July 2015

Humphrey v. Lane: The Ohio Constitution's David Slays the Goliath of Employment Division, Department of Human Resources of Oregon v. Smith

Jeffrey D. Williams

HUMPHREY V. LANE[1]*:* THE OHIO CONSTITUTION'S DAVID SLAYS THE GOLIATH OF *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH*[2]

Give me liberty, or give me Smith.[3]

I. INTRODUCTION

Wendall Humphrey, a practicing Native American Indian, wore his hair long.[4] His employer told him to cut his hair or be fired.[5] Humphrey did not wear his hair long as an act of rebellion.[6] Humphrey wore his hair long for only one reason, to exercise his religious beliefs.[7]

The story of Wendall Humphrey is a modern-day version of the biblical narrative of David and Goliath.[8] Humphrey represents citizens whose rights to the free exercise of religion

---

[1] Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000) (holding, six-to-one, that the Ohio Constitution's Free Exercise Clause affords a broader protection than is provided by the United States Constitution, and that strict scrutiny is the standard of review for religious free exercise cases in Ohio, rather than the generally applicable, religion-neutral standard in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).

[2] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

[3] Patrick Henry, *Speech at the Virginia House of Delegates, Richmond*, (Mar. 23, 1775) *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 270 (1937). The full text of the original quote reads, "I know not what course others may take; but as for me, give me liberty or give me death." *Id*. The author takes poetic license with the statement made by Patrick Henry prior to the American Revolution. This illustrates the view that the abandonment in *Smith* of the strict scrutiny analysis for free exercise cases was an ending of sorts to what Justice Blackmun, in his dissent in *Smith*, referred to as "a settled and inviolate principle of this Court's First Amendment jurisprudence." *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting).

[4] Alan Johnson, *A Fight for His Heritage: Long Hair at Center of Court Case,* COLUMBUS DISPATCH, April 10, 2000, at A-1. In the interview, Humphrey stated further that "[n]ative people believe the Creator knows you by your hair. . . . When I braid my hair, each braid is a prayer." *Id.*

[5] *Humphrey*, 728 N.E.2d at 1041.

[6] Humphrey's beliefs included the idea that a man's hair would be cut only on special occasions, such as at times of mourning. *Id*.

[7] In *Humphrey*, the Ohio Supreme Court noted that the trial court made express findings that Humphrey's beliefs were sincerely held. *Id*. at 1045. Humphrey's practice of allowing his hair to grow long is consistent with those who walk "the red road" in the practice of Native American spirituality as a Shoshone-Bannock Tribe member. *Id.*

[8] 1 *Samuel* 17. The story of David and Goliath in the Bible describes the young Hebrew David, later to become King of Israel, who slays an apparently overpowering opponent in Goliath. According to THE ABINGTON BIBLE COMMENTARY, the nuance of the story is that David is not so much concerned with a victory in battle, but rather

will remain protected under the Ohio Constitution, even though they are threatened by narrow federal interpretations of religious free exercise.[9] In *Humphrey*,[10] the Ohio Supreme Court left the battlefield of religious freedom, having successfully defended the right of religious free exercise under the authority of the Ohio Constitution.[11]

This Note explores the renewed relevance and power of the Ohio Constitution's free exercise language in combating the weakened protection afforded an individual's free exercise of religion under current federal analysis.[12] The Goliath of the *Smith* analysis[13] is slain by the David of the *Humphrey* analysis,[14] which is rooted in the Ohio Constitution.

David's concern throughout is for defending the honor of his God. THE ABINGTON BIBLE COMMENTARY 392 (Fredrick Carl Eiselen et al. eds., 1st ed. 1929).

[9] Alan Johnson, *Corrections Officer May Keep Long Hair*, COLUMBUS DISPATCH, May 25, 2000, at D-1. Kathleen Trafford, Humphrey's attorney, stated in an interview after the decision in *Humphrey* was announced, that they "were hopeful the Ohio Supreme Court, given their long history of broadly upholding religious freedom in Ohio, was the place to be . . . . I think this is an important decision, not only in Ohio but across the country." *Id*. Upon hearing the decision, Humphrey remarked, "I think I changed a little history here." *Id*.

[10] Humphrey v. Lane, 728 N.E.2d 1039, 1043-44 (Ohio 2000) (declaring that the decision is based solely on the Ohio Constitution).

[11] *See infra* Part II.B.1.

[12] Justice Pfeifer, writing for the majority in *Humphrey*, stated that:

> It was the *Smith* decision that marked the divergence of federal and Ohio protection of religious freedom. Not until *Smith* did the difference in the constitutional clauses become relevant . . . . [T]he Ohio Constitution's free exercise protection is broader, and we therefore vary from the federal test for religiously neutral, evenly applied governmental actions. We apply a different standard to a different constitutional protection.

Humphrey, 728 N.E.2d at 1044-45.

[13] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 882-85 (1990) (holding that religion-neutral, generally applicable laws would not be found to violate the Free Exercise Clause).

[14] *Humphrey*, 728 N.E.2d at 1043-45 (affirming that the Ohio Constitution requires a strict scrutiny analysis, as preserved through existing precedent in Ohio law).

II. BACKGROUND

A. Employment Division, Department of Human Resources of Oregon, v. Smith[15] *and its Aftermath: The Stage is Set for* Humphrey[16]

In 1990, the United States Supreme Court, in its decision in *Smith*,[17] made what many considered to be a radical shift away from the country's historic accommodation of the free exercise of religion.[18] Dissenting from the majority, Justice Blackmun wrote:

> [T]his Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion . . . . Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismiss it as a "constitutional anomaly."[19]

The painstaking development referred to is found in a line of cases beginning with *Sherbert*[20] and *Yoder*,[21] Free Exercise Clause decisions, and *Lemon*,[22] a controversial Establishment Clause

---

[15] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

[16] *Humphrey*, 728 N.E.2d at 1044 (explaining that it was "the *Smith* decision that marked the divergence of federal and Ohio protection of religious freedom").

[17] *Smith*, 494 U.S. at 886. *Smith* characterized a broad interpretation of the Free Exercise Clause right as a "private right to ignore generally applicable laws." *Id*. at 886-87. The decision further characterized that a broad free exercise right would be "courting anarchy." *Id.* at 888. *But see id*. at 891 (O'Connor, J., concurring in judgment only) (stating that the majority's holding "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty").

[18] Honorable Arlin M. Adams, *Perspectives: Religion and the Law: Recent Decisions by the United States Supreme Court Concerning the Jurisprudence of Religious Freedom*, 62 U. CIN. L. REV. 1581 (1994). In reviewing recent U.S. Supreme Court decisions, Judge Adams found that:

> religious faith is that thing most trivialized and shoved aside in the public arena, treated like an embarrassing tick or even a character failing, particularly when religious people seek to couple their beliefs with vision of America . . . . Thus, a growing number of thoughtful citizens are beginning to realize what the Framers apparently understood, namely, that religion plays an invaluable part in American society.

Id. at 1598.

[19] *Smith*, 494 U.S. at 907-08.

[20] Sherbert v. Verner, 374 U.S. 398 (1963). Mrs. Adele Sherbert, a devout Seventh-day Adventist, who observed her Sabbath on Saturdays, was denied unemployment compensation by South Carolina because she declined to work on Saturdays. *Id.* at 399-400. Holding that Sherbert had a right to the benefits, the Court stated that:

decision in 1971. After *Smith*,[23] this Free Exercise Clause line of authority appeared to have been abandoned, and the decision drew criticism from Justices Souter and O'Connor in later decisions.[24]

Congress attempted to get around the decision in *Smith* when it enacted the Restoration Freedom of Religion Act of 1993 (RFRA),[25] which was overturned by the United States

---

> [t]he ruling forces her to choose between following precepts of her religion and forfeiting benefits . . . [g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.

Id. at 404.

[21] Wisconsin v. Yoder, 406 U.S. 205 (1972). The Yoders were parents who were members of the Old Order Amish religion and the Amish Mennonite Church. *Id*. at 207. They were convicted of violating Wisconsin's compulsory school attendance law because they declined to send their children to school after eighth grade. *Id*. at 207-08. The Court held that the state's interest in education was not "totally free from a balancing process when [the state statute] impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . . " *Id*. at 214.

[22] Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that payment of salary supplements by the state to public school teachers who taught secular topics in religious schools was in violation of the Establishment Clause because the salary supplement statute required state officials to become involved with religious school procedures and oversight). While *Humphrey* involves a free exercise claim, *Lemon* dealt with an Establishment Clause claim. *Id*. In *Lemon*, the U.S. Supreme Court established a three-prong test to determine whether there is a violation of the Establishment Clause. *Id*. at 612-13.

A statute does not violate the Establishment Clause if: 1) the statute has a secular legislative purpose; 2) the statute's primary effect neither advances nor inhibits religion; and 3) the statute does note excessively entangle government with religion. *Id*. *Lemon*, like *Smith*, has been criticized by various Justices in recent opinions. *See, e.g*., Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); Allegheny County v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 655-57 (1989) (White, J., concurring in part, dissenting in part); Westside Community Schools Bd. of Educ. v. Mergens, 496 U.S. 226, 258 (1990) (Kennedy, J., concurring). *See also* NOWAK & ROTUNDA, CONSTITUTIONAL LAW § 17.3, n.1, at 1223 (5th ed. 1995).

[23] *Smith*, 494 U.S. at 890-907 (O'Connor, J., concurring in judgment only). Justice O'Connor's concurring opinion is an eloquent recital of the history of U.S. Supreme Court free exercise decisions and their importance. *Id*.

[24] The criticism of *Smith* was evident in post-*Smith* opinions of the U.S. Supreme Court. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993), Justice Souter stated that he had "doubts about whether the *Smith* rule merits adherence." *Id.* Souter continued, observing that "we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, by reexamining the *Smith* rule . . . ." *Id*. at 564.

In her dissent in *City of Boerne v. Flores*, Justice O'Connor declared: "I remain of the view that *Smith* was wrongly decided . . . [and] that in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong." *City of Boerne*, 521 U.S. at 544-54 (1997) (O'Connor, J., dissenting). For a current analysis of how each individual justice would find on related Establishment Clause issues, see Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705 (1999).

Supreme Court in *City of Boerne v. Flores*.[26] Both Congress and many states have responded with a vast array of alternative means to protect free exercise rights.[27]

B. The Ohio Solution

1. The Independent Force of the Ohio Constitution

Ohio courts may look to interpretations of the federal Constitution when they interpret the Ohio Constitution, but the United States Supreme Court has determined that states are not bound to do so.[28] In fact, Ohio's constitutional religious free exercise right grew out of the

---

[25] *See* Symposium, *James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5, 5 (1995) (describing the RFRA prior to its being overturned). Congress passed RFRA to revive the compelling-state-interest/ least-restrictive-means analysis for free exercise cases. *Id*..

[26] City of Boerne v. Flores, 521 U.S. 507, 563 (1997). In *City of Boerne*, local zoning authorities denied Catholic Archbishop Flores a building permit to enlarge his church because the church was covered by a city ordinance governing historic preservation. *Id*. at 511-12. The suit, filed under RFRA, ultimately provided an opportunity for the U.S. Supreme Court to overturn RFRA as it applied to states, holding that Congress exceeded its authority by passing such legislation. *Id*. at 536. *See also generally* Symposium, *Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 597 (1998).

[27] Congress responded in 1993 with RFRA, the application of which to the states was voided in the *City of Boerne* decision in 1997. *See supra* notes 25-27 and accompanying text. The Free Exercise Clause may have been an innocent victim of this line of U.S. Supreme Court cases. Thomas L. DeBusk, *RFRA Came, RFRA Went: Where Does That Leave the First Amendment? A Case Comment on* City of Boerne v. Flores, 10 REGENT U. L. REV. 223, 246 (1998). At the state level, many states have enacted their own versions of RFRA. *E.g*., W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1999); Stanley H. Freidelbaum, *Free Exercise in the States: Belief, Conduct, and Judicial Benchmarks*, 63 ALB. L. REV. 1059 (2000). *But see* Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L. REV. 153 (2000) (noting serious separation-of-powers and Establishment Clause conflicts with state RFRAs, and analyzing whether legislation could be redrafted to resolve such conflicts). *Cf.* Eugene Volokh, *Intermediate Questions of Religious Exemptions – A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595 (1999) (analyzing the fact that RFRA remains valid at the federal level, observing its possible unintended consequences in the areas of government employment and property, or government-run schools, and suggesting an analytical "test suite" to test for alternatives to RFRA).

Federal free exercise protection may still be sought under Title VII. 42 U.S.C. § 2000e-2 (1994). *See also generally* Gregory J. Gawlick, *The Politics of Religion: 'Reasonable Accommodations' and the Establishment Clause: An Analysis of the Workplace Religious Freedom Act*, 47 CLEV. ST. L. REV. 249 (1999). For a discussion of related Title VII free exercise issues and the potential conflict of laws between state RFRAs and Title VII, see Vikram David Amar, *State RFRAs and the Workplace*, 32 U.C. DAVIS L. REV. 513 (1999).

[28] Two U.S. Supreme Court decisions from the 1980s bolster this observation. *See* California v. Greenwood, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints . . . than does the Federal Constitution."); 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.").

language of the Ordinance of 1787, and was not based upon the language of the First Amendment of the United States Constitution.[29]

Prior to *Humphrey*, the Ohio Supreme Court had already determined that the language of the Ohio Constitution is of independent force,[30] and that, where the state Constitution's language is distinct from the language of the federal Constitution, courts are not bound to read the Ohio Constitution as co-extensive with the federal Constitution.[31] The Ohio Supreme Court has also established that the language of the Ohio Constitution provides a broader freedom to exercise religion than does the language of the United States Constitution.[32] In an analogous 1995

---

[29] The Ordinance of 1787 provided: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory . . . ." Act of Aug. 2 1789, ch. 8, 1 Stat. 51, 52 (1789). Section Three, Article Eight of the original Ohio Constitution of 1802 stated that: "all men have a natural and indefeasible right to worship Almighty God according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience . . . ." ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 155 (1964) (describing not only the 1802 Ohio Constitution's language, but also the history of religious freedom in the United States, including comparisons of the varying origins and development of state constitutional language providing for freedom of religious practice).

[30] Arnold v. Cleveland, 616 N.E.2d 163 (Ohio 1993). In *Arnold*, the Ohio Supreme Court held that:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state courts may not fall. As long as state courts provide at least as much protection as the Unites States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Id. at 164 (citing the syllabus).

[31] State v. Robinette, 685 N.E.2d 762 (Ohio 1997). *Robinette* involved a review of the search and seizure provisions of the Ohio and federal Constitutions. *Id.* The Court found the provisions were co-extensive because the language of the State and federal protections from search and seizure were "virtually identical." *Id*. at 766. For an extended investigation of this issue and *Robinette*, see Marianna Brown Bettman, *Identical Constitutional Language: What Is A State Court to Do? The Ohio Case of* State v. Robinette, 32 AKRON L. REV. 657 (1999).

The texts at issue in *Humphrey*, however, are not identical, but the textual issues are analogous to those dealt with in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). *Simmons-Harris* addressed the issue of school voucher programs. *Id.* Analyzing the Ohio Constitution, the Court found that the "language of the Ohio [Religion Clauses] is quite different from the federal language." *Id*. at 212. As a result, the Court held that "[t]here is no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the U.S. Constitution, though they have at times been discussed in tandem." *Id*. at 211-12.

[32] *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"), *with* OHIO CONST. art. 1, § 7 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship . . . . "). In

decision involving Ohio's Free Speech Clause, the Ohio Supreme Court found that the Ohio language provides greater protection than does the federal Constitution.[33]

2. Ohio Free Exercise Precedent

The history of Ohio's free exercise jurisprudence is simpler than the federal history.[34] Over the past two decades, the Ohio Supreme Court has articulated a religious free exercise line of authority based upon the language of the Ohio Constitution.[35] In *State v. Whisner*,[36] the Court stated:

> [Section Seven, Article One] means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship toward the Almighty, are as sacred in the eye of the law as his rights of person or property, and that although in the minority, he shall be protected in the full and unrestricted enjoyment thereof. The "protection" guaranteed by [Section Seven, Article One] means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many.[37]

---

contrast, the First Amendment states, in regard to freedom of speech, that "Congress shall make no law . . . abridging freedom of speech, or of the press," while the Ohio Constitution's free speech language states that "[e]very citizen may speak freely . . . and no law shall be passed to restrain or abridge the liberty of speech, or of the press." OHIO CONST. art. I, § 7.

[33] Vail v. Plain Dealer Publishing Co., 649 N.E.2d 182 (Ohio 1995). "The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press." *Id.* at 281.

[34] Ohio has not resorted to the vast array of novel statutory devices or constitutional analysis that characterizes the federal free exercise history. *See supra* notes 17-27 and cases cited therein.

[35] The three primary cases relevant to *Humphrey* are: *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976) (holding invalid state compulsory school attendance laws applied to children attending religious non-public schools); *In re Milton*, 505 N.E.2d 255 (Ohio 1987) (affirming an individual's right to refuse medical treatment for religious reasons); and *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) (dealing with school vouchers and analyzing religious claims under the Ohio Constitution that are significant to construing free exercise claims under the federal Constitution).

[36] *Whisner*, 351 N.E.2d at 766-67.

[37] *Id.* at 766 (quoting Board of Ed. v. Minor, 23 Ohio St. 211, 249-51 (1872)).

Following *Whisner*,[38] the Court found, in *In re Milton*,[39] that the claimant, an adult woman, had a right to choose faith healing over medical treatment that was in conflict with her religious beliefs.[40] The Court cited Section Seven, Article One of the Ohio Constitution and held that such a right to choose existed and would be upheld.[41]

The most recent Ohio Supreme Court decision to impact freedom of religion rights prior to *Humphrey* was in 1999 in *Simmons-Harris v. Goff*.[42] To bolster the continuity of the Court's line of authority in freedom of religion issues, the Court stated in *Simmons-Harris*:

> There is no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States Constitution, though they have at times been discussed in tandem. The language of the Ohio provisions is quite different from the federal language . . . . We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason.[43]

The stage was set for the Ohio Supreme Court's decision in *Humphrey*.[44]

---

[38] State v. Whisner, 351 N.E. 750 (Ohio 1976).

[39] *Milton*, 505 N.E.2d at 257 (upholding the right of a competent adult to make a religiously motivated choice of faith healing over forced medical treatment).

[40] The *Milton* court rejected the finding by the appellate court that appellant's belief in faith healing constituted a delusion. *Id*. at 258. The Court instead found that:

> [t]here is a dichotomy between modern medicine . . . and religion which is . . . a matter of individual faith . . . . Absent the most exigent circumstances, courts should never be a party to branding a citizen's religious views as baseless on the grounds that they are non-traditional, unorthodox or at war with what the state or others perceive.

Id. at 258-60.

[41] The *Milton* holding is an example of the convergence of the protection afforded free exercise of religion under both the Ohio Constitution and the federal constitution. *Id*. at 258. In *Humphrey*, the Court noted that, because of the change of direction in *Smith*, there was no longer a convergence, but rather a divergence, of state and federal free exercise jurisprudence. Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000).

[42] Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (upholding the constitutionality of school voucher program, stating that the program in general did not violate the Establishment Clause, and affirming the independent authority of the Ohio Constitution).

[43] *Id.* at 211-12.

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

III. STATEMENT OF THE CASE

A. Statement of Facts

Wendall Humphrey began his employment with the Ohio Department of Rehabilitation and Correction (ODRC),[45] at the Hocking Correctional Facility (HCF),[46] in 1988.[47] Prior to his employment, Humphrey discovered his heritage as a member of the Shoshone-Bannock Tribe, but had not yet begun the active practice of his Native American spirituality.[48] At the time of his initial employment, Humphrey wore his hair short.[49] Two years later, in 1990, Humphrey began to practice Native American spirituality, and began to wear his hair long in conformity with his religious beliefs.[50] The ODRC implemented a Grooming Policy in 1992.[51] Through the Ohio

---

[45] The ODRC is established in, and its responsibilities are defined by, Ohio statute. OHIO REV. CODE ANN. § 5120 (West 2000). The ODRC is administered by a director whom the Governor appoints. *Id.* § 5120.01. The Director is the Chief Administrator of ODRC, and has full power and authority to supervise and control the ODRC's affairs. *Id.* The ODRC maintains 34 prisons, in addition to providing parole and community services. *ODRC Mission and Organization* (visited Jan. 30, 2001) <http://www.drc.state.oh.us/web/whoweare.htm>.

[46] *Humphrey*, 728 N.E.2d at 1041.

[47] *ODRC Hocking Correctional Facility* (visited Jan. 30, 2001) <http://www.drc.state.oh.us/public/hcf.htm>. HCF is located near Nelsonville, Ohio. *Id.* HCF is a minimum/medium-security prison that houses the state's oldest inmates. *Id.* HCF was opened in 1983, and is designed to provide a safe and secure environment for its aging population of about 400 inmates. *Id.* HCF's total number of staff is 161, of which 87 are security staff. *Id.* Inmates do not perform industrial labor, but rather perform a wide variety of community service projects, such as hiking trail maintenance and painting projects for local churches and schools. *Id.*

[48] *The Shoshone-Bannock Tribes Tribal History* (visited Jan. 30, 2001) <http://www.sho-ban.com/history/asp>. The Shoshone and Bannock Indians live on the 544,000-acre Fort Hall Indian Reservation. *Id.* The Shoshone-Bannock originally roamed the areas of what is now Wyoming, Utah, Nevada, and Idaho. *Id.* When Lewis and Clark explored the West, they were led by a Shoshone woman named Sacajawea. *Id.* A Presidential Executive Order established the current reservation at Fort Hall in 1867. *Id*. The Tribes on the Fort Hall Reservation are organized under a sovereign government. *Id*. The Shoshone-Bannock are engaged in agriculture, tourism, and other business enterprises. *Id*. The Fort Hall reservation is located about 100 miles west of Yellowstone National Park, and 200 miles north of Salt Lake City, Utah. *The Shoshone Bannock Tribes Tribal History* (visited Jan. 30, 2001) <http://www.sho-ban.com/history/htm>.

[49] *Humphrey*, 728 N.E.2d at 1041.

[50] Alan Johnson, *A Fight for His Heritage: Long Hair at Center Court Case*, COLUMBUS DISPATCH, Apr. 10, 2000, at A-1. Wendall Humphrey was born on April 26, 1952, on the Shoshone-Bannock Indian reservation, at Fort Hill, Idaho. *Id.* As a boy, he lived with his father, Shoshone Wheeler, who was killed in and hit-and-run accident; his mother, Serena Edmo Wheeler, succumbed to problems with alcohol and lost her children when Humphrey was five. *Id*. Humphrey was adopted by Thomas and Ann Humphrey, and grew up with them in Vacaville, California, near

Civil Rights Commission, Humphrey and the ODRC reached an agreement to accommodate Humphrey's beliefs despite the Policy; this accommodation continued without incident for seven years.[52] However, in January of 1997, Warden Lane attempted to force Humphrey to conform to the Grooming Policy, and initiated disciplinary hearings against Humphrey for not cutting his hair.[53]

B. Procedural History

On May 28, 1997, Humphrey filed a complaint for declaratory judgment and injunctive relief, as well as a motion for a preliminary injunction against ODRC, in the Hocking County

---

Travis Air Force Base. *Id*. Humphrey did not know about his Native American heritage until he was 29 years old. *Id*. Humphrey and his wife, Cathy, flew to Idaho for a reunion with his family. *Id*. Humphrey discovered that his great-great-grandfather, Arimo, had been a Shoshone-Bannock chief. *Id*. Within a few years, Humphrey began to walk "the red road," the sincere practice of Native American spirituality. Alan Johnson, *A Fight for His Heritage: Long Hair at Center Court Case*, COLUMBUS DISPATCH, April 10, 2000, at A-1. Humphrey's earnest practice of his Native American religious beliefs began early in his employment history with ODRC. *Id*.

[51] The Grooming Policy, ODRC Policy 401-06, was issued in compliance with Section 5120.01 of the Ohio Revised Code. Under Section 5120.01, the authority to establish departmental policies is delegated to the Director of ODRC. OHIO REV. CODE ANN. § 5120.01 (West 2000). The Director is empowered to manage all divisions and institutions of the ODRC and to establish such rules and regulations as he prescribes. *Id.* The relevant section of the Grooming Policy states:

> V. Procedures:
> A. Uniformed Personnel
> . . . .
> 2. Hairstyle shall not interfere with the wearing or proper positioning of the uniform cap. Hair shall be styled above the eyebrow in the front. Certain hairstyles may be considered incompatible with a professional and dignified appearance.

ODRC EMPLOYEE GROOMING POLICY, § V.A.2. Although this is the language of the current policy, it does not differ materially from the grooming policy that was in place in 1992. *Humphrey*, 728 N.E.2d at 1041.

[52] Humphrey simply pinned his hair under his cap. *Humphrey*, 728 N.E.2d at 1042.

[53] Blanken v. Ohio Dep't of Rehab. & Corr., 944 F. Supp. 1359, 1359 (S.D. Ohio 1996) (holding that the ODRC Grooming Policy did not violate the free exercise protection in regard to the particular plaintiff, a cafeteria worker who wore an extreme and highly visible hair style). Warden Lane issued a memorandum based on the *Blanken* decision, demanding that employees conform to the Grooming Policy. *Humphrey*, 728 N.E.2d at 1042. Humphrey sought further accommodation based on his religious practice. *Id*. As a result, Humphrey was subjected to disciplinary hearings and threatened with termination. *Id.* The Ohio Supreme Court ultimately held that *Blanken* was distinguishable from Humphrey's situation because the plaintiff in *Blanken* exhibited an extreme hair style that could not be concealed during work hours; in contrast, Humphrey's long hair was pinned under his cap at all times, and therefore was concealed. *Id*. at 1046.

Court of Common Pleas.[54] The trial court ruled in Humphrey's favor, basing its decision upon established Ohio precedent.[55]

ODRC appealed, and the Court of Appeals for the Fourth District reversed the trial court.[56] The Court of Appeals found that the religion-neutral/generally applicable analysis in *Smith*[57] applied.[58] The Court of Appeals further predicted that, if this case were to go before the Ohio Supreme Court, the high court would revisit its prior decisions and would harmonize Ohio law with the reasoning in *Smith*.[59]

C. The Ohio Supreme Court Decision

The Ohio Supreme Court heard the case on discretionary appeal[60] and, on May 24, 2000, resolved the split between the trial court and the appellate court by relying on the unique

---

[54] *Id*. at 1042. A hearing on the motion for a preliminary injunction was held on June 6, 1997, and the motion was granted on June 11, 1997. *Id*. On August 28, 1997, a bench trial was held on the merits. *Humphrey*, 728 N.E.2d at 1042. The decision was rendered, and the permanent injunction was granted to Humphrey on February 6, 1998. Humphrey v. Lane, No. 97 CIV 182 (Hocking County C.P. Feb. 6, 1998), *rev'd*, No. 98CA 4, 1998 WL 880592 (Oh. Ct. App. Dec. 14, 1998), *aff'd*, 728 N.E.2d 1039 (Ohio 2000).

[55] The trial court looked at the constitutional analysis for free exercise claims established by earlier decisions of the Ohio Supreme Court in *In re Milton*, 505 N.E.2d 255 (Ohio 1987), and in *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976). *Id*. Those decisions employed a strict scrutiny analysis, whereby the state must show, after determining that the individual's religious beliefs were sincerely held, that the state had a compelling interest, and that where free exercise was infringed, the state interest was furthered by the least restrictive means available. *Id*. The trial court found that requiring Humphrey to cut his hair was not the least restrictive means, and that pinning his hair under his cap met the aims of the Grooming Policy. *Id*.

[56] Humphrey v. Lane, No. 98 CA 4, 1998 WL 880592 (Ohio Ct. App. Dec. 14, 1998), *rev'd* 728 N.E. 2d 1039 (Ohio 2000). The Court of Appeals differed in approach to the issue from the trial court, and found that the trial court had applied the wrong standard of review. *Id*. at *6. The appellate court held that the correct standard was to be found in the *Smith* analysis, under which the ODRC did not need to show a compelling state interest, as long as the regulation was religion-neutral and was generally applicable. *Id*. at *9. Further, the appellate court found that, while states may rely on their own constitutional language, Ohio's Constitution should be read not as independent from, but rather as co-extensive with, federal law. *Id*. at *7.

[57] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 878-90 (1990).

[58] *Humphrey*, 1998 WL 880592, at *6, *10-*13.

[59] The Court of Appeals stated that it "believe[d] that the Ohio Supreme Court, if confronted with the issue, would revisit its [*Milton* and *Whisner* holdings] to bring them into compliance with [*Smith*]." *Id*. at *8.

[60] Humphrey v. Lane, 708 N.E.2d 1012 (Ohio 1999) (granting certiorari).

language of the Ohio Constitution,[61] and on the established Ohio jurisprudence in free exercise cases.[62] The six-to-one majority in *Humphrey* determined that strict scrutiny is the appropriate standard of review when the free exercise of religion was at issue.[63] A single justice chose to dissent, concerned that not following *Smith*[64] and maintaining a pre-*Smith* analysis, "would be courting anarchy."[65]

IV. ANALYSIS

I think I changed a little history here.[66]

A. Resolving the Clashes[67]

In *Humphrey*, the Ohio Supreme Court resolved several clashes between disparate interests.[68] The most fundamental clash resolved was that between the Ohio Constitution and the

[61] In its opinion, the Ohio Supreme Court made its first priority an analysis of the difference between the language of the Ohio Constitution and that of the federal Constitution. Humphrey v. Lane, 728 N.E.2d 1039, 1043-44 (Ohio 2000).

[62] *See supra* notes 35-42 and accompanying text.

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

[64] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 888 (1990).

[65] Justice Cook, dissenting, presented an argument for following *Smith*. *Humphrey*, 728 N.E.2d at 1048 (Cook, J., dissenting). One of the Justice's concerns was that following the pre-*Smith* analysis would encourage an unacceptable number of claims by individuals who wanti to be free of the need to obey generally applicable laws, and thereby, in the words of *Smith*, would court "anarchy." *Id.* at 1048 (quoting *Smith*, 494 U.S. at 888).

[66] Johnson, *supra* note 9 (quoting Wendall Humphrey).

[67] The Ohio Supreme Court characterized the precipitating event of the case as a clash between Humphrey's sincerely held religious beliefs and the grooming policy of the ODRC. *Humphrey*, 728 N.E.2d at 1041. "Clash" is a strong term that connotes a sharp, usually jarring or unpleasant contrast. WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 416 (1986).

[68] Various clashes, apart from the first clash between Humphrey's religious beliefs and the Grooming Policy, can be identified throughout the opinion. *Humphrey*, 728 N.E.2d at 1041-49. Second, there is the clash between the reasoning of the trial court and that of the appellate court. *Id*. at 1042-43. Third, the Court analyzed the clash between the Ohio Constitution and the federal Constitution. *Id*. at 1043-44. Fourth, the Court identified a clash between the U.S. Supreme Court decision in *Smith* and past Ohio Supreme Court free exercise decisions. *Id*. at 1044-45. Fifth, the opinion addressed the clash between the strict scrutiny Ohio analysis, and the religion-neutral/ generally-applicable legal analysis of federal free exercise claims. *Id.* at 1044-45. Sixth, the Court resolved varying views of that standards that apply to prison employees in regard to image. *Humphrey*, 728 N.E.2d. at 1045-46. Seventh, the Court distinguished the case at issue from the federal case of *Blanken v. Ohio Department of*

federal Constitution.[69] Second only to the constitutional conflict was the clash between the two standards of review for free exercise claims.[70] The Ohio Supreme Court resolved that clash by determining that the strict scrutiny test, based upon the Ohio Constitution and Ohio precedent, would control over the religion-neutral/generally-applicable standard that the United States Supreme Court announced in *Smith*.[71]

1. The Clash Between the Ohio and Federal Constitutions

With simplicity and dignity,[72] the majority based its analysis on the cornerstone of a state's governing power, the state Constitution.[73] The language of the First Amendment of the United States Constitution[74] and Section Seven, Article One of the Ohio Constitution differ

---

Rehabilitation & Correction, 944 F. Supp. 1359 (S.D. Ohio 1996), which caused HCF Warden Lane to pursue disciplinary action against Humphrey. *Id*. at 1046. Eighth, there is the clash between the majority reasoning and the dissent, wherein the dissent addresses many of the points at issue in the various clashes identified. *Id*. at 1047-49.

[69] *Id*. at 1043-44. The Court found the constitutional issue so compelling that it began both the Court-written syllabus and the main opinion with definitive statements citing the authority of the Ohio Constitution. *Id*.

[70] *Id*. at 1044-45.

[71] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990).

[72] *Humphrey*, 728 N.E.2d at 1039. The majority disposed of this case in a seven-page opinion, relying succinctly on only seven cases, in addition to citing the Free Exercise Clauses of both the Ohio and United States Constitutions. *Id*. The trial court, with which the majority largely agreed, produced a four-page opinion, citing only four cases, in addition to the Ohio Constitution, and a reference to RFRA. Humphrey v. Lane, No. 97 CIV 182 (Hocking County C.P. Feb. 6, 1998). The appellate court, however, yielded a 17-page judgment covering 50 case citations, in addition to references to statutory materials and the relevant constitutions. Humphrey v. Lane, No. 98 CA 4, 1998 WL 880592 (Ohio Ct. App. 4th Dist. Dec. 14, 1998). The Ohio Supreme Court, in its final decision in *Humphrey*, commenting on the constitutional language at issue, stated that "we are not doing a mere word count, but instead are looking for a qualitative difference." Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000).

[73] 16 AM. JUR. 2D *Constitutional Law* § 9 (1998) ("Under the American system, each state was left free to establish a constitution for itself, and in that constitution to provide such limitations and restrictions on the powers of its particular government as its judgment might dictate.").

[74] John Witte, Jr., *Oracle of Religious Liberty*, 2 GREEN BAG 2D 327 (1999) (reviewing JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998)). The book review highlights several observations of the author about the role of the federal Constitution in providing for religious freedom throughout the history of the United States. *Id*. Specifically, the author draws an analogy between modern day high technology and the Constitution, when he observes that the "Constitution is a semiconductor between religion and government . . . . A semiconductor, like silicon, passes on small, controlled amounts of electricity which enables you to have exactly was much as you need . . . . Free Exercise [is] the silicon of our society." *Id*. at 331.

significantly.[75] The federal Free Exercise Clause opens with a limitation on federal power, stating that "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[76] In contrast, the Ohio Constitution's Religion Clause opens by describing a right:

> *All men have a natural and indefeasible right* to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law, to any religious society; nor shall any interference with the rights of conscience be permitted.[77]

The Ohio Supreme Court accorded due deference to the Free Exercise Clause of the federal Constitution, noting that "[t]he one phrase in the United States Constitution regarding the freedom of religion is one of the most powerful statements in human history."[78] As the Court

---

[75] The Ohio Supreme Court found that the Ohio Constitution "does have an eleven word phrase that distinguishes itself from the United States Constitution." *Humphrey*, 728 N.E.2d at 1044. That phrase, "nor shall any interference with the rights of conscience be permitted," was read by the Court as providing a total "ban on any interference [with religious free exercise, and] makes even . . . tangential effects [on religious free exercise] potentially unconstitutional." *Id*.

[76] U.S. CONST. amend. I (emphasis added). The full text reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Id.

[77] OHIO CONST. art. 1, § 7 (emphasis added). The full text reads:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing hereinshall be construed to dispense with oaths or affirmations. Religion, morality, and knowledge, however, begin essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Id.

[78] *Humphrey*, 728 N.E.2d at 1043. It is notable that the Ohio Supreme Court did not refer to the federal Constitution in the syllabus, which, in Ohio, is written by the Court and carries the force of law. *Id*. at 1039. The opening

compared that utterance with Ohio's Constitution, it found that, while Ohio's more specific description was not prima facie proof of a broader freedom, the words of the Ohio Framers indicated their intent to make an independent statement on the meaning and extent of religious freedom in Ohio.[79]

The Ohio Supreme Court established that the Ohio Constitution is a document of independent force in *Arnold v. Cleveland.*[80] In *Arnold*,[81] the Court held that the federal

---

paragraph of the opinion makes clear that this Court intended to rest its analysis in *Humphrey* on the Ohio Constitution as possessing independent authority:

> We hold that under Section 7, Article I of the Ohio Constitution, the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest.

Id. at 1043.

[79] The Ohio Supreme Court was looking at not only the differing lengths of the Ohio and federal religion clauses – a "mere word count" – but also a qualitative difference in the words of the Framers of the Ohio Constitution. *Id*. at 1043-44. Several other States have similarly specific language their constitutions' religion clauses. *See, e.g.,* CAL. CONST. art. I, § 4 (unequivocally stating that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.); ME. CONST. art. I, § 3 (stating that "[a]ll 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 . . . ."); MASS. CONST. pt. I, art. II (providing that no "subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments . . . ."); MINN. CONST. art. I, § 16 (stating that the "right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . ."); N.J. CONST. preamble (stating a source of power prior to the state by announcing that "We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.").

[80] Arnold v. Cleveland, 616 N.E.2d 163 (Ohio 1993) (involving a challenge on Second Amendment grounds of a city ordinance prohibiting the possession and sale of assault weapons, holding that the ordinance was a reasonable exercise of police power and did not violate the Supremacy Clause of the U.S. Constitution). In *Arnold*, the Court established that there was no prohibition upon a state's granting individuals or groups greater or broader protection than that afforded under the federal Constitution. *Id.* at 169. *But see* Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984) (observing that the Ohio Supreme Court, at that time, had been reluctant to use the Ohio Constitution to extend greater protection to the rights and civil liberties of Ohio citizens).

[81] To make a strong statement of the independence of a state constitution, the Ohio Supreme Court relied upon two U.S. Supreme Court decisions. *Arnold*, 616 N.E.2d. at 168. First, the *Arnold* Court cited *City of Mesquite v. Aladdin's Castle, Inc.*, where the U.S. Supreme Court held that:

> [a] state court is entirely free to read its own State's constitution more broadly than [the U.S. Supreme] Court reads the Federal Constitution, or to reject the mode of analysis use by [the U.S. Supreme] Court reads the Federal Constitution, or to reject the model of analysis used by [the U.S. Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.

Constitution provided a "floor [of protection] below which state court decisions may not fall."[82] In *Simmons-Harris v. Goff*,[83] the Court expressed its conviction that, where state constitutional language varies from the federal constitutional language, the state Constitution need not be read as co-extensive with the federal Constitution.[84] Even where language might be looked at "in tandem," the Ohio Supreme Court "reserve[s] the right to adopt a different constitutional standard" relevant to the Ohio Constitution.[85] Where a state court relies upon its own Constitution, the court preserves the integrity of our system of federalism, and recognizes that

---

Id. (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982)). Second, the *Arnold* Court relied on language in *Michigan v. Long*, in which the U.S. Supreme Court declared that interpretations of state constitutions are to be accepted as final, as long as the state court states plainly that the decision is based upon independent and adequate state grounds. *Id*. (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)).

[82] *Arnold*, 616 N.E.2d at 169 ("As long as state courts provide at least as much protection as the U.S. Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.").

[83] Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999). *Simmons-Harris* addressed Establishment Clause issues dealing with school vouchers; however, to reach that issue, the Ohio Supreme Court had to determine first whether the Ohio Constitution would control. *Id*. at 211-12. The Court in *Simmons-Harris* applied a federal analysis to the case, as outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Simmons-Harris*, 711 N.E. 2d at 208. However, the Court went out of its way to state emphatically that it did not follow *Lemon* because that is the federal test. *Id*. at 211. The Court declared that, "[t]oday we [adopt] the elements of the . . . *Lemon* test. We do this not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method . . . ." *Id*. The Court thus preserved the Ohio Constitution as the source of its authority, independent of the federal Constitution, stating that " we now analyze pursuant to the Ohio Constitution . . . ." *Id*. at 212.

[84] *See generally* Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clause of Their Own Constitutions in the Wake of Employment Division v. Smith*, 67 TEMP. L. REV. 1017, 1032-45 (1994) (containing an extensive discussion of the common types of analysis employed in cases involving the need to determine whether to employ both state and federal constitutions where language is either similar or dissimilar). There are essentially four basic approaches to harmonizing state and federal constitutional language. *Id*. 1032. The first is lockstep, where a state allows the U.S. Supreme Court to define the scope of federal free exercise claims as well as claims brought under the state's constitution. *Id*. at 1032-35. The second is interstitial, where the state will first look to the federal Constitution, and then will analyze whether the state Constitution offers ameans to, or warrants, the supplementing of the federal rights. *Id*. at 1035-37. The third approach is dual reliance, where free exercise claims are analyzed under both the federal and state constitutions. *Id*. at 1040. The fourth approach is one of primacy reliance, in which a state relies essentially upon the authority of the state constitution, independent of the federal Constitution. *Id*. at 1044-45.

[85] *Simmons-Harris*, 711 N.E.2d at 212. The full text as cited in the *Humphrey* opinion is a powerful statement of the Ohio Supreme Court's analysis of the independent force of the Ohio Constitution: "The language in the Ohio [Religion Clause] provisions is quite different from the federal language . . . . We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason." *Humphrey*, 728 N.E.2d at 1045 (quoting *Simmons-Harris*, 711 N.E. 2d at 211-12).

individual liberties are not protected solely by the decisions of the United States Supreme Court.[86]

The Ohio Supreme Court in *Humphrey* thus demonstrated that the language of the Ohio Constitution is distinct[87] and independent from that of the federal Constitution.[88] In its ultimate holding, the Ohio Supreme Court established an unmistakable standard for Ohio free exercise jurisprudence:

> [T]he Ohio Constitution's free exercise protection is broader, and we therefore vary from the federal test for religiously neutral, evenly applied government actions. We apply a different standard long held in Ohio regarding free exercise claims – that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. *That applies to direct and indirect encroachments upon religious freedom.*[89]

2. The Clash Between Ohio Precedent and *Smith*[90]

In *Humphrey*,[91] the Ohio Supreme Court held that, under Ohio precedent, there is a strict scrutiny standard of review for free exercise of religion claims.[92] Such a standard of review

---

[86] *See* Glen V. Salyer, *Free Exercise in Illinois: Does the State Constitution Envision Constitutionally Compelled Religious Exemptions?,* 19 N. ILL. U. L. REV. 197 (1998) (analyzing the potential effects of construing the Illinois constitution as granting broader religious freedom). According to the language of the Illinois Constitution, religious freedom is "absolutely guaranteed," save for conduct that endangers peace and safety. *Id*. at 218-19. There is a significant need to rely on the state's constitutional language so that "religious minorities are not subject to the whims of the often oblivious majority." *Id*. at 219.

[87] *See supra* notes 80-85 and cases cited therein.

[88] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post*-Smith *Jurisprudence,* 1993 B.Y.U. L. REV. 275 (1993) (observing that a return to a pre-*Smith* analysis is suggested because of a unique aspect of state constitutional language, which is the common use of explicitly religious language). In the preambles to 45 state constitutions, there are references to a higher authority, usually by use of "God." *Id*. at 284. The article notes that this use of acknowledgment of an authority prior to the state and to the state law, indicates that religious exemptions have a unique position in state law. *Id*. The author states that "[w]hen . . . rights to religious exercise are not derived from the state but exist prior to it, religious exemptions in the absence of overriding state interests makes sense." *Id*.

[89] *Humphrey*, 728 N.E.2d at 1045 (emphasis added). The language "direct and indirect encroachments" recalls the unique and broad language in the Ohio Constitution that provides that no "interference with the rights of conscience [shall] be permitted." OHIO CONST. art. I, § 7.

[90] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

involves a generally applicable, religion-neutral state regulation, and a determination of whether there is a compelling state interest and if there is, whether that interest is accomplished by the least restrictive means.[93]

The standard of review announced in *Smith*[94] eschews the least-restrictive-means element of strict scrutiny, and instead states that the free exercise right does not relieve individuals of the duty "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).' "[95]

---

[91] *Humphrey*, 728 N.E.2d at 1043. Ohio's precedent in regard to analyzing freedom of religion claims appears to be historically more stable than current federal free exercise jurisprudence. *See, e.g.*, Bloom v. Richards, 2 Ohio St. 387, 388-89 (1853) (considering whether a contract made on a Sunday was valid, and holding that the making of a contract on a Sunday did not interfere with the rights of conscience as it pertained to the observance of the Sabbath). *Bloom* is relevant because the opinion includes an analysis of the exact language of the Ohio Constitution used by the Court in *Humphrey*. *Id.* at 390. The *Bloom* Court observed, in regard to religious tolerance:

> It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural and indefeasible rights of conscience, which in the language of the [Ohio] Constitution, are beyond the control or interference of any human authority.

Id. at 390-91.

[92] *See In re* Milton, 505 N.E.2d 255 (Ohio 1987) (affirming an individual's right to refuse medical treatment on religious grounds); State v. Whisner, 351 N.E.2d 750 (Ohio 1976) (granting exception to Amish children in regard to compulsory school attendance laws); Bacher v. North Ridgeville, 352 N.E.2d 627 (Ohio App. 1975) (allowing a Jehovah's Witness to retain the right not to raise the flag for religious reasons).

[93] *Humphrey*, 728 N.E.2d at 1043.

[94] The U.S. Supreme Court, in *Smith*, held that the Free Exercise Clause did not prohibit the enforcement of generally applicable laws that were religion neutral. Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 879-80 (1990). The Court was severely fragmented in this decision. *Id.* at 873. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy. *Id.* at 873-891. Justice O'Connor wrote an extensive opinion concurring in judgment only, joined in part by Justices Brennan, Marshall, and Blackmun, who did not concur in the judgment. *Id.* at 891-907. Justice Blackmun wrote a dissent, joined by Justices Brennan and Marshall. *Id.* at 907-921. *But see* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000). There is skepticism about the durability of *Smith*, not only because of the split in the opinion itself, but also because the Court has split in the following ways in recent related decisions: five-four on federalism; four-two-three on funding religious schools; six-three on school prayer; four-three, with two undeclared, on free exercise. *Id.* at 57.

[95] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (holding that an Amish employer must collect and pay Social Security taxes, even though his beliefs prohibited participation in government support programs)). The majority cited *Lee* to support its analysis in *Smith* as an example of a then-recent decision of the Court that involved compelling an individual to comply with a religion neutral, generally applicable law, even where that law compelled activity forbidden by the individual's religion. *Id.* at 880.

Under *Smith*, the ODRC would need only show that the Grooming Policy was religion-neutral and generally applicable, and therefore the ODRC would not have to show a compelling state interest.[96] The Ohio Supreme Court agreed with both lower courts in finding that there was a compelling state interest in requiring that male prison employees present a uniform appearance.[97] In this case, however, the ODRC, while in furtherance of a compelling state interest, did not employ the least restrictive means of furthering that interest.[98] In the alternative, ODRC attempted to use the decision in *Blanken v Ohio Department of Rehabilitation and Corrections*.[99] The Ohio Supreme Court distinguished the two cases because of the extreme facts in *Blanken*.[100] The ODRC further argued that the adoption of the *Smith* standard was necessary because the number of accommodations would become so numerous as to undermine the safety of the prison system.[101] This did not happen.[102]

---

[96] *See supra* notes 94-95 and accompanying text.

[97] ODRC Director Reginald Wilkinson gave testimony regarding the Grooming Policy, stating that such policy is "essential to the esprit de corps, image, discipline and security at these [prisons]. The purpose of the policy is to create a unified appearance among uniformed personnel . . . essential to [project] an image of monolithic, indivisible authority to inmates . . . ." *Humphrey*, 728 N.E.2d at 1045. Courts have granted prison authorities "wide-ranging deference" in regard to policies needed to maintain order in dangerous settings. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

[98] The Ohio Supreme Court determined that the trial court must determine whether the least restrictive means was used. *Id.* at 1046. The trial court found that, when Humphrey had his hair tucked under his cap, he presented a "professional and dignified image" and that it was "impossible to tell that his hair is longer than one or two inches when worn in this fashion." *Id.*

[99] Blanken v. Ohio Dep't of Rehab. & Corr., 944 F. Supp. 1359 (S.D. Ohio 1996) (using the compelling state interest test and determining that the employee, who wore an extreme hair style that was impossible to conceal, was required to cut his hair).

[100] *Humphrey*, 728 N.E.2d at 1046. The Court, in fact, used *Blanken* as an example of where the compelling-state-interest test would cause a citizen to comply with a state regulation that would interfere with his or her religious beliefs because there were no less restrictive means of doing so. *Id.*

[101] The ODRC contended that refusing to grant any exemptions from the Grooming Policy would avoid "the need of ODRC officials to engage in a case-by-case analysis of which employees would be entitled to exemption." Humphrey v. Lane, No. 98 CA 4, 1998 WL 880592, at *16 (Ohio Ct. App. Dec. 14, 1998).

[102] In 1992, the first year the Grooming Policy was implemented, ODRC employed 10,000 to 12,000 personnel. *Humphrey*, 722 N.E. 2d at 1047. Employees desiring accommodation in regard to hair length were required to

The relevant criteria under the *Smith* standard are whether the regulation at issue is religion-neutral and generally applicable.[103] If these criteria are fulfilled, then the regulation does not violate the Free Exercise Clause.[104]

Prior to *Smith*, Ohio Supreme Court free exercise decisions mirrored federal jurisprudence because both systems followed the compelling-state-interest test.[105] The majority in *Humphrey* viewed *Smith* as diverging from Ohio precedent.[106]

In the end, the Ohio Supreme Court resolved this clash by declaring that "we have made it clear that this court is not bound by federal court interpretations of the federal Constitution in interpreting our own constitution . . . . The language in the Ohio provisions is quite different . . . . We reserve the right to adopt a different standard."[107] Other states may follow Ohio's lead.[108]

---

submit affidavits in support of their request for exemption. *Id.* In 1992, only 16 employees requested such an accommodation. *Id.* Such numbers do not support the dissent's claim that not accepting *Smith* in this case would lead to anarchy. *Id.* at 1048. Recall that Wendall Humphrey, as the result of an accommodation with ODRC, had worn his hair under his cap without incident since the inception of the Grooming Policy. *Id.* at 1042.

[103] Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 880-887 (1990).

[104] The Ohio Supreme Court found that the *Smith* decision "made it clear that earlier federal jurisprudence on free exercise claims should not be relied on . . . ." *Humphrey*, 722 N.E. 2d at 1044. The previous federal jurisprudence had been the compelling-state-interest, strict scrutiny test, noted in *Whisner* as being "a finding 'that there is a state interest of sufficient magnitude to override the interests claiming protection under the Free Exercise Clause.' " *Whisner*, 351 N.E.2d at 771 (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)). According to *Whisner*, the state must demonstrate that such interests cannot otherwise be served in order to *overbalance legitimate claims to the free exercise of religion*. *Id.* (emphasis added) (citing *Yoder*, 406 U.S. at 215, and Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

[105] *See supra* notes 40-41 describing the pre-*Smith* decision in *In re Milton*, 505 N.E.2d 255 (Ohio 1987), in which the Ohio Supreme Court found that there was a convergence of state and federal free exercise jurisprudence because both employed a strict scrutiny analysis for claims of interference with the free exercise of religion.

[106] The majority chose to characterize *Smith* as having created a divergence. Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000). "Divergence" signifies "a drawing apart (as of lines extending from a common center). WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 662 (1986). In contrast, the dissent characterized the majority opinion as a "departure" from *Smith*. *Humphrey*, 728 N.E.2d at 1047 (Cook, J., dissenting). The term "departure" refers to "a beginning of a new course of thought or action." WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 604 (1986).

[107] *Humphrey*, 728 N.E. 2d at 1044. In its earlier decision in *Arnold*, the Ohio Supreme Court revealed the strength of its conviction on the issue of the independent authority of the state Constitution by citing pointed language by the Texas Supreme Court in *Davenport v. Garcia*: "[w]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state character and denies citizens of the

B. The Dissent Argues for Goliath

The dissent expresses two basic concerns.[109] First, it is not the place of a court to measure the particular religious beliefs of each plaintiff.[110] Second, *Humphrey* could impair the state's ability to enforce universally applicable rules.[111] The dissent, however, makes significant concessions to the majority.[112] The most significant of these concessions is that the dissent acknowledges that following *Smith* could "disadvantage religious minorities whose belief systems are inadvertently offended by generally applicable laws."[113]

---

state charter and denies citizens the fullest protection of their rights." Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (1993) (quoting Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992)).

[108] So Chun, *A Decade After* Smith*: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305 (2000) (exploring how other states have sought to circumvent *Smith*). The New York Court of Appeals, in its free exercise decisions, "appears oblivious" to its own state Constitution in regard to the free exercise of religion. *Id*. at 1305. A disturbing implication of such a failing is that state constitutions are "inferior documents," incapable of resolving constitutional dilemmas, even when the claims are state-based. *Id*. at 1311.

[109] *Humphrey*, 728 N.E.2d at 1048.

[110] The dissent disregards the majority's finding that the sincerity of belief is a finding of fact to be determined not by a test of a religion, but by a trial court. *Id*. at 1045-46.

[111] Johnson, *supra* note 4. If forced to cut his hair, Humphrey planned to hold a ceremony "surrounded by family and friends as well as the sacred sweat lodge and altar of his religion . . . . [and] plans to donate the locks for a wig for a cancer survivor." *Id*. The dissent presumes that, if they are not afforded accommodation by the state, every citizen in every circumstance would chose to break the law. *Id*. This is not so with Wendall Humphrey.

[112] The dissent concurs that the Ohio Constitution is a document of independent force. *Humphrey*, 728 N.E.2d at 1047. The dissent is accustomed to strict scrutiny in application to free speech and racial discrimination. *Id*. at 1048. The dissent even goes so far as to acknowledge that strict scrutiny shields those who suffer from the effects of generally applicable laws. *Id*. (citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 at 903 (O'Connor, J., concurring in judgment only)).

[113] *Humphrey*, 728 N.E.2d at 1049 (quoting *Smith*, 494 U.S. at 890). The original text in *Smith* appears to be a very candid observation that *Smith* "will place at a relative disadvantage those religious practices that are not widely engaged in . . . ." Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990). *See also* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. REV. 331 (1994) (discussing the disparate treatment of Native Americans both pre-*Smith* and post-RFRA). Religious freedom is the crowning feature and basis of American society. *Id*. at 331. However, in general, the court system has not offered protection for the free exercise of Native American Indian worshippers. *Id*. at 336. *See also* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285 (1998/1999) (describing *Smith*, RFRA, and *City of Boerne*, as well as *City of Boerne's* unintended effects on Indian Free Exercise). Both *Smith* and *Humphrey* involved state infringement on Native Americans' free exercise of their religion, a profound irony if the founding purpose of the United States is not to be overlooked.

The dissent states that the majority chose the system "expressly rejected in *Smith*."[114] The majority itself expressly held, rather, that it chose the Ohio Constitution.[115] The phrase "religion-neutral" is curiously absent from the dissent's reasoning.[116] The dissent found that the compelling state interest outweighed Humphrey's free exercise right, providing an analysis, which, if adopted, could have an unintended effect that would marginalize religious viewpoints,[117] and in the process interfere with Ohio citizens' "natural and indefeasible right to worship Almighty God . . . ."[118]

---

[114] *Humphrey*, 728 N.E.2d at 1049. The term "expressly" is subject to interpretation, with *Smith* being one the most fragmented U.S. Supreme Court decisions in that Court's history. *See* Laycock, *supra* note 94, at 57. On freedom of religion issues, the U.S. Supreme Court is clearly divided, and that there are "deep ambiguities in the present doctrine." *Id*.

[115] *Humphrey*, 728 N.E.2d. at 1040 (citing the syllabus). *See also* Larry Witham, *Ohio Court Overrides U.S. Constitution: State Charter Protects Indian's Long Hair*, WASH. TIMES, May 29, 2000, at A-5 (reporting reactions to the decisions and observations regarding future effects of state constitutions affording broader free exercise protection).

[116] *Humphrey*, 728 N.E.2d at 1045-49. The phrase "religion neutral" is usually used in tandem with "compelling state interest," and is used as such in the majority opinion. *Id*. at 1045. The dissent's view suffers from the same defect observed in *Smith*, that of empowering courts to prefer the interests of the regulatory state over the interests of the individual, thus placing the individual in the position of having to stand against the state. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 693 (1992) (addressing the negative attitudes prevalent towards religion in public life, often the result of a desire to be neutral even though, very often, the motivation – or results – of such neutrality translates into significant interference with religious practice). *But see* Mark Tushnet, *The Underside of Mandatory Accommodations of Religion*, 26 CAP. U. L. REV. 1 (1997). Professor Tushnet states that "the law of accommodation presents itself as a benign law, serving to soften the edges of a rigid majoritarianism or bureaucratic system . . . yet . . . each expansion occurs in conjunction with the creation of [another group wanting accommodation] who is not protected." *Id*. at 6.

[117] Gedicks, *supra* note 116, at 672. "[M]any who value the contributions of religion to American life have contended that American politics and public life are hostile to religion." *Id*. at 671.

[118] OHIO CONST. art. I, § 7. The dissent characterizes strict scrutiny as a weapon to be used against the state, stating that such an analysis as the most "exacting . . . in our judicial arsenal." *Humphrey*, 728 N.E.2d at 1047. In contrast, the majority characterized strict scrutiny as a defense for state infringement upon citizens in regard to their "rights of conscience." *Id*. at 1044.

C. David Defeats Goliath: The Ohio Test is Born

Humphrey was heralded as the first decision of its kind.[119] The Ohio test,[120] born in *Humphrey*, may appear as nothing more than a strict scrutiny analysis for claims involving the infringement of religious free exercise.[121] The Ohio test consists of four elements: (1.) whether the claimant hold a sincere religious belief; (2.) whether the claimant's free exercise of religion is infringed; (3.) whether the state has a compelling interest; and (4.) whether the state is using the least restrictive means necessary.[122] Those who pass this test, such as Wendall Humphrey, are free to continue to practice their religion.[123]

---

[119] Witham, *supra* note 115, at A-5. Patrick Korten, of the Becket Fund for Religious Liberty, stated that "[f]or the first time since the 1990 ruling [in *Smith*] we are seeing a contrary decision at the highest state level." *Id*. The Becket Fund submitted an *amicus curiae* brief in *Humphrey*. *Humphrey*, 728 N.E.2d at 1043. Roman Storzer, the attorney who wrote the *amicus* brief places *Humphrey* in historical context:

> Prior to 1990, when the government restricted the exercise of sincerely held religious beliefs, it generally needed to justify its actions by showing that it had a compelling interest and that the means employed were the least restrictive ones. But in *Employment Division v. Smith* (1990), the Supreme Court decided that the United States Constitution provides no protection for the exercise of religious faith if it was in conflict with neutral and generally applicable laws. When Congress attempted to remedy this situation by passing the Religious Freedom Restoration Act in 1993, the United States Supreme Court struck it down in *City of Boerne v. Flores* (1997). The Ohio Supreme court has stepped into the breach and upheld the fundamental religious liberties of its citizens. We hope many other states soon follow.

Ohio Law Protects Religious Liberty More Than the U.S., The Becket Fund News Releases (visited Feb. 1, 2001) < http://www.becketfund. org>.

[120] Henley v. City of Youngstown Bd. of Zoning Appeals, 735 N.E.2d 433, 442-43 (Ohio 2000) (Lundberg-Stratton, J., dissenting) (upholding an accessory use permit granted by the city board of zoning appeals to St. Brendan's Church in order to provide transitional housing for homeless women and children in a former convent on church property). *Henley* is the first Ohio Supreme Court case to cite *Humphrey*. *Id.* at 443. Justice Lundberg-Stratton, who wrote the dissent in *Henley*, characterized the strict scrutiny analysis used in *Humphrey* as "the Ohio test." *Id.*

[121] The majority expressly stated its use of a strict scrutiny analysis. *Humphrey*, 728 N.E. 2d at 1044-45. The dissent expressly criticized the use of such an analysis in contradiction of *Smith*. *Id*. at 1047-49 (Cook, J., dissenting).

[122] "[T]he Ohio Constitution's free exercise protection is broader [than the federal free exercise protection], and we therefore vary from the federal test . . . ." *Id.* at 1045.

[123] "[T]he Ohio Constitution allows no law that even interferes with the rights of conscience." *Id*. at 1044. The Court concluded that "[f]orcing Humphrey to cut his hair would certainly infringe upon the free exercise of his religion." *Humphrey*, 728 N.E.2d at 1045.

The Ohio test is distinguishable because it derives its power solely from the Ohio Constitution and Ohio Supreme Court precedent, independent of federal law.[124] Thus, the Court laid the foundation with the independence of the Ohio Constitution, an approach affirmed in *Arnold*[125] and *Simmons-Harris*.[126] Next, the Court added walls of stone with *Whisner*.[127] Lastly, as a roof overhead to keep out the rain of interference with the rights of conscience, the Ohio Supreme Court completed this legal structure with *Humphrey*.[128]

Sanctuary[129] is an ancient term that refers not only to a structure for religious worship, but also to concepts of freedom and protection. Into the sanctuary of the Ohio test, individuals may enter and find protection for their freedom to exercise their sincerely held religious beliefs.

V. CONCLUSION

I owe it all to the Creator.[130]

In *Humphrey*, the Ohio Supreme Court took a courageous step in preserving religious freedom in the United States.[131] The Ohio test preserves for Ohio's citizens a greater measure of

---

[124] *See supra* Part II.B.1. and accompanying text.

[125] Arnold v. City of Cleveland, 616 N.E.2d 163, 164 (Ohio 1993) (establishing that the Ohio Constitution is a document of independent force).

[126] Simmons-Harris v. Goff, 711 N.E.2d 203, 211-12 (Ohio 1999) (reserving the right to interpret the Ohio Constitution independently from federal determinations).

[127] State v. Whisner, 351 N.E.2d 750, 771 (Ohio 1976) (determining that the compelling interest test would be followed in Ohio).

[128] *Humphrey*, 728 N.E.2d at 1040, 1043 (declaring that the language of Section Seven, Article One of the Ohio Constitution provides that the strict scrutiny analysis is the law of Ohio's religious free exercise jurisprudence).

[129] WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 2000 (1986). "Sanctuary" is defined as a sacred place to be held inviolable, a place of refuge and protection, a place of resort for those who seek relief. *Id*.

[130] Johnson, *supra* note 9, at D-1. Cathy, Humphrey's wife, upon hearing the news that the Ohio Supreme Court had held in Humphrey's favor, shouted: "There'll be no barbers here!" *Id*. Humphrey responded, "I owe it all to the Creator." *Id*. *See supra* notes 4, 9 and accompanying text.

[131] *See supra* note 119 and accompanying text.

freedom to exercise their religion than that given by the federal Constitution.[132] Ohio religious free exercise precedent, of which *Humphrey* is the most recent affirmation,[133] preserves the strict scrutiny, compelling-state-interest/least-restrictive-means analysis in the face of the religion-neutral/generally applicable standard set forth in *Smith*.[134]

Wendall Humphrey walks "the red road" and his hair grows freely.[135] The shield of the Ohio test[136] is raised to defend an individual's right of conscience and to preserve a strict scrutiny standard of review for cases involving interference with the free exercise of religion.[137] The Goliath of *Smith*[138] has been slain by the David of the Ohio Constitution.[139]

Jeffery D. Williams

---

[132] *See supra* notes 28-33 and accompanying text.

[133] *See* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); *In re* Milton, 505 N.E.2d 255 (Ohio 1987); State v. Whisner, 351 N.E.2d 750 (Ohio 1976).

[134] *See supra* Part IV.A.

[135] Alan, *supra* note 50 at A-1 and accompanying text, recounting the development of Humphrey Humphrey's practice of religion.

[136] *See supra* Part IV.C.

[137] *See supra* Part IV.A.2.

[138] The majority in *Smith* acknowledged that the decision would "place at a relative disadvantage those religious practices that are not widely engaged in . . . ." Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990).

[139] "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience." OHIO CONST. art. 1, § 7.