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Fulton's Answer: State Constitutional Rejections of *Employment Division v. Smith* as a Practical Model for the Restoration of the Free Exercise Clause

Nathan Moelker

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The Supreme Court's 1990 decision in *Employment Division v. Smith* redefined its approach to cases under the Free Exercise Clause of the First Amendment. Many have criticized that approach and questioned its validity in the three decades since it was adopted. In *Fulton v. City of Philadelphia*, the Court again considered *Smith*'s flaws, but declined to overrule it, instead evading the *Smith* standard by clarifying an exception to its purportedly bright-line rule. While multiple Justices acknowledged and largely accepted the reasons that scholars continue to denounce *Smith*, a majority did not agree that it was time to change course. Justice Barrett, in particular, penned a concurring opinion raising several pragmatic concerns about what standard the Court might establish in the wake of *Smith*. In so doing, she asked four distinct questions about the future of the Court's free exercise approach.

This Article seeks to address Justice Barrett's four questions by looking to examples in the laboratories of democracy—the States. Many states have dealt with free exercise questions under alternatives to *Smith*'s approach. These states shed light on the workability of strict scrutiny regimes like the Court's own pre-*Smith* standard, illustrating the application of the approach, the scope of the rights involved, and the respect the judiciary should give free exercise claims. Ultimately, such state models reveal that leaving *Smith* behind protects religious free exercise in a way that is not only consistent with the Founders' understanding, but also functional in practice, thus resolving each of Justice Barrett's questions.

AUTHOR

2022–2023 Law Clerk for Alabama Chief Justice Tom Parker. Associate Counsel, American Center for Law and Justice. Special thanks to Dean Bradley Lingo, Regent University School of Law, whose class on State Constitutional Law taught with Chief Judge Jeffrey Sutton provided the impetus and framework for me to consider this issue. Thanks to Laura Hernandez, Alex Touchet, and Hosea Hornemann for their invaluable editorial advice.

ARTICLE

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Nathan Moelker[†]

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The Supreme Court's 1990 decision in Employment Division v. Smith *redefined its approach to cases under the Free Exercise Clause of the First Amendment. Many have criticized that approach and questioned its validity in the three decades since it was adopted. In* Fulton v. City of Philadelphia*, the Court again considered* Smith*'s flaws, but declined to overrule it, instead evading the* Smith *standard by clarifying an exception to its purportedly bright-line rule. While multiple Justices acknowledged and largely accepted the reasons that scholars continue to denounce* Smith*, a majority did not agree that it was time to change course. Justice Barrett, in particular, penned a concurring opinion raising several pragmatic concerns about what standard the Court might establish in the wake of* Smith*. In so doing, she asked four distinct questions about the future of the Court's free exercise approach.*

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I. INTRODUCTION

In *Fulton v. City of Philadelphia*, the Supreme Court unanimously held that Philadelphia violated the Free Exercise Clause by refusing to contract with Catholic Social Services because of its religious beliefs.[1] It did not, however, address the overarching framework of Free Exercise exemption claims and instead allowed *Employment Division v. Smith* to remain largely intact. Instead of overruling *Smith*, Justice Robert's majority opinion concluded that "a system of individual exemptions, made available in this case at the 'sole discretion' of" a government actor, constitutes an exception to *Smith*'s rule protecting neutral rules of general applicability from Free Exercise Clause challenges.[2] When a legal system contains individual exemptions, made available at the discretion of an individual government employee, it is no longer a generally applicable standard; it is, therefore, subject to strict scrutiny.[3] The Court left for another day any substantial refinement of *Smith*.[4] Arguably, *Smith* itself, which concerned a government agency's discretionary denial of employment benefits,[5] would have come out differently under the *Fulton* Court's analysis. But in the meantime, *Smith*, with refinements and exceptions, remains the governing framework for First Amendment Free Exercise claims.

Three justices in concurrence, Alito, Gorsuch, and Thomas, contended for the long-looked-for overturning of *Smith*, implicitly rejecting the majority's attempt to refine the *Smith* test.[6] They highlighted the many scholarly challenges to the *Smith* test and its inconsistency with the history and tradition of the First Amendment.[7] Members of the Supreme Court[8]

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[1] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

[2] *See id.* at 1878.

[3] *See id.*

[4] *See id.* at 1887.

[5] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

[6] *See Fulton*, 141 S. Ct. at 1883 (Alito, Thomas, & Gorsuch, JJ., concurring) ("Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.").

[7] *Id.* at 1883, 1888–89.

and the scholarly community[9] have extensively critiqued *Smith*. In a separate concurrence, Justice Barrett, joined by Justice Kavanaugh, prevented Justice Alito, Justice Gorsuch, and Justice Thomas from reaching a majority. In her concurrence, Justice Barrett seemed to agree with the textual and historical critiques of *Smith*.[10] She nonetheless chose to deny a majority to the cause of overruling *Smith* because of a broadly-expressed pragmatic concern with "what should replace *Smith*?"[11] Justice Barrett posed four practical questions that she believed should be determinative in deciding the Free Exercise test.[12] The first asked about whether there should be any distinction between entities and individuals.[13] The second, whether there should be any distinction between direct and indirect burdens on religious exercise.[14] The third, and most important, is what level of scrutiny

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[8] City of Boerne v. Flores, 521 U.S. 507, 544–45, 565 (1997) (O'Connor & Breyer, JJ., dissenting) ("I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. . . . If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty.").

[9] *See* Bradley J. Lingo & Michael G. Schietzelt, *A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise after* Fulton, 57 WAKE FOREST L. REV. 711 (2022) (viewing *Fulton* as the impetus for reexamining strict scrutiny, although focusing more on the First Amendment itself rather than the state analogues); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 102 (1990).

[10] *Fulton*, 141 S. Ct. at 1882–83 (2021) (Barrett & Kavanaugh, JJ., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

[11] *Id.*

[12] *See id.*

[13] *Id.*

[14] *Id.*

(strict, heightened, or something else entirely) should apply post-*Smith*.[15] The final was whether pre-*Smith* cases would have come out any differently in cases regarding challenges to "garden-variety laws."[16]

Justice Barrett's concerns do not appear to be primarily with the normative question of original Free Exercise interpretation but the practical question of *Smith*'s replacement. In other words, there appear to already be five votes for overturning *Smith* on the merits; the remaining issue is the practical question of how *Smith* should be replaced.[17] It is the contention of this article that many of Justice Barrett's practical concerns have already been addressed, not merely by the Court's pre-*Smith* jurisprudence, but by a variety of state supreme courts who have already carefully wrestled with this question. Some state supreme courts merely interpret state constitutional provisions in tandem with the U.S. Supreme Court.[18] Others have, thankfully, not often had the necessity of addressing free exercise claims in significant detail at all. But a significant number of state courts have directly addressed the same question faced by *Fulton*, and they have sought to determine the role of *Smith* in their jurisdictions.[19] These state constitutional decisions, especially from those states whose constitutions were in existence at the time of the Founding, provide helpful guidance in the interpretation of the federal Constitution.[20] Moreover, if the States are

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[15] *Id.*

[16] *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett & Kavanaugh, JJ., concurring).

[17] Lingo & Schietzelt, *supra* note 9, at 715.

[18] *See* Trujillo v. State, 2 P.3d 567 (Wyo. 2000); State v. Fluewelling, 249 P.3d 375, 378–79 (Idaho 2011) (applying *Smith* standard as a matter of state law); Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 123 (Md. 2001) (same).

[19] *See* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 239 (1998) (arguing that *Smith*, while wrongfully decided, nonetheless has had the unintended beneficial side effect of encouraging state courts to independently protect Free Exercise rights through their critical responses to *Smith*); Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1019 (1994) (same).

[20] District of Columbia v. Heller, 554 U.S. 570, 600–01 (2008) ("Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and

indeed the laboratories of democracy,[21] these state alternatives to *Smith* should provide experimental answers to Justice Barrett's questions. These state approaches and the insights they provide are the focus of this Article. State supreme courts and their robust defense of religious liberty can "reinvigorate federal free exercise jurisprudence."[22]

This Article seeks to address Justice Barrett's concerns by using state court decisions to illustrate the practical ways courts have applied strict scrutiny regimes. First, state contours of free exercise jurisprudence have helped to define the strict scrutiny methodology, demonstrating that such a system is not as categorical or unyielding as it was portrayed by its critics in *Smith*. Second, state constitutional decisions help provide a thorough and careful definition of the scope of the rights being protected in the free exercise context and elucidate the courts' role in taking the conflicting claims in these cases seriously. Third, garden-variety laws are not threatened by an appropriate application of strict scrutiny, although courts are willing to grant exceptions when such an exception would not interfere with the law's operation. Overall, more states have continued to reject *Smith*, and these rejections have thoroughly illustrated the practical workability and reliability of the strict scrutiny methodology in ensuring that religious practices are robustly respected.

II. AN OVERVIEW OF STATE APPROACHES TO FREE EXERCISE

Justice Barrett's concurrence,[23] along with the original *Smith* opinion,[24] targeted its argument against the practical consequences of adopting a strict

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immediately followed adoption of the Second Amendment."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455–56 (1990) ("[S]tate constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the [F]irst [A]mendment assumed the term 'free exercise of religion' meant what it had meant in their states.").

[21] New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

[22] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275, 276 (1993).

[23] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett & Kavanaugh, JJ., concurring).

scrutiny regime. Scholars who support the *Smith* regime largely echo the same concerns, fearing the floodgates of litigation that would allegedly result from establishing a stronger standard for the protection of free exercise.[25] The simple fact that approximately eighteen states, including six of the original thirteen, have judicially adopted a form of strict scrutiny is a thorough refutation of the claim that strict scrutiny results in a free-for-all, where everyone does what is right in their own eyes, and generally applicable laws are a thing of the past.[26] On the contrary, states with a form of strict scrutiny for religious claims are appropriately equipped to address each individual religious liberty claim on the merits as they arise, and they have neither rubberstamped every government act nor provided a license to every religious liberty claim. These states have not descended into anarchy and chaos simply because they take claims for religious exemptions seriously.

The general approach of these states is as follows: although phrased differently in different states, the states refusing to follow *Smith* generally apply a four-part test for evaluating religious freedom claims and defenses based on state constitutional provisions. For a party to make a religious liberty claim to seek an exception from an applicable law, the party must show a sincerely-held religious belief and that that belief has been burdened by state action. It is only once that initial showing is made that the two elements of strict scrutiny apply and require the government to justify the infringement. This framework does not apply in contexts where religious

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[24] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.") (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

[25] Brief for Professor Eugene Volokh as Amici Curiae Supporting Neither Party at 1–2, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[26] I recognize that differing examinations of this matter may reach a slightly different final tally, as state courts do not always make completely explicit the extent to which they are rejecting *Smith*, and, in some cases, the rejection is implicit rather than explicit.

liberty rights are more absolute, such as the ministerial exception,[27] or in contexts where it is clear that government action has directly targeted religion. With that formula as the baseline, I focus here on the applications and variations among the states.

A. States in Existence at the Founding

According to *Heller*, the scope of a right's protection in state contexts at the time of the Founding "is strong evidence that that is how the founding generation conceived of the right."[28] The founding thirteen states are particularly useful practical examples of how free exercise rights function, because these states have wrestled with their shared history of religious liberty going back to the Founding. While this Article will not address all fifty state constitutions, it will seek to address all thirteen of the original colonies' constitutions insomuch as those provisions have been independently interpreted; unique insights can be gleaned from these states.[29]

1. Massachusetts

Massachusetts was a forerunner in the battle for religious liberty. Its constitution, drafted by John Adams, provides that

> no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or

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[27] *See* Van Osdol v. Vogt, 908 P.2d 1122, 1127 (Colo. 1996). The ministerial exception protects the employment decisions of churches relating to their ministers, broadly defined, from almost all government scrutiny.

[28] District of Columbia v. Heller, 554 U.S. 570, 603 (2008).

[29] The following three states of the original thirteen have not addressed the issue: Delaware, Georgia, and South Carolina. Of the original states, only these three states have adopted *Smith*'s approach: Connecticut, Hopkins v. Hamden Bd. of Educ., 289 A.2d 914 (Conn. 1971); Maryland, Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 123 (Md. 2001); and New Jersey, S. Jersey Cath. Sch. Tchrs. Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 721 (N.J. 1997).

> sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[30]

Of particular note is the provision for religious sentiments that do not "disturb the public peace,"[31] language which on its face seems to allow only narrow justifications for permissible regulations that infringe upon religious practice.[32]

The Massachusetts Supreme Court rejected *Smith.* It criticized *Smith* for "weaken[ing] First Amendment protections for religious conduct."[33] The court insisted on continuing to analyze questions of free exercise through the framework of strict scrutiny.[34] The court's analysis in rejecting *Smith* did not center on Massachusetts's heritage or unique constitutional text and tradition, but focused upon its grounds as an independent sovereign to refuse to abide by the U.S. Supreme Court's holding in *Smith.* Massachusetts generally follows the standard four-part analysis.[35] In most cases, the sincerity of a religious belief can generally be taken for granted. A burden is established when "the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly."[36] In Massachusetts, a burden can also be shown by demonstrating the burden of public stigma.[37] The Massachusetts Supreme Court has explicitly held that the protections given to religious exercise under the Massachusetts constitution are more robust than other rights, because it requires "attention given to no other right or liberty."[38] In that light, the

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[30] MASS. CONST. pt. 1, art. II.

[31] *Id.*

[32] This provision occurs in several other state constitutions and is best understood as defining the kinds of compelling interests that justify infringements upon religious rights. *See* Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL'Y 971, 973–74 (2019).

[33] Att'y Gen. v. Desilets, 636 N.E.2d 233, 235–36 (Mass. 1994).

[34] *Id.* at 236.

[35] *Id.* at 236–37.

[36] *Id.* at 237.

[37] *Id.* at 237–38.

[38] Rasheed v. Comm'r of Corr., 845 N.E.2d 296, 302–03, 308 (Mass. 2006).

state must show a state "interest sufficiently compelling to justify [a] burden" on religious exercise and prove that a religious exception would "unduly burden that interest."[39] This unusually heightened manner of framing the matter ultimately addresses whether the compelling interest is actually threatened by the provision of a religious exemption.

By way of example, in *Attorney General v. Desilets*, two devout Catholic landlord brothers refused to rent an apartment to unmarried cohabitants on the ground that they could not, in good conscience, facilitate conduct that their faith taught was immoral.[40] The rejected cohabitants filed a complaint with the Massachusetts Commission Against Discrimination.[41] The Massachusetts Supreme Court determined that summary judgment in favor of the State was improper, emphasizing the state's obligations to establish a particular compelling interest as to the defendants and their religious claims in particular.[42] In other words, rather than alleging a compelling interest in the broad goal of law enforcement generally, the State had to specifically prove its compelling interest in imposing the discrimination law on the religious landlords.[43] The "general objective of eliminating discrimination of all kinds referred to in the [statute] . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion."[44]

2. New Hampshire

The New Hampshire constitution declares the right of conscience to be "unalienable."[45] It further provides that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or

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39 *Id.* at 302–03.

40 *Desilets*, 636 N.E.2d at 234–35.

41 *Id.* at 235.

42 *Id.* at 235, 241.

43 *Id.* at 238, 241.

44 *Id.* at 238.

45 N.H. CONST. pt. 1, art. IV.

for his religious profession, sentiments, or persuasion."[46] The New Hampshire judiciary has emphasized the distinctive quality of the protection of the right of conscience, having a more fundamental quality than mere civil and political rights.[47] In 1868, New Hampshire's highest court emphasized that if an individual acts according to religious conviction "in a way not to disturb others, that right is without exception and without qualification."[48] Government or society cannot "have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of others."[49] The only legitimate infringements on religious practice under the New Hampshire constitution, in other words, can be for "acts or practices in religious services which disturb the public peace, or disturb others in their religious worship."[50]

In light of New Hampshire's unique, historic emphasis on the importance of religious freedom, the New Hampshire Supreme Court has wholeheartedly rejected *Smith*.[51] The "rights of conscience could not be . . . surrendered; nor could society or government have any claim or right to assume to take them away."[52] New Hampshire continues to regularly apply strict judicial scrutiny to religious exemption claims.[53]

3. New York

New York is an interesting outlier in this largely dichotomous debate. The New York constitution provides that,

> [t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall

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46 N.H. CONST. pt. 1, art. V.

47 Hale v. Everett, 53 N.H. 9, 61 (1868).

48 *Id.*

49 *Id.*

50 State v. White, 5 A. 828, 829–30 (N.H. 1886).

51 State v. Mack, 249 A.3d 423, 441 (N.H. 2020).

52 *Hale*, 53 N.H. at 61.

53 Cmty. Res. for Just., Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007).

> forever be allowed in this state to all humankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.[54]

New York has adopted neither strict scrutiny nor the categorical rule of *Smith*. Instead, New York has adopted what it views to be a medium between the two views.[55]

In *Catholic Charities of the Diocese v. Serio*, the New York Court of Appeals announced its methodology for evaluating the free exercise of religion and liberty of conscience claims and defenses.[56] The court criticized *Smith*'s holding as an "inflexible rule."[57] Instead of *Smith*, the court adopted a test that requires the court to consider the interest advanced by legislation if the legislation imposes a burden on religious interests and to balance "[t]he respective interests . . . to determine whether the incidental burdening is justified."[58] In such a case, the party challenging the legislation must show that "the challenged legislation . . . is an unreasonable interference with religious freedom."[59] The court emphasized, however, that this rule would be "more protective of religious exercise than the rule of *Smith*."[60] It rejected *Smith*'s argument that Free Exercise constitutional provisions never require granting individual exceptions from general requirements. Instead, "parties claiming an exemption from generally applicable and neutral laws will be able to show that the State has interfered unreasonably with their right to practice their religion."[61]

Even if there are grounds for critiquing New York's substantial deference to the legislature, New York still avoids *Smith*'s fundamental error. As *Serio* emphasized, certain generally applicable laws, such as a complete

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54 N.Y. CONST. art. I, § 3.

55 *See* Cath. Charities of Diocese v. Serio, 859 N.E.2d 459, 466–67 (N.Y. 2006).

56 *Id.*

57 *Id.* at 466.

58 *Id.* (alteration in original) (quoting La Rocca v. Lane, 338 N.E.2d 606 (N.Y. 1975)).

59 *Id.*

60 *Id.*

61 Cath. Charities of Diocese v. Serio, 859 N.E.2d 459, 467 (N.Y. 2006).

prohibition of alcohol use, would clearly have a substantial effect on religious practice.[62] The New York Court of Appeals had no difficulty acknowledging that such laws would be well beyond the bounds of constitutional acceptability.[63] The reason why is that, under the New York approach, a plaintiff still has the opportunity to attack "the challenged legislation[] as applied to that party."[64] *Smith* denied the possibility of any as-applied challenge to a generally applicable law. More fundamentally, under *Smith,* religious liberty cases, unlike other individual rights cases, are focused not on the extent to which a particular right has been allegedly interfered with, but on the nature and scope of the law being challenged.[65] New York avoids this fundamental problem by allowing for at least the possibility of as-applied free exercise claims to attack neutral, generally applicable laws.

4. North Carolina

The North Carolina Constitution's Declaration of Rights provides that "no human authority shall, in any case whatever, control or interfere with the rights of conscience."[66] The Court of Appeals of North Carolina has implicitly rejected *Smith*, requiring a compelling state interest in order to justify a compulsion by government action to do something contrary to religious belief.[67] In *In re Browning*, a father opposed to psychological evaluation due to his religious belief refused to permit a mental health evaluation of his two sons.[68] The court emphasized that First Amendment liberties are "basic and fundamental," thus, they are held to the compelling-state-interest test.[69] However, the State has a compelling state interest in

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[62] *Id.* (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418–19 (1990)).

[63] *Id.*

[64] *Id.* at 466.

[65] Lingo & Schietzelt, *supra* note 9, at 749.

[66] N.C. CONST. art. I, § 13.

[67] *In re* Browning, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996).

[68] *Id.* at 466.

[69] *Id.* at 467.

protecting neglected and abused children from abuse, sufficient to justify an infringement upon the father's religious belief in that particular case.[70]

5. Pennsylvania

Pennsylvania's constitution provides that "no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."[71] In Pennsylvania, principles of religious freedom and liberty of conscience are uniquely rooted in the state's history and traditions.[72] The rights of conscience can only be restrained when they would "impinge on the paramount right of the public."[73]

Pennsylvania has neither specifically addressed *Smith*, nor has it made explicit its universal approach to religious exemptions. However, even after *Smith*, the Pennsylvania courts held that where the state denies unemployment compensation because of religious mandated conduct, "[t]he burden . . . must be sufficiently compelling to override . . . [F]irst [A]mendment rights."[74] The Pennsylvania court has also cited to *Sherbert* and relied on that case in its analysis of free exercise claims, even after *Smith*'s rejection of *Sherbert*.[75] The court has also emphasized the danger of failing to give deference to an individual's own claims regarding the scope of their religious belief.[76] This seems to strongly suggest that the Pennsylvania courts are at least inclined to reject *Smith* for purposes of their state's constitution. These decisions could be generously read as implicitly

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[70] *Id.*

[71] PA. CONST. art. I, § 3.

[72] Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).

[73] Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160 (Pa. 1828) (Gibson, C.J., dissenting).

[74] Cassatt v. Unemployment Comp. Bd. of Rev., 642 A.2d 657, 659 (Pa. Commw. Ct. 1994); Kaite v. Unemployment Comp. Bd. of Rev., 175 A.3d 1132, 1134 (Pa. Commw. Ct. 2017).

[75] Kaite v. Unemployment Comp. Bd. of Rev., 175 A.3d 1132, 1136 (Pa. Commw. Ct. 2017).

[76] *Id.*

rejecting *Smith*, even though the Pennsylvania Supreme Court has never explicitly addressed the question.

"The guarantee of religious liberty conferred by the text of the Pennsylvania Constitution mirrors William Penn's original vision of religious tolerance."[77] Penn, in a vision of religious toleration that would serve as the foundation for the American experiment, emphasized the importance of broad protections for religious conscience. "We are pleading only for such a *Liberty of Conscience*, as preserves the Nation in Peace, Trade, and Commerce; and would not exempt any man, or Party of men, from not keeping those *excellent Laws*, that tend to Sober, Just, and Industrious Living."[78] There is no suggestion that Liberty of Conscience does not provide exemption to any law,[79] nor is his limiting principle based on "general applicability." As Professor McConnell observed, a rational basis test would not restrict denial of conscience-based exemptions to "excellent Laws," but would permit governmental interests to take precedence over religious exercise in most every instance.[80]

At the time of Pennsylvania's adoption of its first constitution in 1776, its constitution even more clearly protected robust religious practice.

> Nor can any man, . . . be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or

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[77] Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 89 (2001); *see also* John K. Alexander, *Pennsylvania: Pioneer in Safeguarding Personal Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 308, 309 (Patrick T. Conley & John P. Kaminsky eds., 1992) ("Pennsylvania's tradition of guaranteeing basic liberties in writing stemmed directly from William Penn's philosophy and experience.").

[78] WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE ONCE MORE BRIEFLY DEBATED & DEFENDED 34 (1670) (second emphasis added).

[79] McConnell, *supra* note 20, at 1447–48.

[80] *See id.* at 1448.

> in any manner controul, the right of conscience in the free exercise of religious worship.[81]

In 1790, after the adoption of the federal Constitution, Pennsylvania's constitution was even further strengthened to say, "no human authority can, in any case whatever, controul or interfere with the rights of conscience."[82] Upon this foundation, even before *Sherbert*, the Pennsylvania courts held that the Pennsylvania constitution safeguarded the right to attempt to convert members of the Roman Catholic faith where there was no evidence that those who attempted to convert had caused any "unrest" in the past or would "breach the peace" or offend "good order" in the future.[83] In other words, Pennsylvania took the words of its constitution seriously and safeguarded religious interests except when compelling state interests, constitutionally defined, were at stake to justify an infringement on religious practice.

In 1817, in *Commonwealth v. Wolf*, the Pennsylvania Supreme Court upheld a Sunday closing law because it was "of the utmost moment" that members of the community abide by a day of rest "to invigorate their bodies for fresh exertions of activity."[84] Without using the words, even the early Pennsylvania courts did not utilize rational basis review or suggest that no religious challenges could be brought against generally applicable laws. Instead, they seemed to analyze religious claims by looking to whether the state had sufficiently demonstrated a compelling justification for the regulation at stake.

6. Rhode Island

Rhode Island's free exercise clause is perhaps one of the longest and emphasizes the state's unique history in the establishment of religious liberty.

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[81] PA CONST. of 1776, art. I, § 2, cl. 2.

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

[83] *In re* Conversion Ctr. Charter Case, 130 A.2d 107, 111 (Pa. 1957).

[84] Commonwealth v. Wolf, 3 Serg. & Rawle 48, 51 (Pa. 1817).

> Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concernments; we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.[85]

Before *Smith*, the Rhode Island Supreme Court emphasized that this right is extensive and can be limited only "when the societal interest becomes so important as to justify an incursion by the state into religious activity."[86] Once a religious claimant establishes sincerity, the State "would bear a heavy burden of establishing how such actions threaten any compelling interest that the state may have."[87] Although the Rhode Island Supreme Court has not expressly rejected *Smith*, it did reject *Smith*'s reasoning in an unpublished decision determining whether the Catholic Church should be scrutinized for its employment decisions; the court did not view the

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[85] R.I. CONST. art. I, § 3.

[86] *In re* Palmer, 386 A.2d 1112, 1115 (R.I. 1978).

[87] *Id.* at 1116.

question of the general applicability of employment laws as sufficient to resolve the issue of religious employment.[88] A strong argument can be made that the court would not be likely to adopt the *Smith* test, even if it has not implicitly rejected it already.[89]

In his seminal article on free exercise jurisprudence, *The Origins and Historical Understanding of Free Exercise of Religion,* Professor McConnell relied heavily on Rhode Island's founding document, the Charter of 1663, in order to establish his argument for the founding principle of religious exemptions and as-applied challenges to legislation.[90] This document protects people from being in "any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony."[91] This language expressly protects religious practices, so long as conduct does not actually disturb the public peace. Professor McConnell explains, "[B]elievers were not required to obey *all* 'laws established,' but only those directed to maintaining the 'civill peace' and preventing licentiousness and profaneness, or the injury of others."[92] Rhode Island's founding document robustly protected the right of religious exemption through explicit language, subject to well-defined exceptions tied to specific and compelling state interests.

7. Virginia

In contrast to the short, terse words in the federal Constitution, the Virginia constitution is lengthy and thorough.

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[88] Heroux v. Carpentier, No. C.A. NC 93-0088, 1998 R.I. Super. LEXIS *52, at *18–19, 23–25 (R.I. Super. Ct. Jan. 23, 1998).

[89] *See* Thomas R. Bender, *Dusting Off Article I, Section 3: The Possibility of Constitutionally Required Exemptions from Rhode Island General Laws*, 53 R.I. BAR J. *13, *13 (2004).

[90] *See* McConnell, *supra* note 20, at 1425–28, 1457 n.242.

[91] CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS—1663, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES: PART II 1595–96 (Ben Perley Poore ed., 2d ed. 2001).

[92] McConnell, *supra* note 20, at 1426.

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[93]

Upon the basis of this provision, the Virginia constitution provides that "all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities."[94] Rather than protecting bare freedom to worship, the language in the constitutional text protects any individual who suffers "on account of his religious opinions or belief."[95] This lengthy, extensive provision is a direct result of the work of James Madison and Thomas Jefferson.[96] "The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed."[97]

Upon this foundation, a Virginia intermediate court has both implicitly disagreed with the Supreme Court in *Smith* and found that Virginia's own constitution provided stronger protections than those found in *Smith*. The Court of Appeals of Virginia held in *Horen v. Commonwealth* that "[t]he Free Exercise Clause of the United States Constitution, the Constitution of Virginia, and the Religious Freedom Restoration Act of 1993, prohibit state imposition of substantial burdens on the exercise of religion unless the state advances a compelling government interest which is furthered in the least restrictive manner."[98] The Virginia court analyzed a Virginia law that prohibited Native Americans from possessing owl feathers that had a

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[93] VA. CONST. art. I, § 16.

[94] *Id.*

[95] *Id.*

[96] Everson v. Bd. of Educ., 330 U.S. 1, 12–13 (1947).

[97] Reid v. Gholson, 327 S.E.2d 107, 111–12 (Va. 1985) (footnote omitted).

[98] Horen v. Commonwealth, 479 S.E.2d 553, 556–57 (Va. Ct. App. 1997) (citations omitted).

religious significance. The law in question, while allowing for a variety of legitimate secular uses of owl feathers, denied an "exception for bona fide religious uses and thereby draws specific subject matter distinctions in regulating the use of feathers."[99] While the court never explicitly critiqued *Smith,* it made clear its belief that the compelling interest test more faithfully modeled the free exercise clauses of both constitutions, implicitly rejecting *Smith*: "[T]he [Religious Freedom Restoration Act ("RFRA")] incorporates the compelling interest test as applied under the Free Exercise Clause and as articulated in *Sherbert.*"[100] Although the Supreme Court of Virginia has yet to address the issue, *Horen*, if followed, would likely lead the court to expressly reject *Smith*.

B. States Not in Existence at the Founding

Although the states that were not existent at the time of the Founding cannot, by necessity, provide the same insights into the founders' understanding of free exercise, the decisions and principles these other states articulate are still valuable. They help illustrate in myriad ways the true center of this debate—the practical questions of workability surrounding free exercise.

1. Alaska

Alaska has regularly emphasized that "no value has a higher place in our constitutional system of government than that of religious freedom."[101] Under the Alaskan system, religious plaintiffs must make an initial showing of three things in order to seek a religious exemption.[102] They must show that a religion is involved, that their conduct is based on religion, and that they are sincere in that religious belief.[103] Once these three initial showings are made, "religiously impelled actions can be forbidden only 'where they

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[99] *Id.* at 557.

[100] *Id.* at 559.

[101] *Sands v. Living Word Fellowship,* 34 P.3d 955, 958 n.11 (Alaska 2001) (quoting *Frank v. State,* 604 P.2d 1068, 1070 (Alaska 1979)).

[102] *In re* Protective Proc. of Tiffany O., 467 P.3d 1076, 1081 (Alaska 2020) (citing *Frank*, 604 P.2d at 1070–71).

[103] *Id.*

pose some substantial threat to public safety, peace or order, or where there are competing governmental interests 'of the highest order and . . . not otherwise served.'"[104] This standard, like that of many of the other states discussed, thus follows a burden-shifting approach, under which a plaintiff must make an initial showing of a sincerely burdened religious practice before the burden of strict scrutiny is imposed on the government.[105] Upon establishing that a sought exemption implicates a compelling government interest, the final question asks "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."[106] Federal courts typically address this final issue by asking whether the state is utilizing the "least restrictive means" in achieving its compelling interest. But this articulation from Alaska helps focus the issue on the real concern that strict scrutiny should seek to address, namely, whether the compelling interest at stake would actually suffer if a particular individual is granted an exception from a piece of legislation. In many cases, the answer to this exception will be a "No," no matter how compelling the interest may be. "If an exemption would not harm the government's interest, the means chosen to achieve the interest were probably neither narrowly tailored nor least restrictive."[107] Thus, the Alaska courts emphasize that the state should generally be in the business of seeking to avoid infringements upon religious practice through its legislation, and religious exemptions should be granted whenever such an exemption might be feasible.

In *In re Protective Proc. of Tiffany O.*, the Alaska Supreme Court held that the state's removal of a guardian who sought to use "faith-based medicine" was justified under strict scrutiny, as the removal was necessary to protect the physical health and safety of the ward.[108] The court emphasized that determining the nature of the government interest at stake is not done in the abstract but by looking at the purposes the actual statutes

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[104] *Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 281 (Alaska 1994) (quoting *Seward Chapel, Inc. v. City of Seward,* 655 P.2d 1293, 1301 n.33 (Alaska 1982)).

[105] *See id.*

[106] *Frank*, 604 P.2d at 1073.

[107] Larson v. Cooper, 90 P.3d 125, 132 (Alaska 2004).

[108] *Tiffany O.*, 467 P.3d at 1078, 1082.

in question reflect.[109] Moreover, the least-restrictive-means analysis focused specifically on whether an exemption would interfere with the performance of the government interest.[110] Should an exemption be granted, the guardian would not be able to follow the duties described by the guardianship statutes.[111] Therefore, granting such an exception "would be directly counter to the State's interest in protecting its most vulnerable citizens from harm."[112] In other words, granting the guardian an exception could not occur without fundamentally thwarting the very purpose of the statute. *Tiffany O.* illustrates that even when religious liberty is at its most robust, when the government truly acts in accordance with a compelling interest and an exemption cannot be granted consistent with that interest, no religious anarchy will occur.

In *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court expressly rejected *Smith* as the framework for analyzing free exercise claims in Alaska, critiquing its reasoning extensively.[113] The court emphasized that free exercise rights are not limited "only to actions rooted in religious rituals, ceremonies, or practices."[114] The court also drew a careful free exercise distinction that merits consideration: it distinguished between "derivative" and "transactional" State interests. In cases regarding derivative State interests, "the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect."[115] In cases where the interest is transactional, the State's compelling interest is in its objection to the specific activity itself.[116] This distinction is a helpful tool of categorization, illustrating the fundamental distinction between laws that function perfectly

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109 *See id.* at 1082.

110 *See id.*

111 *Id.*

112 *Id.*

113 Swanner v. *Anchorage Equal Rts. Comm'n*, 874 P.2d 274 (Alaska 1994).

114 *Id.* at 281.

115 *Id.* at 282.

116 *Id.*

well after a religious exemption and laws whose fundamental purpose is defeated by the religious exemption.

The case wherein the Alaska Supreme Court began to develop its independent defense of religious liberty is, perhaps not surprisingly, a case regarding the prosecution for the hunting of a moose.[117] There are interesting parallels to *Smith*. A Native American hunted a moose in violation of state hunting regulations but in accordance with the requirements for a funeral ceremony he intended to conduct as part of his religious practices.[118] Even though the defendant admitted that it was not necessarily impossible for the religious practice to be accomplished without the use of moose meat, the Alaska Supreme Court emphasized:

> [A]bsolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification. The determination of religious orthodoxy is not the business of a secular court.[119]

In other words, a vegetarian ceremony was theoretically possible, but the religious belief clearly expected the use of moose meat, and that was sufficient to bring the claim within the ambit of Free Exercise protections.[120] The State demonstrated a compelling interest in protecting and maintaining a healthy moose population within the state, a compelling interest that those of us who do not reside in Alaska may not as easily understand.[121] The State described a long parade of horribles that it contended would result from taking religious claims seriously by allowing a religious exemption to the hunting requirements.[122] The Alaska Supreme Court's rebuke of this argument was an implicit criticism of *Smith*'s similar parade of horribles.

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117 Frank *v. State*, 604 P.2d 1068 (Alaska 1979).

118 *Id.* at 1069, 1072.

119 *Id.* at 1072–73.

120 *Id.*

121 *Id.* at 1073.

122 *Id.* at 1074.

> [This] prediction of general lawlessness is an extreme and unwarranted comment on the general character of the state's citizens. Interests which justify limitations on religious practices must be far more definite than these. "Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment."[123]

The State had elucidated a compelling interest.[124] But what it did not show is how allowing a religious exemption would in any way defeat this interest.[125] A mere fear of general lawlessness that might result from granting religious exemptions was insufficient to justify their denial.[126] Speculation about the effect exemptions might have in some hypothetical future scenario is insufficient; the State must empirically demonstrate the necessity of its burdening of religious conduct.

In short, the Alaska court has emphasized that "[n]o value has a higher place in our constitutional system of government than that of religious freedom."[127] The court has further recognized that the presence of a compelling interest does indeed justify actions that infringe upon religious freedom, but only if the interest "will suffer if an exemption is granted to accommodate the religious practice."[128]

2. Colorado

Before *Smith*, the Colorado Supreme Court had observed that the free exercise clause of Colorado's constitution embodies "the same values of free

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[123] Frank *v. State*, 604 P.2d 1068, 1074 (Alaska 1979) (quoting Teterud v. Burns, 522 F.2d 357, 361–62 (8th Cir. 1975)).

[124] *Id.*

[125] *Id.* at 1073–74. This approach leaves results somewhat dependent on the factual record. For example, if thousands of people claimed religious exemptions for moose consumption, threatening moose population levels, the court's analysis would substantially shift.

[126] *Id.* at 1074.

[127] *Id.* at 1070.

[128] *Id.* at 1073.

exercise and governmental noninvolvement secured by the religious clauses of the First Amendment."[129] Thus, before *Smith*, the Colorado court utilized "the body of law that has been developed in the federal courts with respect to the meaning and application of the First Amendment for useful guidance."[130]

But, once *Smith* was decided, the Colorado courts began to shift their analysis and, like other states, stopped assuming that state free exercise jurisprudence would or should track with federal case law. For example, in the ministerial exemption case *Van Osdol v. Vogt*, the court described the "traditional" free exercise test of *Sherbert*, and applied it in order to grant a ministerial exception.[131] Citing a variety of pre-*Smith* cases, the court emphasized that a church's interest in free exercise outweighs the government's interest in enforcing a nondiscrimination statute.[132] Regardless of how "generally applicable" or "neutral" Title VII may be, it still cannot be allowed to intrude upon the ministerial decisions of churches.[133] While the Colorado Supreme Court distinguished *Smith*, rather than explicitly rejecting it, the court still nonetheless demonstrated a preference for the "traditional approach" to religious liberty claims—that is, strict scrutiny—and cast doubt on *Smith*'s applicability more generally.

3. Indiana

Indiana's constitution is perhaps one of the most facially clear and direct state constitutions in the country on the question of free exercise. It provides that "[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."[134] The Indiana Supreme Court has held that this provision prohibits the government from imposing a "material burden" on religious

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[129] *Ams. United for Separation of Church & State Fund, Inc. v. State,* 648 P.2d 1072, 1081–82 (Colo. 1982).

[130] *Conrad v. City & Cnty. Of Denver,* 656 P.2d 662, 670–71 (Colo. 1982).

[131] Van Osdol v. Vogt, 908 P.2d 1122, 1127 (Colo. 1996).

[132] *Id.* at 1125, 1127.

[133] *Id.* at 1130–31.

[134] IND. CONST. art. I, § 3.

practice.[135] The court has explicitly rejected the idea that the Indiana constitution need mirror the federal Constitution.[136] Unlike other states' analyses, Indiana's analysis goes "to the magnitude of the impairment and does not take into account the social utility of the state action at issue."[137] The "material burden" standard is also the standard Indiana courts utilize for other First Amendment rights, such as free speech.[138] This test is explicitly not a balancing test.[139] Instead, it looks solely to the question of the "magnitude of the impairment" on the right being infringed by government conduct.[140] The court has emphasized 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."[141]

4. Kansas

In Kansas, strict scrutiny applies to free exercise claims and "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[142] After *Smith*, in *State v. Evans*, the Kansas Court of Appeals found that "[t]he Kansas [c]onstitution contains a strong prohibition against religious coercion. . . . '[O]nly those interests of the highest order' ought to override the free exercise of religion."[143] In *Stinemetz v. Kansas Health Policy Authority*, the court of appeals reiterated there must be "a compelling state interest to justify imposition of terms that violate a[n individual's]

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[135] City Chapel Evangelical Free Inc. v. City of S. Bend *ex rel.* Dep't of Redevelopment, 744 N.E.2d 443, 445–46 (Ind. 2001).

[136] *Id.* at 446.

[137] *Id.* at 447 (quoting Price v. State, 622 N.E.2d 954, 960 n.7 (Ind. 1993)).

[138] Price v. State, 622 N.E.2d 954, 960 (Ind. 1993).

[139] *Id.* at 960 n.7.

[140] *Id.*

[141] *City Chapel Evangelical Free Inc.*, 744 N.E.2d at 450.

[142] *Wright v. Raines,* 571 P.2d 26, 31–32 (Kan. Ct. App. 1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[143] State v. Evans, 796 P.2d 178, 180 (Kan. Ct. App. 1990) (quoting *Wright*, 571 P.2d at 32).

constitutional rights."[144] Thus, Kansas courts continue to apply strict scrutiny to religious liberty claims in light of the independent language of the Kansas Constitution, regardless of the rule of *Smith*.

5. Maine

Before *Smith,* Maine viewed its constitution as protecting individual rights in parallel with the federal Constitution and applied the four-part framework articulated above.[145] After *Smith,* the Maine Supreme Court retained this framework, implicitly rejecting *Smith*, and continued to apply it to religious claims.[146] However, the Maine court, unlike other states' courts, has uniquely emphasized "the necessity of balancing the societal interests and the associated infringement on the free exercise of religion."[147] This balance is achieved by following the four-part framework and recognizing the significance of all interests at stake in clashes between laws and religious practices. The free exercise issue at stake in religious exemption cases must not be "an abstraction," but must concern the actual religious claims of the particular religious claimant.[148]

6. Michigan

Michigan continues to apply strict scrutiny to religious claims, relying on precedents like *Yoder* and *Sherbert.*[149] However, Michigan does not articulate the issue in terms of the burden-shifting framework articulated in other states. Instead, it has adopted a five-element test, asking whether an individual's conduct is sincerely held, whether it is religious in nature, whether a state regulation imposes a burden on the religious conduct, "whether a compelling state interest justifies the burden imposed upon a

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144 *Stinemetz v. Kan. Health Pol'y Auth.*, 252 P.3d 141, 157 (Kan. Ct. App. 2011) (citing State v. Bennett, 200 P.3d 455, 459 (Kan. 2009)).

145 Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1379, 1385 (Me. 1988).

146 *See* Rupert v. City of Portland, 605 A.2d 63, 65–66 (Me. 1992) (quoting *Blount*, 551 A.2d at 1379).

147 Fortin v. Roman Cath. Bishop of Portland, 871 A.2d 1208, 1228 (Me. 2005) (citing Swanson v. Roman Cath. Bishop of Portland, 692 A.2d 441, 444–45 (Me. 1997)).

148 *Id.* at 1229 (citing *Swanson*, 692 A.2d at 445).

149 McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998).

defendant's belief or conduct[,] and . . . whether there is a less obtrusive form of regulation available to the state."[150]

7. Minnesota

Smith provided an impetus for the Minnesota Supreme Court to begin to independently interpret the free exercise clause of its own constitution.[151] Under the Minnesota constitution, "the state may interfere with the rights of conscience only if it can show that the religious practice in question is [licentious] or 'inconsistent with the peace or safety of the state.'"[152] The Minnesota court has emphasized the state's unique history in respecting and promoting religious freedom, "with a lively appreciation by its members of the horrors of sectarian intolerance and the priceless value of perfect religious and sectarian freedom and equality."[153]

In light of the prominence and history of religious liberty in Minnesota, the Minnesota constitution imposes "a more stringent burden on the state" than is required by *Smith.*[154] Under the Minnesota approach, an individual must be granted a religious exemption "unless the state can demonstrate [a] compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption."[155] The court granted a religious exemption to an individual refusing to rent to unmarried individuals living together because the state possessed a "less restrictive means" to achieve its goals.[156] The court emphasized "the uncertain meaning of [*Smith*]," insisting on the need to keep following

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[150] *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 214–30 (1972)); *see also* Abdur-Ra'oof v. Dep't of Corr., 562 N.W.2d 251, 252 (Mich. Ct. App. 1997); Reid *ex. rel.* Reid v. Kenowa Hills Pub. Sch., 680 N.W.2d 62, 68–69 (Mich. Ct. App. 2004) (citing McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998)).

[151] State v. French, 460 N.W.2d 2, 8 (Minn. 1990) (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)).

[152] *Id.* at 9 (quoting MINN. CONST. art. I, § 16).

[153] *Id.* (emphasis omitted) (quoting State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. Eight, 44 N.W. 967, 974–75 (Wis. 1890)).

[154] *See id.*

[155] *Id.*

[156] *Id.* at 11.

robust strict scrutiny of religious liberty claims.[157] "Only the government's interest in peace or safety or against acts of licentiousness" can justify any imposition on religious practice.[158] Once a claimant demonstrates a sincere religious practice, the State is required to show that its interest in "public [peace or] safety cannot be achieved by proposed alternative means."[159] When faced with conflicts between the fundamental values of religious practice and public safety, the Minnesota constitution requires the "court to look for an alternative that achieves both values."[160] This articulation highlights the role of the final stage in the analysis, which is typically called the "least restrictive means" prong. What this prong means in practice is that once a religious liberty interest is established, and a compelling state interest is likewise established, the first goal of the court should be to seek to avoid the conflict and protect religious freedom. The Minnesota Supreme Court later restated its test in continued rejection of *Smith*.[161] Applying this test, in *Rasmussen v. Glass*, the Minnesota Court of Appeals held that a municipal civil rights commission had violated the Minnesota constitution in imposing a sanction on a restaurant and the restaurant's owner who, for reasons of "moral conscience," had refused to deliver food to an abortion clinic.[162]

8. Montana

The Montana constitution requires that "only those interests of the highest order and those not otherwise served can overbalance legitimate

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[157] State v. Hershberger, 462 N.W.2d 393, 396–98 (Minn. 1990) (citing Michigan v. Long, 463 U.S. 1032, 1040 (1983)).

[158] *Id.* at 397.

[159] *Id.* at 398 (citing State v. Hershberger, 444 N.W.2d 282, 288–89 (Minn. 1989)).

[160] *Id.* at 399.

[161] Hill-Murray Fed'n of Tchrs. v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992) (first citing *Hershberger*, 462 N.W.2d at 398; and then citing *State v. Sports & Health Club*, 370 N.W.2d 844, 851 (Minn. 1985)).

[162] Rasmussen v. Glass, 498 N.W.2d 508 (Minn. Ct. App. 1993).

claims to the free exercise of religion."[163] The Montana court has emphasized that the state may regulate religious activity only when there is an "overriding governmental interest."[164] Montana has thus implicitly rejected the *Smith* test.

9. Ohio

The Ohio Supreme Court explicitly rejected *Smith*, applying strict scrutiny to religious claims under the Ohio constitution.[165] *Smith* "marked the divergence of federal and Ohio protection of religious freedom."[166] Under the Ohio approach, the court first looks at the beliefs and practices of the person affected by the state action, then, that individual "must show that his religious beliefs are truly held and that the governmental [action] has a coercive affect against him in the practice of his religion."[167] Once that demonstration has been made, the burden shifts to the state to meet the compelling interest test.[168]

In *Humphrey v. Lane*, the Ohio Supreme Court addressed a conflict between a Native American's belief in the necessity of long hair and the State's policy prohibiting long hair for prison guards.[169] The court determined that the State had "a compelling state interest in establishing uniform and grooming policies for prison workers."[170] But the critical question in the case was the least restrictive means prong, which is primarily a factual determination.[171] Accommodating belief by allowing the religious individual to wear his hair pinned under a cap would still have

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[163] *Miller v. Cath. Diocese of Great Falls*, 728 P.2d 794, 796 (Mont. 1986) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1276 (Mont. 1992) (quoting *Miller*, 728 P.2d at 796).

[164] *St. John's Lutheran Church*, 830 P.2d at 1277 (citing United States v. Lee, 455 U.S. 252 (1982)).

[165] Humphrey v. Lane, 728 N.E.2d 1039, 1043–45 (Ohio 2000).

[166] *Id.* at 1044.

[167] *Id.* at 1045 (citing State v. Whisner, 351 N.E.2d 750 (Ohio 1976)).

[168] *Id.*

[169] *See id.* at 1045–46.

[170] *Id.* at 1046.

[171] Humphrey v. Lane, 728 N.E.2d 1039, 1046 (Ohio 2000).

fully effectuated the State interest at stake: consistent grooming policies.[172] Therefore, the State was required to allow the guard to pin his hair rather than cut it in a manner that would violate his religious belief.[173]

10. Oregon

Oregon's test for freedom of religion is somewhat unique. If a law targets religion, "exacting" scrutiny is applied.[174] If a law is neutral and generally applicable, the only questions are whether the regulation has statutory authority, and "whether [the court] should grant 'an individual claim to exemption on religious grounds.'"[175] Individuals affected by a law of general applicability can challenge that law as applied to them by "argu[ing] that [the court] should craft an exception for religiously motivated [conduct] from the neutral rule."[176] Although this is clearly a rejection of *Smith*, the Oregon courts have not yet defined a test to determine the criterion whereby a religious exception is granted.[177] In other words, they have gone so far as to reject *Smith*'s primary point but have not yet clarified what they intend to adopt as an alternative.

11. Washington

The Washington Supreme Court has also explicitly rejected *Smith*, requiring a compelling interest to justify infringements on religious practice.[178] It too has chosen to "eschew the 'uncertainty' of *Smith*."[179] The Washington court thoroughly attacked *Smith* and its reasoning, arguing that *Smith* "departs from a long history of established law and adopts a test

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172 *Id.*

173 Humphrey v. Lane, 728 N.E.2d 1039, 1046 (Ohio 2000).

174 State v. Hickman, 358 P.3d 987, 995 (Or. 2015) (citing State v. Van Brumwell, 249 P.3d 965, 974 (Or. 2011)).

175 *Id.* (quoting Cooper v. Eugene Sch. Dist., 723 P.2d 298, 305 (Or. 1986)).

176 *Van Brumwell*, 249 P.3d at 974.

177 *See* Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1077 (Or. Ct. App. 2017).

178 First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (citing Witters v. Comm'n for the Blind, 771 P.2d 1119, 1122–23 (Wash. 1989)).

179 *Id.* at 185 (citing State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990)).

that places free exercise in a subordinate, instead of preferred, position."[180] Unlike *Smith*, the Washington "court . . . has rejected the idea that a political majority may control a minority's right of free exercise through the political process."[181]

In Washington, a burden on religious exercise can only be justified by a compelling interest, which in Washington is defined as "a clear justification . . . in the necessities of national or community life"[182] that presents a "clear and present, grave and immediate" danger to public health, peace, and welfare.[183] Moreover, "the State . . . must [show] that the means chosen to achieve [the] compelling interest are necessary and the least restrictive available."[184] In particular, this necessitates a showing that the government "has a narrow means for achieving a compelling goal."[185]

In one case, the Washington Supreme Court held that an ordinance authorizing an administrative delay of up to fourteen months in issuing a demolition permit for any structure more than fifty years old, or "places of historic value," could not constitutionally be applied to a Catholic bishop who sought a permit to demolish an old school building and replace it with a new pastoral center.[186] Even though the law in question was essentially "neutral," the State interest could still be achieved while allowing for religious exemptions.

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[180] *Id.* at 187.

[181] *Id.* (citing State *ex rel.* Bolling v. *Super. Ct. for Clallam Cnty., 133 P.2d 803, 807–08 (Wash. 1943)).*

[182] *Bolling, 133 P.2d at 809 (Wash. 1943)* (quoting *Barnette v. W. Va. State Bd. of Educ.,* 47 F. Supp. 251, 253–54 (S.D. W. Va. 1942), *aff'd,* 319 U.S. 624 (1943)).

[183] *State ex rel. Holcomb v. Armstrong, 239 P.2d 545, 548 (Wash. 1952); see City of Sumner v. First Baptist Church of Sumner, 639 P.2d 1358, 1363 (Wash. 1982)*; *Bolling,* 133 P.2d at 808–09; *State v. Norman,* 808 P.2d 1159, 1163 (Wash. Ct. App. 1991).

[184] First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (citing *Sumner*, 639 P.2d at 1362–63; *id.* at 1366 (Utter, J., concurring)).

[185] City of Woodlinville v. Northshore United Church of Christ, 211 P.3d 406, 410 (Wash. 2009) (citing Open Door Baptist Church v. Clark Cnty., 995 P.2d 33, 38–39 (Wash. 2000)).

[186] Munns v. Martin, 930 P.2d 318, 322, 326 (Wash. 1997).

12. Wisconsin

Wisconsin has also explicitly rejected the rule of *Smith* and adopted the four-part strict scrutiny test.[187] The provisions of the Wisconsin constitution protecting the freedom of religious conscience

> operate as a perpetual bar to the state, and each of the three departments of the state government, and every agency thereof, from the infringement, control, or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guaranty protection in the freedom of such exercise. We neither have nor can have in this state, under our present constitution, any statutes of toleration, nor of union, directly or indirectly, between church and state[,] for the simple reason that the constitution forbids all such preferences and guaranties all such rights.[188]

In one case, an Old Order Amish religious community argued that displaying a red and orange triangular "slow-moving vehicle" emblem on their horse-drawn buggies would burden their sincerely held religious beliefs.[189] Acknowledging *Smith*, the Wisconsin court nonetheless relied on *Sherbert*, *Yoder*, and pre-*Smith* decisions.[190] The Amish church prohibited loud colors and worldly symbols, and the statute requiring the symbol would have, according to these individuals, infringed upon their religious practices.[191]

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[187] State v. Miller, 549 N.W.2d 235, 239–40 (Wis. 1996); Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm'n, 768 N.W.2d 868, 886 (Wis. 2009).

[188] *State ex rel. Weiss v.* Dist. Bd. of Sch. Dist. No. Eight, 44 N.W. 967, 978 (Wis. 1890).

[189] *Miller*, 549 N.W.2d at 236–37.

[190] *Id.* at 240–41.

[191] *Id.* at 241.

The compelling interest of the State in public safety was undisputed.[192] But although "the State [has] a compelling interest in public safety on the highways," it failed to demonstrate "that its interest[] [could not] be met by alternative means that [were] less restrictive of the challengers' free exercise of religion."[193] As an alternative to the objectionable emblem, the Amish proposed that they place white reflective tape around the perimeter of their buggies.[194] Expert testimony established that this white reflective tape was *more* visible than the red and orange emblem required by state law and, therefore, would even more effectively fulfill the compelling interest relied upon by the State.[195] The State's primary argument against this alternative was that it would be "irregular and nonenforceable."[196] The State argued that its compelling interest could only be served by the unique official emblem.[197] Rather than rubberstamping this argument, the court emphasized that the State did not put forward any evidence that its requirement would be more effective than the alternative, or that the alternative exemption would be unenforceable. Rather than dealing in the abstract, the court relied on concrete, record evidence to reject the State's unsupported assertion that the law was the least restrictive means of achieving its interest.

III. ANSWERING JUSTICE BARRETT'S QUESTIONS

The time has come to return to the questions posed by Justice Barrett. As noted above, Justice Barrett's concern was not the first-order concern about whether *Smith* was rightly decided. She directly conceded, "the textual and structural arguments against *Smith* are more compelling."[198] Her concern instead was with the practical consequences of replacing *Smith* with "an

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192 *Id.*

193 *Id.* at 241–42 (citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).

194 *Id.* at 241.

195 State v. Miller, 549 N.W.2d 235, 241–42 (Wis. 1996).

196 *Id.* at 242.

197 *Id.*

198 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

equally categorical strict scrutiny regime."[199] Justice Barrett posed four questions.[200] All four have received practical answers in state courts. The first asked about whether there should be any distinction between entities and individuals.[201] The second, whether there should be any distinction between direct and indirect burdens on religious exercise.[202] The third, and most important, is what level of scrutiny should apply.[203] The final was whether pre-*Smith* cases would have come out any differently in cases regarding challenges to "garden-variety laws."[204] These states have faced the same problems Justice Barrett raises and have thoroughly wrestled with the answers. These answers illustrate that strict scrutiny, rather than a lawless and unintelligible wasteland, has proved to be a clear and comprehensive standard, responsive to the questions Justice Barrett raised.

A. Distinction Between Entities and Individuals?

It is perhaps interesting that Justice Barrett even raised the question of whether a distinction should be drawn between entities and individuals under an alternative approach to *Smith*, because even under *Smith* the Supreme Court has already made clear that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission."[205] The Court has held that RFRA, which incorporates the pre-*Smith* framework, applies to corporate entities as well as individuals.[206] None of those holdings were in any way dependent on the *Smith* rule, and there is no reason to believe that overruling *Smith* would in any way have an effect on these precedents.

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199 *Id.*

200 *See id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

205 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).

206 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014).

But if there were any doubt, states that apply strict scrutiny to free exercise claims all consistently apply them to the claims of religious entities. The ministerial exception is an area of particular importance in the state courts, and courts have no hesitancy to robustly protect the employment decisions of religious entities.[207] Colorado, for example, applies "a balancing test to determine when a person *or religious institution* should be granted an exemption from a law that would otherwise require that person or institution to violate their religious beliefs."[208] The test does not, in other words, distinguish between the rights of individuals and entities. Other areas of the First Amendment do not drive a major distinction between rights possessed by an individual and those possessed by an entity, and it would make little sense to develop such a distinction here.

B. Distinction Between Direct and Indirect Burdens on Religious Exercise?

In *Braunfeld v. Brown*, the Supreme Court suggested, in an opinion by Justice Warren, that a distinction could be drawn between laws that impose a direct burden on religious exercise and those that impose an indirect burden.[209] *Brown*, which preceded *Sherbert*, stated that the Court shouldn't "strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself."[210] What it did not do is define what that "critical scrutiny" looks like. However, it clearly did not suggest that laws that impose an indirect burden are immune from scrutiny at all. In fact, the court explicitly rejected *Smith*-style reasoning, making clear that "to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification."[211] The Court held that a statute of general

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[207] Schmoll v. Chapman Univ., 83 Cal. Rptr. 2d 426, 432 (Cal. Ct. App. 1999); Van Osdol v. Vogt, 908 P.2d 1122, 1127 (Colo. 1996) (en banc) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

[208] *Van Osdol*, 908 P.2d at 1127 (emphasis added) (citing *Sherbert*, 374 U.S. 398).

[209] Braunfeld v. Brown, 366 U.S. 599, 600, 606–07 (1961) (plurality opinion).

[210] *Id.* at 606.

[211] *Id.* at 607.

applicability is valid despite an indirect burden "unless the State may accomplish its purpose by means which do not impose such a burden," a clear foreshadowing of the least-restrictive-means test.[212] *Sherbert* would later distinguish *Braunfeld,* emphasizing that the compelling state interest present in *Braunfeld* was not present in the decision being reviewed there.[213] It utilized *Braunfeld* as a development on the road to strict scrutiny, rather than considering it a separate, stand-alone decision.

Oregon seems to somewhat maintain the *Braunfield* distinction: if a law targets religion, "exacting" scrutiny is applied.[214] If a law is neutral and generally applicable, the only question is whether the regulation has statutory authority, and whether the court should grant "an individual claim to exemption on religious grounds."[215]

The Alaska Supreme Court has addressed this sort of distinction by distinguishing between "derivative" and "transactional" state interests. In cases regarding derivative state interests, "the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect."[216] In cases where the interest is transactional, "the State objects to the specific desired activity itself."[217] That distinction is likely to be far more effective as a means of addressing free exercise claims than simply attempting to distinguish between "direct" and "indirect." Overall, the direct and indirect distinction seems largely addressed by the compelling interest test, and *Sherbert* helped focus our analysis not on the extent of the burden, but on the scope of the state justification for infringing on the right. In other words, religious practices are indirectly burdened; the courts then regularly wrestle with whether that burden is justified, in the light of the state's interests, as applied to the claimant's religious practice.

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212 *Id.* (citing Cantwell v. Connecticut 310 U.S. 296, 304–05 (1940)).

213 Sherbert v. Verner, 374 U.S. 398, 408 (1963).

214 State v. Hickman, 358 P.3d 987, 995 (Or. 2015) (citing State v. Van Brumwell, 249 P.3d 965, 974 (Or. 2011) (en banc)).

215 *Id.* (quoting Cooper v. Eugene Sch. Dist., 723 P.2d 298, 305–06 (Or. 1986)).

216 Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274, 282 (Alaska 1994).

217 *Id.*

C. What Level of Scrutiny Applies?

Of course, the primary question here is what replaces *Smith*. As New York illustrates, strict scrutiny is not the only alternative to *Smith*.[218] However, strict scrutiny is by far the majority approach, as this Article and others have demonstrated. Many states that have not yet formally rejected *Smith* have still shown signs they will likely continue to apply strict scrutiny when the issue is directly presented. But under these systems, strict scrutiny is not applied to every religious claim. Instead, the plaintiff must establish threshold showings of sincerity and burden for an as-applied challenge to be cognizable.[219] A burden is established when "the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly."[220] In general, while these threshold requirements are taken seriously, states do not overly scrutinize the extent of the individual's religious sincerity but center their examination on the asserted compelling interest.

Once these threshold showings are met, "the [S]tate would bear a heavy burden of establishing how such actions threaten any compelling interest that the [S]tate may have."[221] The inquiry focuses on whether the government interest is sufficiently compelling as to the particular defendant.[222] "The general objective of eliminating discrimination of all kinds referred to in the [statute] . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion."[223] "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[224] The question being posed is "whether a compelling [S]tate interest justifies the burden imposed

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218 *See* discussion *supra* Section II.A.3.

219 *See* discussion *supra* Section II.A.

220 Att'y Gen. v. Desilets, 636 N.E.2d 233, 237 (Mass. 1994).

221 *In re* Palmer, 386 A.2d 1112, 1116 (R.I. 1978).

222 State v. Mack, 249 A.3d 423, 443 (N.H. 2020).

223 *Desilets*, 636 N.E.2d at 238.

224 Wright v. Raines, 571 P.2d 26, 32 (Kan. Ct. App. 1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

upon a defendant's belief or conduct; [and] . . . whether there is a less obtrusive form of regulation available to the [S]tate."[225] Overall, the compelling interest typically needs to be established by looking to the particular interests underlying the statutory scheme at stake and asking a serious question of the State. State courts often look for explicit justification for the State's compelling interest in the language and explicit policy of the statutes in question themselves, with specific language in their constitutions helping frame the analysis in accord with the states' unique traditions.

The final inquiry is "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."[226] "If an exemption would not harm the government's interest, the means chosen to achieve the interest were probably neither narrowly tailored nor least restrictive."[227] The focus of these cases is rarely on what constitutes a compelling interest. Instead, the cases are almost always focused on the means chosen to achieve that interest. The precise weight of an interest in a particular statute can at times be difficult to determine, while whether the means chosen is sufficiently least restrictive is a direct, verifiable question. An individual must be granted a religious exemption "unless the [S]tate can demonstrate compelling and overriding [S]tate interest, not only in the state's general statutory purpose, but in refusing to grant an exemption."[228] This means a question can often be a question requiring extensive investigation and factfinding.[229] The State must show "that its interest[] [could not] be met by alternative means that are less restrictive of the challengers' free exercise of religion."[230] This analysis is very practical and objective, dependent on the very practical question of the tangible effect of a religious exemption on achieving the State's legitimate purposes.

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[225] People v. Dejonge, 501 N.W.2d 127, 135 (Mich. 1993) (citing Wisconsin v. Yoder, 406 U.S. 205, 214–230 (1972)).

[226] Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979); Seward Chapel, Inc. v. Seward, 655 P.2d 1293, 1293 (Alaska 1982).

[227] Larson v. Cooper, 90 P.3d 125, 132 (Alaska 2004).

[228] State v. French, 460 N.W.2d 2, 9 (Minn. 1990).

[229] *See, e.g.*, Frank *v. State*, 604 P.2d 1068 (Alaska 1979).

[230] State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996).

D. "Garden-Variety" Laws?

Justice Barrett's primary concern seems to be the result of "garden-variety" laws.[231] This concern echoes that of Justice Scalia, who wrote the majority opinion in *Smith,* that strict scrutiny "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[232] In her concurring opinion in *Smith*, Justice O'Connor addressed Justice Scalia's fears immediately, emphasizing that the Supreme Court and the lower courts have historically proved "quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests."[233]

State courts have empirically demonstrated and applied Justice O'Connor's rejoinder to Justice Scalia, showing the practical viability of properly recognizing the importance of state interests while protecting religious freedom. Contrary to Justice Scalia's fear that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice," state courts have proved more than competent to appropriately recognize and balance the interests at stake.[234] These cases illustrate that there are two kinds of garden-variety laws. In the first category, such as a garden-variety traffic law requirement for an emblem on horse-drawn buggies, the granting of a religious exemption may actually not infringe upon the operation or design of the garden-variety law.[235] The true issue is whether "the State . . . show[s] that its interest[] [could not] be met by alternative means that are less restrictive of the challengers' free exercise of religion."[236] In these cases, contrary to Justice Scalia's fears, the law can continue to effectively function even when religious people receive an individual exemption. The fact that we may choose to categorize a traffic-law

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[231] *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) (citing Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990)).

[232] *Smith*, 494 U.S. at 888.

[233] *Id.* at 902 (O'Connor, J., concurring).

[234] *Id.* at 889 n.5.

[235] *Miller*, 549 N.W.2d at 240–42.

[236] *Id.* at 241 (citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).

requirement as garden-variety does not change the fundamental point, which is that the law itself can fulfill the interest it is designed to carry out, even if religious individuals receive exceptions. Thus, religious liberty can often be a specific empirical inquiry. In other contexts, such as a murder prohibition, the granting of a religious exemption would clearly prevent the law from operating at all. That distinction, rather than whether a law is garden-variety or not, is what state courts have centered on in their application of free exercise principles. The shorthand of least restrictive means refers to this basic distinction. In other words, the constitutions, both federal and state, nowhere suggest that certain laws are banal enough to be exempt from First Amendment challenge. Instead, it is often banal, garden-variety laws that most easily lend themselves to religious exemptions without in any way preventing the law from achieving its ends. This is because the constitutional focus in determining whether an exemption is appropriate needs to never be on the law at stake, but on the scope of the religious right that has been interfered with by state action.

IV. CONCLUSION

A vast number of states have adopted strict scrutiny, and even more have made the basic recognition that *Smith* was wrong when decided. The state constitutions often make explicit what is implicit in the federal Constitution, namely, that limitations on religious practice can only be justified in specific, enumerated circumstances. From the beginning, state constitutions protected free exercise, subject only to narrow circumstances where a sufficiently compelling state interest justified an infringement on that right.

Robustly protecting First Amendment rights and acknowledging and applying their scope will only provide more protection to the core of those rights.[237] Justice Scalia feared that respect for religious freedom would be weakened by religious exemptions, but what weakens respect for the First Amendment is not the robust protection of the rights it protects, but shifting cultural attitudes that fail to truly recognize the scope and necessity

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[237] John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 488 (2014).

of fundamental rights.[238] Courts can robustly and carefully protect religious rights, regardless of cultural attitudes. But it is still ultimately the case that the protection of religious liberty depends on a shared cultural commitment to religious expression.[239] The unique values protected by the religion clauses should be recognized and embraced, rather than being minimized to a subordinate position. Religious expression can only be protected and valued as it should be if it is removed from the disfavored place *Smith* put it, even with regard to other First Amendment rights. These state courts illustrate that strict scrutiny for religious claims is not some unknown and untrod field, but the well-trod path of adjudication—not fundamentally different in kind from the protection of any other right. However, ultimately, state courts will not be completely sufficient to address religious accommodation, and the corollary protection at the heart of the federal Constitution must be restored.[240]

State supreme courts have avoided the gymnastics of *Smith* by continuing to apply a carefully defined strict scrutiny that robustly protected rights while also recognizing governmental interests. State courts have highlighted the reality that exemptions on the grounds of free exercise are just as appropriate and just as necessary as exceptions on any other ground. First Amendment issues can be perceived as somewhat partisan issues, differing significantly depending on one's political perspective. But on the issue of whether religious exemptions are at least possible, New York and Ohio, Oregon and Michigan, Massachusetts and Indiana are all in essential agreement, as this is, without doubt, an issue that transcends the particularities of partisanship. Their practical experiences demonstrate that the anarchy *Smith* feared has not become a political reality in any state—blue or red.[241] Government actions on the right and the left can and do inadvertently affect religious expression just as much as they can

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238 *Id.* at 506; *see also* Emp. Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

239 *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 779 (1986).

240 *See* Lingo & Schietzelt, *supra* note 9, at 723.

241 *Id.* at 761.

inadvertently affect the freedom of expression.[242] Ultimately, the entirety of the First Amendment is "a particularly important manifestation of the basic constitutional premise that the individual is to be left alone by government unless the government can show a sufficient reason to justify interfering with the individual's liberty."[243] The founders, particularly Madison and Jefferson, did not view religious liberty as a matter of choice but as a matter of acting according to the dictates of one's conscience.[244] The First Amendment does more than merely protect against discrimination; it renders government fundamentally unable to interfere with religious practice except in carefully defined circumstances. Justice Barrett feared that the granting of religious exemptions would be impracticable. But state courts' long histories of robust religious protection have resolved all her concerns.

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[242] Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1334 (1995).

[243] *Id.* at 1337.

[244] Michael J. Sandel, *Religious Liberty: Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597, 610 (1989).