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A VENERABLE BULWARK: REAFFIRMING THE PRIMACY APPROACH TO INTERPRETING MAINE'S FREE EXERCISE CLAUSE

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ABSTRACT

Does the Maine Constitution afford guarantees for individual rights that are independent of those afforded by the United States Constitution? As set forth in Part I, the answer to this question is "yes." Because state constitutions are a "font of individual liberties," the Law Court has adopted the primacy approach to interpreting the 200-year-old Maine Constitution. Under this approach, state courts must consider state constitutional claims before reaching any federal claims and must not give controlling weight to the interpretation given to the United States Constitution. This approach gives the state constitution the significance that it deserves as a consequential guarantor of the rights of Maine people, comports with principles of federalism, and promotes judicial restraint.

Because the Maine Constitution does afford independent protections for individual rights, a further question arises: Does the scope of the rights protected under the Declaration of Rights differ meaningfully from those secured in the Bill of Rights? As discussed in Part II, the text and history of the Maine Constitution indicates that at least some of the guarantees set forth in the Declaration of Rights are broader than those set out in the first ten amendments to the United States Constitution. In particular, the free exercise clause in Article I, Section 3 of the Maine Constitution is more expansive than its counterpart in the First Amendment, as it has been interpreted in *Employment Division v. Smith*. Article I, Section 3 contains specific language ensuring that the state may not burden the free exercise of religion absent limited, compelling government interests. This text reflects the founders' commitment, clearly expressed in the constitutional debates prior to the adoption of the Maine Constitution, to a generous conception of religious liberty.

As this Article concludes, the Law Court's primacy approach is sound. Only a firm commitment to independently interpreting the state constitution will ensure that the liberties guaranteed therein will be adequately protected.

INTRODUCTION

"*Permit me, gentlemen, to hope that the constitution with which God has been pleased through you to bless us may long preserve the liberties and promote the happiness of all our fellow citizens, and that for your services you may not only receive the respect of the virtuous of your own times, but the regard of posterity.*"

William King, President, Constitutional Convention of the State of Maine, 1819-1820[1]

In 1819, delegates gathered in a constitutional convention to prepare the foundational governing document for the nascent State of Maine.[2] They might have

1. THE DEBATES AND JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MAINE (1819-1820), 135 (1894) [hereinafter DEBATES AND JOURNAL].

2. 274 delegates gathered at the constitutional convention. *See* LOUIS CLINTON HATCH, I MAINE: A HISTORY 147 (1919); RONALD F. BANKS, MAINE BECOMES A STATE: THE MOVEMENT TO SEPARATE MAINE FROM MASSACHUSETTS 1785-1820 150 (1970).

reasonably expected that the courts established under that constitution would closely consider its text rather than rotely interpret it as a carbon copy of the United States Constitution. Had the latter approach occurred to the delegates, they might have dispensed with debating the words used to secure the rights of Maine citizens. But debate those words they did, over the course of more than two weeks.[3] Together, the delegates produced a remarkable document that would continue to govern the State over the two centuries that have since passed.

Honoring the work of those delegates, the Maine Law Court[4] has chosen to adopt an independent approach to interpreting the Maine Constitution rather than to construe the State's founding document as a carbon copy of its federal counterpart. The Law Court has expressly endorsed the "primacy approach" to state constitutional interpretation,[5] a doctrine that rests on two fundamental tenets: that state courts should resolve state constitutional issues before reaching federal constitutional issues, and that federal court opinions interpreting the United States Constitution are merely helpful guides when interpreting the state constitution.[6] The primacy approach protects the state constitution's role as guarantor of the rights of Maine citizens, comports with judicial federalism, and conforms to principles of judicial restraint. In short, it ensures that state courts do not "abdicate [their] function of conclusively resolving matters of purely state law,"[7] but instead exercise their "authority and important responsibility to construe the Maine Constitution."[8] The primacy approach "has not been consistently followed," however, and has at times "been all but ignored."[9] Despite its halting application of the primacy approach, the Law Court has nevertheless recently reaffirmed its commitment to that doctrine.[10]

An examination of the free exercise clause in Maine's Declaration of Rights demonstrates the necessity of faithfully applying the primacy approach. In *Blount v. Department of Educational and Cultural Services*, the Law Court applied a "substantial burden" test under the Maine free exercise clause: that laws placing a substantial burden on the free exercise of religion are unconstitutional absent a compelling state interest.[11] This test coincided with the then-prevailing approach to

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3. The convention began on October 11, 1819, and adjourned on October 29, 1819. *See* DEBATES AND JOURNAL, *supra* note 1, at 44-45, 370.

4. Maine's highest court, the Supreme Judicial Court, is known as the Law Court when sitting as the court of final appeal.

5. *See* State v. Fleming, 2020 ME 120, ¶ 17 n.9, __ A.3d __ (stating that the Court applies the primacy approach to state constitutional interpretation); State v. Chan, 2020 ME 91, ¶ 34, __ A.3d __ (Connors, J., concurring) (observing that the Law Court has "explicitly adopted" the primacy approach); State v. Rowe, 480 A.2d 778, 781 (Me. 1984) (noting adoption of primacy approach).

6. *See Fleming*, 2020 ME 120, ¶ 17 n.9, __ A.3d __; State v. Flick, 495 A.2d 339, 344 (Me. 1985); State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984).

7. Dussault v. RRE Coach Lantern Holdings, L.L.C., 2014 ME 8, ¶ 27, 86 A.3d 52 (alterations omitted) (quoting Furhman v. Staples Off. Superstore E., Inc., 2012 ME 135, ¶ 27, 58 A.3d 1083).

8. All. for Retired Ams. v. Sec'y of State, 2020 ME 123, ¶ 23, __ A.3d __.

9. Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61, 62 (1988) [hereinafter Tinkle, *At the Crossroads*].

10. *Fleming*, 2020 ME 120, ¶ 17 n.9, __ A.3d __; *see All. for Retired Ams.*, 2020 ME 123, ¶ 23, __ A.3d __.

11. Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1379, 1385 (Me. 1988) (explaining the test under the federal free exercise clause and equating the protections provided under the Maine free exercise clause with the protections available under the United States Constitution).

federal free exercise claims.[12] Just two years later, however, the United States Supreme Court fundamentally altered its free exercise jurisprudence in *Employment Division v. Smith*, concluding that "neutral" laws withstand constitutional scrutiny regardless of the burden on any religious believer.[13] Many state courts changed course to follow *Smith*, while others continued to apply the pre-*Smith* test.[14] The Maine Law Court followed the latter path.[15] Had the Law Court ignored the primacy approach and followed *Smith*, it would have adopted an approach at odds with a fair reading of the Declaration of Rights.

Both the text and history of the free exercise clause support *Blount*. Article I, Section 3 of the Maine Constitution guarantees that "no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments"—a right only constrained if its exercise would "disturb the public peace" or "obstruct others in their religious worship."[16] This language does more than create a corollary to *Smith*'s non-discrimination principle; indeed, Section 3 contains a separate clause guaranteeing equal protection.[17] Instead, it precludes the state from limiting an individual's religious practices, beliefs, or expressions absent compelling state interests. Moreover, the framers adopted this language after a lengthy debate in which they expressed their resolve to provide robust protection for free exercise.[18] Section 3 is, in short, incompatible with *Smith*.

This Article considers anew the justifications for the Law Court's primacy approach and demonstrates that the primacy approach avoids fundamentally misinterpreting Article I, Section 3 of the Maine Constitution. Part I of this Article explains the primacy approach and argues that the primacy approach is the most appropriate method of constitutional interpretation. Part II of this Article shows how failing to follow the primacy approach would inappropriately curtail the scope of the right to free exercise under Section 3 of the Declaration of Rights. Specifically, Part II demonstrates that the right to free exercise of religion protected by Section 3 is broader than that protected under *Smith*. In sum, this Article urges a renewed commitment to a vibrant, independent approach to state constitutional interpretation, including free exercise jurisprudence.

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12. *Id.*; *see* Wisconsin v. Yoder, 406 U.S. 205, 221-29 (1972); Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

13. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 876-90 (1990); *see also* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (mem.) (Alito, J., concurring in denial of certiorari) (noting that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause").

14. *See* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J. L. & PUB. POL'Y 103, 186-89 (2013).

15. *See* Fortin v. Roman Catholic Bishop of Portland, 2005 ME 57, ¶ 56, 871 A.2d 1208 (stating that the Law Court has "expressly acknowledged" that it has not adopted the "holding in *Smith*" under Article I, Section 3); MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION 31 (2d ed. 2013) [hereinafter TINKLE, THE MAINE STATE CONSTITUTION].

16. ME. CONST. art. I, § 3.

17. *Id.* ("[A]ll persons . . . shall be equally under the protection of the laws . . . .").

18. DEBATES AND JOURNAL, *supra* note 1, at 92-115.

I. THE PRIMACY APPROACH TO STATE CONSTITUTIONAL INTERPRETATION

State constitutions, like the United States Constitution, contain meaningful guarantees protecting individual rights, and state courts do not exist solely to afford citizens the full protections of the federal constitution. As Justice Brennan wrote, "[s]tate constitutions, too, are a font of individual liberties,"[19] the particulars of which might differ from the federal constitution. Because of this basic fact, the Law Court has expressly adopted the primacy approach, whereby courts must interpret the Maine Constitution independently of the United States Constitution.[20] Maine is one of several states to adopt the primacy approach, which began to gain jurisprudential traction in the late 1970s and early 1980s in conjunction with a renewed focus in academia on the importance of state constitutions.[21]

The primacy approach is a sound mode of constitutional interpretation. It stands in contrast to, and rejects, a "parallelism" approach whereby a court construes state constitutional provisions "as being precisely conterminous with their counterparts" in the United States Constitution."[22] It also departs from an "interstitial" approach, "whereby the state constitution is consulted only when the state court is dissatisfied with the federal doctrine."[23] The primacy approach gives the Maine Constitution the significance that it deserves as a carefully drafted, consequential guarantor of the rights and liberties of the people of Maine; reflects its rightful position within our Republic's federal structure; and allows state courts to avoid expounding on federal constitutional issues that they need not reach.

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19. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

20. *See* State v. Fleming, 2020 ME 120, ¶ 17 n.9, __ A.3d __ ; State v. Rowe, 480 A.2d 778, 781 (Me. 1984); *see also* Tinkle, *At the Crossroads*, *supra* note 9, at 62.

21. *See* Robert F. Williams, *State Constitutional Religion Clauses: Lessons from the New Judicial Federalism*, 7 U. ST. THOMAS J. L. & PUB. POL'Y 192, 192-93 (2013); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097-98 (1997). The seminal article precipitating the new judicial federalism revolution was written by Justice Brennan in 1977. *See* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii, xv (1996). Maine was not alone in adopting an autonomous approach to interpreting state charters in the early 1980's. Among other states, Massachusetts and New Hampshire have also reaffirmed the independent force of their state constitutions. *See* Commonwealth v. Upton, 476 N.E.2d 548, 555 (Mass. 1985); State v. Ball, 471 A.2d 347, 350 (N.H. 1983). It is unsurprising that New England states have been leaders in this independent approach, given the rich constitutional history of the region—many of these states' charters have roots pre-dating the United States Constitution. *See* Roderick J. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 406, 407 (2004).

22. Tinkle, *At the Crossroads*, *supra* note 9, at 74; *see also* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983 (1985) (noting that some states "tie their decisions to both the state and federal constitutions").

23. Tinkle, *At the Crossroads*, *supra* note 9, at 95; *see also* Pollock, *supra* note 22, at 983-84 (noting that, under the interstitial, or "supplemental," approach, a court "looks first to the federal constitution" and generally only reaches the state constitution if "the status of the litigant's rights are questionable under the United States Constitution, or if the asserted violation of rights is found valid under that document").

A. The Primacy Approach Explained

The primacy approach has been aptly summarized by Justice Hans Linde, an early champion of the "new judicial federalism" that revived the primacy approach.[24] According to Justice Linde, the proper inquiry under a state constitution is not whether a particular state guarantee is the same as or broader than its federal counterpart.[25] Rather,

> The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may turn out to be more protective than federal law. The state law also may be less protective. In that case, the court must go on to decide the claim under federal law, assuming it has been raised.[26]

In short, analysis of a state constitutional question must proceed on its own, fully independent of any federal constitutional issues. The point of the primacy approach is that a state's constitutional guarantees "were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law."[27]

As explained by the Law Court, the primacy approach directs Maine courts to "forbear from ruling on federal constitutional issues before consulting [the] state constitution."[28] Thus, when an individual "invokes the protection" of the Maine Constitution, courts "will . . . examine the state constitutional claim before reaching any federal question."[29] State courts are charged with the responsibility to determine the "maximum statement of the substantive content" of a state constitutional guarantee.[30] Only if the state court concludes that the claims under the state constitution fail should the court take up and consider the claims "from [the] standpoint of federal constitutional law."[31] Accordingly, a court should not look to the federal constitution first and express "restraint" in giving the state constitution a different construction.[32]

The primacy approach also directs state courts to use federal court opinions interpreting the United States Constitution as "helpful guides" to interpreting the

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24. Tarr, *supra* note 21, at 1098 & n.7. The now-old "new judicial federalism" has been the subject of much analysis, *see id.* 1097 n.3, which is beyond the scope of this article. This article provides an overview primarily from a Maine jurisprudential perspective.

25. *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

26. *Id.*

27. Oregon v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

28. State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); *see* State v. Fleming, 2020 ME 120, ¶ 17 n.9, __ A.3d __ ("Under the primacy approach applied by this Court, we first look to the Maine Constitution . . . ." (internal citation omitted)).

29. State v. Flick, 495 A.2d 339, 344 (Me. 1985); *see* State v. Chan, 2020 ME 91, ¶ 34, __ A.3d __ (Connors, J., concurring) ("[W]hen properly raised and developed, we interpret the Maine Constitution first, examining—independently of the United States Constitution—the constitutional question pursuant to Maine values.").

30. State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982).

31. *Cadman*, 476 A.2d at 1150; *see Chan*, 2020 ME 91, ¶ 34, __ A.3d __ (Connors, J., concurring); State v. Larrivee, 479 A.2d 347, 349 (Me. 1984).

32. Nevertheless, the Court has at times taken exactly this approach. *See, e.g.*, State v. Buzzell, 617 A.2d 1016, 1018 n.4 (Me. 1992).

Maine Constitution rather than as precedent determinative of the scope of state constitutional guarantees.[33] Of course, the Law Court has "high regard" for the Supreme Court's opinions, "particularly when they provide insight into the origin of provisions common to the state and federal bills of rights rather than only a contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time and among the several states."[34] Properly viewed, however, "federal decisions do not serve to establish the complete statement of controlling law."[35] Federal case law is merely persuasive, and its persuasiveness depends on the similarity of the constitutional provisions at issue (both textually and historically) as well as the soundness of its reasoning. It neither compels a particular conclusion under the Maine Constitution nor "diminish[es] . . . the independent sufficiency" of that document.[36]

B. Justifications for the Primacy Approach

The primacy approach is, as the Law Court has recognized, the best method of state constitutional interpretation.[37] It is the only approach that fully protects the rights secured by the Maine Constitution. The primacy approach also fits best with principles of federalism, and promotes well-accepted principles of judicial restraint.

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33. *Flick*, 495 A.2d at 344; *see Fleming*, 2020 ME 120, ¶ 17 n.9, __ A.3d __ ("[F]ederal precedent serv[es] as potentially persuasive but not dispositive guidance with respect to constitutional provisions with similar goals.").

34. *Id.* at 344 n.2 (quoting Oregon v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983)).

35. *Caouette*, 446 A.2d at 1122; *see* All. for Retired Ams. v. Sec'y of State, 2020 ME 123, ¶ 23, __ A.3d __ (stating that the interpretations of other constitutions by other courts does not control the interpretation of the Maine Constitution); *Chan*, 2020 ME 91, ¶ 33, __ A.3d __ (Connors, J., concurring) (observing that federal precedent does not bind state courts when interpreting state constitutions); State v. Rees, 2000 ME 55, ¶¶ 5, 9, 748 A.2d 976 (noting that the Law Court is "not confined" by Supreme Court precedent). This accords with the Supreme Court's own view of the effect of its decisions on state constitutional law. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940))); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("[T]he States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." (citations omitted)).

36. *Flick*, 495 A.2d at 344. This principle traces its roots further back into Maine jurisprudence than the genesis of the new judicial federalism revolution. *See* Morris v. Goss, 147 Me. 89, 97, 83 A.2d 556, 561 (1951) ("It is to be remembered that we are now interpreting our own Constitution. In so doing, we are not bound by any of the interpretations which other courts may have made of their own Constitutions. Nor do we follow such interpretations except to the extent that the reasoning upon which they rest is convincing to us when applied to our Constitution."); *see also All. for Retired Ams.*, 2020 ME 123, ¶ 23, __ A.3d __ (citing *Morris*).

37. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018) ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same way."); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381-84 (1983). This article does not exhaustively analyze the various justifications for the primacy approach, but rather sets forth several themes informing the Maine Law Court's primacy approach cases.

1. The State Constitution as the Primary Guarantor of the Rights of Maine Citizens

The primacy approach ensures that the Maine Constitution retains its intended position as the primary guarantor of the rights of Maine citizens. As the Law Court has recognized, the state constitution "has been the primary protector of the fundamental liberties of Maine people since statehood was achieved" in 1820.[38] Indeed, prior to incorporation of the federal Bill of Rights, the Maine Declaration of Rights provided the sole source of protections for Maine citizens vis-à-vis state law.[39] As in other states, the "sovereign people [of Maine] gave limited powers to the State government," and adopted provisions meant to "protect[] the people from governmental excesses and potential abuses."[40] The Maine Constitution was therefore imbued with tremendous significance at its drafting and ratification, and it has lost none of that significance. "The Federal Bill of Rights did not supersede those of the states."[41]

In designing the Declaration of Rights, the framers drew from multiple constitutional sources to adopt broad guarantees of individual liberty. The Maine Constitution—though based perhaps primarily on the Massachusetts Constitution of 1780, written by John Adams—reflects the influence of various constitutions then in effect, along with the advice of such founding luminaries as James Madison and Thomas Jefferson.[42] The Maine Constitution "contains purposeful differences in emphases, inclusions, omissions, and phraseology" from both the Massachusetts Constitution and the United States Constitution—variations that the framers intentionally adopted.[43] In drafting Maine's unique constitution and "[i]n selecting the appropriate articulation of a given constitutional right, the framers of the Maine Constitution tended to favor the most generous formulation available."[44] They thus chose "to enlarge the number of individual rights expressly guaranteed; to employ terminology that was expansive rather than constricted, particular rather than abstract, obligatory rather than hortative; and to emphasize freedom from government interference as an overarching principle."[45]

The framers, then, did not simply copy any existing constitution, including the United States Constitution; instead, they sought to—and did—create a unique

38. State v. Larrivee, 479 A.2d 347, 349 (Me. 1984).

39. *See* SUTTON, *supra* note 37, at 179 (noting that state constitutions are the "first bulwarks of freedom"); Tinkle, *At the Crossroads*, *supra* note 9, at 68.

40. State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

41. Linde, *supra* note 37, at 381.

42. *See* Tinkle, *At the Crossroads*, *supra* note 9 at 63-67, 66 n.27; TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 5-7; BANKS, *supra* note 2, at 153-54.

43. Tinkle, *At the Crossroads*, *supra* note 9, at 101. For instance, "the Maine Declaration of Rights removed the barriers to the free exercise of religion that had been erected in Massachusetts." *Id*. at 64. Maine's free exercise clause is also significantly more detailed than its federal counterpart. The unique aspects of Maine's free exercise clause are discussed further in Part II(B), *infra*. Other differences can be seen, for example, in the freedom of speech as well as search and seizure provisions. *Id.* at 64, 66. *See also* BANKS, *supra* note 2, at 153-55.

44. Tinkle, *At the Crossroads*, *supra* note 9, at 66.

45. *Id.* at 67.

document with independent guarantees for the liberties of the people of Maine.[46] Accordingly, absent a reasoned basis for doing so, it is inappropriate to construe the document as necessarily coextensive with the federal constitution. Courts have the duty and "responsibility to make an independent determination of the protections afforded" under the Maine Constitution.[47] If they fail to do so, they fail to uphold their oath to uphold that constitution.[48]

2. Judicial Federalism

The primacy approach also accords with the structure of the federal system, and the place of state constitutions within that system. The United States Constitution established a system of government based on "a unique concept of federalism and divided sovereignty between the nation and fifty States."[49] The primacy approach supports this federal system in two critical ways. First, consistent with the overall relationship between the states and the federal government, the primacy approach ensures that state courts retain the authority to interpret state law. Second, the primacy approach ensures that there are two independent checks on overweening exercises of state power.

As the Law Court has recognized, construing federal "opinions as expressing a limitation upon the scope" of state constitutional rights "would be to stand the state-federal relationship and the Fourteenth Amendment to the Constitution of the United States on their heads."[50] Our federal system reserves to the states "a substantial portion of the Nation's primary sovereignty."[51] It is well established that states "retain 'a residuary and inviolable sovereignty,'" and are not "relegated to the role of mere provinces or political corporations."[52] A strict parallelism, which would ensure that state constitutions are construed in accord with federal precedent, would undermine this federal structure. Under this approach, the Supreme Court would have the power to effectively overrule state law precedent and implicitly alter the scope of state constitutions, thereby subjecting state courts and state constitutions to shifts in doctrine at the federal level.[53] The primacy approach, in contrast, ensures that state constitutions do not "swing[] on the Supreme Court's pendulum."[54]

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46. BANKS, *supra* note 2, at 153-54. *See generally* State v. Badger, 450 A.2d 336, 347 (Vt. 1982) ("[O]ur constitution is not a mere reflection of the federal charter. Historically and textually, it differs . . . . It is an independent authority.").

47. State v. Ball, 471 A.2d 347, 350 (N.H. 1983); *see* All. for Retired Ams. v. Sec'y of State, 2020 ME 123, ¶ 23, __ A.3d __ (noting the Law Court's "responsibility" to construe the Maine Constitution); Ireland, *supra* note 21, at 407 ("Because the Massachusetts Declaration of Rights is a sovereign document, the SJC has an obligation to make an independent determination of rights, liberties, and obligations for Massachusetts." (quotation marks and alterations omitted)).

48. *Ball*, 471 A.2d at 350.

49. *Id*.

50. State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982).

51. Alden v. Maine, 527 U.S. 706, 714 (1999).

52. *Id.* (quoting The Federalist No. 39); *see* Ireland, *supra* note 21, at 407.

53. *See* SUTTON, *supra* note 37, at 183.

54. Tinkle, *At the Crossroads*, *supra* note 9, at 99. It is not even necessary for there to be shifts in federal doctrine in order for parallelism to wreak havoc on state constitutional law. Until the Supreme Court speaks, state courts can merely predict what federal law will be. *See Ball*, 471 A.2d at 351. As a result, when state courts assert that federal and state constitutional law are coextensive and then opine

The primacy approach also protects federalism by recognizing and respecting the fact that the federal structure was adopted in order to create a "double security . . . to the rights of the people."[55] The "genius of federalism" is that it ensures that fundamental rights are protected by not only the United States Constitution, but also state constitutions.[56] This "double security" has real value. While courts interpreting the Bill of Rights, as incorporated against the States under the Fourteenth Amendment, must "give consideration to the nature of federalism," state courts interpreting a state constitution are "not confronted with the problems which face [courts] in determining whether the right was one protected against State impingement . . . under the [United States] Constitution."[57] That is, while there are difficult questions regarding the existence and scope of particular rights under the Fourteenth Amendment and whether those rights are incorporated against the States,[58] such questions need not be addressed in order to adjudicate a claimed violation of a state constitutional right. Accordingly, if state courts conflate their own state's charter with the United States Constitution, they vitiate the federalist structure that was designed to protect the rights of the people[59]—and potentially deprive the people of those rights.

3. Judicial Restraint

The primacy approach also promotes principles of judicial restraint. "[I]t is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary."[60] Likewise, a court should "forbear from ruling on federal constitutional issues before consulting [the] state constitution."[61]

There are several reasons for exercising such restraint. Reaching federal issues prior to resolving any state law issues is imprudent, as it creates the significant possibility of "friction between state and federal judiciaries."[62] Moreover, reaching federal issues first is unsound analytically, as there is "no legal basis for addressing

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on an area of law that the Supreme Court has not addressed, it leaves state law subject to unexpected changes. The difficulty this creates is immediately apparent. For instance, in *State v. Tozier*, the Law Court first implied that the Fourth Amendment and Article 1, Section 5 are coextensive and then held—in the absence of Supreme Court case law on point—that a police officer "does not violate the Fourth Amendment when the officer randomly checks a license plate number of a vehicle on a public road, learns the owner's license has been suspended and revoked, and observes no other circumstances that demonstrate the driver is not the vehicle's owner." 2006 ME 105, ¶¶ 6-10, 905 A.2d 836. What if the Supreme Court were to take up a similar case and decide to the contrary? Would *Tozier* be good law? Or would the scope of the state constitutional guarantee change? Such difficulties are avoided if state courts take care to independently interpret the state constitution. *See Ball*, 471 A.2d at 351; State v. Badger, 450 A.2d 336, 347 (Vt. 1982).

55. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) (quoting The Federalist No. 51); *see* SUTTON, *supra* note 37, at 11.

56. State v. Hempele, 576 A.2d 793, 800 (N.J. 1990); *see* SUTTON, *supra* note 37, at 175.

57. Danforth v. Dep't of Health &Welfare, 303 A.2d 794, 800 (Me. 1973).

58. *See generally* Nelson Lund, *Federalism and Civil Liberties*, 45 U. Kan. L. Rev. 1045, 1058-59, 1059 n.48 (1997) (noting complexity of debate over incorporation).

59. *Ball*, 471 A.2d at 350.

60. State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984).

61. *Id.*

62. State v. Badger, 450 A.2d 336, 347 (Vt. 1982).

issues of federal constitutional law" if an individual may obtain a remedy under state law.[63] The federal Bill of Rights only applies to the states as a result of incorporation through the Fourteenth Amendment.[64] But there is no need to consider the federal constitution when the state constitution provides an adequate remedy. If a State recognizes and protects a citizen's rights under state law, then the State has not deprived that citizen of any Fourteenth Amendment rights.[65] Finally, by reaching and resolving state constitutional issues first, a court provides litigants with a final disposition of the case by precluding the necessity of federal review.[66] The primacy approach therefore appropriately directs courts to first determine whether a state remedy exists before turning, as a last resort, to the United States Constitution.

C. Application of the Primacy Approach by the Maine Law Court

Applying the primacy approach, the Law Court has had no difficulty concluding in a wide variety of instances—and for a wide variety of reasons—that the guarantees contained in the Declaration of Rights differ in scope from the Bill of Rights.[67] On some occasions, the Law Court has concluded that textual differences require it to interpret the Maine Constitution differently than the federal Constitution.[68] However, these textual differences have not been the *sine qua non* for interpreting the two constitutions differently.[69] In other instances, the court has relied upon

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63. Freedom Socialist Party v. Bradbury, 48 P.3d 199, 205 (Or. 2002) (Landau, J., concurring).

64. *See* State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982).

65. *Cadman*, 476 A.2d at 1150; *see* Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981); *Freedom Socialist Party*, 48 P.3d at 205 (Landau, J., concurring); SUTTON, *supra* note 37, at 180-81 ("When a state court arrests the relevant state action under its own constitution, any deprivation of life, liberty, or property or denial of equal protection evaporates."); Linde, *supra* note 23, at 383 ("Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question.").

66. *Badger*, 450 A.3d at 449; *see* Ireland, *supra* note 21, at 407-08 ("The Supreme Court will not overrule a decision . . . based solely on state law.").

67. *See*, *e.g.*, State v. Fleming, 2020 ME 120, ¶ 17 n.9, __ A.3d __ (stating that the right to an impartial jury under Article I, Section 6 is not necessarily coextensive with the U.S. Constitution); Fortin v. Roman Cath. Bishop of Portland, 2005 ME 57, ¶ 56, 871 A.2d 1208 (free exercise analysis under Article I, Section 3 is more rigorous than under the First Amendment); *Caouette*, 446 A.2d at 1122 (privilege against self-incrimination is broader under Article I, Section 6 than under the Fifth Amendment); State v. Sklar, 317 A.2d 160, 170-71 (Me. 1974) (right to a jury trial is more expansive under Article I, Section 6 than under the Sixth Amendment); Danforth v. State Dep't of Health & Welfare, 303 A.2d 794, 800 (Me. 1973) (due process right to counsel in child custody cases is broader under Article I, Section 6 than under the Fourteenth Amendment). *See also* State v. Rees, 2000 ME 55, ¶¶ 4-9, 748 A.2d 977 (declining to "retreat from the more restrictive state standard" in *Caouette*). *Cf.* State v. Bouchles, 457 A.2d 798, 801-02 (Me. 1983) (noting that the Law Court has expressly "rejected any straightjacket approach by which [the court] would automatically adopt the federal construction of the Fourth Amendment ban of 'unreasonable searches and seizures' as the meaning of the nearly identical provision of the Maine Constitution" and has "acknowledge[d] a duty to declare independently the meaning of the search-and-seizure clause of the Maine Constitution," but nevertheless following persuasive federal precedent in the absence of Maine authority, without independent analysis).

68. *See*, *e.g.*, *Fortin*, 2005 ME 57, ¶ 56, 871 A.2d 1208; *Sklar*, 317 A.2d at 166-67.

69. As the Law Court concluded in *Flick*, the protection provided by a particular provision in the Maine Constitution "does not *depend on* the interpretation of the federal Constitution" even if the relevant texts are materially indistinguishable. State v. Flick, 495 A.2d 339, 343 (Me. 1985) (emphasis in original). According to the Law Court, such similarities "do[ ] not support the non sequitur that the

differences in the history of the provisions,[70] its prior jurisprudence,[71] or its own judgment regarding the balancing of public policies.[72] The Law Court has thus utilized a variety of rationales to support its independent interpretation of the Maine Constitution under the primacy approach.[73] When carefully applied, the primacy approach encourages thoughtful analysis of the text, history, structure, and common law pertinent to the relevant state constitutional provision.[74]

The Law Court, however, has not always hewed to the primacy approach that it has expressly espoused and has thereby jeopardized the vitality of the rights guaranteed under the Maine Constitution.[75] At times, the Law Court has appeared to apply a parallelism approach by stating that a particular provision is "interpreted coextensively with its federal counterpart."[76] In such cases, it has not independently examined the Maine Constitution, and has treated federal case law as controlling.[77]

United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions." *Id.* (quoting State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983)). *See Cadman*, 476 A.2d at 1150 (applying primacy approach despite lack of meaningful textual differences between the speedy trial guarantees of Article I, Section 6 and the Sixth Amendment).

70. *See Sklar*, 317 A.2d at 167-68.

71. *See, e.g.*, *Fortin*, 2005 ME 57, ¶¶ 41, 55, 871 A.2d 1208; *Flick*, 495 A.2d at 343.

72. *See, e.g.*, *Fleming*, 2020 ME 120, ¶ 17 n.9, __ A.3d __; *Danforth*, 303 A.2d at 801; State v. Collins, 297 A.2d 620, 626-27 (Me. 1972).

73. Massachusetts' courts have done likewise. *See* Ireland, *supra* note 21, at 409-18 (explaining how the Massachusetts Supreme Judicial Court has relied on "textual analysis, history, common law, structural difference, and comparison to other states").

74. The importance of such careful analysis when interpreting the state constitution should not be underestimated. Mere "reliance on debates about the meaning of a federal guarantee is not apt to dignify the state constitutions as independent sources of law." SUTTON, *supra* note 37, at 177. Rather than simply "tak[ing] sides on the federal debates and federal authorities," state courts should "marshal[] the distinct state texts and histories and draw[] their own conclusions from them." *Id.* As Justice Ireland of the Massachusetts Supreme Judicial Court has observed, a court's grounding of its interpretive method in, among other things, "an examination of state history, a careful analysis of the text, [and] an investigation of the body of statutory and common law on the subject," will "legitimize[]" its state constitutional analysis. Ireland, *supra* note 21, at 406. In short, a court "must be able to explain its decisions in terms other than the personal preferences of those who make them." Ireland, *supra* note 21, at 409 (quoting Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 890-91 (2000)).

75. The inconsistency of the Law Court on this point has been noted by multiple observers. *See, e.g.*, Jamesa J. Drake, *Reviving Maine's State Constitutional Protection Against Unreasonable Searches and Seizures*, 68 ME. L. REV 321, 325-28 (2016); Tinkle, *At the Crossroads*, *supra* note 9, at 94-100.

76. Clifford v. Me. Gen. Med. Cent., 2014 ME 60, ¶ 67 n.21, 91 A.3d 567. *See, e.g.*, State v. Patterson, 2005 ME 26, ¶ 10, 868 A.2d 188 (discussing Article I, Section 5 of the Maine Constitution); State v. Anderson, 1999 ME 18, ¶ 9, 724 A.2d 1231 (discussing Article I, Section 6 of the Maine Constitution); State v. Sterling, 685 A.2d 432, 434 (Me. 1996) (discussing Article I, Section 8 of the Maine Constitution).

77. The Law Court has even utilized this approach to interpret a particular constitutional provision despite acknowledging, at other times, that the very same provision may afford "additional protections" unavailable under its federal counterpart. *Compare* State v. Glover, 2014 ME 49, ¶ 10 n.2, 89 A.3d 1077 (discussing Article I, Section 5 of the Maine Constitution), *with* Patterson, 2005 ME 26, ¶ 10, 868 A.2d 188 (same). Justice Connors has noted such discrepancies in the Court's due process jurisprudence. *See* State v. Chan, 2020 ME 91, ¶¶ 32-33, __ A.3d __ (Connors, J., concurring) (noting that the Law Court has stated that the state due process clause "provides no greater protection" than the federal due process clause, but has at other times "departed from federal concepts of due process").

In other cases, the Law Court has engaged in more of an interstitial approach, analyzing federal constitutional claims at length before disposing summarily with the state constitutional claim.[78] These cases are characterized by an initial examination of the federal constitutional claim and a subsequent determination regarding whether a different result should apply under state law. The Law Court's adherence to the primacy approach has been, therefore, uneven at best. That inconsistency risks a stunted and improper interpretation of the Maine Constitution—a topic to which this Article now turns.

II. APPLYING THE PRIMACY APPROACH TO THE FREE EXERCISE CLAUSE OF THE MAINE DECLARATION OF RIGHTS

The Law Court's primacy approach has led the court to avoid improperly narrowing the expanse of the protections afforded by the state free exercise guarantee contained in Article I, Section 3 of the Maine Constitution. As a matter of state constitutional interpretation, the Law Court has correctly declined to follow the vagaries of the Supreme Court's free exercise jurisprudence, instead recognizing that Maine's Declaration of Rights provides greater protection for the free exercise of religion than that provided under the United States Constitution.

In its *Blount* decision, the Law Court set out a multi-part test for analyzing free exercise claims under Section 3 of the Declaration of Rights. As the court noted, that test coincided with the then-prevailing test under the free exercise clause contained in the First Amendment to the United States Constitution.[79] After the Supreme Court's decision in *Smith* fundamentally altered the scope of the federal Free Exercise Clause, however, the Law Court declined to correspondingly narrow the free exercise guarantees contained in the Declaration of Rights.[80]

As described herein, the Law Court's jurisprudence is amply supported by both the text and history of Section 3. That provision contains broad language ensuring that the state may not burden the free exercise of religion absent compelling justifications. This language reflects the framers' commitment to a generous conception of religious liberty. Had the Law Court followed *Smith*, it would have vitiated the rights guaranteed by Section 3 of the Declaration of Rights.

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78. *See, e.g.*, State v. Milliken, 2010 ME 1, ¶ 16, 985 A.2d 1152 (analyzing federal due process claims, and declaring that the court saw "no reason to depart from the federal standard"); City of Portland v. Jacobsky, 496 A.2d 646, 648-49 (Me. 1985) (acknowledging that "judicial restraint impels us to forbear from ruling on federal constitutional questions when the provisions of our state constitution may settle the matter," but nevertheless relying entirely on federal law without analysis of state law or principles).

79. *See* Rupert v. City of Portland, 605 A.2d 63, 65-66 & n.3 (Me. 1992); Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988). As discussed *infra* Part II(B)-(C), there was good reason textually and historically for interpreting Section 3 of the Declaration of Rights to provide roughly the same protection as available under the then-prevailing interpretation of the federal Free Exercise Clause.

80. Fortin v. Roman Cath. Bishop of Portland, 2005 ME 57, ¶ 56, 871 A.2d 1208; TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 30.

A. A Short History of Free Exercise Jurisprudence

1. The Shifting Sand of Federal Free Exercise Clause Jurisprudence

The United States Supreme Court's Free Exercise Clause jurisprudence has engendered a long and lively debate over "accommodations" of religion.[81] The most significant aspect of this debate has focused on whether the First Amendment mandates that, in certain circumstances, religious believers must be granted exemptions (or "accommodations") from generally applicable laws that substantially burden those believers' exercise of their faith.[82] In *Sherbert v. Verner* and *Wisconsin v. Yoder*, the Supreme Court set forth a test that constitutionally required exemptions to such laws unless the state could establish adequate justification for the infringement upon a believer's conscience.[83] The Supreme Court's position on this point underwent a dramatic shift in 1990 with *Smith*, signaling an end to such constitutionally mandated exemptions.[84] *Smith* generated an extended period of critical analysis and, as—or perhaps more—importantly, a re-invigoration of state free exercise jurisprudence.

a. Sherbert *and* Yoder

Supreme Court jurisprudence regarding constitutionally mandated accommodations of religion reached its high-water mark with the "compelling interest" test in *Sherbert* and *Yoder*.[85] Simply stated, this test asks two questions: (1) does the law substantially burden the free exercise of religion? (2) if so, is that burden outweighed by a compelling state interest that the law is narrowly tailored to serve?[86] If the answer to the first question is "yes," and the answer to the second "no," then accommodation is required. As Professor Witte observed, this test "served to draw together the classic principles of liberty of conscience, free exercise, equality, pluralism, and separationism, and to accord free exercise protection to both

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81. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV 685, 686 (1992).

82. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414–15 (1990) [hereinafter McConnell, *The Origins*]. There is also a second aspect to the debate: whether legislative accommodations are a constitutionally permissible means of protecting religious freedom. *Id.* at 1415. In his seminal study of the history of the federal Free Exercise Clause, Professor Michael McConnell, a former judge on the United States Court of Appeals of the Tenth Circuit, concluded that "[t]here is no substantial evidence that [religious] exemptions were considered constitutionally questionable." *Id.* at 1511. This Article focuses on whether or not Maine's free exercise clause mandates certain accommodations of religion, not on the constitutionality of legislative accommodations of religion.

83. *See* Wisconsin v. Yoder, 406 U.S. 205, 214-29 (1972); Sherbert v. Verner, 374 U.S. 398, 402-08 (1963).

84. *See* Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2005–06 CATO SUP. CT. REV. 257, 260-66 (2006) (discussing the *Sherbert*, *Yoder*, and *Smith* cases).

85. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 414–18 (1996) (discussing *Sherbert*, *Yoder* and other Supreme Court cases applying the compelling interest test).

86. *See Yoder*, 405 U.S. at 214-15.

religious individuals and religious groups"[87] through accommodations of religion. In doing so, this test "served to mold the free exercise clause into a . . . delicate and flexible instrument that could counter both overt and covert forms of religious discrimination."[88]

In *Sherbert* and *Yoder*, the Supreme Court affirmed that religious believers were entitled to accommodations of their religion. In *Sherbert*, the Supreme Court held that it was unconstitutional to deny a Seventh Day Adventist unemployment compensation benefits because of her refusal to work on Saturday for religious reasons.[89] The Court concluded that "condition[ing] the availability of benefits upon [an individual's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[90] It also found that the law was not justified by any compelling state interest.[91] In *Yoder*, the Supreme Court held that the Amish should be exempted from compulsory school-attendance laws because those laws violated their sincere religious beliefs.[92] The Court concluded that Wisconsin's "requirement of compulsory formal education . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[93] It went on to conclude that the law did not serve a compelling state interest, in the context of the facts before it.[94]

b. Smith

A sea-change in the Supreme Court's jurisprudence occurred in 1990. That year, in *Smith*, the Supreme Court decided a case involving a challenge by Alfred Smith, a member of the Native American Church, to the denial of unemployment compensation based on his sacramental use of peyote, a controlled substance.[95] The Supreme Court rejected Smith's argument that he had been deprived of his free exercise rights and, in so doing, did away with constitutionally mandated accommodations.[96] According to Justice Scalia, writing for the Court, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[97] The Supreme Court distinguished *Yoder* as a "hybrid" rights case that succeeded only because the free exercise claim was buttressed by other constitutional claims.[98] The Court distinguished *Sherbert* as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to

87. Witte, *supra* note 85, at 414.
88. *Id.*
89. *See* Sherbert v. Verner, 374 U.S. 398, 399-402 (1963).
90. *Id.* at 406.
91. *See id.* at 406–07.
92. *See* Wisconsin v. Yoder, 406 U.S. 205, 207-13 (1972).
93. *See id.* at 219.
94. *See id.* at 221-29.
95. Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 874-76 (1990).
96. *Id.* at 879-82.
97. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
98. *Id.* at 881-82.

cases of 'religious hardship' without compelling reason."[99] Under the new *Smith* standard, the salient question is whether a law is truly neutral and generally applicable.[100] Neutral laws of general applicability "must prevail—regardless of the nature of the state's interest and regardless of any intrusion on the interest of a religious believer or body."[101]

c. The Response to Smith

The response to *Smith* among legal commentators has been aptly described as "thunderous."[102] Some defend *Smith*, even though its defenders often questioned its rationale.[103] Most scholars, however, criticize *Smith*.[104] These scholars contest Justice Scalia's textual and historical analysis, as well as the use of precedent in *Smith*.[105] Scholars also criticize *Smith* as leaving religious individuals and groups exposed to the "crushing" weight of generally applicable laws that "ignore an entire dimension of human activity and meaning."[106] Some of these scholars propose that the Supreme Court reexamine its decision in *Smith* and recognize that "the Free Exercise Clause, by its very terms and read in the light of its historic purposes, guarantees that believers of every faith, and not just the majority, are able to practice their religion without unnecessary interference from the government."[107] Others propose another approach—namely, restoring a more active scrutiny of free exercise

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99. *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

100. Under *Smith*, the Supreme Court will invalidate as unconstitutional a law that "targets" religion by discriminating against religious practices or that is not "generally applicable" because it is underinclusive with regard to the state's asserted interests—unless the law survives the compelling interest test. *Id.* at 879; *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-46 (1993).

101. Witte, *supra* note 85, at 420.

102. Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 236 (1998). The details of this extensive debate are beyond the scope of this article.

103. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

104. *See, e.g.*, David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*].

105. McConnell, *Free Exercise Revisionism*, *supra* note 104, at 1114-28.

106. Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 278 (1993).

107. McConnell, *Free Exercise Revisionism*, *supra* note 104, at 1152. At least four justices have seemingly indicated an openness to revisiting *Smith*. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari) (observing that the case potentially raised free exercise issues but that the petitioner had not asked the Court to "revisit" *Smith*). The Supreme Court may take up this question in the October 2020 term. *See* Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (mem.) (granting petition for certiorari). Although the Supreme Court has not yet revisited *Smith* as of this writing, Congress—with massive bipartisan support—adopted the Religious Freedom Restoration Act ("RFRA"), which codified the *Sherbert* and *Yoder* compelling interest test. *See* Garnett & Dunlap, *supra* note 84, at 258, 268-69. RFRA, however, only applies to challenges to federal law, not state law. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (concluding that RFRA exceeded the scope of Congress' power under the Fourteenth Amendment).

claims under state constitutions.[108]

This latter call did not go entirely unheeded. Likely because of the scholarly debate regarding the propriety of constitutionally mandated exemptions under the First Amendment, "*Smith* forced a useful reexamination by states and state courts of their own constitutions," specifically, "what liberties and values do . . . state constitutions—which are organic, constitutive documents—protect?"[109] Very quickly after the Supreme Court's *Smith* decision, state courts began to examine anew the guarantees to free exercise of religion contained in their own state constitutions.[110] Some states have chosen to forego an independent approach.[111] At least ten states, however, have declined to follow *Smith* and continue to find accommodations to be constitutionally mandated.[112]

Maine's closest neighbors illustrate this divergent response. Although both New Hampshire and Massachusetts have free exercise clauses similar to the one contained in Maine's Declaration of Rights,[113] New Hampshire has followed *Smith* while Massachusetts has interpreted its constitution as having separate vitality.[114] For its part, New Hampshire has expressly relied upon *Smith* in denying a free exercise claim brought under the state constitution by a defendant seeking to modify his probation conditions. Without analyzing the text or history of the state constitution at all, New Hampshire's Supreme Court reasoned that the free exercise claim must fail because the probation condition was "facially neutral."[115] Massachusetts has followed a different course. In a case involving a free exercise challenge to a state statute prohibiting discrimination on account of marital status, the Massachusetts Supreme Judicial Court noted that it should "reach its own conclusions on the scope

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108. *See, e.g.*, Carmella, *supra* note 106, at 279.

109. Piero A. Tozzi, *Whither Free Exercise:* Employment Division v. Smith *and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence*, 48 J. CATH. LEGAL STUD. 269, 276 (2009).

110. Christine Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 365-66 (2004); Crane, *supra* note 102, at 244-51; *see* Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1032-49 (1994).

111. Linton, *supra* note 14, at 186.

112. *Id.*; *see* Witte, *supra* note 85, at 374-75.

113. The New Hampshire Constitution is very similar to that of Maine. Article V of the New Hampshire Declaration of Rights states: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship." N.H. CONST., pt. I, art. V. Massachusetts has two free exercise provisions—Article 2 of the Declaration of Rights ("Article 2") and Article 46, Section 1 of the amendments to the state constitution ("Article 46"). *See* Att'y Gen. v. Desilets, 636 N.E.2d 233, 235, 241 (Mass. 1994). The text of Article 46 is similar to the text of the First Amendment. *See* MASS. CONST. amend. art. 46 § 1. Article 2 is similar to Section 3 of Maine's Declaration of Rights. *See* MASS. CONST., pt. II, art. II (stating, in part: "[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship").

114. *See* Linton, *supra* note 14, at 137-44, 159.

115. State v. Perfetto, 7 A.3d 1179, 1182-83 (N.H. 2010).

of the protections" afforded under the state constitution "and should not necessarily follow the reasoning adopted by the Supreme Court . . . under the First Amendment."[116] Relying primarily on its own precedent applying the compelling interest test, the court chose to "adhere to the standards of [its] earlier . . . jurisprudence."[117]

In sum, following *Smith*, academic and judicial approaches to free exercise have fractured. It remains uncertain whether a consistent line of state cases will ultimately reinvigorate the protections that were rolled back by *Smith*.[118] There is no question, however, that the divergence of scholarly and judicial analysis has provided fertile ground for independent analysis of state constitutions.

2. A More Stable Maine Free Exercise Clause Jurisprudence

It is in this context that the Maine Law Court's free exercise jurisprudence has developed. The Law Court adopted the pre-*Smith* analysis as a matter of Maine law in its 1988 *Blount* decision.[119] The court has adhered to that analysis even after the Supreme Court's departure from it, as can be seen in a series of cases culminating in *Fortin v. Roman Catholic Bishop of Portland*.[120] As Professor Tinkle has observed, "[i]n the area of free exercise of religion, state and federal law have diverged."[121] By maintaining continuity in its approach to Article I, Section 3 before and after *Smith*, the Law Court has provided analytical stability, which is lacking under federal law, and has maintained the availability of constitutionally mandated accommodations of religion as a matter of state law.

a. Blount v. Department of Educational and Cultural Services

In *Blount v. Department of Educational and Cultural Services*, the Law Court adopted an interpretation of Article I, Section 3 that coincided with the free exercise analysis used by the Supreme Court in *Sherbert* and *Yoder*.[122] In *Blount*, parents

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116. *Desilets*, 636 N.E.2d at 235.

117. *Id.* at 236-41; *see* Magazu v. Dep't of Children & Families, 42 N.E.3d 1107, 1117 n.10 (Mass. 2016). The Massachusetts Supreme Judicial Court has interpreted the two free exercise provisions in its constitution as providing distinct and separate protections. *See id.* at 236-37, 242-43. Its holding rejecting *Smith* came in the context of Article 46 rather than Article 2. *See Desilets*, 636 N.E.2d at 235 (rejecting *Smith* despite textual similarity between Article 46 and the First Amendment). Somewhat ironically, therefore, Massachusetts departed from *Smith* in interpreting a text similar to the First Amendment, while the New Hampshire Supreme Court followed *Smith* in interpreting a very different text. Massachusetts' treatment of Article 2 is discussed further *infra*, at Part II(B)(2).

118. *See* Stanley H. Friedelbaum, *Free Exercise in the States: Belief, Conduct, and Judicial Benchmarks*, 63 ALB. L. REV. 1059, 1066-67 (2000).

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

120. *See infra* Part II(A)(2)(d); Fortin v. Roman Cath. Bishop of Portland, 2005 ME 57, 871 A.2d 1208.

121. TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 31; *see* Linton, *supra* note 14, at 134 (noting that the Maine Law Court "has departed from the Supreme Court's interpretation of the Free Exercise Clause as set forth in *Employment Division v. Smith*, preferring, instead, to adhere to the pre-*Smith* jurisprudence"); Crane, *supra* note 102, at 245, 249 (noting that the Maine Law Court has continued to apply heightened scrutiny even after *Smith*).

122. *See* TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 31-32; Linton, *supra* note 14, at 134-35.

brought suit challenging a state regulation requiring them to obtain prior approval of the home schooling instruction they provided to their children.[123] Among other claims, the parents brought a free exercise challenge under both the United States and Maine Constitutions.[124]

In the context of the federal free exercise challenge, the Law Court applied "a four-stage framework" under the Free Exercise Clause.[125] Citing *Yoder*, the Law Court concluded that a person challenging a government regulation as a violation of the Free Exercise Clause bears the burden of showing: "1) that the activity burdened by the regulation is motivated by a sincerely held religious belief; and 2) that the challenged regulation constrains the free exercise of that religious belief."[126] If the challenger makes these showings, the state must prove both "3) that the challenged regulation is motivated by a compelling public interest; and 4) that no less restrictive means can adequately achieve that compelling public interest."[127] The court found that the parents had established that the state law substantially burdened their religious beliefs. The court also concluded, however, that the State's interest in ensuring a quality education for children was "so essential that the [parents'] loss in [religious] freedom [was] clearly outweighed by the benefit," even though religious liberty itself is a "compelling public interest[]."[128] Finally, the court found that the regulation was the least restrictive means of furthering the State's interests.[129]

The Law Court then turned to the parents' claim under the Maine Constitution, using the same four-part framework. The court—perhaps loosely following a parallelism approach[130]— "conclude[d] that the full range of protection afforded the [parents] by the Maine Constitution is also available under the United States Constitution."[131] In the court's view, the parents' state claim relied on the premise that the Maine Constitution "provides more protection for religious practice and less protection for countervailing public interests than does the" First Amendment, as interpreted in *Yoder*.[132] The court rejected this premise for two reasons. First, the Maine Constitution, which specifically provides that a person's religious freedom may be curtailed for certain enumerated reasons, could not "be read as giving *less* weight to 'compelling public interests' than does the unqualified language of the

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123. *Blount*, 551 A.2d at 1378-79.

124. *Id.* at 1379, 1385.

125. *Id.* at 1379.

126. *Id.*

127. *Id.*

128. *Id.* at 1381.

129. *Id.* at 1379-85.

130. The Law Court did not fully explain its reasons for adopting the *Sherbert*/*Yoder* test in *Blount* and some of its language suggests a parallelism approach. Accordingly, it is difficult to determine whether the Law Court adopted the *Sherbert*/*Yoder* test through independent analysis (consistent with the primacy approach) or by conflating Section 3 with the First Amendment (consistent with the parallelism approach). The lack of clarity on this point is ultimately irrelevant because the Law Court later applied the primacy approach in *Fortin*.

131. *Blount*, 551 A.2d at 1385. This was not the first time that the Law Court relied on the *Sherbert* formulation. *See* Dotter v. Me. Emp. Sec. Comm'n, 435 A.2d 1368, 1372-74 (Me. 1981); Osier v. Osier, 410 A.2d 1027, 1030-31 (Me. 1980). In *Blount*, however, the Court tied it to the Maine Constitution.

132. *Blount*, 551 A.2d at 1385.

First Amendment forbidding any 'law . . . prohibiting the free exercise thereof.'"[133] Further, the Law Court observed that the framers of the Maine Constitution had "laid upon the legislature . . . the obligation to see that suitable provision is made for the support and maintenance of public schools" in a section that "has no federal counterpart."[134] The court thus rejected the state claim. Nevertheless, the Law Court's *Blount* test—which incorporated the Supreme Court's familiar *Sherbert*/*Yoder* analysis—would define the Law Court's free exercise jurisprudence going forward.

b. Rupert v. City of Portland

Two years after the Supreme Court's decision in *Smith*, the Law Court declined to revisit the free exercise test it had adopted in *Blount*.[135] In *Rupert v. City of Portland*, the Law Court's first post-*Smith* free exercise case, the court considered a claim that state drug laws infringed upon religious freedom.[136] The court held that *Blount* was "controlling authority . . . so far as the Maine Constitution [was] concerned."[137] Because the court concluded that Maine had a compelling public interest in preventing the distribution and use of illegal drugs and that the law was the least restrictive means of accomplishing that compelling purpose, the court stated that it had "no reason . . . to decide" whether—in interpreting Section 3—it would "change course to follow the Supreme Court's lead in *Smith*."[138] Although the Law Court declined to decide this issue, its choice to apply the *Blount* test in a case that closely paralleled *Smith* foreshadowed its later departure from the Supreme Court's jurisprudence.[139]

c. Swanson v. Roman Catholic Bishop of Portland

Following its decision in *Rupert*, the Law Court again signaled its continued adherence to the *Blount* balancing test in *Swanson v. Roman Catholic Bishop of Portland*—albeit in a different context.[140] In *Swanson*, a husband and wife brought an action against a priest and the Catholic Church as a result of the priest's alleged sexual liaison with the wife, asserting claims against the priest for infliction of emotional distress and against the church for negligent supervision.[141] After the church moved to dismiss the plaintiffs' claims on constitutional grounds, the Superior Court granted the motion in part and reported the case to the Law Court for interlocutory review pursuant to Maine Rule of Civil Procedure 72(c).[142] The legal

133. *Id.*
134. *Id.*
135. *See* TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 32.
136. Rupert v. City of Portland, 605 A.2d 63, 64 (Me. 1992); *see* Linton, *supra* note 14, at 135.
137. *Rupert*, 605 A.2d at 65.
138. *Id.* at 65-66 & n.3.
139. *See* Crane, *supra* note 102, at 245 n.74 ("Whatever questions the court intended to reserve, it clearly departed from the *Smith* approach in its reasoning, if not in its outcome."); Levy, *supra* note 110, at 1047 (observing that the Law Court's decision in *Rupert* indicated its "commit[ment] to its traditional four-stage framework for analyzing free exercise claims.").
140. *See* Swanson v. Roman Cath. Bishop of Portland, 1997 ME 63, 692 A.2d 441.
141. *Id.* ¶¶ 1-4.
142. *Id.* ¶ 5.

issue presented to the Law Court was whether a negligent supervision claim against a church could survive under the federal and state constitutions.[143]

Without distinguishing between the federal and state free exercise provisions, the Law Court relied upon the well-established rule that courts may only adjudicate church-related disputes that can be resolved by neutral principles without consideration of church doctrine.[144] The court concluded that a claim of negligent supervision would likely require an examination of church doctrine regarding how it governs its clergy and infringe upon the ecclesiastical relationship between the church and its pastoral staff. [145] Although it did not directly cite *Blount*, the court echoed its balancing test by concluding that "imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedom inhibited."[146] In so stating, the court implicitly reaffirmed the compelling interest test and signaled its hesitance to follow the Supreme Court's decision in *Smith*.[147] But again, in *Swanson*, the Law Court did not speak definitively regarding *Smith*.

d. Fortin v. Roman Catholic Bishop of Portland

The Law Court was not presented with an opportunity to directly consider the post-*Smith* vitality of its *Blount* formulation until 2005.[148] Once given that

143. *See id.* ¶ 7.

144. *Id.* ¶ 8.

145. *Id.* ¶¶ 10-12.

146. *Id.* ¶ 13.

147. The Law Court's hesitance is notable in light of the fact that various scholars have argued that *Smith* undermines the principle of church autonomy, a doctrine prohibiting courts from reviewing "internal church disputes involving matters of faith, doctrine, church governance, and policy." Andrew Soukup, Note, *Reformulating Church Autonomy: How* Employment Division v. Smith *Provides a Framework for Fixing the Neutral Principles Approach*, 82 NOTRE DAME L. REV. 1679, 1680 (2007) (quoting Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002)); *see* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU. L. REV. 1099, 1193-95 (2004) (arguing that *Smith* should be extended to eliminate the ministerial exception). The Law Court did not take this path, but instead relied on pre-*Smith* precedent prohibiting courts from resolving questions of church polity and governance. See Parent v. Roman Cath. Bishop of Portland, 436 A.2d 888, 890-91 (Me. 1981). The Law Court's decision implicitly accepted the argument that *Smith* should not apply in church autonomy cases. *See generally* Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2031 n.153 (2007) (discussing the distinction between the theories underlying individual and institutional free exercise claims); Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1722 (2004) ("*Smith* is inapplicable to the traditional doctrines of religious institutional autonomy. . . ."). The Supreme Court itself has accepted this view. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (declining to extend *Smith* to "internal church decision[s] that affect[] the faith and mission of the church itself").

148. While the Law Court reviewed a free exercise challenge to Maine's tuition program in 1999, the parties to that case did "not contend that the Maine Constitution affords greater protection than the United States Constitution." The Court therefore proceeded "with the understanding that the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive." Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 13, 728 A.2d 127. The court applied the *Blount* test, noting that the law at issue was not "neutral on its face" and was thus subject to the compelling interest test even after *Smith*. *Id.* ¶ 16 n.10; *see also* Linton, *supra* note 14, at 135.

opportunity, the court "indicated that the *Blount* analysis applied under the Maine Constitution and was more rigorous than the US Supreme Court's current test under the Federal Constitution's free exercise clause."[149] Specifically, in *Fortin v. Roman Catholic Bishop of Portland*, the court reviewed an appeal of the Superior Court's decision to grant the church's motion to dismiss the plaintiff's breach of fiduciary duty and negligent supervision claims against the church arising from allegations of sexual abuse.[150] The Law Court reversed, concluding that the complaint stated sufficient facts to survive dismissal.[151] The court took up, and ultimately rejected, the church's argument that a recognition of a fiduciary relationship would "necessarily infringe on its free exercise of religion in violation of the First Amendment of the United States Constitution and Article I, Section 3 of the Maine Constitution."[152]

In analyzing the First Amendment defense, the Law Court applied the *Smith* test, noting that a neutral, generally applicable law that does not have the "object" of prohibiting the exercise of religion does not violate the Free Exercise Clause.[153] The court observed, however, that the question of whether a law is "neutral" is one that itself remained somewhat unsettled. The Law Court took note of the debate over whether a law must only be *formally* neutral (*i.e.*, a law that does not have as its object discrimination against religion) or whether a law must also be *substantively* neutral (*i.e.*, a law that does not burden religious individuals more than it burdens others).[154] The court declined to weigh in on this dispute, finding that the First Amendment defense failed under either approach because the church did not "identify a specific religious doctrine or practice that will be burdened if [the plaintiff's] claim is not dismissed."[155]

The Law Court then separately took up the defense raised under Section 3 of the Declaration of Rights, noting that the church had argued that "Article I, Section 3 of the Maine Constitution is more protective of religious liberty than is the Free Exercise Clause of the First Amendment."[156] The court observed that the church was "correct that *Blount*'s and *Rupert*'s formulation of the standard applied to free exercise claims" was "akin to the more rigorous standard" in *Yoder*.[157] The court went on to note that it had, in *Rupert*, "expressly acknowledged that [it] w[as] not

149. TINKLE, MAINE STATE CONSTITUTION, *supra* note 13, at 32; *see* Linton, *supra* note 14, at 136.

150. Fortin v. Roman Cath. Bishop of Portland, 2005 ME 57, ¶¶ 3-4, 871 A.2d 1208.

151. *Id.* ¶ 12.

152. *Id.* ¶ 40.

153. *Id.* ¶ 42. The Law Court applied the *Smith* test in the context of a free exercise claim raised by a religious institution because the institution itself relied on *Smith* and its progeny as support for its claim. *Id.* ¶ 41. It is apparently for this reason that *Smith*, rather than the church autonomy cases, guided the Law Court's analysis. That arguably did not make any difference, however, because the claimant never identified religious doctrines or practices upon which the asserted claim would intrude. *Id.* ¶ 52.

154. *Id.* ¶¶ 44-48 (discussing the views of neutrality set out by Justice Kennedy in the majority opinion and Justice Souter in a concurring opinion in *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

155. *Id.* ¶ 51; *see also id.* ¶¶ 53-54.

156. *Id.* ¶ 55.

157. *Id.* ¶¶ 48, 56 (observing that *Blount* and *Rupert* were similar to the view of neutrality set out by Justice Souter in his *Lukumi* concurrence, which in turn was consistent with "earlier decisions such as *Wisconsin v. Yoder*").

adopting the U.S. Supreme Court's then recent holding in *Smith* as part of [the Court's] Article I, Section 3 analysis."[158] It also observed that, in *Swanson*, it—while "not expressly employ[ing] the *Blount* analysis"—had reaffirmed "the necessity of balancing the societal interests and the associated infringement on the free exercise of religion."[159] Accordingly, utilizing the primacy approach to constitutional interpretation, the court applied the *Blount* test in analyzing Article I, Section 3.[160] The court ultimately rejected the church's arguments because the church was not able to show that the claim would cause the court to burden the free exercise of religion by, for instance, delving into doctrinal matters.[161] The *Fortin* decision, however, made it clear that the Law Court saw Section 3 as providing greater protection than that afforded under *Smith*.[162]

e. Summary

The Law Court's jurisprudence from *Blount* to *Fortin* establishes that Section 3 of the Declaration of Rights provides the same protections that the First Amendment was understood to provide prior to *Smith*. In *Blount*, the Law Court endorsed the availability of constitutionally-mandated exemptions, thereby rejecting the notion that neutral, generally applicable laws necessarily pass muster under Section 3.[163] *Blount* established that Section 3 was co-extensive with the First Amendment as

158. *Id.* ¶ 56.

159. *Id.* ¶ 57.

160. *Id.* ¶¶ 58-69.

161. *Id.* ¶ 61.

162. Although the Court did not uphold the free exercise claim, its application of the compelling interest test indicates that free exercise claims brought under the Declaration of Rights are more likely to succeed than those brought under the First Amendment. *See* Linton, *supra* note 14, at 136.

163. The *Blount* decision implicitly discarded the crabbed reading of Section 3 adopted in *Donahoe v. Richards*, 38 Me. 379, 409-13 (1854). In that case, the Law Court refused to mandate an accommodation of religion, permitting a Catholic student to be expelled from school because she wished to be exempted from participation in the reading of a Protestant Bible—which she believed to be a sin. *Donahoe*, 38 Me. at 386. *Donahoe* was decided as anti-Catholic prejudice swept the country, including New England. *See* Richard D. Komer, *Trinity Lutheran and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 MITCHELL HAMLINE L. REV. 551, 558-59 (2018); *see also* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2269-73 (2020) (Alito, J., concurring); Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 561-62 (2003). *Donahoe* reflected that prejudice, as evidenced by the shocking persecution visited upon the Donahoe family's priest. *See* Komer, *supra*, at 558 n.49. "After the decision, the Donahoe family's priest, Father John Bapst, was tarred and feathered, run out of town on a rail, and threatened with being burned at the stake; the chapel he had officiated in was also set on fire." *Id.* *Donahoe* can fairly be read as an attempt to induce by judicial means changes in Catholic teaching. *See* Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1679, n.165 (2004). *Donahoe*'s anti-Catholic context provides some explanation for the decision's departure from prior cases acknowledging the principle of constitutionally mandated accommodations. *See* Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 990-1001 (2011) (contrasting *Donahoe* with prior exemption cases and noting that it marked "a clear departure from their logic and scope"). *Donahoe* is more a remnant of political suppression of freedom of religion than an exposition of that doctrine and illustrates the shortcomings of the *Smith* "neutrality" rule. *Blount* appropriately left this embarrassing judicial aberration behind in favor of an interpretation of Section 3 that is supported by the text and history of the Declaration of Rights. *See infra* Part II(B).

interpreted by *Sherbert* and *Yoder*—not necessarily because the state free exercise clause *must* be interpreted to mean the same thing as its federal counterpart, but rather because it *should* be so interpreted. In later cases, the Law Court indicated that *Blount* had retained its vitality. In *Fortin*, the Law Court again endorsed the *Blount* test and made known its disagreement with *Smith*. In so doing, the Law Court necessarily reaffirmed both the primacy approach and its view that Section 3 of the Declaration of Rights contains more expansive protections than are provided under the First Amendment after *Smith*.

B. Textual Analysis of Article I, Section 3

The text of Section 3 of the Declaration of Rights strongly supports the Law Court's decision to chart an independent course after *Smith*. The language used by the framers in Section 3 is consistent with the Law Court's *Blount* test and the availability of constitutionally mandated accommodations of religion. By setting forth a clause guaranteeing religious liberty, a proviso ensuring that religious liberty claims are not permitted to disturb the public peace or religious liberties of others, and a separate clause guaranteeing equal protection, Section 3 makes it clear that the Maine Constitution does more than prevent religious discrimination. Instead, it expressly contemplates exemptions from generally applicable laws for religious believers, subject only to the most compelling of state interests.

1. The Text: Different than the First Amendment

Section 3 of the Declaration of Rights is worded differently than its federal counterpart in the First Amendment. This simple fact is of critical salience. In interpreting the Maine Constitution, state courts must "look primarily to the language used."[164] Accordingly, different words used in one constitutional text than another may lead a court to conclude that the scope of the rights guaranteed by that text is different from the scope of the rights guaranteed by the other.

In the context of the federal and state Religion Clauses, the constitutional language is significantly different. The familiar words of the Religion Clauses of the First Amendment are succinct: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[165] Section 3 of the Declaration of Rights, by contrast, is far lengthier:

> All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the

164. Voorhees v. Sagadahoc Cnty., 2006 ME 79, ¶ 6, 900 A.2d 733; *see* Op. of the Justices, 2015 ME 107, ¶ 35, 123 A.3d 494. It is most appropriate to "look to the interpretation of constitutional provisions undertaken by other courts when the constitutional language at issue is similar or drawn from similar historical passages." Op. of the Justices, 2015 ME 107, ¶ 40, 123 A.3d 494.

165. U.S. CONST., amend. I. The United States Constitution also contains a prohibition on religious tests for public office but locates that prohibition elsewhere. *See id.* art. VI, cl. 3 ("no religious test shall ever be required as a qualification to any office or public trust under the United States"). The "no religious test" clause, though not placed within the First Amendment, nevertheless provides critical protection for free exercise of religion. *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1578 (1989).

> manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship—and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.[166]

A close analysis of Section 3 of Maine's Declaration of Rights demonstrates that the provision is considerably more specific than the First Amendment.

Section 3 consists of several constituent parts. First, and of most pertinence to this Article, is the free exercise clause.[167] This clause sets out the basic principle that every individual has the unalienable right to worship God according to his or her conscience, and that no individual's liberty may be curtailed as the result of the exercise of this right. The free exercise clause also contains a proviso limiting the scope of religious liberty by precluding religious believers from asserting a right to disturb the public peace or inhibit the religious liberties of others. Second, Section 3 contains an equal protection clause, requiring that individuals be provided the equal protection of the laws regardless of their religious beliefs and practices.[168] Third, Section 3 contains an establishment clause prohibiting legal recognition of any particular religious denomination.[169] Fourth, Section 3 contains a religious test clause.[170] This provision prohibits the establishment of any religious test for public office. Fifth, Section 3 contains a ministerial exception clause preventing the state from interfering with a religious institution's choice of its teachers.[171]

The very specific language of Section 3 does not necessarily mean that the framers chose to provide restraints on state government more extensive than the restraints already placed on the federal government by the First Amendment. For example, while the First Amendment does not contain separate clauses guaranteeing equal protection and prohibiting government intervention in the hiring practices of religious institutions, the First Amendment can—and should—be read to address these issues. The Supreme Court, for instance, has held that laws "may not single out the religious for disfavored treatment," and has struck down discriminatory

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166. ME. CONST. art. I, § 3.

167. "All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship . . . ." *Id.*

168. "[A]ll persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, ..." *Id.*

169. "[N]o subordination nor preference of any one sect or denomination to another shall ever be established by law. . . ." *Id.*

170. "[N]or shall any religious test be required as a qualification for any office or trust, under this State; . . . ." *Id.*

171. "[A]ll religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance." *Id.*

schemes disfavoring religious entities and believers.[172] The Supreme Court has also held that the First Amendment does indeed prohibit the government from interfering in certain employment decisions by religious institutions.[173] Even as to the issue of constitutionally mandated exemptions, there is strong historical evidence that the First Amendment was originally understood to require accommodations of religion—contrary to *Smith*.[174]

The text of Section 3 does demonstrate, however, that the framers chose to delineate the various aspects of religious liberty more precisely than the First Amendment. Thus, to use two examples just considered, the framers chose to explicitly state that religious liberty includes an equal protection guarantee as well as a ministerial exception. The benefits of having enumerated the different aspects of religious liberty are significant. In the context of ministerial exception claims, for example, the specificity of the Maine Constitution ensured that courts recognized protections for religious institutions as a matter of state law long before the Supreme Court addressed the existence of the ministerial exception as a matter of federal law.[175] In the context of constitutionally mandated accommodation of religion, the specificity of Section 3 short-circuits the debate over *Smith*. The framers' choice of language means that, unlike the First Amendment, the existence of mandatory exemptions does not have to be determined based on the principles underlying a sparse text or historical evidence regarding that text's original meaning (as compelling as such principles or evidence might be). Instead, it can be determined based on the text of Section 3.

2. The Text: A Balancing Test

In addition to guaranteeing equal protection and providing a safe harbor for

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172. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020-25 (2017); *see* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2255-57 (2020). Equal protection, in fact, forms the core of the First Amendment's protection of free exercise after *Smith*. *See Trinity Lutheran*, 137 S. Ct. at 2020-21. Even if the Free Exercise Clause should be read to encompass more than an equal protection principle, there is sound reason to conclude that equal protection of religious individuals and groups is an important element of the First Amendment's guarantee of religious liberty. *See, e.g.*, Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 965-66 (2013) ("The Religion Clauses of the original Constitution and of the federal Bill of Rights were . . . consistent with the Lockean principle of allowing only general rules applicable to all religions only on similar terms."); Witte, *supra* note 85, at 398-99.

173. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188-89 (2012). This conclusion is supported by the history of the First Amendment. *See* Dunlap, *supra* note 147, at 2015-25 (discussing the historical justification for the ministerial exception under the First Amendment).

174. Professor McConnell, who conducted perhaps the most extensive historical study of the Free Exercise Clause and constitutionally-mandated accommodations of religion, concluded that the "doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." McConnell, *The Origins*, *supra* note 82, at 1512. *But cf.* Hamburger, *supra* note 103, at 947-48.

175. Courts recognized the ministerial exception under the Maine Constitution decades prior to the Supreme Court's 2012 decision in *Hosanna-Tabor*. *See Hosanna-Tabor*, 565 U.S. at 188-89; Graffam v. Wray, 437 A.3d 627, 635 n.11 (Me. 1981) (citing Master v. Second Parish of Portland, 36 F. Supp. 918, 926 (D. Me. 1940), *aff'd*, 124 F.2d 622 (1st Cir. 1941)).

religious institutions' right to choose their ministers, the framers of the Maine Constitution expressly adopted protections for the free exercise of religion that balanced the burden placed on free exercise against the state interests justifying that burden. Section 3 of the Declaration of Rights defines both the scope of free exercise and its limits.[176] It expressly acknowledges that religious liberty protects not only beliefs but also conduct. It also recognizes, however, that a limited set of state interests, such as the interest in public peace and safety, may prevail over a claim of religious liberty. The framers thus built into the text a balancing test—comparable to the *Sherbert* and *Yoder* test—that contemplates constitutionally mandated accommodations. The text of Section 3 provides no basis for concluding that neutral, generally applicable laws that substantially burden the free exercise of religion are constitutional, absent some compelling state interest.

a. The Scope of Religious Liberty: Belief and Conduct

The free exercise clause of Section 3 defines religious liberty broadly. It protects all individuals' "natural and unalienable right to worship Almighty God according to the dictates of their own consciences" and prohibits restrictions on any "person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments."[177]

Under the language of Section 3, religious freedom encompasses both practices and beliefs.[178] The phrase "no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience" protects actions while the phrase "nor for that person's religious professions or sentiments" protects religious beliefs.[179] Thus, as Professor McConnell has explained, the language used in the Maine Constitution—as with the text of its sister constitutions in Massachusetts and New Hampshire—defines the scope of free exercise "in terms of the conscience of the individual believer and the actions that flow from that conscience."[180] To read the free exercise clause of Section 3 as protecting only beliefs would render the first of these two phrases meaningless, contrary to canons of constitutional interpretation.[181]

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176. Professor McConnell has helpfully explored both the scope and the limitations of similar free exercise clauses contained in early state constitutions. *See* McConnell, *The Origins*, *supra* note 82, at 1455-66.

177. ME. CONST. art. I, § 3.

178. McConnell, *The Origins*, *supra* note 82, at 1459.

179. *See* Att'y Gen. v. Desilets, 636 N.E.2d 233, 242 (Mass. 1994) (the reference in Article 2 of Massachusetts' Declaration of Rights to "worshipping God in the manner and season most agreeable to the dictates of his own conscience" refers to and protects "conduct," while the reference to "religious profession or sentiments" protects "religious beliefs").

180. McConnell, *The Origins*, *supra* note 82, at 1458-59; *see id.* at 1451-52 (noting that, in colonial America, it was well accepted that liberty of conscience was widely understood to include actions compelled by conscience: "there could be no such thing as freedom of conscience without freedom to act").

181. *See* Op. of the Justices, 673 A.2d 1291, 1297 (Me. 1996) (declining to adopt constitutional interpretation that would render a provision meaningless). The broad scope of Section 3, protecting not only beliefs but also conduct motivated by "the dictates of [each] person's own conscience," is

While Section 3 does not define the precise scope of the actions or conduct protected, there is no reason to conclude that the use of the term "worship" indicates that religious freedom is limited to protecting the rituals or ceremonial acts of religion that occur within the four walls of a church building or other house of worship. The language of Section 3 contains no suggestion that "worship" refers solely to ceremonial acts; to the contrary, it protects the right of every individual to worship according "to the dictates of that person's own conscience." This language unambiguously establishes that every individual is free to decide what that worship entails.[182] Further, as Professor McConnell notes, the understanding of the term "worship," in the Protestant view dominant during early American history, is generally indistinguishable "from 'the duty we owe to our Creator.'"[183] In the Protestant tradition, "'duties' to God included actions, perhaps all of life, and not just speech and opinion."[184] "Worship" is, therefore, any act that is motivated by one's religious beliefs. Unsurprisingly, then, "[i]n none of the state free exercise cases in the early years of the Republic did the lawyers argue or the courts hold that religiously motivated conduct was unprotected because it was not 'worship.'"[185] It is for good reason that Maine courts have never so limited the scope of Section 3.[186]

b. The Countervailing Interests: Peace or Obstruction

The language of Section 3 strikes a clear constitutional balance between

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consistent with the notion that the "right of free exercise precedes and is superior to" civil obligations. McConnell, *The Origins*, *supra* note 82, at 1459. This theory of religious liberty is discussed further in Part II(C)(1).

182. *See Desilets*, 636 N.E.2d at 243-44 (Liacos, C.J., concurring). Indeed, an attempt to distinguish between what is or is not worship would necessarily entangle courts in inherently religious questions. *Id.* at 244 ("The decision by an individual as to what form of religious worship constitutes an appropriate vehicle by which to pay homage to a chosen object of that worship can hardly be characterized as anything but a religious belief or sentiment, for it is religious belief which informs, and serves as the foundation for, that choice. Accordingly, if . . . any court purports to consider whether a practice is truly a form of worship, then in essence the court is inquiring into the validity of a religious belief. No civil court, however, may make such an inquiry."). The Law Court has signaled its hesitance to engage in such analysis. *See* Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 18, 728 A.2d 127 (noting that courts "should be hesitant to delve into the asserted 'centrality' of a religious practice" to an individual's beliefs).

183. McConnell, *The Origins*, *supra* note 82, at 1460 (quoting R. MEHL, THE SOCIOLOGY OF PROTESTANTISM 107-08 (J. Farley trans. 1970)).

184. *Id.* at 1459.

185. *Id.* at 1461.

186. The Massachusetts Supreme Judicial Court, by contrast, has limited that state's corollary to Section 3 by drawing a distinction between "the ritual and ceremonial aspects of worship" and "conduct motivated by sincerely held religious convictions." Soc'y of Jesus of New Eng. v. Commonwealth, 808 N.E.2d 272, 284-85, 284 n.15 (Mass. 2004) (quoting Att'y Gen. v. Desilets, 636 N.E.2d 233, 237 (1994)). The Massachusetts Supreme Judicial Court adopted this distinction in an attempt to avoid conflating Article 2 with Article 46, both of which protect free exercise rights. *Id.* at 284 ("[I]f all actions taken based on religious belief qualified as 'worship[]' under art. 2, the free exercise clause of art. 46, § 1, would be superfluous."). The court did not undertake any analysis of the original understanding of Article 2 or the reasons for the (much later) adoption of Article 46. *Id.* at 279-82, 284-85. In any event, Maine has no provision similar to Article 46, and thus there is no need to harmonize what may well be—in the unique context of the Massachusetts Constitution—two overlapping provisions.

religious liberty and the rightful exercise of civil authority by stating that the free exercise of religion is limited by—or, phrased another way, may only be outweighed by—specified state interests. Section 3 expressly states that the free exercise of religion may be restricted only if it would "disturb the public peace" or "obstruct others in their religious worship."[187] By juxtaposing religious liberty against the state's interest in preserving "public peace" and protecting the religious liberty of others, this proviso serves two purposes: confirming the breadth of the protections under Section 3 and delineating the bounds of free exercise by providing that compelling state interests may limit religious liberty.

The proviso both confirms that Section 3 protects religious conduct and also establishes that Section 3 mandates accommodation of religion even in the context of generally applicable laws. As to the first of these points, the proviso "confirm[s] that the free exercise right was not understood to be confined to beliefs," as "[b]eliefs without more do not have the capacity to disturb the public peace and safety."[188] As to the second of these points, the proviso confirms that Section 3 "envisions religiously compelled exemptions from at least some generally applicable laws."[189] If Section 3 did no more than create a *Smith*-like nondiscrimination principle, then there would be no question that a religious believer is prohibited from engaging in actions inconsistent with the public peace as outlined by neutral, generally applicable state laws.[190] "In a regime where all generally applicable laws are enforced even against contrary religious conscience, there is no need to specify that the right" is limited by the state's interest in preserving the peace—in short, no need for the proviso.[191] It would be superfluous to expressly limit the constitutional protection afforded religious conduct that would breach the peace unless Section 3 mandated exemptions to some generally applicable laws.

The proviso also establishes that religious freedom is subject to certain limitations while simultaneously creating a high threshold for the government to meet in order to justify any restrictions on religious liberty. The proviso creates this high threshold by limiting "the sorts of state interests that may override a demand for a free exercise exemption."[192] The proviso is tightly circumscribed, comparable to the third and fourth prongs of the *Blount* formulation—the compelling interest and least restrictive means analyses.[193] Consistent with the maxim *expressio unius est*

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187. ME. CONST. art. I, § 3.

188. McConnell, *The Origins*, *supra* note 82, at 1462.

189. *Id.*

190. *Id.*

191. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 831 (1998) [hereinafter McConnell, *Freedom from Persecution*]. Justice Scalia criticized this reading of similar provisos in other state constitutions. *See* City of Boerne v. Flores, 521 U.S. 507, 538-540 (Scalia, J., concurring). In his view, any breach of any law is a breach of the peace. *Id.* Justice O'Connor, however, agreed that the provisos "would have been superfluous" unless the right to free exercise was viewed as "generally superior to ordinary legislation." *Id.* at 554-55 (O'Connor, J., dissenting).

192. Crane, *supra* note 102, at 263; *see* Carmella, *supra* note 106, at 280-81; Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 765-66 (1993).

193. *See* Carmella, *supra* note 106, at 281.

exclusio alterius,[194] the proviso's enumeration of specific limitations on free exercise establishes that only a "narrow[] subcategory of the general laws" can overcome an individual's right to free exercise.[195] The phrase "obstruct others in their religious worship" prevents privileging one individual's religious liberty above another's. The "public peace" limitation prevents religious claimants from seeking to "invade the private rights of others or to disturb public peace and order."[196] Absent some compelling reason such as the invasion of another's religious liberty or the maintenance of public order, religious conduct must be accommodated.[197]

A reading of the proviso allowing any generally applicable law to circumscribe religious liberty does not fit with the text of Section 3. The term "public peace," which "refer[s] to the fundamental peacekeeping functions of government," stands in contradistinction to broader terms such as "happiness," which "is a term as compendious as all of public policy," and thus only allows a subset of laws—namely, those essential to maintaining a peaceful society—to outweigh the right to free

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194. The enumeration of certain exceptions "implicitly deny the availability of any other." Nevin v. Union Tr. Co., 1999 ME 47, ¶ 34, 726 A.2d 694 (quoting Musk v. Nelson, 647 A.2d 1198, 1202 (Me. 1994)).

195. McConnell, *The Origins*, *supra* note 82, at 1462; *see* Branton J. Nestor, Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J. L. PUB. POL'Y 971, 978-99 (2019) (explaining that "peace and safety" provisos "constituted . . . narrow exceptions to an otherwise broad free exercise right," and did not encompass every violation of law).

196. McConnell, *The Origins*, *supra* note 82, at 1464.

197. The Law Court has rejected the argument that Section 3 of the Declaration of Rights provides even greater protection to free exercise than the compelling interest test. *See* Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988). In so doing, it adopted the generalized balancing test set forth in *Sherbert* and *Yoder*, as other courts have. *See, e.g.*, First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 186-188 (Wash. 1992) (applying compelling interest test). There is an argument, however, that the proviso identifies the *only* two state interests that are sufficient to overcome the right to free exercise and does not create a general balancing test between religious freedom on the one hand and state interests on the other. *See id.* at 192 (Utter, J., concurring) (rejecting need for a balancing test, and concluding that "[o]nly the government's interest in peace and safety . . . can excuse an imposition on religious liberty"); Parsell, *supra* note 192, at 766. As Justice Liacos noted in considering Massachusetts' parallel provision, the proviso—read strictly—"guarantees . . . absolute freedom as to religious belief and liberty unrestrained as to religious practices, subject only to the conditions that public peace must not be disturbed or others not be obstructed in their religious worship." Commonwealth v. Nissenbaum, 536 N.E.2d 592, 600 (Mass. 1989) (Liacos, J., dissenting). This reading would further constrain the state interests that might limit free exercise. The scope of the "obstruction of worship" limitation is relatively self-evident. The scope of the "disturbance of the peace" limitation—of common law origin—likely refers to the crime of "disturb[ing] the peace of the public . . . by actions, conduct or utterances, the combination of which constituted a common nuisance." *Id.* at 601 (Liacos, J., dissenting) (quoting Commonwealth v. Jarrett, 269 N.E.2d 657 (Mass. 1971)). That is, disturbance of the peace consists of "conduct which tends to annoy all good citizens and does in fact annoy anyone present not favoring it." *Id*. (Liacos, J., dissenting); *see id.* (Liacos, J., dissenting) (noting that the conduct must be "unreasonably disruptive" to most people and must also "infringe on someone's right to be undisturbed"); Soc'y of Jesus of New Eng. v. Bos. Landmarks Comm'n, 564 N.E.2d 571, 573-74 (Mass. 1990) (adopting Justice Liacos' construction of "disturbing the peace" and implicitly overruling *Nissenbaum*'s broader reading equating that phrase to any violation of the law). Under Justice Liacos's approach, if either the obstruction of worship or the disturbance of the peace limitation applies, then the religious liberty claim would fail. If neither limitation applies, then the religious liberty claim would prevail without any balancing of interests. This approach would substantially clarify what is an otherwise somewhat open-ended balancing test. *See* State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); McConnell, *The Origins*, *supra* note 82, at 1464.

exercise.[198] In addition, were the proviso construed to permit any law of general applicability to constrain free exercise, the exception would swallow Section 3's general rule that religious conduct is protected.[199] Further, if the proviso were construed to subject free exercise to any generally applicable exercise of legislative power, thereby creating a *Smith*-like guarantee precluding discrimination but not permitting exemptions from generally applicable laws, it would render the equal protection clause of Section 3 superfluous: that clause already expressly prevents discriminatory targeting of religious believers.

In short, Section 3 establishes that only compelling government interests are sufficient to overcome the fundamental right to freedom of religion and embodies more than a nondiscrimination principle. Section 3, and, specifically, the proviso limiting the free exercise of religion, creates a *Sherbert*/*Yoder*-style balancing test to determine whether accommodations of religion are constitutionally mandated. Religiously motivated conduct is protected, subject only to the strongest of state interests. Absent such an interest, a believer should be exempted from a generally applicable law that substantially burdens his or her exercise of religion. Section 3 includes, but is not limited to, a guarantee of equal protection.

C. Historical Analysis of Article I, Section 3

Several different conceptions of religious liberty influenced the state constitutions adopted in the early United States.[200] These views informed the debate over Section 3 of the Declaration of Rights, which was one of the longest debates of Maine's constitutional convention.[201] As this debate suggests, Section 3 embodies an expansive understanding of religious liberty that protects both belief and conduct, and therefore contemplates accommodations of religion—consistent with *Blount* and the above textual analysis. The framers did not endorse the narrower conception of

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198. McConnell, *The Origins*, *supra* note 82, at 1463. The term "public peace" was chosen despite the frequent use of broader terms, such as "the public good," when used to describe the scope of legislative power. Had the framers truly meant to subject free exercise to ordinary legislation, they would have used a broad term like "the public good." Accordingly, the best reading of the term "public peace" is that it is "confined to public disorder and violent or tortious injury to other persons." McConnell, *Freedom from Persecution*, *supra* note 191, at 835-37; *see* Nestor, *supra* note 195, at 992-93 (noting that "early state governments' constitutional powers extended beyond securing the 'peace and safety' of the state"). Further, "the terms 'peace' and 'safety' were historically defined by colonial charters and Founding-era dictionaries and commentaries to fall short of encompassing 'all laws.'" Nestor, *supra* note 195, at 982.

199. *See* Carmella, *supra* note 106, at 306-07.

200. Professor Witte has identified four such views, which he categorizes as follows: Puritan, Evangelical, Enlightenment, and Civic Republican. *See* JOHN WITTE, JR. & JOEL NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21-37 (4th ed. 2016); Witte, *supra* note 85, at 376-89. Some have debated the usefulness of this taxonomy, arguing that there was broad consensus on liberty of conscience as an unalienable right. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 384-98 (2002). Witte's analysis, however, usefully distills distinctions among those with different views of the scope of religious liberty and is not inconsistent with the notion that liberty of conscience was widely supported. *See* Adams & Emmerich, *supra* note 165, at 1582-95, 1599-1600 (classifying three views roughly consistent with the classifications adopted by Witte and noting commonalities).

201. HATCH, *supra* note 2, at 152; *see* TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 7.

free exercise exemplified by *Smith* and, ultimately, adopted a provision that "gave full liberty of conscience and of worship."[202] Indeed, the provision adopted by the convention has been described as guaranteeing "absolute freedom of religion."[203] Constitutional history therefore supports the *Blount* test and confirms that Section 3 is incompatible with *Smith*.

1. Section 3 and Free Exercise as an Unalienable Right

The text of Section 3 reflects a "theological view" of free exercise that stands in contradistinction to the "Enlightenment view" underlying *Smith*. Under the Enlightenment view, often attributed to Thomas Jefferson, "the right to the free exercise of religious *belief* [is] beyond the reach of governmental control," but, in contrast, government can "control religious *conduct* that might conflict with otherwise neutral general laws."[204] This view is reflected in *Smith*. Regardless of the propriety of interpreting the First Amendment in accord with this view, "many . . . state constitutions embody broader understandings of religious liberty," understandings advanced by—among others—James Madison.[205] In Madison's view, religious liberty is an unalienable right (not a matter of mere toleration), that protects conduct (not just beliefs) and is limited only by the necessity of preserving public order.[206] Madison's view, as will be seen, tracks closely with Section 3 of the Maine Declaration of Rights.

Madison's view can be traced back to evangelical groups, Baptists prominent among them, who asserted a "theological view" of free exercise.[207] Proponents of the theological view called for "free exercise" of religion and "full and equal rights of conscience" because "religious liberty is a pre-political, fundamental human right."[208] They also emphasized the voluntary nature of religious convictions.[209] Under the theological view, civil government has no authority over matters of conscience because religious duties take precedence over civil duties and must be left to the conviction of every individual.[210] Because "civil obligations are subordinate to religious duty," then "where possible, those religious practices that

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202. HATCH, *supra* note 2, at 152.

203. TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 7; BANKS, *supra* note 2, at 155.

204. Durham, *supra* note 110, at 353.

205. *Id.* at 354.

206. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 86 (2002) (Madison's conception of religious freedom departed "from the old-world regime of religious toleration, in which religious exercise was a mere privilege that the civil state could grant or revoke at its pleasure"); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 505-12 (1991); McConnell, *The Origins*, *supra* note 82, at 1443-44, 1452-53, 1464.

207. The author uses the term "theological view" because it expressly relied on religious justifications for religious liberty. Dunlap, *supra* note 147, at 2019 & n.84; *see* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154 (1991). Professor Witte refers to it as the "evangelical view." Witte, *supra* note 85, at 381.

208. Durham, *supra* note 110, at 359; *see* McConnell, *The Origins*, *supra* note 82, at 1443; Witte, *supra* note 85, at 382.

209. WITTE & NICHOLS, *supra* note 200, at 26, 28.

210. Smith, *supra* note 207, at 153-61; *see* McConnell, *The Origins*, *supra* note 82, at 1437-43, 1453; Witte, *supra* note 85, at 382.

conflict with civil law" are to be accommodated.[211] That this view has fallen out of common jurisprudential discourse does not minimize its importance in the development of religious liberty in the fledgling United States,[212] nor its continuing relevance.[213]

Proponents of the theological view argued that government is not a competent authority in matters of conscience because the demands of God on man's conscience are supreme over all other demands and because matters of conscience, by their nature, entail freedom of choice. Roger Williams—the Baptist dissenter and founder of Rhode Island, who apprenticed under the renowned jurist Sir Edward Coke and authored an early defense of the principle of liberty of conscience in the colonies[214]—asserted that the "civil sword" is "of a material civil nature" and therefore "cannot, according to its utmost reach and capacity . . ., I say, cannot extend to spiritual" matters.[215] He contended that matters of religious conscience were not entrusted to the oversight of government.[216] According to Isaac Backus, a Baptist preacher who is credited with the disestablishment of the state church in Massachusetts[217] and who authored a major treatise on religious liberty in 1773,[218] "nothing can be true religion but a voluntary obedience unto [God's] revealed will, of which each rational soul has an equal right to judge for itself."[219] Therefore, Backus argued, "every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind."[220] Their argument was echoed by others.[221] James Madison distilled

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211. City of Boerne v. Flores, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting).

212. Most proponents of free exercise of religion "were members of the most fervent and evangelical denominations in the nation." McConnell, *The Origins*, *supra* note 82, at 1437. "The drive for religious freedom was part of [the] evangelical movement" that swept the colonies near the Revolution. *Id.* at 1438. The view therefore "carried considerable weight with Americans of the founding generation." Smith, *supra* note 207, at 156.

213. Smith, *supra* note 207, at 153-68, 196-223 (summarizing the importance of the theological view and arguing that it cannot adequately be replaced).

214. *See* Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 429, 435-36 (1999).

215. *Id.* at 457 (quoting Roger Williams, *The Bloudy Tenet of Persecution*).

216. *See id.* at 441-43, 457-58; Hall, *supra* note 206, at 469-74.

217. *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1432-48 (2004).

218. William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392, 1405-06 (1968).

219. *Id.* at 1403 (quoting Isaac Backus, *A Declaration of the Rights of the Inhabitants of the State of Massachusetts-Bay*); *see* Witte, *supra* note 85, at 382.

220. McLoughlin, *supra* note 218, at 1403.

221. John Leland, Baptist preacher and close ally to James Madison, argued that "every man ought to be at liberty to serve God in a way that he can best reconcile to his conscience." Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 34, n.164 (1992) (quoting John Leland, *Right of Conscience Inalienable*); *see* Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN. ST. L. REV. 733, 797-98 (2009) (noting John Leland's influence on James Madison and the importance of his contributions to the debate over religious liberty). The evangelical Presbyterian preacher Israel Evans, who was a contemporary of James Madison at the College of New Jersey, exhorted the New Hampshire Legislature that "[r]eligious liberty is a divine right immediately derived from the Supreme Being, without the intervention of any created authority. It is the natural privilege of worshipping God in that manner which, according to the judgment of men, is most agreeable and pleasing to the divine character." Israel Evans, *A Sermon Delivered at Concord, Before the Hon. General Court of the State of*

it as follows: "'the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him' is 'precedent, both in order of time and in degree of obligation, to the claims of Civil Society' and 'therefore that in matters of Religion, no man's right is abridged by any institution of Civil Society.'"[222]

Proponents of the theological view, however, also recognized the rightful sphere of civil government and accordingly advocated setting limits on the outer bounds of religious liberty.[223] Roger Williams, firebrand though he was, contended that the "civil sword" is a "sword of civil justice," and is rightly used "for the defense of persons, estates[,] families, liberties of a city or civil state, and the suppressing of uncivil or injurious persons."[224] Isaac Backus argued only that "every person has an inalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby."[225] Again, this theme was consistently echoed by proponents of the theological view.[226] Madison expressed it this way: the right to free exercise should prevail "in every case where it does not trespass on private rights or the public peace."[227]

Williams and Backus are of particular importance to the development of religious freedom in New England. Williams's writings "provide a framework of argument and theory that is more comprehensive than those of any other writer prior to the constitutional period."[228] Williams established a "theoretical foundation that would justify the constitutional protection of religion and that would elaborate a basis for determining the limits of that protection."[229] His arguments informed those of

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New Hampshire at the Annual Election, reprinted in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1062-63 (Sandoz, ed. 1991); *see* Witte, *supra* note 85, at 382.

222. Durham, supra note 111, at 359 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 188 (G. Hunt ed. 1901)); *see* McConnell, *The Origins*, *supra* note 82, at 1453.

223. *See* McConnell, *The Origins*, *supra* note 82, at 1465.

224. Eberle, *supra* note 214, at 457 (quoting Roger Williams, *The Bloudy Tenet of Persecution*); *see* Hall, *supra* note 206, at 478-87 (describing Williams' argument that both the government and conscience are subject to limitations).

225. McLoughlin, *supra* note 218, at 1403 (quoting Isaac Backus, *A Declaration of the Rights of the Inhabitants of the State of Massachusetts-Bay*).

226. John Leland acknowledged that, "[s]hould a man . . . [in] any wise disturb the peace and good order of the civil police, he should be punished according to his crime, let his religion be what it will; but where a man is a peaceable subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience." McConnell, *Freedom from Persecution*, *supra* note 110, at 825 (quoting John Leland, *The Yankee Spy*, in THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (L.F. Greene ed., New York, G.W. Wood 1845)). Lest there be any doubt about the scope of civil authority, Leland also asserted that the "legitimate powers of government extend only to punish men for working ill to their neighbors." McConnell, *Free Exercise Revisionism*, *supra* note 104, at 1145 (quoting THE WRITINGS OF THE LATE ELDER JOHN LELAND 118). In Israel Evans' words, "[w]hen a man adopts such notions as, in their practice, counteract the peace and good order of society, he then perverts and abuses the original liberty of man," and therefore, it is both right and proper that he be prevented from "disturbing the peace of the community, and injuring his fellow-citizens." Israel Evans, *supra* note 221, at 1062-63.

227. McConnell, *The Origins*, *supra* note 82, at 1448, n.267 (quoting Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (G. Hunt ed. 1901)).

228. Hall, *supra* note 206, at 458.

229. *Id.*

Backus and others who would participate in the formative constitutional debates regarding religious liberty.[230] Backus was "one of the most influential advocates of religious freedom at the founding."[231] Backus actively began opposing the state-established church in Massachusetts in 1748 and continued thereafter, advocating for a broad conception of religious liberty at the Massachusetts constitutional convention.[232] Their view of religious liberty found fertile ground in Maine, where Baptists formed "the largest religious denomination" around the time Maine achieved independence in 1820.[233]

Given the influential nature of the proponents of the theological view in New England generally, and Maine in particular, it is not surprising that Section 3 of the Declaration of Rights reflects the primary tenets of their view. Section 3 expressly affirms that religious liberty is an "unalienable right."[234] It declares that every man is free to worship God "in the manner and season most agreeable to the dictates of that person's own conscience,"[235] thereby recognizing that matters of religion are outside the scope of civil cognizance and are left to individual conviction. And, finally, it frames the limitations on religious liberty in terms of protecting "the public peace" and the "religious worship" of others,[236] thereby establishing that religion cannot be used to disturb the peace or the individual rights of others. The parallels between the theological view and Section 3 are patent.

2. The Framers' View of Religious Liberty

The confluence of the theological view and Section 3 of the Declaration of Rights is no mere accident; rather, it reflects a reasoned choice. The framers of the Maine Constitution debated at length the proper relationship between government and religion, and their conclusion was consistent with the theological view advanced by Williams, Backus, and Madison. Perhaps not coincidentally, dissenting clergymen were well represented at the convention—including eight Baptist ministers.[237] Their presence may well account for the constitutional convention's

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230. Eberle, *supra* note 214, at 464, 466, 470-71.

231. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 17 (2000).

232. *See* Adams & Emmerich, *supra* note 165, at 1592.

233. WILLIAM D. WILLIAMSON, 2 THE HISTORY OF THE STATE OF MAINE 696 (1832).

234. ME. CONST. art. I, § 3.

235. *Id.*

236. *Id.*

237. BANKS, *supra* note 2, at 151. Of the delegates, the majority were likely farmers and participated little in the constitutional debates. *Id.* Of the remainder, the largest group (around forty-five) were businessmen. *Id.* At least thirty-seven were lawyers. *Id.* There were at least thirteen ministers, all but one of whom were dissenters from Massachusetts' Puritan orthodoxy. *Id.* Among the delegates who debated the scope of religious freedom under the Maine Constitution, there were many distinguished figures. Three of the most prominent speakers during this debate had remarkable careers. Judge Thacher was a former U.S. Congressman from Massachusetts and associate justice on the Massachusetts Supreme Judicial Court. He would serve on the Maine Supreme Judicial Court upon Maine's admission to statehood. *See* Thacher, George, *Biographical Dictionary of the United States Congress*, *available at* https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=T000141 [https://perma.cc/P5LC-8NUV]. Judge Parris was a former U.S. Congressman from Massachusetts, as well as judge of the U.S. District Court for the District of Maine. He was later elected Governor of Maine and United States Senator from Maine and would also serve on the Maine Supreme Judicial

solicitude toward free exercise of religion, including "why the convention adopted no religious tests of any kind in the Constitution."[238] Notably, "[i]n the debate over what became Section 3 of Article I, no one contested the establishment of the principle of freedom of religion."[239] Further, as will be seen, none of the delegates echoed Thomas Jefferson's Enlightenment view of religious liberty, with its "profound skepticism of organized religion."[240]

Instead, the debate reflected the influence of not only the theological view of religious liberty but also the "civic republican view" and the "Puritan view" —both of which had a strong influence in New England generally and Massachusetts in particular.[241] Civic republicans "shared much common ground" with the theological view, but they "sought to imbue the public square with a common religious ethic and ethos."[242] The Puritan view, meanwhile, "readily countenanced the coordination and cooperation of church and state," including material aid to churches, while "leaving little room for individual religious experimentation."[243] Massachusetts's constitution reflected (at least in part) the civic republican and Puritan views, proclaiming that "[i]t is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the SUPREME BEING, the great Creator and preserver of the universe."[244] Massachusetts also allowed for taxation for the support of public worship.[245] In practice, moreover, Massachusetts long suppressed religious dissent.[246]

The debate over whether the Maine Constitution should reflect such views of religious liberty, or instead the more voluntarist approach of the theological view, "occupied most of the debate on Article I at the 1819 Convention."[247] Ultimately,

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Court. *See* Parris, Albion, *id.*, *available at* https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=P000079 [https://perma.cc/LX7E-SUNQ]. Mr. Holmes, the most notable speaker and a vigorous advocate for a broad conception of religious liberty, was a former U.S. Congressman from Massachusetts, and would become a United States Senator for the State of Maine upon Maine's admission to the Union. *See* Holmes, John, *id.*, *available at* https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=H000739 [https://perma.cc/ZS2B-4F7L].

238. BANKS, *supra* note 2, at 151. A religious test requirement was proposed but defeated. DEBATES AND JOURNAL, *supra* note 1, at 293-94.

239. BANKS, *supra* note 2, at 151.

240. Witte, *supra* note 85, at 384.

241. *Id.* at 378-79 (describing Puritan influence in New England); *id.* at 385, 387 (noting that John Adams, author of the Massachusetts Constitution, was a "principal spokesman" of the civic republican view and noting that "[p]ost-revolutionary Massachusetts proved to be fertile ground for the cultivation of . . . civic republican views").

242. *Id.* at 381.

243. *Id.* at 378-80.

244. MASS CONST. part I, art. II.

245. Witte, *supra* note 85, at 379-80; Adams & Emmerich, *supra* note 165, at 1563; Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 883 (1995). This practice imposed significant hardship on dissenters. BANKS, *supra* note 2, at 154-55.

246. Witte, *supra* note 85, at 380 (noting that, even in the eighteenth century, dissidents "enjoyed only limited political rights"). The Baptists, for instance, "were severely persecuted in Massachusetts, for mere opposition to infant baptism." WILLIAMSON, *supra* note 231, at 696. Ultimately, the Puritan view did soften into a more voluntarist view. *See* WITTE & NICHOLS, *supra* note 200, at 25.

247. Tinkle, *At the Crossroads*, *supra* note 9, at 64 n.17.

the delegates opted "in favor of genuine religious freedom."[248] As Professor Esbeck has observed,

> Maine [at the time of its founding] was . . . a land of diverse religious influences populated by rugged individualists . . . . Competing religions and convictions concerning voluntaryism, as well as the independent spirit of the settlers, found their voice in Maine's 1819 constitution. . . . The constitution did not establish any religion while ensuring religious liberty for the state's diverse population.[249]

This new course is evidenced by the framers' debate over the wording of Section 3 as well as the framers' debate over religious exemptions from militia duty.

a. Religious Liberty as an Unalienable Right

As will be seen, the framers spent much time debating the language to be used in Section 3. A large portion of that debate focused on whether the Maine Constitution ought to include a preamble, similar to that used in the Massachusetts Constitution, acknowledging man's duties toward God. The framers ultimately chose to exclude such language—not because they believed religion to be anathema, but because they concluded that religion is a voluntary matter of conscience beyond the jurisdiction of civil government.

The debate over Section 3 began with a poignant moment. A group representing the "Catholics of Maine" presented a petition to the convention stating that "under the Constitution of Massachusetts they were excluded from an equal participation of the benefits of government, and praying that by the new constitution, they might be admitted to an equality of religious and civil rights and immunities."[250] Judge Parris observed that "the object of the memorialists" would "doubtless be secured to them by the Bill of Rights, if adopted as reported."[251] He then moved that the petition lie on the table, and it was so ordered.[252] It was with this clear indication of the drafting committee's intent to enshrine a robust protection of religious liberty that the delegates took up consideration of Section 3. After long debate, the convention placed religious practices largely beyond the purview of government, as the petitioners had hoped.[253]

Following presentation of the petition, Judge Thacher moved to amend the text of Section 3 to include language declaring as follows: "As it is the absolute duty of all men to worship God their creator, so it is their natural right to worship him in such way and manner as their conscience dictates, to be agreeable to his revealed

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248. *Id.*; *see* BANKS, *supra* note 2, at 154-55.

249. Esbeck, *supra* note 217, at 1538-39.

250. DEBATES AND JOURNAL, *supra* note 1, at 92. This was not the first time that Maine residents raised objections to Massachusetts' restrictions on religious liberty. In 1680, over a hundred individuals, including Baptist dissenters, in what would become southern Maine petitioned "for direct royal control of Maine on the ground that Massachusetts was suppressing religious freedom." Charles E. Clarke, THE EASTERN FRONTIER: THE SETTLEMENT OF NORTHERN NEW ENGLAND 1610-1763, at 80 (1970); *see* BANKS, *supra* note 2, at 10-11.

251. DEBATES AND JOURNAL, *supra* note 1, at 93. Judge Parris's observation stands in stark contrast to the Law Court's ruling in *Donahue*.

252. *Id.* at 93-94.

253. *See generally* HATCH, *supra* note 2, at 152-54.

will."[254] He expressly declared it his purpose to place in the Declaration of Rights a recognition of the obligation to worship God.[255] Dr. Rose immediately objected that the delegates had come "to establish a declaration of rights and not a prescription of duties."[256] Mr. Herrick, following Dr. Rose, raised no objection to declaring the duty of man to worship God, but suggested that it be made clear that the legislature could not enforce performance of that duty. "Religion is in its nature personal, it is a quality of the heart," he argued, "and not subject to human laws, which by their severe penalties commonly make hypocrites and bigots."[257] Mr. Holmes then rose to speak on behalf of the drafting committee.[258] In his view, "[t]o make it a duty to exercise a right [was] preposterous."[259] "Worship," he contended, "is the voluntary offering of the fruit of the heart to a Deity."[260] He ended with a stirring peroration, speaking of the drafting committee's prior deliberations:

> We concluded, at length, to declare the people's rights of conscience, without attempting to define their religious duties . . . . To prescribe the duty would be to authorize the Legislature to enforce it. This would excite jealousy and alarm. The worship of God is, and ought to be free. Religious oppression brought our fathers to this country, and their descendants will not fail to resist it.[261]

Judge Thacher's motion "was lost by a great majority."[262]

Another motion along the same lines was made by Mr. Emery, who sought to amend Section 3 to read that "all men have a natural and unalienable right to exercise the duty of worshipping Almighty God."[263] The debate again focused on whether the state government ought to be able to declare man's obligation to worship God. Mr. Holmes again took the position that the government has no authority to prescribe a manner of worship: "If you mean the duty is to be performed in a particular way, then you prescribe the mode of performance, which we have no right to do."[264] Judge Green, in support of the motion, argued that it was the "duty" of government "to encourage" religion because it was "the best security of man."[265] Mr. Locke, a Baptist minister, responded with an appeal to voluntarism as stirring as that raised by Mr. Holmes in response to Judge Thacher's motion:

> We ought not to be obliged to perform the duty of worshipping God by legislative power. The Legislature is departing from its proper sphere, when it undertakes to regulate the intercourse between man and his Maker. Religion being seated in heart, cannot in its own nature be cognizable by human laws. And if we appeal to history,

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254. DEBATES AND JOURNAL, *supra* note 1, at 94.
255. *Id.*
256. *Id.* at 95.
257. *Id.* at 96.
258. Holmes, who was chairman of the drafting committee, is credited with having "exercised the most influence in shaping the document that emerged from his committee." TINKLE, THE MAINE STATE CONSTITUTION, *supra* note 15, at 5; *see* BANKS, *supra* note 2, at 152.
259. DEBATES AND JOURNAL, *supra* note 1, at 96.
260. *Id.* at 97.
261. *Id.*
262. *Id.*
263. *Id.* at 98-99.
264. *Id.* at 99.
265. *Id.* at 101.

> we shall find little encouragement for legislating on this subject. Pure religion always flourishes most, when it is left most free.[266]

Judge Thacher protested that the amendment would not prescribe how to exercise the duty of worshiping God, but would instead "protect each worshipper to discharge the duty according to the dictates of his conscience."[267] Mr. Holmes responded that the constitution should not "prescribe duties" in regard to religion, and that religion stood best when undisturbed by government: "I do not believe religion is in danger from liberality. I trust it has better props, than any this Convention can establish. The people . . . sent us here to guard their civil rights, but not to instruct them in the precepts of religion."[268] Mr. Emery's motion was also "lost by a large majority."[269]

The convention confronted a similar issue when Mr. Whitman introduced a motion to permit the Legislature to "encourage and support the institutions of public worship."[270] Whitman argued that religion "constitutes the basis of social order," and that the government therefore has an interest in "promoting good morals."[271] Mr. Holmes again responded: "Sir, I will never consent, on any consideration, to put any restraints upon conscience . . . . I tremble when I think of the fatal effects, which have resulted from the interference of the civil authority in matters of religion."[272] And such a constraint and interference he viewed Whitman's motion to be: "Give your Legislature a power to uphold religion, and trust to their discretion for the suitable means, and you arm them with a weapon which might prostrate in the dust, your religious liberties."[273] Judge Thacher supported the amendment as a "salutary provision to preserve our existing wholesome institutions."[274] Judge Parris supported Holmes: "As far as I can go with the gentleman [Mr. Whitman] to support the cause of religious principles, and leave the conscience free, so far I am with him. But I see the dangerous tendencies of the exercise of this power; and cannot consent to give it to them."[275] After further debate, Mr. Whitman's amendment was "decided in the negative."[276]

This debate over the wording of Section 3 is notable on at least two levels, and it confirms that the framers meant to leave the exercise of religion as free as possible from government interference. First, the entire debate is suffused with a solicitude toward religion. The framers argued not over *whether* to protect religious liberty, but *how* best to do so. No delegates suggested that religious liberty ought to merely be tolerated, or that religious beliefs should be granted more protection than religious conduct. Instead, they presented two conflicting approaches to promoting religious liberty that were both solicitous toward religion. Second, the debate is notable because the two competing approaches to religious liberty advanced by the

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266. *Id.*; *see id.*, Biographical Sketches at 94.
267. *Id.* at 103.
268. *Id.* at 105.
269. *Id.*
270. *Id.* at 107.
271. *Id.* at 105-06; *see id.* at 111.
272. *Id.* at 108.
273. *Id.* at 108-09.
274. *Id.* at 110.
275. *Id.*
276. *Id.* at 114.

delegates—civic republicanism and the theological view—was clearly resolved in favor of the voluntarist theological view, with its broad conception of religious liberty. The "great majority" of the constitutional convention affirmed a key tenet of that approach to religious liberty: religion is a voluntary matter of the conscience, beyond the reach of civil authority. It is entirely unsurprising, therefore, that Section 3 comports with the theological view and frames the right to free exercise as an unalienable right that mandates accommodation of religion.

b. Anticipating Accommodations of Religion

The debate at the 1819 constitutional convention also indicates the framers' sensitivity toward the need for accommodations of religion even in the face of the most compelling of state interests: national defense. The draft constitution initially presented to the convention permitted exemption of Quakers and Shakers from military duty.[277] This provision led to substantial debate focusing on the necessity of, and the difficulties with, exemptions from militia duty.[278] The compromise eventually struck allowed limited exemptions, not because of insensitivity toward claims of conscience, but because of the importance of national defense.

Mr. Hall moved to amend the provision establishing the composition of the militia, namely, Article VII, Section 5, in a manner that would not have provided for exemptions.[279] Mr. Redington objected because the amendment would draw into service members of "religious denominations, whose consciences forbid their doing military duty," either by direct service or by paying an equivalent that may be equally unconscionable to such believers.[280] Mr. Holmes likewise expressed concern that it would "interfere with the right of conscience, to compel these people to contribute to purposes of war," yet he also acknowledged that "a state of things may exist, when it shall be necessary that they should contribute something for military purposes."[281] Judge Thacher then posed a challenging question: "[W]ho was to determine what a man's conscientious scruples were; and when they were sincere?"[282] He raised concerns with leaving it "to the consciences of individuals . . . to say whether they will obey a general law or not, and so, on that ground, claim an exemption from a general duty."[283] He was particularly concerned that, "in times of a national war, or when taxes bear heavily on the community," it was likely that "hypocritical" claims

277. *Id.* at 252.

278. HATCH, *supra* note 2, at 158.

279. DEBATES AND JOURNAL, *supra* note 1, at 252.

280. *Id.* at 253-54.

281. *Id.* at 255.

282. *Id.* at 257. For a general discussion of Judge Thacher's arguments, *see* Campbell, *supra* note 163, at 988-89.

283. DEBATES AND JOURNAL, *supra* note 1, at 257-58. In Judge Thacher's view, the Legislature would never "knowingly pass a general law, directly contrary to the laws of their religion . . . contained in the Bible." *Id.* at 259. Because he believed that the Legislature would always act in accord with scripture, he contended that any claim for exemption from such laws would likely reflect "erroneous principles of religion." *Id.* at 259-60. It was for this reason that Judge Thacher believed that, as a general matter, "convictions of conscience . . . are no legitimate grounds for personal exemptions." *Id.* at 259. His view of the scriptural validity of claims of conscience was extraordinarily paternalistic toward religious believers, and the record does not show that it was ever endorsed by other delegates at the convention.

of conscience would proliferate.[284] But even he did not oppose the granting of all exemptions from militia duty; rather, Judge Thacher contended that exemptions could be granted if based on clear religious principles and if the legitimacy of the claim could be verified. On the first point, he acknowledged that "any law of man . . . contrary to, or forbidden by the laws of Christ's kingdom, are null and void;" but, he said, those religious dictates "ought to be clear and express" if they are to be "paramount to all human laws."[285] On the second point, he proposed that exemptions could be extended on the basis of denomination; that is, Quakers could be exempted because it could readily be determined that they actually had a conscientious objection to war.[286] Thus, despite generally rejecting the voluntarist view of Mr. Holmes and other delegates, even Judge Thacher acknowledged that exemptions from militia duty should be recognized if adequately supported. The convention ultimately rejected Mr. Hall's motion, with its no-exemptions language.[287]

Colonel Atherton then introduced another motion that would have eliminated exemptions based on religious conscience.[288] He acknowledged the "strong claims for exemption" by Quakers, but argued that, if the convention "exempt[ed] all those conscientiously scrupulous of bearing arms, what will become of our defence?"[289] In his view, "self defence" outweighed all claims of exemption.[290] Atherton's motion, like Hall's, was defeated.[291]

Further motions were made, and further debate was held, after Colonel Atherton's motion was rejected. Mr. Francis made a motion that all persons "whose religious sentiments forbid their engaging in war" may be exempted from military service without having to pay an equivalent.[292] Mr. Holmes again noted the importance of claims of conscience by the Quakers, but also argued that, "in the extremest cases, when the ultimate safety of the State is in danger," their claims of conscience might be outweighed and the state permitted to require payment of an equivalent.[293] Mr. Francis's motion lost.[294] Several delegates then spoke in favor of allowing the Legislature to make exemptions.[295] General Chandler acknowledged the need for exemptions for those with "conscientious scruples," but also spoke in

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284. *Id.* at 269; *see id.* at 258.

285. *Id.* at 261. Judge Thacher believed that there was no fair basis in the Christian faith to object to paying an equivalent to serve on one's behalf in the militia and expounded on that point at some length. *Id.* at 259, 262-67. In an example of his paternalistic views toward religion, he concluded that anyone seeking an exemption from paying an equivalent were "very much confused" in their religious beliefs. *Id.* at 267.

286. *Id.* at 267-69.

287. *Id.* at 270.

288. *Id.*

289. *Id.* at 272.

290. *Id.*

291. *Id.* at 273.

292. *Id.*

293. *Id.* at 275.

294. *Id.* A similar motion was made later by Mr. Stockbridge, who protested that "[t]here are many in this Convention, who cannot vote for the constitution, unless this provision is made." *Id.* at 355. His motion also lost. *Id.*

295. *Id.* at 276 (Mr. Preble: arguing that it should be left "in the power of the Legislature to exempt those who were conscientiously scrupulous of bearing arms"); *id.* at 277 (Colonel Moody: "It was enough to say the Legislature may make exemptions").

favor of requiring an equivalent in order to maintain "the militia for the defence of the State."[296] Colonel Atherton spoke again against allowing the Legislature to permit conscientious or other objections without payment of an equivalent, pointing to past difficulties in raising and funding a militia.[297]

Ultimately, the convention adopted a provision that struck a compromise among these competing concerns.[298] As adopted, Section 5 of Article VII permitted exemptions of "Quakers and Shakers" as well as "Ministers of the Gospel" from military duty.[299] Quakers, Shakers, and clergymen were recognized to have such an unquestioned claim of religious conscience that they could be exempted even from the requirement to pay an equivalent; others could be exempted, but—given the strength of the state's interests—would be required to pay an equivalent.[300] Accordingly, the framers recognized the necessity of religious exemptions, even in the context of military service.

The debate over military exemptions was not definitive, but it was resolved in a manner consistent with the theological view of free exercise.[301] It indicates that the framers accepted the concept that individual claims of conscience may require exemptions from generally applicable laws because of the superior claim of religious conscience. It also indicates, however, that the framers recognized the necessity of ensuring the common defense as central to the role of civil government. In the context of military duty—which implicates the most compelling of state interests—the framers ultimately chose not to constitutionally mandate accommodation of religion. They did, however, specifically provide that the Legislature was free to allow such exemptions.[302] This approach was almost precisely the approach

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296. *Id.* at 277.

297. *Id.* at 348-51.

298. *See generally* HATCH, *supra* note 2, at 158.

299. ME. CONST. OF 1820, art. VII, § 5. The delegates expressly chose not to limit the exemption for "Ministers of the Gospel" to those who were "ordained and settled." DEBATES AND JOURNAL, *supra* note 1, at 355-58. Judge Thacher and Colonel Moody supported including this limitation, because it would otherwise "be difficult to decide who were ministers of the gospel." *Id.* Mr. Holmes spoke against the limitation, because "[t]here are many candidates and missionaries . . . who we do not want in the ranks of the militia." *Id.* at 355. Mr. Locke also spoke against the limitation, as the "ordained and settled" language might prevent missionaries from being exempted from military service. *Id.* at 356. Judge Dana lent his support to Mr. Holmes and Mr. Locke, arguing that toleration—not coercion—should be the guiding principle, and that denominations might arise "who shall have able and pious teachers, who ought . . . to be exempted from military duty, and yet do not come within this description." *Id.* at 357. "[H]ow unwise and how unjust," he argued, "it would be to select those teachers of religion, and those only, who belong to particular denominations, as candidates for favour, to the exclusion of all others; it would be an invidious distinction, and such an one as I hope and trust we shall not adopt." *Id.* The proposed limitation was stricken. *Id.* at 358.

300. ME. CONST. OF 1820, art. VII, § 5.

301. The debate does not indicate that Article I, Section 3 fails to mandate exemptions for religious practices. Although one could argue that no exemption would have been necessary in the militia clause if Section 3 requires accommodation of religion, this argument falls short. Constitutionally mandated exemptions for religious believers might not apply to military service because of the compelling state interest in providing for the public defense.

302. ME. CONST. OF 1820, art. VII, § 5.

advocated by Roger Williams.[303] Accordingly, the debate indicates that the framers appreciated the difficult balancing required in accommodating religion and valued religious conscience even when it conflicted with a basic obligation of civil government—protection of the state. Ultimately, they resolved the issue of exemptions from militia duty in a manner consistent with the theological view of religious liberty.[304]

CONCLUSION

The Law Court has established that the Maine Constitution still has independent vitality and must be accorded its proper place as a guarantor of the civil rights of Maine citizens. The primacy approach to constitutional interpretation is sound, and the Law Court should renew its commitment to that jurisprudential approach, thereby giving the Declaration of Rights the attention that it is due. Only by doing so can the liberties guaranteed therein—including the "unalienable right" of religious liberty—be adequately protected.

The free exercise clause illustrates the importance of the primacy approach. As the Law Court has recognized, Section 3 of the Declaration of Rights guarantees that religious believers will be protected in their beliefs and conduct absent a compelling state interest. The text of Section 3 mandates that the conscience of religious believers be accommodated as long as they do not violate the public peace or deprive others of religious liberty. This mandate reflects more than the non-discrimination principle of *Smith*. Instead, it reflects the framers' commitment to vibrant conception of religious liberty for all—including minorities who, like the Catholics of their day, suffer oppression through the application of "neutral" laws.

The Maine Constitution, even 200 years after its adoption, still matters—for civil liberties generally and free exercise of religion specifically. To borrow the words of John Holmes, the Declaration of Rights ensures that the people of Maine remain as they "ought to be": free.

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303. Adams & Emmerich, *supra* note 165, at 1630 (noting that Williams asserted that "Quakers and Baptists . . . could not claim a right, divine or otherwise, to exemption from militia service" but allowed that it might be appropriate for "government to accommodate conscientious objectors").

304. *See generally id.* at 1634-35.