free exercise of religion.").

119. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994) ("[W]e prefer to adhere to the standards of earlier First Amendment jurisprudence, such as we applied in *Alberts v. Devine* . . . . In each opinion, we used the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder* . . . and subsequent opinions." (citations omitted)).

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

> 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 person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that

Clause,[121] relied on its ruling in *State v. DeLaBruere* in holding that "the Vermont Constitution protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise under the United States Constitution."[122]

Together, *Swanner*, *Desilets*, and *Hunt* demonstrate how a state supreme court may rely on the doctrine of *stare decisis* to reject *Smith*'s rational-basis test and adopt strict scrutiny.

2. States Ignoring *Stare Decisis* in Adopting Rational Basis

Similar to the textual approach in differentiating a state constitution's free-exercise provision from the Free Exercise Clause, the doctrine of *stare decisis* has been ignored by several state supreme courts in favor of adopting *Smith*'s rational-basis test. The supreme courts of Kentucky and Nebraska have taken this approach.

The Kentucky Supreme Court, in *Gingerich v. Commonwealth*,[123] ignored its six-decades-old precedent that applied strict scrutiny under its free-exercise provision.[124] The *Gingerich* court held "statutes, regulations, or other governmental enactments which provide for the public health, safety and welfare, *and* which are statutes of general applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution, as they are under the federal constitution."[125]

The Nebraska Supreme Court also disregarded its prior case law interpreting its free-exercise provision. In *In re Interest of Anaya*, the court ignored the strict scrutiny standard it had established in *Palmer v. Palmer*.[126] The court concluded that the Nebraska Constitution protects individual liberties in congruence with the level of protection provided under the federal Constitution.[127]

Summarily, it is clear that the doctrine of *stare decisis*, similar to textual analysis, may be a sufficient—but not a necessary—basis upon which a state supreme court may decide to adopt or reject *Smith*. Although a state's prior

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> shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.

Id.

121. Hunt v. Hunt, 648 A.2d 843, 852 (Vt. 1994).

122. *Id.* at 852–53 (citing State v. DeLaBruere, 577 A.2d 254, 269–70 (Vt. 1990)).

123. Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012).

124. Mosier v. Barren Cnty. Bd. of Health, 215 S.W.2d 967 (Ky. 1948) (applying strict scrutiny analysis to a claim raised under the Kentucky free-exercise provision). *See supra* note 107 for the Kentucky Constitution's free-exercise provision.

125. *Gingerich*, 382 S.W.3d at 844.

126. *In re* Interest of Anaya, 758 N.W.2d 10, 18–19 (Neb. 2008).

127. *See id.* at 19.

holdings and legal tradition may influence the court's decision, they are not dispositive.

C. PUBLIC POLICY CONSIDERATIONS

In deciding to reject *Smith*, state supreme courts often consider the public policy implications of adopting a heightened standard of review. This Subpart examines several specific public policy considerations that the supreme courts of Washington, Minnesota, and New York identified and relied upon in deciding to reject *Smith*.

In the Washington Supreme Court's *First Covenant Church* opinion, the court expressly repudiated *Smith*'s acceptance that the application of rational-basis review to facially neutral, generally applicable laws would put minority religions at a disadvantage.[128] The court noted, "Our court . . . has rejected the idea that a political majority may control a minority's right of free exercise through the political process."[129] Thus, in deciding to reject *Smith* in part on this basis, the Washington Supreme Court identified the protection of minority religions as one public policy reason to adopt strict scrutiny.

In *State v. Hershberger*, the Minnesota Supreme Court began its argument for adopting strict scrutiny by declaring religious liberty a "precious right."[130] The court then briefly described the plight of religious intolerance that Minnesota's settlers faced in their native countries.[131] The court noted that religious intolerance acted as an impetus for immigration to Minnesota, which provided a historical justification for the greater sensitivity that Minnesotans grant to minority religions.[132] In identifying the public policy favoring religious tolerance, the *Hershberger* court concluded, "This history supports a broad protection for religious freedom in Minnesota."[133]

Finally, in *Catholic Charities v. Serio*, the Court of Appeals of New York wrote extensively with regard to the public policy underlying its decision to adopt heightened scrutiny under its state constitution's free-exercise provision.[134] The *Serio* court began its analysis by describing *Smith* as "an insuperable obstacle to plaintiffs' federal free-exercise claim."[135] It went on to conclude that *Smith*'s rule for analyzing generally applicable, facially neutral laws was "inflexible" because "no person may complain of a burden

128. *See* First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (en banc).

129. *Id.*

130. State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See* Catholic Charities v. Serio, 859 N.E.2d 459, 465–68 (N.Y. 2006).

135. *Id.* at 465.

on religious exercise that is imposed by a generally applicable, neutral statute."[136]

The *Serio* court also criticized the adoption of strict scrutiny for free-exercise claims under state constitutions. Characterizing other state supreme courts' use of strict scrutiny as mere "lip service," the New York court ruled that *real* strict scrutiny "would give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government."[137] The Court of Appeals of New York relied on multiple public policy considerations in deciding to adopt a heightened scrutiny standard, including deference to the legislative branch, the policy favoring efficient government, and the preference for a flexible standard.[138]

These cases show that public policy considerations may influence a court's decision to adopt a greater standard of review under its state constitution's free-exercise provision than provided under *Smith*.

D. ORIGINAL INTENT

In deciding to adopt or reject *Smith*, many state supreme courts use evidence of their state constitution's framers' original intent to determine the level of protection provided under its free-exercise provision. Surprisingly, unlike the Supreme Court of the United States,[139] most references to original intent made by state supreme courts are very brief.[140] The Indiana Supreme Court, however, comprehensively analyzed the original intent of its state constitution's framers when it decided to reject *Smith* and adopt strict scrutiny.

In *City Chapel Evangelical Free Inc. v. City of South Bend*, the Indiana Supreme Court relied heavily on the reported debates and proceedings of Indiana's constitutional convention, ancient dictionaries, and contemporary law review articles and history books in interpreting the free-exercise provision of the Indiana Constitution.[141] The court pointed to the remarks of the delegates in attendance at Indiana's constitutional convention in

136. *Id.* at 466.

137. *Id.* at 467.

138. *Id.* at 466–68.

139. The Supreme Court of the United States regularly bases its opinions on the original intent of the Constitution's framers. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008); Marsh v. Chambers, 463 U.S. 783 (1983).

140. *See, e.g.*, Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000) (acknowledging that the differences between Ohio's free-exercise provision and the Free Exercise Clause "indicate [the Ohio framers'] intent to make an independent statement on the meaning and extent of [religion]"); State v. Miller, 549 N.W.2d 235, 239 (Wis. 1996) (referencing the Wisconsin framers only once in determining that "the drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise the dictates of their religious beliefs").

141. *See* City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 447–50 (Ind. 2001).

1850 as evidence of the framers' original intent for the free exercise of religion in Indiana.[142] For example, the court quoted one delegate with regard to the original understanding of Indiana's free-exercise provision when he said, "It means . . . all men have a right to worship God according to their own creed . . . . The object of the provision is, that the law should recognize the right and protect it by proper legislation; that is all."[143] The court also relied on a mid-19th century Webster's dictionary in interpreting what the word "worship" meant to the framers of Indiana's Constitution at the time the document was written.[144] Finally, the court relied upon contemporary law review articles and history books to inform its decision in concluding 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."[145]

Although most state supreme courts have only fleetingly mentioned original intent when analyzing whether to reject *Smith*, however briefly, these courts have factored original intent into the analysis of what level of scrutiny to apply to state free-exercise claims. Further, the *City Chapel* decision displays the various ways a state supreme court may investigate and rely upon the original intent of a state constitution's framers in deciding to adopt or reject *Smith*'s rational-basis test.

IV. THE IOWA SUPREME COURT SHOULD REJECT *SMITH* AND ADOPT A STRICT SCRUTINY STANDARD

The Iowa Supreme Court should reject the rational-basis standard established in *Smith* and adopt a strict scrutiny standard in analyzing free-exercise claims brought under Article I, Section 3 of Iowa's Constitution. In arguing to adopt a strict scrutiny standard, this Part applies the factors other state supreme courts have considered—textual differences, *stare decisis*, public policy considerations, and original intent—to the Iowa Constitution's free-exercise provision. This Part shows why the text of Iowa's free-exercise provision and prior case law do not constrain the court's decision to follow or reject *Smith*. Furthermore, various public policy considerations, and the intent of Iowa's framers both point toward the Iowa Supreme Court applying a strict scrutiny standard of review to free-exercise claims.

A. TEXTUAL BASIS: THE IOWA CONSTITUTION'S FREE-EXERCISE PROVISION

As discussed above, comparing and analyzing the textual similarities and differences between a state's free-exercise provision and the Free

142. *See id.* at 447–48.
143. *Id.* at 448.
144. *Id.*
145. *Id.* at 448–50.

Exercise Clause of the First Amendment is one factor state supreme courts have considered when deciding whether to reject *Smith*.[146]

In applying this analysis to Iowa's Constitution, however, it immediately falls flat. The text of the Iowa Constitution's free-exercise provision is identical to the Free Exercise Clause of the First Amendment.[147] As such, when the Iowa Supreme Court determines what level of protection Article I, Section 3 provides the citizens of Iowa, it cannot rely, as the Minnesota Supreme Court in *Hershberger* and the Washington Supreme Court in *First Covenant Church* relied,[148] upon textual differences between the two provisions to support a finding of greater protection for Iowans' individual right of religious liberty.

This factor, however, is not fatal to the adoption of strict scrutiny. State supreme courts are not required to interpret congruent provisions of its state constitution with the Supreme Court's interpretation of the federal Constitution. Just as the Alaska Supreme Court overcame this predicament in *Swanner*,[149] the Iowa Supreme Court may do the same. In fact, the Iowa Supreme Court has routinely interpreted the Iowa Constitution independently of how the Supreme Court of the United States interprets similar provisions of the United States Constitution.[150] This being the case, the similarities in the text of Iowa's free-exercise provision and the Free Exercise Clause do not bar the Iowa Supreme Court from adopting a strict scrutiny standard under Article 1, Section 3 of the Iowa Constitution.

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146. *See* discussion *supra* Part III.A.

147. *Compare* IOWA CONST. art. 1, § 3 ("*The general assembly shall make no law* respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." (emphasis added)), *with* U.S. CONST. amend. I. ("*Congress shall make no law* respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." (emphasis added)).

148. *See supra* Part III.A.1.

149. *See supra* Part III.A.3.

150. *See* State v. Baldon, 829 N.W.2d 785, 820 (Iowa 2013) (Appel, J., concurring specially). Justice Appel listed instances where the Iowa Supreme Court applied Iowa state constitutional law independent of the Supreme Court of the United States' interpretation of the United States Constitution. *Id.* In the area of equal protection, see, for example, *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980). In the area of cruel and unusual punishment, see *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009). In the area of due process, see *State v. Cox*, 781 N.W.2d 757, 761 (Iowa 2010); *Callender v. Skiles*, 591 N.W.2d 182, 187, 189 (Iowa 1999). In the area of search and seizure, see *State v. Pals*, 805 N.W.2d 767, 782 (Iowa 2011); *State v. Ochoa*, 792 N.W.2d 260, 297 (Iowa 2010); *State v. Tague*, 676 N.W.2d 197, 204, 206 (Iowa 2004); *State v. Cline*, 617 N.W.2d 277 (Iowa 2000); *State v. Cullison*, 173 N.W.2d 533, 538–39 (Iowa 1970). *See also* Santi v. Santi, 633 N.W.2d 312, 317 (Iowa 2001) ("[I]t is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution." (quoting *Callender*, 591 N.W.2d at 187)).

B. *DOCTRINE OF* STARE DECISIS

Another factor the Iowa Supreme Court can use to reject *Smith*'s rational-basis test and adopt strict scrutiny is to rely on the doctrine of *stare decisis*. As noted above, several state supreme courts have relied upon case law as precedent in determining that abandoning strict scrutiny would violate the doctrine of *stare decisis*.[151] This Subpart begins by analyzing the two most recent free-exercise cases decided by the Iowa Supreme Court in concluding that the court is not barred from adopting strict scrutiny. This Subpart then ends with a historical review of several cases in which the Iowa Supreme Court has interpreted the Iowa Constitution as providing greater protection for civil rights than is or was provided by the Supreme Court of the United States under the United States Constitution.

1. *Stare Decisis* Does Not Bar Adoption of Strict Scrutiny

The Iowa Supreme Court has rarely decided cases interpreting Iowa's free-exercise provision. In fact, since the Supreme Court's decision in *Smith*, the Iowa Supreme Court has decided only two cases in which a plaintiff has brought an action under Article I, Section 3 of the Iowa Constitution. In the first case, *Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*,[152] the plaintiff pled a violation of its free-exercise rights under both the Free Exercise Clause of the First Amendment and Article I, Section 3 of the Iowa Constitution.[153] The Iowa Supreme Court applied *Smith*'s rational-basis test in concluding that a tax imposed upon a church did not violate the church's free exercise of religion.[154] The court failed to acknowledge, however, whether it was deciding the case under the Free Exercise Clause or Article I, Section 3 of the Iowa Constitution.[155] The court's ambiguity in deciding *Hope Evangelical*, therefore, is not persuasive as to how the Iowa Supreme Court should interpret Iowa's free-exercise provision.

In the second case, decided in 2012, *Mitchell County v. Zimmerman*, the plaintiff plead a violation of his free-exercise rights under both the Free Exercise Clause and Article I, Section 3 of the Iowa Constitution.[156] In deciding the case, the court analyzed the plaintiff's claim under the Free Exercise Clause in determining that the statute at issue—a county ordinance that outlawed the use of steel-cleated tires on paved county roads—failed to meet the *Smith* requirement of "general applicability" as espoused in *Lukumi*,

151. *See supra* Part III.B.1.

152. *See* Hope Evangelical Lutheran Church v. Iowa Dep't of Revenue & Fin., 463 N.W.2d 76 (Iowa 1990) (concluding that the assessment and required payment of a consumer tax did not significantly burden a church's religious practices or beliefs).

153. *See id.* at 79.

154. *See id.* at 82.

155. *See id.* (failing to acknowledge whether the case was being decided under the First Amendment or the Iowa Constitution).

156. Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1 (Iowa 2012).

and therefore it applied the *Sherbert* test.[157] As a result of its analysis, the court ruled that the state did not have a compelling interest in denying Zimmerman, a Mennonite, the right to use steel-cleated tires on county roads.[158] Because the court granted Zimmerman an exemption from the statute under the First Amendment, it declined an opportunity to an interpret Article 1, Section 3 of the Iowa Constitution.[159]

Unlike the Alaska Supreme Court's decision in *Swanner*, the Massachusetts Supreme Court's decision in *Desilets*, and the Vermont Supreme Court's decision in *Hunt*, in which the courts relied on the doctrine of *stare decisis* to reject *Smith*,[160] the Iowa Supreme Court is neither compelled to, nor barred from, a particularized outcome with regard to the doctrine of *stare decisis*. The Iowa Supreme Court is, therefore, free to make an independent assessment on any grounds it chooses because of the lack of jurisprudence regarding the interpretation of Article I, Section 3 of the Iowa Constitution.

2. Iowa's Legal Tradition Supports Greater Protection for Individual Religious Liberty

The Iowa Supreme Court regularly departs from the United States Supreme Court's analysis when deciding similarly worded constitutional issues under the Iowa Constitution.[161] Indeed, the Iowa Supreme Court has a strong tradition of providing greater protection for individual liberty than is provided under the United States Constitution. Recently, Chief Justice Cady detailed how Iowa's unique history has influenced the Iowa Supreme Court's decisions in this area of the law.[162] This Subpart, therefore, looks to other instances of Iowa constitutional interpretation to provide insight into why the court may interpret Article 1, Section 3 of the Iowa Constitution in favor of the individual and against the state. In doing so, this Subpart makes clear that the Iowa Supreme Court has a long tradition of interpreting the Iowa

157. *See id.* at 11–18.

158. *See id.* at 18.

159. *See id.* ("We therefore hold that the application of the Mitchell County road protection ordinance to Matthew Zimmerman violates his rights of free exercise of religion under the First Amendment to the United States Constitution. We need not . . . reach the question whether Zimmerman's rights under article I section 3 of the Iowa Constitution have also been violated.").

160. *See supra* Part III.B.1.

161. *See supra* note 150 and accompanying text.

162. *See* Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133, 1145 (2012) ("Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights . . . especially considering the [United States Constitution Bill of Rights] applied only to actions by the federal government for most of our country's history.").

Constitution as providing greater protection for individual liberty than the United States Constitution.

Since its inception, the Iowa Supreme Court has been a leader on legal issues regarding race. Beginning with the first case decided by the Iowa Supreme Court in 1839, *In re Ralph*, the court refused to recognize a freed slave as property.[163] This decision came seventeen years before the United States Supreme Court decided *Dred Scott* and twenty-six years before the passage of the Thirteenth Amendment.[164] The Iowa Supreme Court struck down the policy of segregation in 1868[165]—a full eighty-six years before the United States Supreme Court decided *Brown v. Board of Education*.[166]

The Iowa Supreme Court has also been a leader in sexual orientation and gender discrimination. In 1976, in *State v. Pilcher*,[167] the Iowa Supreme Court struck down Iowa's anti-sodomy law, twenty-six years before the United States Supreme Court found sodomy laws to be unconstitutional in *Lawrence v. Texas*.[168] The Iowa Supreme Court was also the first state to allow women to practice law.[169] Furthermore, Iowa is one of only seventeen states and the District of Columbia that allow same-sex marriage.[170] In *Varnum v. Brien* in 2009, the Iowa Supreme Court held that state law prohibiting same-sex marriage violated the equal protection clause of the Iowa Constitution.[171] At this writing, the United States Supreme Court has not provided constitutional protection for same-sex couples to marry.[172]

Therefore, the Iowa Supreme Court's interpretation of Article 1, Section 3 is not beholden to a particularized outcome with regard to prior case law, and Iowa has a tradition of providing greater protection for individual liberties than is traditionally available under the United States Constitution. Therefore, it follows that it would be appropriate and in line with Iowa's proud legal tradition for the Iowa Supreme Court to adopt a

163. *See In re* Ralph, 1 Morris 1, 9–10 (Iowa 1839).

164. *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

165. Clark v. Bd. of Dirs., 24 Iowa 266 (1868).

166. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

167. State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976).

168. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

169. Arabella A. Mansfield became the first female attorney in the United States when she was admitted to the Iowa Bar in 1869. *See Arabella Mansfield*, IOWA COMMISSION ON THE STATUS OF WOMEN, http://www.women.iowa.gov/about_women/HOF/iafame-mansfield.html (last visited Jan. 26, 2014).

170. *See 17 States with Legal Gay Marriage and 33 States with Same-Sex Marriage Bans*, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last updated Jan. 6, 2014, 10:33 AM).

171. Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

172. The United States Supreme Court has, however, recently ruled that the section of the Defense of Marriage Act that defined marriage as between one man and one woman for federal purposes was unconstitutional under the Due Process Clause of the Fifth Amendment. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

strict scrutiny standard for free-exercise claims that arise under Article 1, Section 3 of the Iowa Constitution.

C. PUBLIC POLICY FAVORING STRICT SCRUTINY

Along with the public policies identified by other state supreme courts noted above,[173] the Iowa Supreme Court should rely upon other public policy considerations in deciding to reject *Smith*'s rational-basis test for neutral laws of general applicability. The policies to consider include: (1) the free exercise of religion as a fundamental right, (2) the rational-basis test as a weak and inadequate standard to protect individual liberty, and (3) the protection of minority religions.

1. Free Exercise of Religion as a Fundamental Right

In utilizing the United States Supreme Court's framework of identifying "fundamental rights," the Iowa Supreme Court should conclude that the free exercise of religion's status as a fundamental right is deserving of strict scrutiny under the Iowa Constitution.

In 1938, the Supreme Court established the general principle that the federal judiciary will presume Congress's legislation to be constitutional unless it appears to infringe upon a fundamental right.[174] Generally, the Court applies strict scrutiny to governmental actions that allegedly infringe upon a fundamental right, and only if the infringed right is deemed *not* fundamental is the rational-basis test applied.[175] This is how the Court decided *Sherbert*.[176] In *Smith*, the Court did not challenge the designation of the free exercise of religion as a fundamental right, but instead argued that policy reasons, such as the difficulty of applying strict scrutiny to a wide variety of religious practices, required adoption of the rational-basis test.[177]

There is no logical or legal rationale, however, for why the Court usurped its original designation of individual religious freedom as a fundamental right in favor of policy justifications. The inconvenience and difficulty of applying a strict scrutiny standard to a guaranteed freedom ought not be subject to the whim of the courts that are obligated to uphold these rights. Nor should the fear of diluting the legislature's authority be

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173. *See supra* Part III.C.

174. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

175. CHEMERINSKY, *supra* note 5, at 946.

176. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

177. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990); *see also supra* notes 4–5 and accompanying text.

given any weight. An individual's ability to practice his or her religion in Iowa should not be grouped into the same category of cases as guest driver statutes[178] or slot machines.[179] None of those contentions should outweigh an individual's right to practice his or her religion because the free exercise of one's religion without government interference or persecution is an ancient and founding principle in the United States.[180] It should not be allowed to fall to the wayside in favor of convenience and judicial avarice. On this basis, the Iowa Supreme Court should recognize the general principle of greater protection and apply strict scrutiny to constitutional rights that are indeed "fundamental."

2. Weakness of Rational-Basis Review

Further, the Supreme Court's use of the rational-basis test regarding the protection of individual liberty has been heavily criticized.[181] The standard is typically condemned for being without substance.[182] Indeed, the Supreme Court has provided a very loose definition of what constitutes rational-basis review.[183] Although Iowa has applied a somewhat "tougher" rational-basis

178. *See* Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980).

179. *See* Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004).

180. *See* DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT 71 (2000) ("[T]he right to worship according to one's conscience was cherished by the colonists and became . . . an emotionally charged issue in anti-British revolutionary rhetoric.").

181. One author finds the following:

> The original legal definition of insanity is the inability to tell right from wrong. So it is the first irony of the "rational" basis test that it is, according to that definition, insane. The word "basis" is likewise a misnomer, since the rational basis test is concerned not with the *actual* basis for challenged legislation, but with speculative and hypothetical purposes instead. Finally, the word "test" is inappropriate, at least insofar as it suggests some meaningful analytical framework to guide judicial decision-making, because the rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor.

Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 898 (2005); *see also* Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006) ("Rational basis review is fundamentally flawed. Underlying rational basis review are few of the normative principles that would lend it coherence, guidance, or a relatively high degree of certainty and predictability. This lack of principle has resulted in the formulation and application of a test in which the government's interests will almost always prevail over the individual's.").

182. *See* Neily, *supra* note 181, at 898–900.

183. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*." (emphasis added)).

analysis in the past, rational-basis review is insufficient to protect Iowans' right to individual religious liberty, no matter what form it takes.[184]

Strict scrutiny more adequately protects individuals from government intrusion by providing minimum standards the government must meet before it can restrict an individual's right to freely practice his or her religion. The *Sherbert* test, even when loosely applied, as with *Lee*,[185] requires the government to prove three factors: (1) the law in question supports a compelling governmental interest, (2) the law is narrowly tailored to achieve the government's interest, and (3) the law is the least restrictive means of achieving the government's interest.[186] Requiring only "any reasonably conceivable state of facts" to overcome a fundamental constitutional protection lampoons individuality in this country.[187] As Benjamin Franklin aptly opined, "[s]o convenient a thing it is to be a *reasonable creature*, since it enables one to find or make a reason for every thing one has a mind to do."[188] This cannot be the standard Iowans rely upon to secure their right to religious liberty in Iowa.

3. Protection of Minority Religions

The Iowa Supreme Court should also consider the importance of providing minority religions protection against majority control. Application of a strict scrutiny standard of review to facially neutral, generally applicable laws that allegedly infringe on an individual's right to practice his or her religion helps protect minority religions. The struggle of minority religions to achieve the same recognition and rights of majority religions in Iowa would be severely curtailed if the government need only provide a rational basis for an infringing law.[189] Indeed, the Supreme Court's pre-*Smith* cases brought by Seventh-day Adventists,[190] Jehovah's Witnesses,[191] and the Amish[192] all provide examples of how application of strict scrutiny helped protect minority religions from government interference. The Iowa

184. *See Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 5–6 (discussing the application of an independent "tougher" rational-basis analysis); *see also* Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address* Varnum v. Brien, 94 IOWA L. REV. 413, 420–22 (2008) (discussing U.S. Supreme Court opinions applying "tougher" rational-basis analysis).

185. *See* United States v. Lee, 455 U.S. 252 (1982).

186. *See supra* text accompanying notes 30–31.

187. *See Beach Commc'ns, Inc.*, 508 U.S. at 313.

188. *See* BENJAMIN FRANKLIN, AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 28 (Simon & Shuster 2004) (1791).

189. *See* IVERS, *supra* note 42, at 140–41 (noting how the Supreme Court's application of strict scrutiny permitted minority religion plaintiffs in several key free-exercise cases to succeed in their claims).

190. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

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

192. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

Supreme Court's application of strict scrutiny in *Zimmerman* also provides an example of how strict scrutiny protects minority religions.[193] If the Iowa Supreme Court would have applied the rational-basis test to any of the claims brought by the religious plaintiffs in these cases, they almost certainly would have lost, for it is reasonable to understand why the government's interest in mandating school attendance beyond the age of sixteen,[194] or resisting the use of steel tires on public highways,[195] is "rationally-based." But these interests do not outweigh an individual's fundamental right to exercise his or her religion.

Therefore, in order to protect the interest of minority religions, it is imperative that the Iowa Supreme Court adopt strict scrutiny.

D. IOWA FRAMERS' ORIGINAL INTENT FOR THE FREE EXERCISE OF RELIGION

State supreme courts sometimes look to the original intent of a state constitution's framers to determine the level of protection provided under its free-exercise provisions.[196] Indeed, the Iowa Supreme Court has used this approach as well.[197] Although the surviving records do not reference the Iowa framers' views regarding the free exercise of religion, the record does provide evidence of the profound respect and deference Iowa's framers held for the freedom of religion. With that in mind, this Subpart looks to the Iowa Constitutional Conventions of 1844 and 1857 to provide a greater understanding of the Iowa framers' attitudes toward religion.

The State of Iowa has held three constitutional conventions. The first convention was held in 1844, when Iowa was still a territory.[198] This convention yielded a document that was approved by Congress, but was ultimately rejected twice by the citizens of Iowa.[199] The second convention, in 1846,[200] produced a document that was ratified by the citizens of Iowa

193. *See* Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1 (Iowa 2012).

194. *See Yoder*, 406 U.S. at 228.

195. *See Zimmerman*, 810 N.W.2d at 17.

196. *See supra* Part III.D.

197. *See, e.g.*, Bierman v. Weier, 826 N.W.2d 436, 451 (Iowa 2013); State v. Ochoa, 792 N.W.2d 260, 274–75 (Iowa 2010); State v. Briggs, 666 N.W.2d 573, 578–84 (Iowa 2003); Rudd v. Ray, 248 N.W.2d 125, 129–33 (Iowa 1976).

198. BENJAMIN F. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 14 (1902) (listing the years of Iowa's three constitutional conventions).

199. *Id.* at 271–84 (discussing the problems of the 1844 constitution and the various policy implications that ultimately led to the document's electoral failure).

200. Almost no record was recorded or has survived the convention of 1846, and what has survived in the historical record is irrelevant to the focus of this Note. Therefore, the Iowa constitutional convention of 1846 will be not be addressed. *See id.* at 294–95 ("[O]nly the barest fragments have been preserved of what was said in the Convention of 1846. The official journal and a few speeches are all that have come down to us.").

and became Iowa's first Constitution.[201] Finally, in 1857, delegates of Iowa's third constitutional convention met at the Old Capitol in Iowa City to significantly amend the 1846 constitution into the modern framework of the Iowa Constitution as it exists today.[202]

1. Constitutional Convention of 1844

The first convention for the purpose of drafting a constitution for the State of Iowa met on October 7, 1844.[203] No official reporting was recorded, nor did any personal accounts survive the proceedings.[204] Daily newspaper fragments of the proceedings, however, are instructive in understanding how Iowa's framers viewed the relationship between religious freedom and state governance.[205]

The debate on whether the convention's daily sessions should open with a prayer is particularly telling of the Iowa framers' attitudes toward religious liberty in 1844. On October 10, the convention took up Mr. Sells' motion to commission a prayer one half-hour before the opening of each daily session.[206] The motion was unexpectedly controversial,[207] as nearly twenty delegates spoke out in favor or against the motion.[208] Mr. Lucas, a former Governor of the Iowa Territory and delegate for Johnson County, regretted that any delegate would think to oppose the motion on the basis that "[i]f ever an assemblage needed the aid of Almighty Power, it was one to organize a system of Government."[209] Mr. Kirkpatrick of Jackson County spoke strongly against the motion,

> [I]f we have a right to enforce moral duties here, we have a right . . . to make every man in the State fall upon his knees fifty times a day; and . . . we may retrograde, step by step, until we get back to the policy and customs of our forefathers, on the eastern

201. *See id.* at 324 ("The Constitution of 1846 narrowly escaped defeat. At the polls on August 3, 1846, its supporters . . . were able to command a majority of only four hundred and fifty-six out of a total of eighteen thousand five hundred and twenty-eight votes.").

202. *Id.* at 335–36.

203. *Id.* at 176.

204. *See* BENJAMIN F. SHAMBAUGH, FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at iii (1900) ("Apart from a bare journal of proceedings, the early constitution-makers of Iowa . . . did not keep and preserve official records of their deliberations.").

205. *See generally id.* at iii–iv (listing *The Iowa Capital Reporter*, *The Bloomington Herald*, and *The Iowa Standard* as newspapers in which debate fragments can be found).

206. *Id.* at 11–12.

207. *See id.* at 14 ("Mr. Sells did not expect the resolution to meet with opposition, and should regret to have it said of Iowa that she had so far travelled out of Christendom as to deny the duty of prayer.").

208. *See id.* at 11–20 (providing the individual comments and summaries of speeches of each of the delegates who spoke in favor or against the motion).

209. *Id.* at 14.

> side of the Atlantic, where tyrants wield despotic sway, and liberty never had a name.[210]

The commentaries of Messrs. Hall,[211] Fletcher,[212] Quinton,[213] and Lowe[214] provide greater insight into the debate on this issue. Ultimately, the motion passed by a vote of 44 yeas to 26 nays.[215] The comments and speeches on both sides of this issue, in support of imposing religious worship on the other delegates or in opposition of such action, make clear the tremendous amount of respect Iowa's framers held for the practice of religion in Iowa.

2. Constitutional Convention of 1857

Iowa's third constitutional convention met on January 19, 1857.[216] In the Supreme Court room of the Old Capitol in Iowa City, thirty-six delegates met to amend the constitution of 1846.[217] Unlike the conventions of 1844 and 1846, the convention of 1857 maintained a well-kept record throughout the proceedings, and it provides great insight into understanding the issues that came before the convention.[218]

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210. *Id.* at 13.

211. *See id.* at 16–17 (arguing for a compromise that would allow the delegates who wanted prayer before the daily session to meet one half-hour early so as not to require it of all delegates, because doing so would be inappropriate).

212. *See id.* at 16 ("[Mr. Fletcher] regretted the opposition that he saw, and he was unwilling that it should go forth to the world that Iowa refused to acknowledge a God. He believed it was becoming in the patriot to appeal to the Almighty for aid and guidance.").

213. Mr. Quinton

> believed that the Bible furnished a rule for faith and practice, but did not believe praying would change the purposes of Deity, nor the views of members of the Convention. In the name of Heaven, don't force men to hear prayers. He believed in religion, but did not want to force members to hear what they did not believe in.

See id. at 18–19.

214. Mr. Lowe

> said that religion had taken a deep hold in this country, and the time would soon come when men of proper moral and religious sentiments would alone hold the offices of this country. The exercise of prayer would have an effect to calm excitement, and contribute to moderation, and for that reason he was in favor of it.

See id. at 19.

215. *Id.* at 21–22.

216. *See* SHAMBAUGH, *supra* note 198, at 335–37 (discussing the date, location, and composition of the delegates to Iowa's third constitutional convention).

217. *Id.*

218. *See generally* 1 W. BLAIR LORD, THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA (1857) (recording all the daily speeches, comments, motions, amendments, and votes of Iowa's third constitutional convention); 2 W. BLAIR LORD, THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA (1857) (same).

A variety of issues the framers discussed and debated during the convention of 1857 illuminates how they viewed the role of religious liberty in Iowa at the time of the founding of the State. For example, as to the question of whether African-Americans should be allowed to hold political office, Mr. Clarke said, "If it be not right to deprive me of my rights on account of my religious belief, it is not right to deprive me of them because I come from any particular place or country, or because I have a particular hue to my skin?"[219] By equating discrimination on the basis of religion to racial discrimination, Mr. Hall skillfully preyed on his colleague's deference to religion to make his point, but his statement also provides insight into to how important religious rights were to the framers.

Moreover, as to the question of whether to amend the religious test provision of the 1846 constitution to protect the right of all people to testify in court,[220] Mr. Clarke noted that the reason the religious test provision was included in the 1846 constitution was to prevent the government from disallowing atheists from testifying in open court.[221] Ultimately, the framers of the 1857 Constitution rejected such a test.[222] Clearly Iowa's framers' reverence for religious beliefs encompassed the beliefs of all people, including those who do not follow any religion.

The debates regarding individual rights and discussions of the extent to which how strongly the framers believed civil rights should apply to all citizens of Iowa are evidence of the framers' commitment to protecting the liberty interests of all Iowans. Even though the debates did not specifically address the free-exercise provision of the Iowa Constitution, the constitutional debates during the conventions of 1844 and 1857 provide strong support for the view that Iowa's framers envisioned a strong liberty interest in the right of individuals to practice their religions with very limited government intervention. Rational-basis review would circumvent the framers' intent by marginalizing the importance of religion to Iowa's citizens in favor of any "rational" government action. Strict scrutiny, therefore, is the only way to maintain the respect and dignity Iowa's framers held for religious liberty.

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219. 1 LORD, *supra* note 218, at 173.

220. *See id.* at 187–93 (discussing various states whose constitutions do not protect the right to testify in court for some classes of citizens who belong to various religions or secret societies).

221. Mr. Clarke stated:

> This provision then is not based upon any action of the Legislature of this State, but has reference to the action of the Legislatures of other States, whereby men on account of their peculiar religious belief, on account of not believing in a God, . . . have been deprived of their rights and their oaths in a court of law, or of holding office in the State.

Id. at 181.

222. *Id.* at 200.

V. CONCLUSION

In light of the United States Supreme Court's decision in *Smith* and Congress' limited ability to modify *Smith*, state supreme courts remain the last, best hope for individuals seeking greater protection for the free exercise of their religious liberty in this country. Many state supreme courts have analyzed several factors—including textual differences, the doctrine of *stare decisis*, public policy, and original intent of a state constitution's framers—in deciding whether to follow *Smith* or reject *Smith* in favor of heightened scrutiny. Ultimately, this decision still lies with the Iowa Supreme Court.[223] Because the court is not bound by either the text of the Iowa Constitution or its own precedent to follow *Smith*, it should consider the various public policies that favor application of strict scrutiny in order to protect religious liberties. Furthermore, the court should adhere to its rich tradition in favor of individual rights and the spirit of Iowa's founders and framers for religious freedom that they intended to preserve in Iowa. For these reasons, the Iowa Supreme Court should reject *Smith* and adopt strict scrutiny for all free-exercise claims that arise under Article 1, Section 3 of the Iowa Constitution.

223. *See* Blackford v. Sioux City Dressed Pork, Inc., 118 N.W.2d 559, 565 (Iowa 1962) ("While . . . the law school reviews have in recent years much curtailed our prerogative of having the last word as to interpretations of Iowa law, there is still probably an area in which we are entitled to decide what it is.").