

REVISITING FREE EXERCISE IN THE MICHIGAN CONSTITUTION

JOSEPH BRENNAN[†]

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[†] B.A., 2016, *magna cum laude*, Michigan State University; the author would like to thank Martin and Jane Brennan for their constant and unfailing encouragement, and Professor Christopher Lund for inspiring the subject of this Note.

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I. INTRODUCTION

The subject of free exercise rights is a priority for the nation’s highest Court.¹ At the end of its 2021 term, the Supreme Court decided two major cases with respect to the Free Exercise Clause of the First Amendment: *Carson v. Makin*² and *Kennedy v. Bremerton School District*.³ These opinions were issued shortly after the landmark cases of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁴ and *Fulton v. City of Philadelphia*.⁵ Even as the Supreme Court grapples with the proper scope of free exercise rights, however, some scholars are questioning the relevance of the right entirely.⁶

While federal free exercise jurisprudence has been evolving over the past half-century,⁷ some have called for a renewed emphasis on state

1. See John Elwood, *Two More Cases Involving Religious Exercise Claims*, SCOTUSBLOG (Mar. 16, 2022), <https://www.scotusblog.com/2022/03/two-more-cases-involving-religious-exercise-claims/> [https://perma.cc/52CL-BC3Y].

2. 141 S. Ct. 2883 (2021).

3. 597 U.S. 507 (2022).

4. 584 U.S. 617 (2018).

5. 593 U.S. 522 (2021).

6. Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 482, 484 (2017) (summarizing the scholarship of “Ronald Dworkin, Christopher Eisgruber, Lawrence Sager, Brian Leiter, and Micah Schwartzman” as suggesting that “the law should abandon special treatment of religion altogether.”).

7. Compare *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) with *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990) (moving from strict scrutiny analysis for all government actions substantially burdening the free exercise of religion to applying strict scrutiny only to government actions which are not “neutral” or “generally applicable.”).

constitutionalism with respect to this right.⁸ However, the decision of many state courts to adopt a “lockstep” approach to interpreting their own constitutions during the 20th century—tying their own constitution’s protections for free exercise rights to the First Amendment—complicates this approach.⁹ For all its merits, relying on federal precedent stunted the growth of robust interpretative frameworks for free exercise rights rooted in state constitutions.¹⁰ Some states have since departed from this method of state constitutional interpretation for free exercise rights.¹¹ Others, including Michigan, have struggled to do so.¹²

This Note argues that Michigan needs to re-examine its method of interpreting Art I § 4 of the Michigan Constitution (hereinafter, Art I § 4) and presents the case for why this clause supports applying strict scrutiny to free exercise of religion claims in Michigan. Part II of this Note provides background information on several landmark federal cases related to the First Amendment’s Free Exercise Clause which contextualizes the Michigan Supreme Court’s interpretation of its own constitution;¹³ then, this Note reviews several Michigan cases that demonstrate the confusion among lower courts in Michigan related to the application of Art. I § 4 to cases involving free exercise rights.¹⁴ Part III presents an argument for why Michigan should revisit its Art I § 4 interpretation to provide a detailed analysis for why the standard of review applied to free exercise rights in Michigan is independent of federal caselaw.¹⁵ Then, this Note presents several arguments to show why strict scrutiny is properly rooted in Art I § 4 based on Michigan’s constitutional history, the 1963 constitution’s structure, and Michigan Supreme Court caselaw related to free exercise rights.¹⁶ Finally, in Part IV, this Note concludes that strict

8. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 497 (2010); Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 354 (2004); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 276 (1993); Nicholas P. Miller & Nathan Sheers, *Religious Free Exercise Under State Constitutions*, 34 J. CHURCH & ST. 303, 305 (1992).

9. See Durham, *supra* note 8, at 364; see also Carmella, *supra* note 8, at 298–99.

10. See Durham, *supra* note 8, at 364; see also Carmella, *supra* note 8, at 298–99.

11. See *e.g.*, *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990); *Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 879 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

12. See discussion *infra* Part II.E.

13. See *infra* Part II.A–D.

14. See *infra* Part II.E.

15. See *infra* Part III.A.

16. See *infra* Part III.B.

scrutiny is properly applied to free exercise claims under Art. I § 4 by Michigan courts.¹⁷

II. BACKGROUND

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”¹⁸ The Supreme Court has considerably developed its approach to both the Establishment Clause and Free Exercise Clause.¹⁹ At one point during the late 19th century, the Court held that the Free Exercise Clause permitted the government to regulate religious *conduct* and only provided protection against the compulsion of religious *beliefs*.²⁰ However, during the middle part of the 20th century the Court eventually applied the highest standard of review, strict scrutiny, to government actions that burdened religious conduct.²¹ That is, to survive a First Amendment challenge, a government policy “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”²² However, the Court eventually walked back the application of strict scrutiny to all free exercise claims, limiting its application only to those statutes that were neither facially “neutral” with respect to religion or to those that were of “general applicability.”²³ This history is critical to understanding the application of the Michigan Constitution’s religion clauses in free exercise cases.²⁴

17. See *infra* Part IV.

18. U.S. CONST. amend. I.

19. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878). See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

20. See *Reynolds*, 98 U.S. at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

21. *Sherbert*, 374 U.S. at 406.

22. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; cf. *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021) (citations omitted) (“A government policy can survive strict scrutiny only if it advances ‘interests of the highest order’ and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.”). Because strict scrutiny requires that the government provide a “compelling interest,” it is also commonly called the “compelling interest test.” See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 746–47 (2014) (Ginsburg, J., dissenting); see also *People v. Dejonge*, 442 Mich. 266, 280–81, 501 N.W.2d 127, 135 (1993).

23. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

24. See MICH. CONST. art. I § 4.

A. The U.S. Supreme Court Established that Courts Must Apply Strict Scrutiny to Free Exercise Clause Claims in the Cases of Sherbert v. Verner and Wisconsin v. Yoder

In *Sherbert v. Verner*, the State of South Carolina denied Adele Sherbert, a member of the Seventh Day Adventist Church, unemployment benefits after she was fired for refusing to work on Saturdays due to her Sabbath observances.²⁵ South Carolina denied Ms. Sherbert these benefits because of her failure to accept “suitable work when offered” by her former employer.²⁶ The South Carolina Supreme Court found no First Amendment issue in denying these employment benefits, but the United States Supreme Court determined otherwise.²⁷ The Court first found that the denial of the unemployment benefits burdened the appellant’s free exercise of religion.²⁸ According to the Court, Ms. Sherbert’s free exercise right was burdened by the denial of unemployment benefits because she was forced “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work.”²⁹ The Court characterized the government’s imposition of this choice upon Ms. Sherbert as a fine levied against her for practicing a Saturday sabbath and evaluated whether a “compelling state interest” justified this burden.³⁰ The Court held that South Carolina did not have a sufficiently compelling state interest for its actions, reasoning that South Carolina’s asserted interest in preventing spurious unemployment claims based on religious exemptions was unfounded.³¹ Therefore, Adele Sherbert was entitled to an exception from South Carolina’s rule denying unemployment claims to those who refused to work on Saturdays.³² *Sherbert* thus established that the government must have a “compelling interest” to burden religious conscience.³³ Otherwise, the government’s action would violate the First Amendment.³⁴

The true significance of *Sherbert* would not be fully realized until nearly ten years later when the Court decided *Wisconsin v. Yoder*.³⁵ At

25. 374 U.S. at 399.

26. *Id.* at 401.

27. *Id.*

28. *Id.* at 403.

29. *Id.* at 404.

30. *See id.* at 404–07.

31. *Id.* at 404–07.

32. *Id.* at 407–09.

33. *See id.* at 406.

34. *See id.*

35. *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972); *see* Alfred G. Killilea, *Privileging Conscientious Dissent: Another Look at Sherbert v. Verner*, 16 J. CHURCH & ST. 197, 197 (1974) (“[w]hat was controversial, however, and indeed most significant about

issue in *Yoder* was whether Amish families could pull their children out of public school before high school, at ages 14 or 15, in violation of Wisconsin's requirement that children attend public school until age 16.³⁶ The Court acknowledged Wisconsin's strong interest in a system of compulsory education.³⁷ Still, relying on *Sherbert*, the Court held that the Amish were entitled to an accommodation given that the Wisconsin did not fulfill its burden of proving how its interest in compulsory education for children generally was adversely affected by granting an exemption to the Amish.³⁸ In particular, the Court noted that the State's policy justifications underlying compulsory education, promoting educational opportunities for children and protecting them from child labor, was not threatened by the traditional Amish practice of employing their children for farm labor.³⁹ Together, *Sherbert* and *Yoder* established that the exercise of religious conduct, not just beliefs, required the Court's highest standard of review under the First Amendment.⁴⁰

B. The Supreme Court's Decision in Employment Division v. Smith Drastically Altered the Court's First Amendment Analysis

In 1990, the Supreme Court revolutionized its approach for assessing religious liberty claims in the landmark decision *Employment Division v. Smith*.⁴¹ At issue in *Smith* was whether the State of Oregon could deny unemployment benefits to persons who were fired following "religiously inspired" peyote use.⁴² A drug rehabilitation center fired both Mr. Alfred Smith and Mr. Galen Black from their jobs for the ceremonial use of peyote in the Native American Church.⁴³ Following their termination, Oregon denied Smith and Black unemployment benefits and cited their

the *Yoder* ruling was that it reasserted and gave new force to an earlier and more important decision, *Sherbert v. Verner*.")

36. *Yoder*, 406 U.S. at 207.

37. *Id.* at 215, 236.

38. *Id.* at 236.

39. *Id.* at 227–28 (“[W]hile agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws. There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.”).

40. *Id.* at 207; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

41. 494 U.S. 872 (1990).

42. *Id.* at 874.

43. *Id.*

workplace misconduct as the basis for this decision.⁴⁴ In *Smith I*, the State of Oregon argued before the Court that the denial of benefits was constitutionally permissible since peyote use was a crime in that state.⁴⁵ While the Court agreed that the criminal status of peyote use was relevant, it ultimately sent the case back to the Oregon Supreme Court to determine whether the *religious* use of peyote was prohibited under Oregon law.⁴⁶ The Oregon Supreme Court held that there was no religious exemption from the statutory criminal prohibition of peyote use.⁴⁷ Ultimately, in *Smith II* the Supreme Court agreed with Oregon and held that there was no violation of Smith’s or Black’s First Amendment free exercise rights since peyote use “was prohibited under Oregon law.”⁴⁸

Although the Court said that it was not departing from its past precedent with respect to the religious exemptions under the First Amendment,⁴⁹ in effect it overturned the strict scrutiny standard established in *Sherbert* and *Yoder*.⁵⁰ In its place, the Court held that “neutral and generally applicable” laws were presumptively constitutional.⁵¹ Writing for the majority, Justice Scalia reasoned that, “[t]o make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is compelling — permitting him, by virtue of his beliefs, to become a law unto himself — contradicts both constitutional tradition and common sense.”⁵² For the Court, upholding free exercise rights where the government does not have a “compelling interest” in laws that burden religious conduct would give too much power to individuals in relation to the state.⁵³

Additionally, the Court acknowledged that subjecting the status of the free exercise right to the political process was a necessary evil.⁵⁴ By

44. *Id.*

45. *See id.* at 875.

46. *Id.*

47. *Id.* at 876.

48. *Id.* at 890.

49. *Id.* at 882–85.

50. *See Carmella, supra* note 8, at 277 (“But *Sherbert*’s analytical framework was discarded in 1990 when the Court decided *Employment Division v. Smith*. With a sweeping opinion that overturned settled law, the Court abandoned the strict scrutiny standard of judicial review in all but a few categories of free exercise cases.”).

51. *Smith*, 494 U.S. at 879, 882; *see Durham, supra* note 8, at 365 (explaining that *Smith* returned to the doctrine, formerly established in *Reynolds*, that the First Amendment only protected religious belief and not religious conduct. This doctrine is sometimes called the “secular regulation rule.”).

52. *Smith*, 494 U.S. at 885 (citations omitted).

53. *See id.* at 888.

54. *Id.* at 890.

refusing to find that neutral and generally applicable laws could implicate free exercise rights,⁵⁵ the Court left the creation of religious exemptions subject to the whims of legislatures.⁵⁶ While the Court acknowledged that their new approach would probably disfavor practitioners of minority religions, ultimately it found this collateral damage acceptable.⁵⁷ The Court reasoned that this approach was necessary because granting accommodations to every religious dissenter would render it nearly impossible to govern.⁵⁸ Given the context of America's considerable religious diversity, the application of strict scrutiny under the Free Exercise Clause would deem too many laws presumptively invalid for large groups of people, thereby "courting anarchy."⁵⁹

In her concurring opinion, Justice O'Connor, joined by Justices Brennan, Marshall, and Blackmun objected to the majority's holding with respect to neutral and generally applicable laws on several grounds.⁶⁰ First, Justice O'Connor recognized that the text of the First Amendment itself contradicted the majority's holding.⁶¹ Because the First Amendment language, "Congress shall make no law . . . prohibiting the free exercise,"⁶² did not distinguish between belief and conduct, Justice O'Connor argued that religious conduct should be presumptively protected by the First Amendment.⁶³ However, the *Smith* Court allowed the government to "prohibit, without justification, conduct mandated by an individual's religious beliefs, *so long as that prohibition is generally applicable*."⁶⁴ According to O'Connor, because *Smith* endorsed the prohibition of religiously motivated conduct, it was incongruent with the text of the Free Exercise Clause.⁶⁵

Additionally, Justice O'Connor argued that the Court's decision to eliminate strict scrutiny for "generally applicable" laws ignored the reality of free exercise cases generally.⁶⁶ Because states would probably not craft facially repressive laws targeting religious practices, requiring that laws

55. *See id.*

56. *See* James E. Wood, Jr., *Abridging the Free Exercise Clause*, 32 J. CHURCH & ST. 741, 749 (1990) (explaining that "[a]s a result of the Court's decision, religious exemption from compliance with a valid state law is entirely dependent on the will of the legislature and need not be concerned with the constraints of the Free Exercise Clause.").

57. *Smith*, 494 U.S. at 890.

58. *Id.*

59. *Id.* at 888.

60. *Id.* at 891 (O'Connor, J., concurring).

61. *Id.* at 893-94.

62. U.S. CONST. amend. I.

63. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring).

64. *Id.* (emphasis added).

65. *Id.*

66. *See id.* at 894.

be “generally applicable” before applying strict scrutiny substantially enervated the First Amendment.⁶⁷ Significantly, all the cases heard by the Court until *Smith* already concerned generally applicable laws that burdened religious practice, demonstrating the First Amendment’s relevance in these cases.⁶⁸

Although the *Smith* majority believed that strict scrutiny would give too much leeway to individual citizens over and against the government’s interest, Justice O’Connor argued that strict scrutiny “effectuates the First Amendment’s command that religious liberty is an independent liberty [and] that it *occupies a preferred position*.”⁶⁹ Therefore, the government needed to justify burdening this right by providing a compelling interest.⁷⁰ She argued that the right to religious free exercise deserved a standard of review reflecting the right’s importance.⁷¹ Justice O’Connor believed that the appropriate standard of review was established in *Sherbert* and *Yoder* which did “not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests *of the highest order*.”⁷² Unfortunately, *Smith* effectively undercut the respect for the First Amendment that *Sherbert* and *Yoder* had established.⁷³

Justice O’Connor also took issue with the way *Smith*’s rule would affect members from minority religions.⁷⁴ While the *Smith* majority found that it was appropriate to subject the status of free exercise rights to the political process,⁷⁵ Justice O’Connor argued that this was unacceptable and ignored the fundamental purpose of the Free Exercise Clause.⁷⁶ Minority religious communities are most at risk from laws that are neutral and generally applicable, since these laws most likely reflect the majority “norms, values and beliefs” in each political community.⁷⁷ This conclusion is supported by evidence suggesting that *Smith* reduced the number of

67. *See id.*

68. *See id.*

69. *Id.* at 895 (emphasis added).

70. *Id.*

71. *See id.* at 894.

72. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)) (emphasis added) (internal quotation marks omitted).

73. *Smith*, 494 U.S. at 882; see Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 899 (1992) (“I do not say this hyperbolically; I have thought about the choice of words carefully before using them. *Smith* creates the legal framework for persecution.”).

74. *Smith*, 494 U.S. at 902 (O’Connor, J., concurring).

75. *See supra* notes 54–59 and accompanying text.

76. *Smith*, 492 U.S. at 902.

77. Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 253 (2004).

favorable decisions for adherents to minority religions.⁷⁸ Aware of the disadvantages faced by members of these faiths, Justice O'Connor argued that it was completely inappropriate to tie the right to the free exercise of religion to politics.⁷⁹ By its nature, the First Amendment protects fundamental rights, including the free exercise of religion, "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁸⁰ Therefore, the compelling interest test was essential to giving full effect to "the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."⁸¹

The bottom line of the Court's decision in *Smith* was that it greatly reduced the threshold the government needed to clear to justify its laws under the First Amendment.⁸² Instead of requiring the government to provide a "compelling interest" when burdening religious conduct, all the government needed to provide after *Smith* was a showing that its regulations were "neutral" and "generally applicable."⁸³ Conversely, Justices O'Connor, Brennan, Marshall and Blackmun thought that *Smith* had gone too far.⁸⁴ While Justice Scalia thought that *Sherbert* and *Yoder* should not be applied broadly,⁸⁵ Justice O'Connor argued that strict scrutiny reflected the commitment by the First Amendment to protect religious liberty as a privileged right which was necessary to American pluralism.⁸⁶ Instead of faithfully interpreting the First Amendment, Justice O'Connor argued that *Smith* diverged from the textual meaning of the First Amendment,⁸⁷ ignored the burdens "generally applicable" laws could have on religious conduct,⁸⁸ denigrated the significance of the right to free exercise of religion,⁸⁹ and inappropriately disadvantaged practitioners of minority faiths.⁹⁰

78. *Id.* at 254.

79. *Smith*, 494 U.S. at 902.

80. *Id.* at 903 (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

81. *Id.* at 902.

82. See Carmella, *supra* note 8, at 278.

83. *Smith*, 494 at 881-82.

84. *Id.* at 891 (O'Connor, J., concurring).

85. *Id.* at 881-85 (majority opinion).

86. *Id.* at 903 (O'Connor, J., concurring).

87. *Id.* at 893-94.

88. *Id.*

89. *Id.* at 902.

90. *Id.*

C. Smith Provoked a Powerfully Negative Reaction Which Led to Congress's Passage of the Religious Freedom Restoration Act

The public reaction to *Smith* was consistent across partisan lines—the decision “was a disaster for religious liberty.”⁹¹ Though the Court communicated that it was merely drawing on legal principles from its past precedent,⁹² many legal scholars and political commentators decried that *Smith* “rewrote the entire jurisprudence of the Free Exercise Clause.”⁹³ Some even went so far as to say that *Smith* emptied the right to free exercise of religion entirely of its substantive meaning.⁹⁴

Almost immediately after *Smith* was decided, Congress set out to reinstate strict scrutiny as the standard of review for religious exemptions through the passage of the Religious Freedom Restoration Act (RFRA).⁹⁵ Within months after *Smith* was decided, the first drafts of RFRA appeared in Congress with then-Senator Joe Biden proposing a bill in the upper house.⁹⁶ In 1992, Senator Edward Kennedy proposed his own version of RFRA.⁹⁷ At the committee hearing for the bill, Senator Kennedy “observed that the RFRA ‘is supported by an extraordinary coalition of organizations with widely differing views on many other issues,’ including

91. See Michael McConnell, *For the Religious Freedom Restoration Act*, FIRST THINGS (Mar. 1992) <https://www.firstthings.com/article/1992/03/for-the-religious-freedom-restoration-act> [<https://perma.cc/H6H3-HQ9M>] (noting that “the reaction among religious and civil liberties groups from left to right was swift and nearly unanimous: it was a disaster for religious liberty. After *Smith*, the government would be free to penalize, punish, or prevent the exercise of religion without serious constitutional scrutiny so long as the law applied to nonreligious entities as well.”); see also Adamczyk et al., *supra* note 77, at 237–38 (explaining that “[t]he outcry over the *Smith* decision was immediate and influential. Within weeks of the decision, a disparate alliance, including the American Civil Liberties Union, . . . the Lutheran Church Missouri Synod, . . . and fifty-five constitutional scholars signed a petition protesting the decision.”).

92. *Smith*, 494 U.S. at 879–82.

93. Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 1015 (1998).

94. Carmella, *supra* note 8, at 278.

95. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

96. See Thomas Jipping & Sarah Perry, *The Religious Freedom Restoration Act: History, Status, and Threats*, THE HERITAGE FOUND. (May 4, 2021), <https://www.heritage.org/civil-rights/report/the-religious-freedom-restoration-act-history-status-and-threats> [<https://perma.cc/JT2H-UTGC>] (“Three months after *Smith*, Representative Stephen Solarz (D–NY) introduced House Resolution 5277, the Religious Freedom Restoration Act. . . . On October 26, 1990, then-Senator Joseph Biden (D–DE) introduced similar language as S. 3254 with seven co-sponsors.”).

97. Religious Freedom Restoration Act of 1992, S.2969, 102nd Cong. (1992), <https://www.congress.gov/bill/102nd-congress/senate-bill/2969/text> [<https://perma.cc/SX2V-6WDC>].

‘the American Civil Liberties Union [and] the Coalitions for America.’⁹⁸ At the same hearing, Senator Orrin Hatch remarked, “when the American Civil Liberties Union and the Coalitions for America see eye to eye on a major piece of legislation, I think it is certainly safe to say that someone has seen the light.”⁹⁹ After several modifications, the Senate passed RFRA by a vote of 97-3.¹⁰⁰ The House, after passing its own RFRA bill, then passed the Senate’s version on November 3, 1993.¹⁰¹ Finally, on November 16, 1993, President Bill Clinton signed RFRA into law.¹⁰²

RFRA explicitly repudiated the Supreme Court’s test in *Smith* and restored the application of strict scrutiny under the Free Exercise Clause previously established in *Sherbert* and *Yoder*.¹⁰³ In its findings, RFRA stated that “in [*Smith*] the Supreme Court virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion.”¹⁰⁴ Therefore, the act would “restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]¹⁰⁵ by providing that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁰⁶ RFRA was a bipartisan rebuke of the Court’s decision in *Smith*.¹⁰⁷

At its inception, RFRA’s scope was broad in its jurisdiction and effect.¹⁰⁸ RFRA would “apply [strict scrutiny] to government action at all levels—Federal, State, and local, and to laws and regulations already

98. Jipping & Perry, *supra* note 96 (quoting The Religious Freedom Restoration Act, S.Hrg. 102-1076, 102nd Congress, 2nd Session, September 18, 1992, at 2) (alteration in original).

99. *Id.*

100. 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993).

101. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).

102. 139 CONG. REC. D1315 (daily ed. Nov. 16, 1993).

103. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)) at § 2000bb(a)(1).

104. 42 U.S.C. § 2000bb(a)(1)-(2), (4) (1997).

105. *Id.* at § 2000bb(b)(1); *see also* Laycock & Thomas, *supra* note 101, at 218 (emphasizing that Congress’s purpose in passing RFRA was “to restore the traditional compelling interest test for all cases in which religious practices are substantially burdened by government, whether intentionally or unintentionally, whether through laws specifically aimed at religion or through laws of general application.”).

106. Pub. L. No. 103-141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb-1, -1 to -4 (2012) at § 2000bb-1(b).

107. *See* Jipping & Perry, *supra* note 96.

108. DAVID M. ACKERMAN, CONG. RSCH. SERV., THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 20 (1992).

existing as well as those enacted in the future.”¹⁰⁹ Furthermore, while the Court had found several exceptions to the application of strict scrutiny in free exercise cases prior to *Smith*, RFRA would apply to all actions by the government burdening religious exercise.¹¹⁰

With respect to its authority to enact RFRA, Congress “rested the case...entirely and exclusively on Section Five of the Fourteenth Amendment.”¹¹¹ In its Due Process Clause, the Fourteenth Amendment guarantees that no state “shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹¹² The Court had found that the “liberty” guaranteed in the Fourteenth Amendment also includes protections afforded to free exercise of religion in the First Amendment.¹¹³ Section Five of the Fourteenth Amendment reads that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”¹¹⁴ The Court had previously interpreted this clause to permit Congress to “use this power to define and protect rights that are more expansive than what the Court has held to be constitutionally protected.”¹¹⁵ Therefore, Congress reasoned that it could enact RFRA even though it “would provide religious exercise broader protection from State interference than does the Constitution”¹¹⁶

D. In City of Boerne v. Flores, the Supreme Court Struck Down RFRA as It Applied to the States and to Localities.

The Supreme Court responded to RFRA in *City of Boerne v. Flores*.¹¹⁷ In this case, a Catholic Archbishop sued the City of Boerne after the city denied a building permit application for a church expansion project.¹¹⁸ Boerne rejected the permit in compliance with a recent ordinance that designated the church’s location as a “historic district” that the city was

109. *Id.*

110. *Id.* at 22 (explaining that exceptions for “military regulations, prison regulations, and government’s management of its internal affairs” were all abandoned by RFRA.).

111. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 578 (1998).

112. U.S. CONST. amend. 14 § 1.

113. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

114. U.S. CONST. amend. 14 § 5.

115. ACKERMAN, *supra* note 108, at 30.

116. *Id.*

117. 521 U.S. 507, 536 (1997).

118. *Id.* at 511.

attempting to preserve.¹¹⁹ The Archbishop contended that the city's denial of the building permit violated RFRA.¹²⁰

In *Boerne*, the Court addressed the question of whether the Fourteenth Amendment gave Congress the power to enact RFRA in the first place.¹²¹ In the majority opinion, the Court held that section 5 of the amendment only afforded Congress the ability to pass "remedial" legislation.¹²² That is, Congress has the power to "enforc[e] the provisions of the Fourteenth Amendment" rather than to determine "the substance of the Fourteenth Amendment's restrictions on the [S]tates."¹²³ The Court reserved the power to decide the substance of the Fourteenth Amendment for itself.¹²⁴ Given the expansive scope of RFRA, the Court found that RFRA was *not* remedial and was instead an "attempt [at] substantive change in constitutional protections."¹²⁵ Therefore, the Court found RFRA be an unconstitutional exercise of Congress' authority under the Fourteenth Amendment.¹²⁶ As a result, RFRA could not be used against neutral or generally applicable laws passed by states or localities but could still be applied to federal laws.¹²⁷

In *Boerne*, Justice O'Connor further developed the arguments she made in her *Smith* concurrence.¹²⁸ In her dissenting opinion, Justice O'Connor did not disagree with the Court's reasoning regarding the Fourteenth Amendment.¹²⁹ Instead, she reiterated that the Court's starting point, namely *Smith*'s interpretation of the First Amendment, was erroneous.¹³⁰ Justice O'Connor acknowledged that since *Smith* was decided, its standard had been applied in several jurisdictions with devastating effects on religious minorities.¹³¹ She then proceeded to

119. *Id.* at 512.

120. *Id.*

121. *Id.* at 516–17.

122. *Id.* at 519.

123. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)) (internal quotation marks omitted).

124. *Id.* at 535–36.

125. *Id.* at 532.

126. *Id.* at 536.

127. See WHITNEY K. NOVAK, CONG. RSRCH. SERV., *THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER* (2020); see also Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 745 (1998) ("Flores held that RFRA is unconstitutional as applied to state and local governments. The decision does not affect RFRA's application to federal law, which is based on Congress's Article I powers and in no way depends on the Fourteenth Amendment.").

128. See *City of Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting).

129. *Id.*

130. *Id.*

131. *Id.* at 547; e.g. *Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990) (ruling that *Smith* prevented Hmong natives from objecting to their son's autopsy, even though their

explore the origins of the Free Exercise Clause to show that the drafters of the clause viewed the provision as a “guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.”¹³² According to the founders, Justice O’Connor argued, the language of “free exercise required, where possible, accommodation of religious practice”¹³³—an idea which *Smith* plainly contradicted.¹³⁴

In her coverage of the founding period, Justice O’Connor looked to several state constitutions and the Northwest Ordinance for assistance in interpreting the original meaning of the Free Exercise Clause.¹³⁵ According to Justice O’Connor, it was reasonable to assume that states interpreted the Federal Constitution as having a meaning similar to their own constitutions when they ratified it; therefore, these early state constitutional clauses related to religion were possibly the best resource available for interpreting the Constitution’s Free Exercise Clause.¹³⁶ It was significant that the first state constitutions of New York, New Hampshire, Maryland, Georgia, and Virginia all emphasized protection from governmental interference with the free exercise of religion *except* when these religious expressions threatened the public “peace” or “safety.”¹³⁷ Similarly, the Northwest Ordinance, which governed the territory including what is now “Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota” established that “[n]o person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.”¹³⁸ If *Smith* were correct, that neutral and generally applicable laws “are enforceable regardless of religious conscience,” then these provisos carving out specific exceptions to the scope of the right to free exercise of religion would have been unnecessary.¹³⁹ Instead, Justice O’Connor argued, it was more reasonable to read the Northwest Ordinance and early state constitutional clauses as protecting religious conscience even against neutral and generally applicable laws.¹⁴⁰

deeply held religious belief were that following the autopsy “the spirit of Neng [their son] would not be free” and that “his spirit will come back and take another person in his family.” (alteration in original)).

132. *City of Boerne*, 521 U.S. at 549 (O’Connor, J., dissenting).

133. *Id.* at 554.

134. *See* *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

135. *City of Boerne*, 521 U.S. at 552–55 (O’Connor, J., dissenting).

136. *Id.* at 552–53.

137. *Id.* at 553–55.

138. *Id.* at 554 (quoting Northwest Territory Ordinance of 1787, Art. I, 1 Stat. 52) (alteration in original).

139. *Id.* at 554.

140. *Id.* at 564.

Despite the relative strength of RFRA as applied to federal laws that are facially neutral as to religion,¹⁴¹ *Smith* is still in effect for First Amendment claims against state and local laws.¹⁴² Therefore, for free exercise claimants, state constitutional protections affirming strict scrutiny¹⁴³ and state RFRA statutes¹⁴⁴ have gained more significance. Even so, state RFRA statutes have been severely ineffective in providing greater protection in free exercise cases.¹⁴⁵ After *Smith* and *Boerne*, individuals seeking religious accommodations from facially neutral and generally applicable laws are in a perilous position—they must “wage battles in every political sphere simultaneously and they must win each one. If they fail anywhere, they fail completely.”¹⁴⁶

E. The Michigan Supreme Court Avoided Applying Smith to Free Exercise Claims Under Its Own Constitution

Michigan has ratified four constitutions throughout its history,¹⁴⁷ and Michigan’s present constitution, ratified in 1963, contains several relevant clauses related to the status of religious exercise.¹⁴⁸ These include the

141. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (holding that the government failed to satisfy RFRA “against the particular claimant whose sincere exercise of religion is being substantially burdened” when the federal government sought to prohibit the importation of DMT that a Brazilian religious group desired to use in its religious services).

142. See, e.g., *Fulton v. City of Phila.*, 593 U.S. 522 (2021); see also Lund, *supra* note 8, at 471 (“With each Supreme Court case that addresses the Free Exercise Clause but fails to reconsider it and with each lower court opinion that relies on it, *Smith* becomes more interwoven into our constitutional fabric.”).

143. See *Miller & Sheers*, *supra* note 8, at 305 (1992) (“What is certain is that religious practitioners can no longer count on the strong federal constitutional protection that they have received in the past. They will have to begin looking at state constitutional safeguards for protection against state laws that are facially neutral towards religion.”).

144. See Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165 (2016).

145. Lund, *supra* note 8, at 469 (2010) (“However valuable it is to have religious liberty enshrined as an ideal on the books, it is far more important to have meaningful protections that can be successfully invoked by plaintiffs in the real world. These state RFRAs, for the most part, are simply not providing that.”).

146. *Id.* at 474.

147. See *Michigan Constitutional Conventions*, UNIV. OF MICH. BENTLEY HIST. LIBR., <https://bentley.umich.edu/legacy-support/politics/conventions.php#1907> (last visited Mar. 30, 2024) [<https://perma.cc/ZZW2-RXYS>]. Michigan Constitutions were ratified in 1835, 1850, 1908, and 1963. *Id.* *Michigan Constitution*, MICH. LEGISLATURE (Feb. 2023), <https://www.legislature.mi.gov/Publications/MICConstitution.pdf> [<https://perma.cc/GV4U-NTKD>].

148. See MICH. CONST. pmb.; See MICH. CONST. art. I § 2; See MICH. CONST. art. I § 4; See MICH. CONST. art. VIII § 1.

preamble, the Equal Protection Clause in Art. I § 2, Art. I § 4, and Art. VIII § 1.¹⁴⁹ While each of these clauses may become the subject of constitutional analysis, this Note will focus on Art. I § 4 and on those clauses that are most closely related to the federal Free Exercise Clause: “Every person shall be at liberty to worship God according to the dictates of his own conscience. . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”¹⁵⁰

The history and evolving context of the federal standard of review related to free exercise cases is highly relevant to understanding Michigan courts’ approach to interpreting the Michigan Constitution’s religion clauses.¹⁵¹ Prior to *Smith*, Michigan courts interpreted these clauses as having basically the same meaning as the First Amendment.¹⁵² Consequently, the compelling interest test developed in *Sherbert* and *Yoder* was applied to interpret Art. I, § 4.¹⁵³ Given the degree to which

149. MICH. CONST. pmb. (“We, the people of the State of Michigan, *grateful to Almighty God for the blessings of freedom*, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution.” (emphasis added)); MICH. CONST. art. I § 2 (“No person shall be denied the equal protection of the laws; *nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion*, race, color or national origin.” (emphasis added)); MICH. CONST. art. I § 4; MICH. CONST. art. VIII § 1 (“*Religion, morality and knowledge* being necessary to good government and the happiness of mankind, schools and the means of education *shall forever be encouraged*.” (emphasis added)).

150. MICH. CONST. art. I § 4 (emphasis added); see *In re Legislature’s Request for An Op.*, etc., 384 Mich. 82, 104, 180 N.W.2d 265, 274 (1970), *appeal dismissed sub nom. Smith v. Eastern Orthodox Churches*, 401 U.S. 429 (1971) (“[t]aken together, these sentences are an expanded and more explicit statement of the establishment and free exercise clauses of the First Amendment to the United States Constitution, the first and fourth sentences constituting the free exercise clause, and the second and third sentences constituting the establishment clause.”).

151. MICH. CONST. art. I, § 4 (“Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”).

152. *In re Legislature’s Request for An Op.*, etc., 180 N.W.2d at 274; see *Bennison v. Sharp*, 121 Mich. App. 705, 711, 329 N.W.2d 466, 469 (1982) (demonstrating how Michigan Courts have tied together the analysis of both the First Amendment and the Michigan Constitution’s religion clauses); see also *Council of Orgs. & Others for Educ. About Parochiaid v. State*, 506 Mich. 455, 491, 958 N.W.2d 68, 88 (2020).

153. See, e.g., *Sheridan Rd. Baptist Church v. Dep’t of Educ.*, 426 Mich. 462, 510–12, 396 N.W.2d 373, 395–96 (1986).

these clauses were tied to federal jurisprudence surrounding the First Amendment, it may seem surprising that, following *Smith*, Michigan courts departed from the Supreme Court's analysis in *Smith* and continued to apply strict scrutiny to free exercise claims brought under the Michigan Constitution, Art. I, § 4.¹⁵⁴

Shortly after *Smith* was decided, the Michigan Supreme Court acknowledged that it had the ability to interpret the Michigan Constitution to provide greater protections for free exercise rights.¹⁵⁵ In *People v. Dejonge*, the court evaluated the issue of whether "Michigan's teacher certification requirement for home schools violated the Free Exercise Clause of the First Amendment."¹⁵⁶ After the Dejonges began to teach their children at home due to their religious beliefs, they were convicted, fined, and placed on a two year probation for educating their children "without state certified teachers."¹⁵⁷ After several pages chronicling the history and importance of the right to the free exercise of religion,¹⁵⁸ the court applied *Smith* to evaluate the First Amendment claim.¹⁵⁹ However, the court found that that the teacher certification requirement had to survive strict scrutiny under *Smith* as other rights besides the right to free exercise of religion were involved, such as the right of parents to educate their children.¹⁶⁰ Ultimately, the court concluded that the teacher certification requirement for parents who chose to homeschool their children did not survive strict scrutiny under the First Amendment.¹⁶¹

Although the Michigan Supreme Court did not examine a free exercise claim under Art. I § 4 in *People v. Dejonge*, it did acknowledge the possibility of evaluating the right to free exercise in the Michigan

154. See *McCready v. Hoffius*, 459 Mich. 131, 586 N.W.2d 723 (1998), *vacated in part*, 459 Mich. 1235, 593 N.W.2d 545 (1999); *Reid v. Kenowa Hills Pub. Sch.*, 261 Mich. App. 17, 25, 680 N.W.2d 62, 68 (2004); *Champion v. Sec'y of State*, 281 Mich. App. 307, 315, 761 N.W.2d 747, 753 (2008), *appeal denied*, 483 Mich. 914, 762 N.W.2d 501 (2009).

155. *People v. Dejonge*, 442 Mich. 266, 279 n.27, 501 N.W.2d 127, 134 n.27 (1993) ("[W]e may certainly interpret the Michigan Constitution as affording additional protection to the free exercise of religion.").

156. *Id.* at 273, 501 N.W.2d at 131.

157. *Id.* at 271, 501 N.W.2d at 130.

158. *Id.* at 274–79, 501 N.W.2d at 132–34.

159. *Id.* at 278–79, 501 N.W.2d at 134.

160. *Id.* at 279, 501 N.W.2d at 134–35 (applying *Smith*'s "hybrid rights" exception to its general rule requiring the application of strict scrutiny only to laws that were not neutral or generally applicable).

161. *Id.* at 298–99, 501 N.W.2d at 143–44 ("In sum we conclude that the historical under-pinnings of the First Amendment of the United States Constitution and the case law in support of it compels the conclusion that the imposition of the certification requirement upon the DeJonges violates the Free Exercise Clause. . . . Thus, we reaffirm 'that sphere of inviolable conscience and belief which is the mark of a free people.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992))).

Constitution under a different framework than what had been provided by the Supreme Court in *Smith*.¹⁶² The court ultimately decided that it could resolve the case on the basis of the First Amendment alone and did “not undertake to determine at this time the extent of the Michigan Constitution’s protection of the free exercise of religion generally.”¹⁶³

The first case after *Smith* where the Michigan Supreme Court provided separate analyses for the First Amendment and for Art. I § 4 was *McCready v. Hoffius*.¹⁶⁴ Though the Michigan Supreme Court vacated a portion of this decision,¹⁶⁵ its application of strict scrutiny in *McCready* has been relied on by lower courts in Michigan, as well as by federal courts, to evaluate Art I § 4 free exercise claims.¹⁶⁶ At issue in *McCready*

162. *Id.* at 279, n.27, 501 N.W.2d at 134, n.27.

163. *Id.*

164. 459 Mich. 131, 586 N.W.2d 723 (1998) *vacated in part*, 459 Mich. 1235, 593 N.W.2d 545 (1999).

165. *McCready*, 459 Mich. 1235, 593 N.W.2d 545 (“On order of the Court, . . . we VACATE that portion of the December 22, 1998 opinion of the Court which holds that the Civil Rights Act does not violate the Free Exercise Clause of the First Amendment of the United States Constitution or Article 1, § 4 of the Michigan Constitution and we REMAND this case to the Circuit Court for the County of Jackson for further consideration of that issue and entry of an appropriate judgment.”). The precedential value for decisions that have been “vacated in part” is complicated. In the Michigan appellate courts, some cases suggest that cases that have been vacated in part do not totally lose their precedential value. *See* *People v. Carson*, 220 Mich. App. 662, 672, 560 N.W.2d 657, 661 (1996) (“an overruled proposition in a case is no reason to ignore all other holdings in the case.”); *see also* *Stein v Home-Owners Ins. Co*, 303 Mich. App. 382, 389, 843 N.W.2d 780, 783 (2013) (distinguishing between complete and partial reversals). Meanwhile, other appellate court decisions point towards the opposite conclusion that cases partially vacated or reversed are not binding precedent. *See* *Dunn v. Detroit Inter-Ins. Exch.*, 254 Mich. App. 256, 262, 657 N.W.2d 153, 156 (2002) (“a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision.” (citing MCR 7.215(H)(1))). Notwithstanding, none of these cases address the situation of a Michigan Supreme Court vacating part of its prior decision in the same case as in *McCready*, 459 Mich. 131, 586 N.W.2d 723 *vacated in part*, 459 Mich. 1235, 593 N.W.2d 545 (1999).

166. *See* *Reid v. Kenowa Hills Pub. Sch.*, 261 Mich. App. 17, 26, 680 N.W.2d 62, 68 (2004); *see also* *Champion v. Sec’y of State*, 281 Mich. App. 307, 329, 761 N.W.2d 747, 753 (2008), *appeal denied*, 483 Mich. 914, 762 N.W.2d 501 (2009); *Intervarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 829–30 (E.D. Mich. 2021) (citations omitted) (“In fact, Michigan courts have interpreted the Michigan Constitution to provide broader coverage than that of the United States constitution. . . . Thus, Defendants’ actions would be subject to strict scrutiny even if they were neutral and generally applicable, which they were not.”); *Country Mill Farms, LLC v. City of East Lansing*, 280 F. Supp. 3d 1029, 1056 (W.D. Mich. 2017) (“Under Michigan law, religious freedom claims brought under Article 1, Section 4 of the state constitution are analyzed using the compelling state interest test announced in *McCready v. Hoffius*. . . .”).

was whether the Michigan Civil Rights Act's protection for marital status violated the free exercise rights of defendants who denied housing to the plaintiffs due to their intention to cohabit while unmarried.¹⁶⁷ The court first evaluated the claim under the First Amendment and applied *Smith* to find that, since the Civil Rights Act was a facially neutral and generally applicable law, it did not implicate the Free Exercise Clause of the U.S. Constitution.¹⁶⁸ However, while considering the act in relation to Art. I, § 4 of the Michigan Constitution, the Michigan Supreme Court applied "the compelling state interest test developed by the United States Supreme Court in *Wisconsin v. Yoder* and *Sherbert v. Verner*."¹⁶⁹ This transition, from following the lead of the federal courts on free exercise claims to charting an independent course under Art. I § 4, occurred without any substantial analysis.¹⁷⁰

In his dissenting opinion in *Donkers v. Kovach*,¹⁷¹ Justice Markman lamented the lack of a detailed treatment by the Michigan Supreme Court for its decision to apply strict scrutiny under Art. I § 4 post-*Smith*,

[T]his Court has apparently held, post-*Smith*, that Michigan's Free Exercise Clause, Const 1963, art 1, § 4, requires the application of strict scrutiny to even neutral laws and that they must serve a "compelling state interest." . . . *McCready* cited no Michigan cases, or otherwise explained in any way why the Michigan Constitution, art 1, § 4, imposes a greater burden upon the government to justify even neutral laws than the United States Constitution, US Const, Am I. In my judgment, this is a substantial constitutional issue that is worthy of far more thorough analysis.¹⁷²

In the absence of a thorough review by Michigan's highest court on this question, lower Michigan courts have continued to assume that the Michigan Constitution's religion clauses "are subject to similar interpretation" as the First Amendment.¹⁷³

167. 459 Mich. at 134, 586 N.W.2d at 725.

168. *Id.* at 142, 586 N.W.2d at 728.

169. *Id.* at 143, 586 N.W.2d at 729 (determining that the Michigan Civil Rights Act's protections for marital status, including cohabitation, survived strict scrutiny as well).

170. *See id.* at 141–45, 586 N.W.2d at 728–29.

171. 481 Mich. 897, 749 N.W.2d 744 (2008) (Markman, J., dissenting).

172. *Id.* at 898, 749 N.W.2d at 745–46 (citations omitted).

173. *See, e.g.,* *Scalise v. Boy Scouts of Am.*, 265 Mich. App. 1, 11, 692 N.W.2d 858, 868 (2005) (applying the test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to assess an establishment clause violation under Art. I § 4 because the court reasoned that both Michigan and federal free exercise clauses "are subject to similar interpretation"); *see also*, *Weishuhn v. Catholic Diocese*, 279 Mich. App. 150, 156, 756 N.W.2d 483, 488 (2008); *Great Lakes Soc'y v. Georgetown Charter Twp.*, 281 Mich. App. 396, 425, 761

The application of this “subject to similar interpretation” rationale has led to confusion regarding the proper standard of review in free exercise cases among lower Michigan courts.¹⁷⁴ In *Great Lakes Society v. Georgetown Charter Township*, the First District Court of Appeals evaluated whether a township’s denial of a building permit to a religious group violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment, or Art I § 4.¹⁷⁵ After dismissing the RLUIPA claim, the court reasoned that “there are no significant differences between the Michigan and United States constitutions with regard to the rights afforded or their interpretation.”¹⁷⁶ But the court did not rely on *McCready* to evaluate the Art. I § 4 claim under strict scrutiny.¹⁷⁷ Instead, the court applied *Smith* to hold that the township acted in accordance with a “generally applicable scheme” and therefore did not violate the free exercise rights of the plaintiff.¹⁷⁸ Strangely, this decision came no more than fourteen days after the First District Court of Appeals relied on *McCready* to employ strict scrutiny to address another Art. I § 4 claim in *Champion v. Secretary of State*.¹⁷⁹ The conflict between these decisions has not been resolved—leave to appeal was denied for both cases.¹⁸⁰

Despite this uncertainty in the lower courts, the Michigan Supreme Court has continued to hold that the right to free exercise under the Michigan Constitution is subject to strict scrutiny.¹⁸¹ Furthermore, both the

N.W.2d 371, 389 (2008) *appeal denied*, 485 Mich. 973, 774 N.W.2d 860 (2009) (reasoning that “there are no significant differences between the Michigan and United States Constitutions with regard to the rights afforded or their interpretation.”).

174. *Great Lakes Soc’y*, 281 Mich. App. at 425, 761 N.W.2d at 389; *but cf.* *Champion v. Sec’y of State*, 281 Mich. App. 307, 314–15, 761 N.W.2d 747, 753 (2008).

175. *Great Lakes Soc’y*, 281 Mich. App. at 398–99, 761 N.W.2d at 375.

176. *Id.* at 425, 761 N.W.2d at 389.

177. *Id.* at 426, 761 N.W.2d at 389.

178. *Id.*, 761 N.W.2d at 390. The Michigan Employment Relations Commission has also used the same rationale to apply *Smith* when assessing a free exercise claim brought under Michigan’s Constitution. *In re Christian Bros. Inst. of Mich.*, No. R03 E-88, 2004 MI ERC LEXIS 223, at *21 (May 26, 2004).

179. 281 Mich. App. at 314, 761 N.W.2d at 753. The Court of Appeals does not state in this analysis that Art. I § 4 is subject to “similar interpretation” as the first amendment. *Id. cf. Great Lakes Soc’y*, 281 Mich. App. 396, 761 N.W.2d at 389–90.

180. *Great Lakes Soc’y*, 281 Mich. App. 396, 761 N.W.2d 371 (2008); *Champion*, 281 Mich. App. 307, 761 N.W.2d 747 (2008).

181. *See, e.g., Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 486 Mich. 311, 319, 783 N.W.2d 695, 698 (2010) (“However, when legislation . . . infringes on a fundamental right protected by the Constitution, such as the free exercise of religion, *the legislation will only be sustained if it passes the rigorous strict scrutiny standard of review*: that is, the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.” (emphasis added)).

Eastern and Western Federal District Courts of Michigan recently acknowledged that Michigan law requires strict scrutiny to apply to claims under Art. I § 4.¹⁸² Nonetheless, the divergent rulings in Michigan's lower courts show that they remain confused about the proper standard of review for assessing free exercise claims under the Michigan Constitution.¹⁸³ At bottom, these courts appear uncertain of whether the right to free exercise is still subject to "similar interpretation" as the First Amendment or not.¹⁸⁴

Several questions arise from these murky interpretive waters. For instance, if the right to free exercise in the Michigan Constitution is in fact "subject to similar interpretation" as the First Amendment, why have Michigan courts failed to apply *Smith* when evaluating free exercise claims under Art. I § 4?¹⁸⁵ And if it is true that the right to free exercise under the Michigan Constitution is no longer subject to similar interpretation as the First Amendment, what is the court's rationale for this decision?¹⁸⁶

This Note attempts to grapple with these issues and present a path forward for Michigan courts related to Art. I § 4. The Michigan Supreme Court should reaffirm *McCready*'s holding that Art. I § 4 is no longer "subject to similar interpretation as the First Amendment."¹⁸⁷ Doing so would not only reduce confusion among the lower courts on this subject but would also open an opportunity for the court to develop a more robust framework for interpreting the Michigan Constitution's protections for the right to free exercise of religion.

182. *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 829–30 (E.D. Mich. 2021); *Country Mill Farms, LLC v. City of East Lansing*, 280 F. Supp. 3d 1029, 1056 (W.D. Mich. 2017).

183. *Great Lakes Soc'y*, 281 Mich. App. at 426, 761 N.W.2d at 398; *but cf. Champion*, 281 Mich. App. at 314, 761 N.W.2d at 753.

184. *See id.*

185. *See supra* notes 164–69 and accompanying text.

186. *See Donkers v. Kovach*, 481 Mich. 897, 897–99, 749 N.W.2d 744, 745–46 (2008) (Markman, J., dissenting).

187. *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich. 82, 104–05, 180 N.W.2d 265, 274 (1970).

III. ANALYSIS

A. The Michigan Supreme Court Should Explicitly Reaffirm that Michigan's Art. I §4 Analysis Is Separate from the Analysis Given to the First Amendment While Providing an Independent Basis Rooted in the Michigan Constitution for This Decision

Given the confusion among Michigan's lower courts regarding the proper standard of review with respect to Art. I § 4, there is a need for clarity regarding whether this provision is still "subject to similar interpretation" as the First Amendment.¹⁸⁸ That is especially evident when considering that this interpretative rationale has led to the application of *Smith* by Michigan's First District Court of Appeals when evaluating an Art. I § 4 claim.¹⁸⁹

Although the Michigan Supreme Court has been applying strict scrutiny under Art. I § 4 since *Smith*,¹⁹⁰ none of these decisions contain an explicit repudiation of the former "subject to similar interpretation" reasoning which originally tied the Art. I § 4 analysis to the Supreme Court's First Amendment doctrine in the first place.¹⁹¹ Nor do these cases provide any reasoning for their de facto departure from the "subject to similar interpretation" rationale.¹⁹² Instead, the Michigan Supreme Court has applied strict scrutiny under Art. I § 4 without providing a substantial basis rooted in the Michigan Constitution for this decision.¹⁹³

Although the Michigan Supreme Court has not provided a well-developed reason for its departure from First Amendment doctrine when interpreting Art. I § 4, it was completely entitled to make this decision.¹⁹⁴ What is needed now is not the reversal of over twenty years of precedent, but a more fully developed rationale for applying strict scrutiny under Art. I § 4 that does justice to the right to free exercise as it is found in Michigan's Constitution. By supplying this rationale, the Michigan Supreme Court would not only provide clarity to lower courts but would

188. *Scalise v. Boy Scouts of Am.*, 265 Mich. App. 1, 11, 692 N.W.2d 858, 868 (2005); *Weishuhn v. Catholic Diocese*, 279 Mich. App. 150, 156, 756 N.W.2d 483, 488 (2008); *Great Lakes Soc'y*, 281 Mich. App. at 425–46, 761 N.W.2d at 389; *Champion*, 281 Mich. App. at 314–15, 761 N.W.2d at 753.

189. *Great Lakes Soc'y*, 281 Mich. App. at 424–26, 761 N.W.2d at 389.

190. *See, e.g., Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 486 Mich. 311, 319, 783 N.W.2d 695, 698 (2010).

191. *See id.*

192. *Id.*

193. *See Donkers v. Kovach*, 481 Mich. 897, 897–99, 749 N.W.2d 744, 745–46 (2008) (Markman, J., dissenting).

194. *See discussion infra* Part III.A.1.

also provide a valuable contribution to the national discourse surrounding free exercise rights more broadly.¹⁹⁵

1. Michigan Was Not Bound to Follow Smith when Interpreting Its Own Constitution

If the religion clauses found in the Michigan Constitution are merely an “an expanded and more explicit statement of . . . the First Amendment . . . subject to similar interpretation[.]”¹⁹⁶ were Michigan courts bound to follow *Smith* in interpreting its own constitution? If so, this would lead to some absurd results. It would mean that if a state court relied on federal decisions when interpreting a provision in its own constitution, any change in the Supreme Court’s doctrine with respect to that provision would *automatically* alter state constitutional interpretation.¹⁹⁷ But that is not the way U.S. federalism works—the Michigan Supreme Court is under an obligation to interpret its own state constitution and cannot simply pass this job off to federal courts.¹⁹⁸ While state courts may choose to follow the Supreme Court’s lead in interpreting their own religious liberty protections,¹⁹⁹ they are not bound to do so.²⁰⁰ Although a new decision by the Supreme Court may persuade state courts to revise their understanding of their own constitution’s protections,²⁰¹ until that happens, strict scrutiny

195. See Carmella, *supra* note 8, at 324 (“[s]tates choosing to employ a strict scrutiny standard of review can serve to engender dialogue on the meaning of religious liberty among state courts and between state and federal courts.”).

196. *In re Legislature’s Request for An Op.*, etc., 384 Mich. 82, 180 N.W.2d 265 (1970).

197. Carmella, *supra* note 8, at 316.

198. See *People v. Tanner*, 496 Mich. 199, 221–22, 853 N.W.2d 653, 665–66 (2014) (holding that “[w]hile members of this Court take an oath to uphold the United States Constitution, we also take an oath to uphold the Michigan Constitution In light of these separate oaths of office, we need not, and cannot, defer to the United States Supreme Court in giving meaning to the latter charter. Instead, it is this Court’s obligation to independently examine our state’s Constitution to ascertain the intentions of those in whose name our Constitution was ‘ordain[ed] and establish[ed].’” (emphasis added) (citations omitted)).

199. See, e.g., *State v. DeLaBruere*, 577 A.2d 254 (Vt. 1990).

200. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (stating that State Courts are at liberty to interpret their own constitutions to provide stronger rights than the U.S. Constitution); see also, William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (“It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues”).

201. See, e.g., *Tanner*, 496 Mich. at 255–57, 853 N.W.2d at 684 (where the Michigan Supreme Court was convinced by the U.S. Supreme Court’s interpretation of the Fifth Amendment’s Self-Incrimination Clause when analyzing the proper scope of the same right

would justifiably remain the default test for Michigan free exercise cases under the Michigan Constitution.²⁰² Even so, the Michigan Supreme Court still has the burden of clearly interpreting the Michigan Constitution to find an independent basis for the decision to apply strict scrutiny under Art. I § 4 when *Smith* would prohibit this under the First Amendment.²⁰³

2. Providing an Independent Constitutional Basis for the Decision to Apply Strict Scrutiny Under Art. I § 4 Would Demonstrate that Michigan's Constitution Can Protect Individual Liberties in a Robust and Coherent Manner

Michigan is certainly not alone in struggling to interpret its own constitution independently from the U.S. Constitution.²⁰⁴ After *Sherbert*, many states elected to pursue a “lockstep” approach to free exercise which resulted in the failure to undertake any state constitutional analysis when deciding religious liberty cases.²⁰⁵ As the power and reach of the federal Constitution grew, the interest in state constitutionalism diminished, leading most Americans to view “the national constitution as the primary, if not sole, protection for their rights.”²⁰⁶

Notwithstanding the present emphasis on the federal Constitution, state constitutions possess a rich legacy of advancing and protecting

in Art. I § 17 of the Michigan Constitution); *see also*, Brennan, *supra* note 200, at 502 (“[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.”).

202. Carmella, *supra* note 8, at 316 (arguing that because states are not bound by the Supreme Court’s decisions when interpreting their own constitutions, prior reliance by a state court on *Sherbert* “leads more persuasively to the conclusion that the *Sherbert* analysis remains the state constitutional interpretation, even though the current federal interpretation has changed.”).

203. *See* Miller & Sheers, *supra* note 8, at 310 (“The majority of states, however, have used the federal analysis of free exercise claims to such an extent that it is unclear whether their state constitutions would independently support a compelling interest test.”); *see also* *People v. Dejonge*, 442 Mich. 266, 279 n.27, 501 N.W.2d 127, 134 n.27 (1993) (“[W]e may certainly interpret the Michigan Constitution as affording additional protection to the free exercise of religion. However, . . . we do not undertake to determine at this time the extent of the Michigan Constitution’s protection of the free exercise of religion generally.”).

204. *See, e.g.*, Clint Bolick, *Principles of State Constitutionalism*, 53 ARIZ. STATE L.J. 771, 772 (2021) (“Rarely have state courts specified *when* they will interpret their constitutions independently and how they will go about that task.”).

205. Durham, *supra* note 8, at 364; Carmella, *supra* note 8, at 298.

206. Bolick, *supra* note 204, at 774.

individual rights.²⁰⁷ As Justice William Brennan contended, state constitutions should be considered a “font of individual liberties.”²⁰⁸ The Michigan Supreme Court already recognized this principle in *People v. Dejonge* when it said that “we may certainly interpret the Michigan Constitution as affording additional protection to the free exercise of religion.”²⁰⁹

Despite its potential, state constitutional law has often been characterized as incoherent.²¹⁰ Because state courts frequently lack clear principles on how to independently interpret their own constitutions, this process is often done on an ad hoc basis, leading observers to conclude that the process is subjective and oriented towards achieving pre-determined results.²¹¹ While Michigan does possess several principles of state constitutional interpretation,²¹² the failure to follow *Smith* in *McCready*, without providing an independent basis rooted in the Michigan Constitution, does lend some evidence to the above criticisms leveled against the practice of state constitutionalism.²¹³ Conversely, by providing an independent basis for the application of strict scrutiny under Art. I § 4, Michigan’s lower courts would receive clarity on how to apply this provision of the Michigan Constitution.

207. *Id.* at 773 (“Apart from a handful of constraints on the power of state governments in the national constitution, state constitutions provided the primary protections for individual rights; thus, for the first 150 years of our republic, most constitutional litigation took place in the states.”).

208. Brennan, *supra* note 200, at 491. Justice Brennan perceived that during his time that civil liberties under the U.S. Constitution were beginning to be limited by the Supreme Court in the name of “federalism,” and advocated that as “federal scrutiny” with respect to these liberties “diminished, state courts must respond by increasing their own.” *Id.* at 503.

209. 442 Mich. 266, 279 n.27, 501 N.W.2d 127, 134 n.27 (1993).

210. *See, e.g.*, James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (“[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”).

211. Bolick, *supra* note 204, at 777.

212. *See* discussion *infra* Part III.B.1.

213. *See* *Donkers v. Kovach*, 481 Mich. 897, 898, 749 N.W.2d 744, 745–46 (2008) (Markman, J., dissenting). (“*McCready* cited no Michigan cases, or otherwise explained in any way why the Michigan Constitution, art 1, § 4, imposes a greater burden upon the government to justify even neutral laws than the United States Constitution, U.S. Const., Am. I. In my judgment, this is a substantial constitutional issue that is worthy of far more thorough analysis . . .”).

B. The Application of Strict Scrutiny to Free Exercise Claims Under the Michigan Constitution Is Justified by the Historical Context of Art I § 4, the Structure of the Michigan Constitution Related to the Subject of Religion, and Michigan Supreme Court Caselaw

1. Interpreting Michigan's Constitution

The goal of interpreting the Michigan Constitution is to “to discern the original meaning attributed to the words of a constitutional provision by its ratifiers, the people”²¹⁴ To discern the original meaning of the text, it is assumed that the words used in the text itself were used “in the sense most obvious to the common understanding” at the time it was ratified.²¹⁵ It is the duty of courts to give the constitutional text the meaning that “the people who ratified the text in 1963 gave to it,” and not “the meaning . . . judges would prefer, or even the meaning the people of Michigan today would prefer”²¹⁶

Furthermore, when interpreting provisions of the Michigan Constitution, the Michigan Supreme Court has said that it has “not been persuaded by textual differences.”²¹⁷ In other words, although a constitutional provision may be worded differently than its federal counterpart, the Michigan Supreme Court could hold that the state constitutional provision has a similar meaning—which is what occurred with respect to Art. I § 4.²¹⁸ Conversely, a textual provision that is identical

214. *People v. Vaughn*, 491 Mich. 642, 650 n.25, 821 N.W.2d 288, 294 n.25 (2012) (quoting *People v. Nutt*, 469 Mich. 565, 573–74, 677 N.W.2d 1, 6 (2004)) (citations omitted) (internal quotation marks omitted); see *Wayne Co. v. Hathcock*, 471 Mich. 445, 468, 684 N.W.2d 765, 779 (2004) (“The primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification.”).

215. *Vaughn*, 491 Mich. at 650, n.25, 821 N.W.2d at 294, n. 25 (quoting *Nutt*, 469 Mich. at 573–74, 677 N.W.2d at 6); see *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 699, 178 N.W.2d 484, 487 (1970) (“The first rule a court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such words as understood by the people who adopted it.”).

216. *Nutt*, 469 Mich. at 573–74, n.7, 677 N.W.2d at 6, n.7.

217. *Woodland v. Mich. Citizens Lobby*, 423 Mich. 188, 205–06, 378 N.W.2d 337, 344–45 (1985).

218. See *id.* at 206, 378 N.W.2d at 344–45 (“For example, although the freedom of religious belief provision, art 1, § 4, is textually dissimilar from the religion clauses of the First Amendment, this Court has held that the state provision is ‘an expanded and more explicit statement of the establishment and free exercise clauses of the First Amendment’ and, ‘accordingly, subject to similar interpretation.’ In contrast, other provisions of the Michigan Constitution which are worded identically to their federal counterparts have been interpreted to be substantively different.” (citations omitted) (quoting Advisory Opinion re Constitutionality of 1970 PA 100, 384 Mich. 82, 180 N.W.2d 265 (1970)).

to its federal counterpart could be given a substantially different meaning and afford broader protections.²¹⁹

When interpreting the Michigan Constitution independently from the U.S. Constitution, the Michigan Supreme Court has considered the following factors:

- 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.²²⁰

It is not clear to what extent weight should be given to each of these factors, or even if consideration of each is necessary.²²¹ In making the argument for the application of strict scrutiny under Art. I § 4 this Note focuses on the historical context of Michigan's constitution,²²² some of its unique structural features,²²³ and relevant caselaw decided prior to the adoption of Michigan's 1963 Constitution.²²⁴

2. The Historical Context of Art. I § 4 Shows that a Greater Level of Protection than What Smith Provides for Is Required for Free Exercise Rights in Michigan.

The language of Art I § 4 in Michigan's current constitution ratified in 1963 developed gradually over the course of several former constitutions.²²⁵ While the right to free exercise of religion was formerly comprised of several different sections across these constitutions, eventually this language was distilled into a single provision.²²⁶

219. *See id.* at 205–06, 378 N.W.2d at 344–45.

220. *Id.*

221. *See id.*; *see also* *People v. Tanner*, 496 Mich. 199, 223–29, 853 N.W.2d 653, 667–69 (2014) (analyzing the Michigan Constitution's text, details related to the Michigan constitutional conventions, as well as Michigan constitutional caselaw to help guide its interpretation, but not considering state law, structural differences between state and federal constitutions, or matters of state or local interest).

222. *See* discussion *infra* Part III.B.2.

223. *See* discussion *infra* Part III.B.3.

224. *See* discussion *infra* Part III.B.4.

225. MICH. CONST. of 1835, art. I §§ 4–6; MICH. CONST. of 1850, art. IV §§ 39–41; MICH. CONST. of 1908, art. II § 3; MICH. CONST. of 1963 art. I. § 4.

226. *See* MICH. CONST. of 1835, art. I §§ 4–6; MICH. CONST. of 1850, art. IV §§ 39–41; MICH. CONST. of 1908, art. II § 3; MICH. CONST. of 1963 art. I. § 4.

Prior to statehood, the territory of Michigan was governed by the Northwest Ordinance which provided that “[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.”²²⁷ As Justice O’Connor and others have argued, this language does not conform with the test provided for in *Smith*; the proviso contained here would be irrelevant if “neutral and generally applicable laws” did not burden the right to free exercise of religion.²²⁸

Michigan did not include a similar proviso in the text protecting free exercise of religion upon ratifying its first constitution in 1835.²²⁹ Originally, the right to “worship Almighty God according to the dictates of one’s own conscience” was qualified by the phrase “provided that such worship does not lead to acts of licentiousness or the breach of the peace.”²³⁰ However, the Daily Journal of the 1835 convention records a motion to strike the proviso entirely from the text; this motion was summarily agreed to.²³¹ The proviso that existed in the Northwest Ordinance was by its nature a limitation on the scope of the right to free exercise of religion.²³² Therefore, at the very least, the removal of a proviso by the Michigan’s 1835 constitutional convention cannot represent a desire by the constitutional delegates to further limit the right to free exercise of religion in Michigan’s 1835 constitution.²³³ At most, the removal of the proviso could be read as a desire to expand the scope of right’s protection.

Several changes were made between Michigan’s 1835 and 1850 constitutions.²³⁴ Some debate was given to the decision to strike out the phrase “religious rights” from the 1835 constitution’s provision which provided “[t]he civil and *religious rights*, privileges and capacities of no individual shall be diminished or enlarged on account of his opinions or belief concerning matters of religion.”²³⁵ A brief dialogue between several delegates to the 1850 constitutional convention provides insight into this decision. The delegate Mr. Britain objected to this removal, stating that “religious rights” were distinct from civil and political rights and that the phrase was needed to protect from “persecution and intolerance in

227. Northwest Territory Ordinance of 1787, art. I, 1 Stat. 52.

228. See discussion *supra* Part II.D.

229. MICH. CONST. of 1835, art. I §§ 4–6.

230. MICH. CONST. CONVENTION, DAILY JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION 39 (1835).

231. *Id.*

232. See *City of Boerne v. Flores*, 521 U.S. 507, 554 (1997) (O’Connor, J., dissenting).

233. See *id.*

234. See MICH. CONST. of 1835, art. I. §§ 4–6; MICH. CONST. of 1850, art. IV. §§ 39–41.

235. MICH. CONST. OF 1835, art. I. § 6 (emphasis added).

consequence of his opinions on matters of religion.”²³⁶ Another delegate Mr. J.D. Pierce, who had moved to strike the word “religious” in the first place, argued that Mr. Britain’s objections were already provided for, and that the emphasis of the provision in question was on the “civil and political rights” not on religious rights.²³⁷ Mr. Pierce also stated plainly that “[e]very man has the right, as far as religious matters are concerned, to maintain his own opinion.” Consequently, Mr. Pierce argued that the word would be “unnecessary.”²³⁸ The exchange between Mr. Britain and Mr. Pierce shows that the removal of the phrase “religious rights” was not intended to limit protections for religious belief and practice, but rather was intended to provide stylistic clarity to the text in question.²³⁹

From Michigan’s 1850 constitution to the ratification of its 1908 constitution, the language of the free exercise clauses only changed slightly.²⁴⁰ Formerly, the 1850 protections for free exercise read that “[t]he Legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience,”²⁴¹ and “[t]he Legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion.”²⁴² In 1908, the constitutional convention changed this language to read, “[e]very person shall be at liberty to worship God according to the dictates of his own conscience” and “[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.”²⁴³ An explanatory comment for these changes was given in the official report from the 1907 convention explaining that the change in phraseology between the 1850 and 1908 language was purely for the sake of clarity and did not reflect a change to the scope of the right itself.²⁴⁴

The current text of Art I § 4 is a direct copy of the provision guaranteeing this right to free exercise of religion found in Michigan’s

236. STATE OF MICHIGAN, REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 109 (1850).

237. *Id.*

238. *Id.*

239. *See id.*

240. *See* MICH. CONST. of 1850, art. IV. §§ 39, 41; MICH. CONST. of 1908, art. II § 3.

241. MICH. CONST. of 1850, art. IV. § 39 (emphasis added).

242. MICH. CONST. of 1850, art. IV. § 41 (emphasis added).

243. MICH. CONST. of 1908, art. II § 3. This language appears to be a return, partially, to language provided in Michigan’s 1835 constitution which says that “[e]very person has a right to worship Almighty God” MICH. CONST. of 1835, art. I. § 4.

244. LAURENT K. VARNUM ET AL., CITIZENS RSCH. COUNCIL, A COMPARATIVE ANALYSIS OF THE MICHIGAN CONSTITUTION VOLUMES I & II ARTICLES I – XVII ii-8 (1961) (“No change from Sections 39, 40, 41, Art. IV of the present Constitution except for the purpose of improving the phraseology.”).

third constitution which was ratified in 1908.²⁴⁵ A report following the constitutional convention by the Citizens Research Council explained that the lack of a change from the 1908 language in Michigan's current 1963 constitution reflects a desire to avoid abridging protections for religious exercise.²⁴⁶ Given that the changes with respect to free exercise of religion between Michigan's 1850 and 1908 constitutions were stylistic, and since there has been no abridgement of the right to free exercise as it existed under Michigan's 1908 constitution when the State adopted its 1963 constitution, the scope of the protections provided to religious exercise in Art I § 4 are at least as broad as those contained in Michigan's 1850 constitution.²⁴⁷

Additionally, the scope of the right to free exercise of religion was not curtailed between Michigan's 1850 constitution and the Northwest Ordinance. The debates surrounding the removal of the phrase "religious rights" from the 1850 constitution suggests that the delegates did not intend to limit the right to free exercise as it was contained in the 1835 constitution.²⁴⁸ Additionally, the deliberate elimination of a proviso for the right to free exercise in the 1835 constitutional convention,²⁴⁹ which Michigan would have been already accustomed to under the Northwest Ordinance,²⁵⁰ implies that the delegates to Michigan's four constitutional conventions never set out to diminish the scope of the right to free exercise of religion.

If Justice O'Connor is correct that the Northwest Ordinance's protections for religious exercise cannot be squared with *Smith*²⁵¹—and if it is true, as this Note argues, that the scope of the right to free exercise of religion in Art I § 4 has not been abridged since the time Michigan was a territory under the Northwest Ordinance²⁵²—then the protections afforded for the free exercise of religion under Art. I § 4 *must* be stronger than the standard of review provided for in *Smith*. Even so, that does not necessarily mean that Art I § 4 should be interpreted so that strict scrutiny should be applied to free exercise cases, only that a First Amendment analysis under *Smith* is less demanding than what Art I § 4 requires.

245. See MICH. CONST. of 1908, art. II § 3; MICH. CONST. of 1963, art. I § 4.

246. LAURENT K. VARNUM ET AL., *supra* note 244, at ii-9. ("The present provision sets out in detail the scope of religious freedom guaranteed. A change to a more concise statement of religious freedom would have the disadvantage that the change might be treated as an abridgment of that right.")

247. See *supra* notes 240–46 and accompanying text.

248. MICH. CONST. of 1850, art. IV § 41.

249. MICH. CONST. CONVENTION, *supra* note 230.

250. Northwest Territory Ordinance of 1787, Art. I, 1 Stat. 52.

251. *City of Boerne v. Flores*, 521 U.S. 507, 564–65 (1997) (O'Connor, J., dissenting).

252. See *supra* notes 225–51 and accompanying text.

3. The Strict Scrutiny Standard of Review for Free Exercise Rights Emphasizes the Importance of the Subject of Religion as It Is Found in the Michigan Constitution.

As Justice O'Connor effectively argued in her *Smith* concurrence, leaving the right of religious exercise to the "vicissitudes of political controversy" does injustice to the reality that religious liberty is a "fundamental right";²⁵³ the strict scrutiny test established in *Sherbert* and *Yoder* is essential to giving full effect to the "mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."²⁵⁴

The right to free exercise of religion in the Michigan Constitution is no less fundamental. The Michigan Supreme Court has acknowledged that "[t]he Michigan Constitution recognizes that religious groups have been traditionally accorded special status."²⁵⁵ But what is the point of considering a right to be "special" if in practice a legislature can simply pass "neutral" and "generally applicable" laws to override it?

The principles of state constitutional interpretation articulated by Arizona Supreme Court Justice Clint Bolick may be useful in discerning the meaning of Art. I § 4. In particular, Justice Bolick's "broader purpose" principle of state constitutional interpretation asserts that each section should be considered within the surrounding context of the entire document, even considering areas such as a constitution's preamble, to determine certain themes which can better guide interpretation.²⁵⁶

When taking this wider structural view of the Michigan Constitution, it is clear why the Michigan Supreme Court considered the status of religious groups under the constitution to be "special."²⁵⁷ Article I § 4 is not the only clause which defends religious expression.²⁵⁸ Michigan's Equal Protection Clause contains another explicit protection against discrimination based on one's religious status.²⁵⁹ What is more, in two instances the Michigan Constitution explicitly encourages religion.²⁶⁰ In its preamble, the Michigan Constitution invokes gratitude "to Almighty

253. *Emp. Div. v. Smith*, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

254. *Id.*

255. Advisory Op. on Constitutionality of 1975 PA 227 (Questions 2–10), 396 Mich. 465, 515, 242 N.W.2d 3, 24 (1976).

256. Bolick, *supra* note 204, at 20–21.

257. Advisory Op. on Constitutionality of 1975 PA 227 (Questions 2–10), 396 Mich. at 515, 242 N.W.2d at 24.

258. *See* MICH. CONST. art. I § 2.

259. *Id.* ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.")

260. MICH. CONST., pmb.; MICH. CONST. art. VII § 1.

God for the blessings of freedom.”²⁶¹ Then, the Michigan Constitution makes the promise that “[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind . . . shall forever be encouraged.”²⁶² When Art I § 4 is considered alongside these passages emphasizing the importance of religious expression, strict scrutiny would justly be applied to evaluate the right it protects. The “special status” that the Michigan Constitution affords religious groups is properly protected by the Michigan Supreme Court’s continued application of strict scrutiny.

4. Several Michigan Supreme Court Cases Support the Conclusion That Strict Scrutiny Is the Appropriate Standard of Review Under Art. I § 4.

Since constitutional rights are designed to protect individuals from excesses of state power, “it is proper to evaluate the constitutionality of a law according to its impact on the individual, rather than simply from the motive of the legislator.”²⁶³ Under this framework, strict scrutiny would be properly applied to the right to free exercise since the first step in this analysis is to consider how a religious practitioner’s free exercise is substantially burdened (as opposed to starting with an analysis of the legislature’s intent).²⁶⁴ Once that consideration is made, the burden of proof shifts to the government to provide a compelling interest to justify their regulation of that behavior.²⁶⁵ In practice, strict scrutiny forces courts to apply a balancing test between individual and state interests while acknowledging that neutral and generally applicable laws may still “substantially burden” religious exercise.²⁶⁶ Because the Michigan Supreme Court has demonstrated a willingness to engage in this kind of analysis with respect to the free exercise of religion prior to *Sherbert*,²⁶⁷ strict scrutiny can be considered a proper application of the scope of the right involved in Art. I § 4.

261. MICH. CONST., pmb1.

262. MICH. CONST. art. VIII § 1.

263. Miller & Sheers, *supra* note 8, at 310.

264. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

265. *See id.*

266. *Emp. Div. v. Smith*, 494 U.S. 872, 894–95 (1990) (O’Connor, J., concurring).

267. *See In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886).

a. In re Frazee

In the 1886 case of *In re Frazee*,²⁶⁸ Michigan's Supreme Court clarified the dimensions of the right to free exercise under Michigan's Constitution.²⁶⁹ In this case, several members of the Salvation Army were imprisoned for leading a parade through the City of Grand Rapids in violation of a city ordinance that required permission from the mayor before doing so.²⁷⁰ In evaluating the claim that the Salvation Army had the right to this activity, the court denied granting a special exemption to the Salvation Army from this ordinance simply because of their religious belief.²⁷¹ However, the court also made the point that the regulation of this behavior, rooted in religious belief, was limited only to the extent it protected the public order:

[I]t has never been supposed that they [Grand Rapids officials] needed, or ought to possess, any repressive power over these movements It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes.²⁷²

While the court concluded that religious belief does not presumptively permit every action which might stem from its belief system, it did limit the State to regulating this behavior only to the extent that it violated the public order.²⁷³ Therefore, the court struck down the ordinance which appeared designed to *preemptively* prevent disruptions to the public peace.²⁷⁴

268. 63 Mich. 396, 30 N.W. 72 (1886).

269. *Id.*; see *Pletz v. Sec'y of State*, 125 Mich. App. 335, 374, 336 N.W.2d 789, 808 (1983) (referencing *In re Frazee* for the proposition that "[t]he Michigan Constitution recognizes that religious groups traditionally have been granted special status.").

270. *In re Frazee*, 63 Mich. at 400–01, 30 N.W. at 72–73.

271. *Id.* at 405, 30 N.W. at 75.

272. *Id.*

273. *Id.*; see also *People v. Maki*, 245 Mich. 455, 476, 223 N.W. 70, 76 (1929), (citing *In re Frazee*, 63 Mich. 396, 223 N.W. 72) ("No man's rights can be submitted, under a constitutional government, to the discretion of anybody."); *Melconian v. Grand Rapids*, 218 Mich. 397, 404, 188 N.W. 521, 524 (1922) (distinguishing between inherent and permissive rights, and speaking of the Salvation Army's right to parade in the street as "a natural or inherent right, subject only to reasonable regulation . . . the by-law which left 'the power of permitting or restraining processions, and their courses, to an unregulated official discretion' was invalid." (quoting *In re Frazee*, 63 Mich. at 407, 30 N.W. at 76) (emphasis added)).

274. See *In re Frazee*, 36 Mich. at 407–08, 30 N.W. at 76.

While it may be difficult to precisely map *In re Frazee* over the tests developed in either *Sherbert* and *Smith*, the Michigan Supreme Court clearly applied a balancing test between the private liberty guaranteed these religious believers by the Michigan Constitution and the State's legitimate interest in protecting the public order.²⁷⁵ Furthermore, the state interest required to overcome the liberty guaranteed to the Salvation Army in the case of *In re Frazee* is surely greater than the rational basis test that *Smith* ushered in with respect to free exercise rights.²⁷⁶ Not every state interest could overcome the right of the Salvation Army practitioners to demonstrate in public, only one that took into account public safety.²⁷⁷ One might even say that the State needed a "compelling interest" to regulate these religious practitioners' behavior which was substantially burdened by the city's ordinance.²⁷⁸

b. Swenson v. Michigan Employment Commission

In the case of *Swensen v. Michigan Employment Commission*²⁷⁹ decided prior to *Sherbert*, the Michigan Supreme Court dealt with the denial of unemployment benefits by the Michigan Employment Security Commission (MESC) to several Seventh Day Adventists.²⁸⁰ In a fact pattern that prefigured that of *Sherbert v. Verner*, the MESC rejected the applications of Bessie Swenson, Aileen I. Langs and Neva I. Van Syckle claiming that they were ineligible because they had stated on their unemployment applications that they could not work on Saturdays.²⁸¹

While the Michigan Supreme Court stated that it was not going to engage in a "lengthy discussion of religious and constitutional rights," and limited the issue in *Swensen* to whether the plaintiffs were actually "available to work" under the relevant statute,²⁸² the court certainly considered the plaintiff's religious beliefs to be a factor when it made its

275. *See id.* at 405, 30 N.W. at 75.

276. *Emp. Div. v. Smith*, 494 U.S. 872, 891 (1990); *see Carmella, supra* note 8, at 278; *see also* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514, 556 (1981) (describing the analysis of *In re Frazee*, "the court emphasized that regulation could only be justified because of actual or threatened harm rather than 'because of the sentiments or purposes of the movement, if not otherwise unlawful.'" (quoting *In re Frazee*, 36 Mich. at 405, 30 N.W. at 75)).

277. *See In re Frazee*, 36 Mich. at 405, 30 N.W. at 75.

278. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

279. 340 Mich. 430, 432, 65 N.W.2d 709, 710 (1954).

280. *Id.*

281. *Id.*

282. *Id.* at 434-35, 65 N.W.2d at 711.

decision.²⁸³ In distinguishing the *Koski Case*,²⁸⁴ which stood for the proposition that claimants for unemployment insurance could not limit their employment to “certain hours . . . where the work he is qualified to perform is not likewise limited,” the court clarified that unlike the case before it, “the *Koski Case* did not involve any religious question of any sort.”²⁸⁵

In rejecting the MESC’s arguments, the Michigan Supreme Court concluded that the plaintiffs were available for work as they did not “refuse[] to perform services over a 40-hour week or refuse[] to work overtime more than 5 days a week.”²⁸⁶ Although the court decided this case “as-applied” and did not strike down any part of the underlying statute,²⁸⁷ *Swenson* demonstrates that when the Michigan Supreme Court has assessed government actions burdening religious conduct it has weighed the state interest sought to be achieved against the actual effects these laws have on religious persons.²⁸⁸

Both *In re Frazee* and *Swensen* support the application of strict scrutiny under Art. I § 4.²⁸⁹ *In re Frazee* demonstrates that the Michigan Supreme Court has applied a balancing test between state interests and individual free exercise rights like the test contained in strict scrutiny.²⁹⁰ When deciding *Swenson*, the court did not engage in an analysis that stopped simply with evaluating the motives of legislators or administrative officials, but considered the ways in which the law and regulation actually burdened religious parties—just as a court normally would when applying strict scrutiny.²⁹¹ Further supporting this conclusion is the United States Supreme Court’s reference to *Swensen* as justification for the exemption it provided to Ms. Sherbert on the basis of her religious beliefs.²⁹² Although these cases were decided prior to Michigan’s 1963 constitution,

283. See *Sherbert v. Verner*, 374 U.S. 398, 407 n.7 (1963) (referencing *Swenson*, “[w]e note that before the instant decision, state supreme courts had, without exception, granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work.” (citations omitted)).

284. *Ford Motor Co. v. Unemployment Comp. Comm’n*, 316 Mich. 468, 473, 25 N.W.2d 586, 588 (1947).

285. *Swenson*, 340 Mich. at 434, 65 N.W.2d at 711.

286. *Id.* at 437, 65 N.W.2d at 712.

287. *See id.*

288. *Id.* (“[T]he commission’s attitude, if upheld, would completely exclude thousands of citizens of this State from the benefits of the act. That could never have been the intent of the legislature; nor should we so construe the act as to accomplish that result.”).

289. *See supra* notes 251–71 and accompanying text.

290. *In re Frazee*, 63 Mich. 396, 405, 30 N.W. 72, 75 (1886).

291. *Swenson*, 340 Mich. at 437, 65 N.W.2d at 712.

292. *Sherbert v. Verner*, 374 U.S. 398, 407 n.7 (1963).

the scope of the protections for free exercise rights under prior Michigan constitutions was not diminished in the 1963 constitution.²⁹³ Therefore, these cases not only illuminate the court's posture under prior constitutions with respect to free exercise, but also reveal how Art I § 4 should be interpreted today.²⁹⁴

IV. CONCLUSION

The Michigan Supreme Court should revisit its interpretation of Art. I § 4 to more clearly articulate the basis by which it applies strict scrutiny to free exercise claims under this constitutional provision. Given the confusion among lower courts as to the correct application of Michigan's "subject to similar interpretation" analysis which tied Art. I § 4 to strict scrutiny in the first place,²⁹⁵ there is a need for clarity on whether this methodology is still in effect in Michigan. Furthermore, by heeding Justice Markman's critique of the Michigan Supreme Court's current approach and choosing to provide a robust analysis for the decision to apply strict scrutiny under Art I § 4,²⁹⁶ Michigan can demonstrate that state constitutionalism is a potent and functional guardian of civil liberties.²⁹⁷

If this re-examination occurred, evidence would show that the application of strict scrutiny under Art. I § 4 is the correct decision.²⁹⁸ First, Michigan's constitutional history suggests that the constitution commends the evaluation of free exercise claims at a higher threshold than what was provided for in *Smith*.²⁹⁹ At no point in any of Michigan's four constitutional conventions did delegates decide to limit or curtail free exercise rights,³⁰⁰ and the context of these adjustments was done with the acknowledgement than "neutral" and "generally applicable laws" could burden religious exercise.³⁰¹ Second, when Michigan's several constitutional provisions related to religion are considered together, the "special status" the constitution gives to religious groups commends the

293. See *supra* notes 218–24 and accompanying text.

294. See *id.*

295. See *Great Lakes Soc'y v. Georgetown Charter Twp.*, 281 Mich. App. 396, 398, 761 N.W.2d 371, 376 (2008), *appeal denied*, 485 Mich. 973, 774 N.W.2d 860 (2009); cf. *Champion v. Sec'y of State*, 281 Mich. App. 307, 314, 761 N.W.2d 747, 753 (2008), *appeal denied*, 483 Mich. 914, 762 N.W.2d 501 (2009).

296. *Donkers v. Kovach*, 481 Mich. 897, 898–749 N.W.2d 744, 745–46 (2008) (Markman, J., dissenting).

297. See discussion *supra* Part III.A.2.

298. See discussion *supra* Part III.B.

299. See discussion *supra* Part III.B.2.

300. See *id.*

301. See *id.*

application of strict scrutiny under Art. I § 4.³⁰² Lastly, pre-*Sherbert* caselaw shows that the court has elected to weigh government actions against the burdens these cause to religious individuals;³⁰³ rather than simply providing an examination of the legislature's motives, Michigan Courts have focused on the effects that actual government actions have had on religious persons—a process which prefigures strict scrutiny.³⁰⁴

The conversation surrounding the proper standard of review for the right to free exercise of religion under federal and state constitutions has immense implications. Whereas *Smith* subjected the right to free exercise of religion to the political process, the strict scrutiny standard of review emphasizes that free exercise is a fundamental right in a pluralistic society whose status is not open to manipulation by legislators. After *Smith* left the status of federal protections for free exercise in question, many states, including Michigan, saw the need to decouple the analysis of their own state constitutions from the First Amendment to ensure protections for this right. However, as this Note has shown, the Michigan Supreme Court has not provided a clear distinction between the First Amendment and Art. I § 4 in Michigan.³⁰⁵ By revisiting the Michigan Constitution's protections for free exercise, the Michigan Supreme Court would provide much needed clarity to a murky area of state constitutional law.³⁰⁶

302. See discussion *supra* Part III.B.3.

303. See discussion *supra* Part III.B.4.

304. See *id.*

305. See discussion *supra* Part II.E.

306. See *id.*