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The Erosion of Nebraska's Free Exercise Protection: *In re Interest of Anaya (Anaya II)*, 276 Neb. 825, 758 N.W.2d 10 (2008)

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Note*

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TABLE OF CONTENTS

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I. INTRODUCTION

Assume, for a moment, that Nebraska enacted a law requiring state employees, without any exceptions, to work on Saturdays in order to provide better access to government services. Although the law's purpose is entirely secular, a government employee whose religion dictates a Saturday Sabbath on which she may not work must choose between violating her religious beliefs and losing her job. What can she do?

She might think that a constitutional right to free exercise of religion guarantees her right to abstain from working on the Sabbath. However, neither the federal nor Nebraska constitutions' free exercise provisions provide any remedy because the law is neutral and generally applicable—it is not directed at religious practices and does not allow any exceptions—and a court would likely consider it to be rationally related to a legitimate government purpose.[1] Thus, unprotected by either the federal or state constitutions, the government employee faces a difficult choice.

Though the United States Supreme Court has interpreted the U.S. Constitution's First Amendment as requiring only a rational basis test for neutral, generally applicable laws since it decided *Employment Division, Department of Human Resources v. Smith* in 1990,[2] only recently was the Nebraska Constitution's free exercise provision interpreted in similar fashion. After the Nebraska Supreme Court's holding in *In re Interest of Anaya* ("*Anaya II*") in December of 2008,[3] an individual whose religious liberty is burdened by a neutral, generally applicable law has no recourse under the Nebraska Constitution, no matter how extreme the burden is.[4]

The plaintiffs in *Anaya II* challenged the state's newborn screening statutes[5] under the free exercise provision of article I, section four of

1. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); *In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 758 N.W.2d 10 (2008).
2. *See Smith*, 494 U.S. 872; *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down a federal statute that reestablished the compelling interest test); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (applying the rational basis test).
3. *Anaya II*, 276 Neb. 825, 758 N.W.2d 10.
4. *Id.*
5. NEB. REV. STAT. §§ 71-519 to -524 (Reissue 2009).

the Nebraska Constitution (hereinafter "Section Four"),[6] claiming that drawing blood from their infant under the newborn screening statutes violated their sincerely held religious beliefs.[7] In so arguing, they cited *Palmer v. Palmer*, in which the Nebraska Supreme Court held that the compelling interest test applied to Section Four claims.[8] The court in *Anaya II* rejected this argument, holding that *Palmer*'s adoption of the compelling interest test depended on a no longer valid federal law.[9] Though the court acknowledged that the state and federal provisions contained different language, it refused to analyze the Nebraska provision's text or history.[10] The court then held that Nebraska's Section Four protected free exercise only as much as the Federal First Amendment because they protected similar rights.[11] Since, under *Smith*, the First Amendment's Free Exercise Clause requires only a rational basis test for neutral laws of general applicability, the court reasoned that the Nebraska provision does as well.[12]

Anaya II will have wide-ranging effects on the status of religious freedom in Nebraska. Part II of this Note discusses the development of federal and Nebraska free exercise jurisprudence, concluding with the *Anaya II* decision. Following this background information, Part III examines the effects of the Nebraska Supreme Court's adoption of the rational basis test for neutral, generally applicable laws that incidentally burden religious practice. Part IV concludes with the recommendation that the Nebraska Legislature adopt a statute reestablishing the compelling interest test for all Section Four free exercise claims.

The Nebraska Supreme Court's adoption of the rational basis test in *Anaya II* was a dangerous mistake. First, by tying the meaning of Section Four to the U.S. Supreme Court's interpretations of the First Amendment, the Nebraska Supreme Court has effectively allowed the U.S. Supreme Court to amend the Nebraska Constitution without the consent of Nebraska's citizens. This is at odds with both the text and the history of the Nebraska Constitution. In addition, the use of the rational basis test results in a lack of any real protection of religious

6. "No person shall be compelled to attend, erect or support 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." NEB. CONST. art. I, § 4; *Anaya II*, 276 Neb. at 832, 758 N.W.2d at 17.
7. *Anaya II*, 276 Neb. at 829, 758 N.W.2d at 15.
8. Palmer v. Palmer, 249 Neb. 814, 545 N.W.2d 751 (1996), *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).
9. *Anaya II*, 276 Neb. at 833–34, 758 N.W.2d at 18. The federal law was the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, part of which the U.S. Supreme Court struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997).
10. *Anaya II*, 276 Neb. at 833–34, 758 N.W.2d at 18.
11. *Id.* at 834–35, 758 N.W.2d at 19.
12. *Id.*

practice—neutral, generally applicable laws can burden religious freedom just as much as laws targeted at religion, and religious minorities' free exercise rights are now subject to the political process. For these reasons, the Nebraska Supreme Court's refusal to apply the compelling interest test, which it applied in *Palmer* to Section Four free exercise claims arising from neutral, generally applicable laws,[13] is a mistake that severely limits the protection of religious exercise under the Nebraska Constitution.

II. BACKGROUND

A. The Federal and Nebraska Free Exercise Provisions

The First Amendment of the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[14] In contrast, article I, section four of the Nebraska Constitution states: "

> No person shall be compelled to attend, erect or support 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.[15]

Judicial interpretations of these two provisions have changed significantly over the past fifty years.

B. The Development of the Compelling Interest Test

1. The United States Supreme Court: Sherbert *and* Yoder

The United States Supreme Court began its thirty-seven year use of the compelling interest test for First Amendment free exercise claims in *Sherbert v. Verner*.[16] South Carolina's unemployment benefits office denied unemployment benefits to the plaintiff in *Sherbert* because she refused to accept a position that required her to work on Saturdays, which Seventh Day Adventists recognize as the Sabbath.[17] The Court found that, by forcing the plaintiff to choose between her religious beliefs and obtaining unemployment benefits, the state burdened her religious exercise in the same way as if it had fined her for her Saturday worship.[18] The Court announced that even incidental burdens on an individual's religious exercise must be justified by a compelling governmental interest.[19]

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13. *Palmer*, 249 Neb. at 818, 545 N.W.2d at 755, *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).
14. U.S. CONST. amend. I.
15. NEB. CONST. art. I, § 4.
16. 374 U.S. 398 (1963).
17. *Id.* at 399–400.
18. *Id.* at 404.
19. *Id.* at 403; *see also id.* at 406 ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional

The Court again addressed free exercise in *Wisconsin v. Yoder*.[20] A Wisconsin law required all children under sixteen years old, with limited exceptions, to attend school.[21] The plaintiffs in *Yoder* were under sixteen, but their parents had stopped sending them to school because formal education beyond eighth grade conflicted with their religious beliefs.[22] The parents instead wished to informally educate their children in values and skills central to the Amish way of life.[23] As in *Sherbert*, the Court stated that a law may only interfere with a genuine religious practice if it serves a compelling state interest.[24] It noted that even a facially neutral law, such as the compulsory school attendance law, may violate the First Amendment if it "unduly burdens" religious exercise.[25] The Court ultimately concluded that the government had not shown a sufficiently compelling interest to justify burdening the plaintiffs' religious freedom.[26]

2. The Nebraska Supreme Court: LeDoux

The Nebraska Supreme Court first applied the compelling interest test to a federal First Amendment claim in *LeDoux v. LeDoux*.[27] *LeDoux* concerned a divorce decree that ordered a Jehovah's Witness convert not to expose his son to religious beliefs and practices at odds with Catholicism.[28] The restrictions were based on testimony that the father's expressions of his newfound religious belief caused his son a great deal of stress.[29] On appeal, the Nebraska Supreme Court cited to *Sherbert* and later cases to support its conclusion that the First Amendment only allowed a state to burden religious practices through a regulation that is narrowly tailored to advance a compelling governmental interest.[30] The court concluded that, given the boy's stress, the restriction was narrowly tailored to advance the state's compelling interest in protecting children.[31]

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area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" (citation omitted)). Ultimately, the Court found in *Sherbert* that the state had not shown any such compelling interest to justify the burden. *Id.* at 406–09.

20. 406 U.S. 205 (1972).
21. WIS. STAT. § 118.15 (1969); *Yoder*, 406 U.S at 207, n.2.
22. *Yoder*, 406 U.S. at 207–10.
23. *Id.* at 210–11.
24. *Id.* at 214.
25. *Id.* at 220.
26. *Id.* at 230.
27. 234 Neb. 479, 452 N.W.2d 1 (1990).
28. *Id.* at 480–81, 452 N.W.2d at 2.
29. *Id.* at 484, 452 N.W.2d at 4.
30. *Id.* at 485–86, 452 N.W.2d at 5.
31. *Id.* at 486–87, 452 N.W.2d at 5.

C. Federal Departure from Free Exercise Precedent

Soon after the *LeDoux* decision, the U.S. Supreme Court changed its interpretation of the Free Exercise Clause. In *Employment Division, Department of Human Resources v. Smith* the Court abandoned its longstanding use of the compelling interest test for neutral laws of general applicability that burden religion.[32] The plaintiffs in *Smith* ingested peyote as part of a Native American sacrament.[33] As a result, they were fired from their jobs at a drug rehabilitation center.[34] When they applied for unemployment benefits, the Oregon Unemployment Division denied them compensation because they had been fired for "misconduct."[35] On appeal, Justice Scalia led a majority of the U.S. Supreme Court in holding, in what many commentators consider a clear departure from precedent,[36] that under the First Amendment, a neutral, generally applicable law that only incidentally burdens religious exercise must pass only the rational basis test.[37] The majority asserted that the compelling interest test had only ever applied to (1) attempts to regulate belief as such;[38] (2) "hybrid" cases that combined violations of other constitutionally protected rights, such as parents' rights to control their children's educations;[39] (3) unemployment compensation cases;[40] and (4) laws that were not neutral or generally applicable.[41]

The majority feared that applying the compelling interest test to neutral, generally applicable laws would allow each individual to become "a law unto himself."[42] The majority distinguished this result from the compelling interest test's effect on racial discrimination.[43] It stated that the compelling interest test, when applied to racial discrimination, produced equality of treatment, a "constitutional norm;"

32. 494 U.S. 872 (1990).
33. *Id.* at 874.
34. *Id.*
35. *Id.*
36. *See generally, e.g.*, Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. Rev. 259 (1993); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).
37. *Smith*, 494 U.S. at 878.
38. *Id.* at 877. An example of this would be a law that forbids holding a belief, as opposed to forbidding a religious practice based on that belief.
39. *Id.* at 881–82*; see* Wisconsin v. Yoder, 406 US. 205 (1972).
40. *Smith*, 494 U.S. at 882–84*; see* Sherbert v. Verner, 374 U.S. 398 (1963).
41. *Smith*, 494 U.S. at 881. For discussion of the meaning of "neutral" and "generally applicable," see *infra* notes 45–47 and accompanying text.
42. *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
43. *Id.* at 885–86.

but if applied to *Smith*, the compelling interest test would create the "constitutional anomaly" of a "private right to ignore generally applicable laws."[44] It also rejected the idea that a court could stem the flood of potential litigation by protecting only "central" religious practices.[45] The majority noted the impossibility of determining the centrality of a particular practice to an individual's faith, comparing it to an unacceptable judicial comparison of the merits of different religious claims.[46]

The Court reaffirmed the *Smith* test and further explained the meaning of "neutral" and "generally applicable" in *Church of the Lukumi Babalu Aye v. City of Hialeah*.[47] *Lukumi* concerned ordinances that a city council passed in reaction to the proposed construction of a Santeria church in which members would conduct animal sacrifices.[48] The ordinances were structured so as to prohibit ritual sacrifice but to allow almost all other forms of animal slaughter.[49] The Court explained that a law is not neutral if it restricts a practice simply *because* it is religiously motivated.[50] In addition, a regulation is not generally applicable if the government burdens religiously motivated conduct but not secular conduct that endangers the same governmental interest as much or more than the religious conduct.[51] The anti-animal sacrifice ordinances in *Lukumi* were not neutral because their purpose was to suppress a Santeria religious practice, as evidenced by the use of the words "sacrifice" and "ritual" in the ordi-

44. *Id.*
45. *Id.* at 886–87. This, however, is a straw man argument. The centrality of a particular religious practice to the religion as a whole has never been a part of the U.S. Supreme Court's compelling interest test for free exercise. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The majority cites to Justice Brennan's dissent in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 473–74 (1988) (Brennan, J., dissenting), as an example of such a centrality requirement. *Smith*, 494 U.S. at 886. However, the majority in *Lyng* explicitly rejected the use of a centrality requirement. *Lyng*, 485 U.S. at 457–58.
46. *Smith*, 494 U.S. at 886–87.
47. 508 U.S. 520 (1993).
48. *Id.* at 525–26. Before enacting the ordinances at issue, the City Council passed a resolution declaring that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." *Id.* at 526.
49. *Id.* at 534–36.
50. *Id.*
51. *Id.* at 542–43. A law that is not neutral is also not generally applicable. However, a law can be neutral but not generally applicable. This happens if a law is not designed to burden religious practice, but it nonetheless burdens religious practice without also curtailing secularly motivated conduct that endangers the same governmental interest. For example, a law that mandates that government employees must work on Saturdays and allows an exemption for parents of young children, but does not provide the same exemption for Saturday Sabbath observers, would not be generally applicable.

nance's language.[52] In addition, the Court found that the ordinances were not generally applicable because they did not prohibit secular conduct that endangered the government's interests in protecting public health and preventing animal cruelty to an equal or greater extent than Santeria sacrifice.[53] Therefore, the ordinances could only stand if they were narrowly tailored to further a compelling government interest. Ultimately, the Court struck down the ordinances because they were neither neutral nor generally applicable, and they were not narrowly tailored to serve a compelling governmental interest.[54]

D. The Religious Freedom Restoration Act

In reaction to the tremendous unpopularity of *Smith* and *Lukumi*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[55] RFRA provided that the federal government could not substantially burden a person's religious exercise, even through a generally applicable law, unless it was the least restrictive means of furthering a compelling government interest.[56] In other words, RFRA sought to restore the compelling interest test from *Yoder* and *Sherbert* to all federal free exercise cases.[57]

E. Interpreting Nebraska's Free Exercise Provision: *Palmer*

The Nebraska Supreme Court first interpreted Section Four in *Palmer v. Palmer*.[58] *Palmer* concerned the constitutionality of restrictions in a custody order on a mother's ability to include her child in her religious activities.[59] Citing to *LeDoux*—which the court noted was based on *Sherbert*—and the federal RFRA, the court applied the compelling interest test.[60] Without separate analyses, the court held that the custody order restrictions violated the free exercise provisions

52. *Id.* at 542.
53. *Id.* at 543, 545–46.
54. *Id.* at 538–40, 543–46.
55. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). As one commentator notes, "*Smith* produced widespread disbelief and outrage." Laycock, *supra* note 36, at 1. Following the Court's invalidation of the federal RFRA as it applied to the states, several state legislatures passed their own state versions of RFRA. *See infra* note 67. In this Note, however, the acronym "RFRA" means the federal RFRA unless otherwise indicated.
56. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
57. The U.S. Supreme Court later found RFRA unconstitutional in *City of Boerne v. Flores* because it exceeded Congress' Fourteenth Amendment powers. 521 U.S. 507 (1997). For more discussion of *City of Boerne*, see *infra* section II.F.
58. 249 Neb. 814, 545 N.W.2d 751 (1996), *overruled by In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 758 N.W.2d 10 (2008).
59. *Id.*
60. *Id.* at 818, 545 N.W.2d at 755.

in both the U.S. Constitution and the Nebraska Constitution because the State had not shown that the restrictions furthered its compelling interest in the child's well-being.[61] The fact that the court provided no separate analysis of the Nebraska provision and concluded that the restrictions violated both the federal and state constitutions indicates that the court intended to establish the compelling interest test as the standard for Nebraska's free exercise provision.[62] This conclusion is further supported by the fact that RFRA only applied to First Amendment claims. State courts could still interpret their state constitutions as providing less protection than the Federal Constitution.[63] Less-protective state free exercise provisions simply became irrelevant because a plaintiff could lose on the state claim and still win on the First Amendment claim.[64] Therefore, in *Palmer*, the court was free to interpret Nebraska's standard in any way it wished. The fact that the court nonetheless adopted the compelling interest test indicates that Section Four independently requires it.

F. The End of the Compelling Interest Test for First Amendment Free Exercise

The United States Supreme Court struck down RFRA in *City of Boerne v. Flores*[65] because it found that it was not a proper exercise of Congress's Fourteenth Amendment power to pass legislation ensuring due process and equal protection of the laws.[66] Because principles of federalism, as embodied in the Tenth Amendment, reserve to the states those powers not constitutionally granted to the federal government, the Court held that Congress exceeded its constitutional power in passing RFRA.[67]

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61. *Id.* at 820, 545 N.W.2d at 756.
62. Jeremy Patrick, *The Religion Provisions of the Nebraska Constitution: An Analysis and Litigation History*, 19 J.L. & RELIGION 331, 374 (2003–04). Indeed, the court noted in *Anaya II* that *Palmer* correctly stated that the compelling interest standard applied to Section Four claims *at that time*. *In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 833, 758 N.W.2d 10, 18 (2008). For more discussion of the evidence that the Nebraska Supreme Court intended to break with federal free exercise jurisprudence and establish an independent, compelling interest standard for Nebraska's Section Four, see *infra* section III.B.
63. Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS. L. REV. 49, 50, 62 (1993).
64. *Id.* at 62–64.
65. 521 U.S. 507 (1997).
66. *Id.* RFRA remains a valid constraint on federal action. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (affirming the granting of a preliminary injunction against a federal government action based on RFRA).
67. After the U.S. Supreme Court struck down the federal RFRA in *City of Boerne*, a number of states passed their own statutes and constitutional amendments ("state RFRAs") that reestablished the compelling interest test for governmental burdens on free exercise, even when that burden came from the application of

The Nebraska Supreme Court then followed *Smith* and *Lukumi* in *Douglas County v. Anaya* ("*Anaya I*"), in which it applied the rational basis test to a First Amendment claim arising from a neutral, generally applicable law.[68] In this case, Josue and Mary Anaya objected to the infant metabolic disease testing required by state statute because it conflicted with their religious beliefs.[69] In addition to holding that the rational basis standard applies to federal free exercise claims based on neutral laws of general applicability, the court rejected the plaintiffs' assertion that a hybrid rights claim (free exercise and parental rights) entitled them to a compelling interest review.[70] The court finally held that the statute did not violate the plaintiffs' federal free exercise rights because it was neutral and generally applicable and because the state has a rational interest in children's health and well-being.[71]

G. *In re Interest of Anaya (Anaya II)*

1. Facts and Procedural History

When the Anayas had another child, Joel, in 2007, they also refused to have him tested for metabolic diseases as required by the newborn testing statutes.[72] The state filed a petition pursuant to section 43-247(3)(a) of the Nebraska Revised Statutes in the separate juvenile court of Douglas County in which it alleged that Joel did not

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neutral, generally applicable laws. *See* ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. § 52-571b (2009); FLA. STAT. §§ 761.01 to 761.05 (2008); 775 ILL. COMP. STAT. 35/1 to 35/99 (2008); OKLA. STAT. tit. 51, §§ 251 to 258 (2010); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2006). These state RFRAs do not present the constitutional problems of the federal RFRA, and states are free to provide greater protection for liberties under their own constitutions than is provided under the U.S. Constitution. McCabe, *supra* note 63, at 50, 62.

68. 269 Neb. 552, 557, 561, 694 N.W.2d 601, 605–06, 608 (2005).

69. *Id.* at 554, 694 N.W.2d at 604 (referring to NEB. REV. STAT. § 71-519 (Reissue 2009)).

70. *Id.* at 557–58, 694 N.W.2d at 606. The court reached this conclusion based on statements in lower federal court decisions, despite the U.S. Supreme Court's statement to the contrary in *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881–82 (1990). The federal court language quoted in *Anaya I* suggests that it is illogical to allow a plaintiff to burden the government with the compelling interest test by combining two individually insufficient constitutional claims. *See Anaya I*, 269 Neb. at 557–58, 694 N.W.2d at 606.

71. *Anaya I*, 269 Neb. at 560–61, 694 N.W.2d at 608. The court held that the statute was neutral because it was not enacted with the purpose of interfering with religious practice or belief. *Id.* at 560, 694 N.W.2d at 608. Further, the court found it to be generally applicable because it applied to all babies born in the state and did not have a system of particularized exemptions from testing. *Id.*

72. NEB. REV. STAT. §§ 71-519 to -524 (Reissue 2009); *In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 828, 758 N.W.2d 10, 15 (2008).

have proper parental care because of his parents' faults or habits.[73] Upon the state's motion, the separate juvenile court of Douglas County ordered Joel to be placed in the custody of the Department of Health and Human Services ("DHHS") until the test results were known.[74] After the test came back negative, the state returned Joel to his parents and moved to dismiss the case.[75] Following the court's dismissal of the case, the Anayas appealed.[76]

2. Holding and Rationale

The most important effect of *Anaya II* is that the court adopted the *Smith* rational basis test for Section Four free exercise claims arising from neutral, generally applicable laws.[77] In doing so, the court announced that its adoption of the compelling interest test for Section Four claims in *Palmer* was no longer binding precedent.[78] The court stated that *Palmer* no longer applied because it depended entirely on RFRA, which the U.S. Supreme Court invalidated in *City of Boerne*.[79] It then adopted the *Smith* rational basis test for Section Four free exercise claims.[80] Though the court acknowledged that Section Four's language differed from the federal provision, it refused to "accord these textual differences weight in terms of their constitutional significance."[81] It stated that Section Four should be interpreted in the same way as the First Amendment because each protects similar rights.[82]

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73. *Anaya II*, 276 Neb. at 828–29, 758 N.W.2d at 15. Section 71-524 provides the procedure for enforcing the newborn screening laws. The normal procedure is to bring a civil action in district court, but it allows for other remedies "available by law." NEB. REV. STAT. § 71-524 (Reissue 2009).
74. *Anaya II*, 276 Neb. at 829–30, 758 N.W.2d at 16.
75. *Id.*
76. *Id.*
77. *Id.* at 833–35, 758 N.W.2d at 18–19. The court first held that it would hear the case based on the public interest exception to the mootness doctrine, even though there was no longer any active case or controversy. *Id.* at 832, 758 N.W.2d at 17.

    The court also discussed the proper procedure for enforcing the newborn screening laws. In *Anaya II*, the state obtained custody of Joel through the neglect provision of the juvenile code, section 43-247(3)(a). 276 Neb. at 828–29, 758 N.W.2d at 15. The court held that although section 43-247 is a proper method of enforcing the screening statutes in some cases, it was not proper in this case because the state did not present any proof that the Anayas had neglected Joel. *Id.* at 838, 758 N.W.2d at 21. Therefore, the court concluded that the juvenile court had never acquired jurisdiction over Joel. However, these procedural considerations did not affect the court's free exercise analysis. *Id.* at 839, 758 N.W.2d at 22.
78. *Id.* at 833–34, 758 N.W.2d at 18.
79. *Id.* at 834, 758 N.W.2d at 18.
80. *Id.*
81. *Id.*
82. *Id.* at 834–35, 758 N.W.2d at 19.

The court then concluded that the newborn screening statutes were neutral laws of general applicability because there was no evidence that the state enforced them for the purpose of restricting religious practices, and they did not contain a system of particularized exemptions.[83] The court then held that the state had a rational basis for the law, namely, to further the state's legitimate interest in protecting children's health and welfare.[84]

The Nebraska Supreme Court ultimately concluded that the newborn screening statutes do not violate Section Four of the Nebraska Constitution because they are neutral and generally applicable, and the state's enforcement is rationally related to its interest in protecting children's health and welfare.[85]

III. ANALYSIS

Anaya II presented the Nebraska Supreme Court with an opportunity to reaffirm a strong commitment to religious freedom by continuing to apply the compelling interest test to state free exercise claims, the contrary holding in *Smith* notwithstanding. The court missed this opportunity, deciding instead to follow *Smith* in applying the rational basis test to free exercise claims arising out of neutral, generally applicable laws. By doing so, the Nebraska Supreme Court left Nebraskans without meaningful constitutional protection for free exercise of religion.

A. By Allowing the U.S. Supreme Court to Determine the Meaning of Nebraska's Free Exercise Provision, the Nebraska Supreme Court Has Disenfranchised the People of Nebraska

The Nebraska Constitution belongs to the people of Nebraska. Nebraskans created it in order to form and limit their government. To preserve this sovereignty, the Constitution can only be amended with the approval of three-fifths of the legislature and the majority of voters in the next election.[86] Thus, the Constitution, the state's most fundamental law, is not easily changed. Despite this, by tying the meaning of Nebraska's free exercise provision to the U.S. Supreme Court's interpretations of the Federal Free Exercise Clause, the Nebraska Supreme Court effectively allowed the U.S. Supreme Court to

83. *Id.* at 835, 758 N.W.2d at 19 (citing Douglas County v. Anaya (*Anaya I*), 269 Neb. 552, 560, 694 N.W.2d 601, 608 (2005)).

84. *Id.* at 835–36, 758 N.W.2d at 20 (citing *Anaya I*, 269 Neb. 552, 694 N.W.2d 601).

85. *Id.* at 836, 758 N.W.2d at 20.

86. NEB. CONST. art. XVI, §§ 1–2.

amend the meaning of the Nebraska Constitution without the people's consent.[87]

Rather than following the federal standard, the Nebraska Supreme Court should have independently analyzed the text, history, and policy behind Section Four. Independent interpretation allows state courts to become more familiar with the state's constitutional history and prevents them from overlooking important textual differences between state and federal provisions.[88]

In *Anaya II*, the Nebraska Supreme Court refused to assign any importance to the textual and historical differences between the state and federal free exercise provisions.[89] This was a mistake for several reasons. First, the court has stated that a constitutional provision's historical background and intended purpose are relevant to its interpretation.[90] When the Nebraska Constitution was first adopted in 1875, the Nebraska provision was the only limitation on the state's ability to interfere with the free exercise of religion because the First Amendment did not apply to state action prior to 1940.[91] The framers of the Nebraska Constitution likely did not intend to tie Section Four's meaning to that of a federal amendment that did not then apply to state action. Further, the Nebraska framers were well-aware of the

87. It is true that the Nebraska Supreme Court has also tied the meaning of other state constitutional provisions to similarly worded federal provisions. *Anaya II*, 276 Neb. at 834, 758 N.W.2d at 19. However, as Daniel A. Crane notes:

> [Tying a state constitutional provision to its federal equivalent] is based on the assumption that the federal jurisprudence will continue to develop in an interstitial manner similar to accretion of the common law. . . .
>
> When the [United States] Supreme Court abruptly and radically breaks with the very constitutional tradition to which the states had tied their own religious liberty jurisprudence, *stare decisis* would not seem to require adherence to the new federal standard under the state constitution. Rather, the presumption should be that the state courts will continue to follow the old standard, which they originally approved in adopting the federal standard.

Crane, *supra* note 36, at 248.

88. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 203–04 (1998)*; see also* Crane, *supra* note 36, at 264 ("Many of the state provisions contain additional twists and turns that could provide courts with additional textual reasons to grant free exercise exemptions.").

89. 276 Neb. at 834, 758 N.W.2d at 19.

90. State *ex rel.* Lemon v. Gale, 272 Neb. 295, 304, 721 N.W.2d 347, 355–56 (2006); *see also* 16 C.J.S. *Constitutional Law* § 56 (2005) ("Constitutional provisions must be construed in context, meaning that a provision's history and purpose must be considered in determining its meaning.").

91. The U.S. Supreme Court first applied the First Amendment to state action through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *See also* Patrick, *supra* note 62, at 335 (noting that the Nebraska Supreme Court has consistently held that rights guaranteed in the Nebraska Constitution are no broader than those guaranteed in the United States Constitution).

Federal First Amendment. The fact that they used different language indicates an intention to give Section Four a different meaning than the First Amendment.

In addition, "[i]t is a fundamental principle of constitutional interpretation that *each and every clause* within a constitution has been inserted for a useful purpose."[92] Because every clause of the Nebraska Constitution has a useful purpose, the court must independently analyze the text of Section Four in order to determine this useful purpose. Failing to do so ignores Section's Four's unique text and history. Section Four's text does not distinguish between laws aimed at restricting religion and neutral, generally applicable laws that burden religious practice only incidentally.[93] Rather, it prohibits "*any* interference with the rights of conscience."[94] A statement by one of the delegates to the first Nebraska Constitutional Convention in 1871 supports this literal reading of the text:

> They require a place wherein they may build their idols, wherein they may worship. I believe it is right because it is in obedience to the fundamental idea, that no man shall be interfered with in the enjoyment of his religion. He shall worship howsoever, whethersoever, [sic] and whensoever [sic] he may.[95]

This statement suggests that the framers intended Section Four to prevent the state from interfering with religious practice without regard to its motive for doing so.

In addition, Nebraska's prohibition of "*any interference* with the rights of conscience"[96] is stronger language than that of the First Amendment, which only says that the government cannot *prohibit* free exercise.[97] Similarly, Minnesota's free exercise provision also prohibits "any interference with the rights of conscience" and says that an individual's right to worship freely shall not be "infringed."[98] Accordingly, the Minnesota Supreme Court has held,

> Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, section 16 precludes even an *infringement* on or an *interference* with religious freedom. Accordingly, govern-

92. *Lemon*, 272 Neb. at 304, 721 N.W.2d at 356 (2006) (citing Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)) (holding that the requirement under NEB. CONST. art. III, § 2 that a ballot initiative not be the same "either in form or essential substance" as another measure submitted to the voters within the preceding three years requires a broader conceptual analysis than the "same or substantially the same" provision in the New Jersey Constitution) (emphasis added).
93. NEB. CONST. art. I, § 4.
94. *Id.* (emphasis added).
95. Experience Estabrook, Member of the Nebraska Constitutional Convention of 1871, Remarks during Debate over the Nebraska Bill of Rights (June 29, 1871) *in* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEBRASKA CONSTITUTIONAL CONVENTION ASSEMBLED IN LINCOLN, JUNE 13, 1871, at 214 (Addison E. Sheldon ed., 1905).
96. NEB. CONST. art. I, § 4 (emphasis added).
97. U.S. CONST. amend. I.
98. MINN. CONST. art. I, § 16.

> ment actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment [sic]) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.[99]

This language supported the court's holding that the Minnesota Constitution requires a stronger degree of protection of free exercise, and, despite *Smith*, it nonetheless necessitates applying the compelling interest test to a neutral, generally applicable law burdening religion.[100] Because Nebraska's Section Four, like the Minnesota provision, contains stronger language than that of the First Amendment, it too suggests that stronger protection is required.

B. The U.S. Supreme Court's Invalidation of RFRA Should Not Affect Nebraska's Standard

The Nebraska Supreme Court adopted the compelling interest test for claims under Section Four in *Palmer*.[101] In so doing, the court cited to both *LeDoux*—and through it, to *Sherbert*—and RFRA.[102] The court stated in *Anaya II* that because it mentioned RFRA in *Palmer*, the U.S. Supreme Court's later voiding of the statute makes *Palmer*'s adoption of the compelling interest test irrelevant.[103]

However, *Palmer*'s adoption of the compelling interest test did not depend on RFRA, so the U.S. Supreme Court's later invalidation of RFRA should not affect *Palmer*'s precedential value. First, RFRA only required the compelling interest test for First Amendment claims. It did not prevent state courts from interpreting their state constitutions as providing less protection than the Federal Constitution.[104] Rather, it made a less-protective state free exercise provision irrelevant because even if a plaintiff lost on the state claim, he or she would still win on the federal free exercise claim.[105] Therefore, when the Nebraska Supreme Court decided *Palmer*, it was free to interpret Nebraska's standard as providing less protection than under the

99. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990).
100. *Id.* at 398.
101. Palmer v. Palmer, 249 Neb. 814, 818, 545 N.W.2d 751, 755 (1996), *overruled by In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 758 N.W.2d 10 (2008). The fact that the court applied the compelling interest test and concluded that the restrictions violated both the First Amendment and Section Four, without separately discussing the two, indicates that the court meant to adopt the compelling interest test for Section Four claims. Patrick, *supra* note 62, at 374. Indeed, the court noted in *Anaya II* that the compelling interest test was the proper standard for Section Four claims when *Palmer* was decided. *Anaya II*, 276 Neb. at 833, 758 N.W.2d at 18.
102. *Palmer*, 249 Neb. at 818, 545 N.W.2d at 755, *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).
103. *Anaya II*, 276 Neb. at 834, 758 N.W.2d at 18.
104. McCabe, *supra* note 63, at 50, 62.
105. *Id.*

compelling interest test. The fact that the court adopted the compelling interest test anyway indicates that Section Four independently requires it.

Palmer's citation to *LeDoux*,[106] which the *Palmer* decision noted was based on the old federal compelling interest standard announced in *Sherbert*,[107] further supports the conclusion that *Palmer*'s adoption of the compelling interest standard did not depend on RFRA. By the time of *Palmer*, the U.S. Supreme Court already had declared that *Sherbert* applied only to the narrow case of unemployment benefits.[108] In citing to *Sherbert* via *LeDoux* in a case unrelated to unemployment benefits, the Nebraska Supreme Court rejected the Supreme Court's narrowing of the *Sherbert* rule.[109] In doing so, it created an independent compelling interest standard for state free exercise claims. This supports the conclusion that *Palmer* cited to RFRA only as another example of the compelling interest test and in order to provide further support for its holding. RFRA was not, however, determinative in that case. Finally, the fact that *Palmer* cites to RFRA with the signal "See, also"[110] further supports this conclusion.[111]

Because *Palmer* did not depend on RFRA, the fact that U.S. Supreme Court later declared RFRA void in *City of Boerne* should not have affected Section Four's meaning. *Palmer* established the compelling interest test as the standard for Section Four claims, independent of any federal requirement. Although *Palmer* did not concern a neutral, generally applicable law,[112] nothing in the text or history of Section Four supports having a lower standard for neutral, generally applicable laws that burden religious practice.

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106. LeDoux v. LeDoux, 234 Neb. 479, 485, 452 N.W.2d 1, 5 (1990).

107. *Palmer*, 249 Neb. at 818, 545 N.W.2d at 755, *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).

108. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882–84 (1990).

109. In citing *Sherbert* and applying the compelling interest test to a case which the United States Supreme Court held was outside of *Sherbert*'s scope, the Nebraska Supreme Court indicated that it was simply not following the United States Supreme Court's lead. Rather emphatically, this indicated the Nebraska Supreme Court's intention to break with the United States Supreme Court on free exercise and establish an independent, compelling interest for Nebraska's free exercise program.

110. 249 Neb. at 818, 545 N.W.2d at 755, *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).

111. *The Bluebook* simply states, "'*See also*' is commonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 46 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

112. Rather, *Palmer* involved a divorce decree that restricted the custodial mother's ability to include her child in religious activities. 249 Neb. at 816, 545 N.W.2d at 754, *overruled by Anaya II*, 276 Neb. 825, 758 N.W.2d 10 (2008).

C. The Use of the Rational Basis Test Robs Section Four of Any Real Power to Protect Free Exercise

Not only do Nebraska constitutional history and precedent require an independent, compelling interest standard for Section Four claims, *Anaya II*'s adoption of the rational basis standard robs Section Four of any real power. It creates the potential for conflict between an individual's religious obligations and his or her obligations to civil society. This is the very sort of conflict that free exercise provisions were intended to prevent.[113] In addition, under the rational basis standard, members of minority religions are at the majority's mercy because their religious liberty is subject to the political process.[114] Courts are powerless to exempt individuals from neutral, generally applicable laws, even though the burden on the individual's religious practice may be severe, and even though the government may have no important reason for burdening religion in the first place.[115]

Constitutional protection of free exercise is based on the belief that a person's religious obligations are beyond the scope of the state's power.[116] James Madison, one of the framers of the Federal Free Exercise Clause, stated that a person's religious duty "is precedent both in order of time and degree of obligation, to the Claims of Civil Society."[117] Free exercise provisions are intended to prevent a forced choice between obedience to religious duties and obedience to civil laws.[118] Throughout history, religious minorities without such protection have been forced to move to more tolerant places. Indeed, such "forced migration of minorities was an evil that lay at the heart of the [federal] religion clauses."[119]

Because of concern about individuals' religious freedom, the drafters of the Nebraska Constitution intended to protect it with Section Four. Section Four's literal text provides an absolute, substantive

113. Laycock, *supra* note 36, at 30.
114. *See*, *e.g.*, *id.* at 15.
115. *Id.* at 38.
116. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992).
117. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* Everson v. Bd. of Educ. 330 U.S. 1, 64 (1947). A person who faces conflicting demands of religion and civil society is like a soldier has been told to charge by the General and to retreat by the Captain. The soldier is under the authority of two officers. When ordered to do inconsistent things, he follows the order of the higher-ranking officer—the General—and charges. Email from Richard F. Duncan, Professor, University of Nebraska College of Law, to Sara Lunsford Kohen (Aug. 3, 2009, 10:54:14 CDT) (on file with author).
118. Laycock, *supra* note 36, at 30.
119. Wisconsin v. Yoder, 406 U.S. 205, 218 n.9 (1972). *Yoder* discusses the federal religion provisions, but there is no reason to think that this applies any less to the Nebraska free exercise provision, given that the Nebraska framers were well aware of the Federal Bill of Rights.

right for believers to be left alone by the government.[120] Though an absolute right of free exercise would be unworkable, the compelling interest test provided a suitable balance, such that only the most important governmental interests could justify limiting religious freedom. The rational basis test, on the other hand, leaves religious freedom largely unprotected. Under rational basis scrutiny, judges cannot exempt a plaintiff from a law that is neutral, generally applicable, and rationally related to a legitimate government interest, even if the burden on the individual's religious practice is extreme[121] and the government has no particularly compelling need for imposing the burden.[122]

Indeed, using the rational basis standard changes the essential character of the rights protected under Section Four. *Anaya II* changes Section Four from a "liberty rule" (protecting religious liberty) to an "equality rule" (treating equally both religious and nonreligious acts).[123] However, the text of Section Four indicates that it should be a liberty rule. Section Four does not say that the state must guarantee believers equal protection under the law; rather, it says the state may not interfere with the rights of conscience.[124]

Equal treatment of religious and secular conduct, moreover, does not actually guarantee any religious liberty. Even though believers might be treated equally under the new rule, they may still be forced to choose between following their religion and following the law—the very sort of choice that a free exercise provision is intended to prevent.[125] Neutral, generally applicable laws can burden free exercise just as much as laws that are directed at restricting religious practice,[126] as almost any burden on religion can be couched in neutral terms.[127] For example, Nebraska could pass a law prohibiting all alcoholic beverages, without any exceptions, for the purpose of preventing the harmful health effects of drinking. This would severely

120. *See* NEB. CONST. art. I, § 4.

121. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); *In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 758 N.W.2d 10 (2008); Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith. 75 N.Y.U. L. Rev. 1045, 1055 (2000).

122. Laycock, *supra* note 36, at 38.

123. For a discussion of this concept with regard to the Federal Free Exercise Clause, see Richard F. Duncan, *Free Exercise is Dead: Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*. 3 U. PA. J. CONST. L. 850, 880–81 (2001); Laycock, *supra* note 36, at 10, 13; McConnell, *supra* note 36, at 1137.

124. *Cf.* Laycock, *supra* note 36, at 13 (discussing the Federal First Amendment).

125. *Id.* at 30.

126. *Smith*, 494 U.S. at 901 (O'Connor, J., concurring); Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

127. Laycock, *supra* note 36, at 42.

burden religious groups that use wine in sacraments, such as communion. The law would stand, regardless of this burden, because it has a neutral purpose and, since it contains no exceptions, is generally applicable.[128] Further, not only can neutral, generally applicable laws burden religious freedom under the rational basis test, the state is more likely to pass such a law than it is to directly target a religious practice.[129]

In addition, applying the rational basis test to neutral, generally applicable laws means that the political branches of government determine the scope of the right to free exercise.[130] However, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[131] It is dangerous to allow the legislature alone to determine whether or not to allow certain religious practices because legislators are likely to act on majority prejudices, ignore restrictions on unpopular groups' free exercise, and are not required to make principled decisions.[132] It is better to enable judges to alleviate unnecessarily severe burdens on religious exercise because judges, at least, are sworn to make decisions based on legal principles, rather than popular prejudice.[133]

Because free exercise is now left largely to the political branches of government, religious minorities stand to lose the most under *Anaya II*. Legislatures may favor majority religions by not passing laws that burden the practices of majority religious groups,[134] but religious minorities often lack the political power necessary to protect their interests.[135] Under the compelling interest standard, courts allowed

128. Duncan, *supra* note 123, at 859–60.

129. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Justice O'Connor reasons:

> [F]ew states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.

Id.

130. Kaplan, *supra* note 121, at 1055.

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

132. Laycock, *supra* note 36, at 15; McConnell, *supra* note 36, at 1136.

133. Laycock, *supra* note 36, at 15; McConnell, *supra* note 36, at 1136.

134. McConnell, *supra* note 32, at 1132. Also, laws that do burden majority religious practices will likely be corrected. *Id.* at 1136.

135. Gregory D. Wellons, Note, Employment Division, Department of Human Resources v. Smith*: The Melting of Sherbert Means a Chilling Effect on Religion*, 26 U.S.F. L. REV. 149, 172 (1992); *see also* Laycock, *supra* note 36, at 15 ("[L]egislators are even more likely to favor familiar faiths with enough adherents to matter at the polls.").

religious minorities to bring attention to burdens on their free exercise rights and obtain "the same sort of hearing that more prominent religions already receive from the political process."[136] Under *Anaya II*, however, Nebraska courts are now powerless to remedy unjust burdens that neutral, generally applicable laws impose on minority religious practice.

These negative effects of the rule articulated in *Smith* and *Anaya II* reach far beyond the facts of those cases.[137] For example, *State v. Miller*[138] concerned Amish plaintiffs who faced a conflict between a law that required all slow-moving vehicles to display an orange slow-moving vehicle sign and a religious belief that required them to abstain from displaying secular symbols on their buggies.[139] The Wisconsin Supreme Court, in construing the Wisconsin free exercise provision, applied the compelling interest test.[140] It noted that under the rational basis test, the plaintiffs would have been forced to move out of state to avoid a law that their consciences would not allow them to obey, even though they demonstrated alternative methods of furthering the government's interest in preventing accidents, such as the use of reflective tape.[141] If the plaintiffs in *Miller* lived in Nebraska today, they would be forced to either violate their beliefs or move to a state that better protects its inhabitants' religious freedom.

In sum, by implementing the rational basis standard, the Nebraska Supreme Court stripped Section Four of its power. Section Four no longer exempts individuals from forced choices between religious and civil obligations. The decision allows the majority to determine the amount of religious freedom enjoyed by minorities by subjecting it to the political process. Also, the state is now free to severely burden individuals' religious practices, even when it has no real need to do so, so long as the burdensome laws are neutral and generally applicable.[142]

D. Concerns about the Compelling Interest Test Are Unfounded

Some critics, including Justice Scalia, fear that in a pluralistic society using the compelling interest standard for neutral, generally applicable laws that burden religious practices would allow each objector

136. McConnell, *supra* note 36, at 1136.
137. Arguably, Anaya's claim still might fail under a compelling interest test because of the danger to the child. Such a discussion is beyond the scope of this Note, however.
138. 549 N.W.2d 235 (Wis. 1996).
139. *Id.* at 237.
140. *Id.* at 239–40.
141. *Id.* at 241–42.
142. Laycock, *supra* note 36, at 38.

to become "a law unto himself."[143] This concern is mistaken for several reasons. First, although some worry about the cost of requiring the government to prove that a law is narrowly tailored to advance a compelling interest, the greater cost is actually born by religious minorities. The burden imposed by governmental prohibitions against certain religious practices falls directly upon religious minorities and is much greater than any burden on the government caused by requests for religious exemptions.[144] The compelling interest test may indeed result in the state having to expend more resources. However, this pales in comparison to the burden imposed on an individual forced to choose between obeying a religious duty and a secular law. Those who find this choice impossible must move to more tolerant places, leaving behind their homes and jobs.

In addition, in a society that values individual rights so greatly that they are enshrined in the Constitution itself, the concern that these rights might lead to much litigation does not justify judicially eviscerating them, which is the result under the standard announced in *Smith* and *Anaya II*.[145] It is for this reason that even known criminals are allowed to go free when their Due Process rights have been violated. If fundamental, constitutional rights are important—and few would deny that they are—then they must be protected, even if their protection produces some unpleasant consequences.

Also, the compelling interest test does not allow people to "become a law unto" themselves, as Scalia feared.[146] Rather, it allows the government to enforce even an extremely burdensome law if its need to do so is great enough. Even before *Smith*, the U.S. Supreme Court rarely held in favor of burdened individuals,[147] either because it found that there was no burden,[148] the government's interest was compelling,[149] or the claims arose in special, tightly controlled governmental institu-

143. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

144. Laycock, *supra* note 36, at 68.

145. *See supra* section III.C; *see also* Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("[I]t is highly doubtful whether [evidence of spurious claims] would be sufficient to warrant a substantial infringement of religious liberties.").

146. *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

147. Duncan, *supra* note 123, at 852; McConnell, *supra* note 36, at 1110.

148. *See* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–05 (1985) (holding that a law that requires bookkeeping and payment of minimum wage does burden the free exercise of religious "businesses" that pay workers in benefits rather than cash).

149. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that the government has a compelling interest in eliminating racial discrimination in education).

tions like the military[150] and prisons.[151] The Nebraska Supreme Court is also capable of balancing competing individual and governmental claims under the compelling interest test. In fact, it is likely in a better position to perform this balancing than a federal court because "state courts may be more in tune with the state law developments than the federal courts."[152]

Courts are fully able to conduct the analysis required by the compelling interest standard. First, proving a compelling government interest presents no unusual problems, as determining whether a compelling interest exists is a part of many constitutional law tests.[153] Additionally, courts are often capable of determining whether a religious practice is burdened. For example, the U.S. Supreme Court held in *Tony and Susan Alamo Foundation v. Secretary of Labor*[154] that a law mandating a minimum wage did not burden the free exercise rights of workers at a religious "business" whose faith prohibited them from accepting cash payment. The Court held that the workers were not burdened because the law did not require cash payment (they could continue to accept payment in benefits), and even if the law did require payment in cash, the workers could refuse the cash if accepting it went against their religious beliefs.[155] Admittedly, there are some situations in which courts may not be able to judge exactly what counts as a burden without drawing their own conclusions as to the requirements of an individual's faith. However, the harm caused by burdening a religious practice is so great that, in borderline cases, a court could easily resolve to err in favor of finding a burden.

Though some might worry that people will pretend to hold beliefs in order to gain a personal benefit, this concern does not justify doing away with the compelling interest test. First, allowing exemptions through the use of the compelling interest test is unlikely to encourage people to adopt a given religion just to circumvent the law because many religious practices impose extra burdens on adherents that are meaningless to non-believers.[156] More importantly, the alternative to

150. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the Air Force did not have to allow a Jewish officer to wear a yarmulke).
151. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that prison officials do not have to accommodate Muslim prisoners' requests for schedule changes to attend prayer services).
152. Crane, *supra* note 36, at 265.
153. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (applying the compelling interest test to political speech under the First Amendment); Grutter v. Bollinger, 539 U.S. 306 (2003) (applying the compelling interest test to law school admissions under the Equal Protection Clause); Chavez v. Martinez, 538 U.S. 760 (2003) (explaining the role of the compelling interest test under the Due Process Clause).
154. 471 U.S. 290 (1985).
155. *Id.* at 303–05.
156. Laycock, *supra* note 36, at 17.

the compelling interest test, the rational basis test, allows the government to burden sincere religious practice without any truly important need to do so. Though some individuals undoubtedly will feign a religious belief in order to reap a personal gain under the compelling interest test, the vital importance of protecting sincere religious practice requires that society bear the actions of a few insincere individuals.[157]

Finally, the majority in *Smith* made much of its rejection of the idea that courts could stem the flood of potential litigation by protecting only "central" religious practices.[158] This is puzzling, however, because not only is the compelling interest test not limited to central religious practices, but an analysis of centrality is not even practically necessary. Though it is true that a court cannot evaluate how central a particular practice is to an individual's personal faith, the U.S. Supreme Court's compelling interest test never required that a particular religious practice be central.[159] Rather, the compelling interest test requires analyzing sincerity, burden, and compelling governmental interest.[160] The majority in *Smith* cites to Justice Brennan's dissent in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[161] as an example of such a centrality requirement.[162] However, the majority in *Lyng* explicitly rejected the use of a centrality requirement.[163] Not only does the compelling interest test not require a centrality analysis, the question of centrality is unnecessary if a belief is sincere. If a person sincerely believes that his or her religion requires a certain course of conduct, then a law to the contrary will create the sort of impossible choice that the framers sought to avoid.

Fears that the compelling interest test will lead to a flood of litigation or force courts to determine the centrality of a particular practice to an individual's faith are unfounded. In addition, concerns about analyzing the centrality of a religious practice are misplaced because such analysis is neither a part of the compelling interest test nor necessary for its proper application. Because these concerns are groundless, and because the compelling interest test provides a superior balance between individual rights and the state's need to enforce

157. See *supra* section III.C. for further discussion of the importance of ensuring free exercise.

158. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886–87 (1990).

159. *See*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

160. *Smith*, 494 U.S. at 899, 906–07 (O'Connor, J., concurring); *see Yoder*, 406 U.S. at 214; *Sherbert*, 374 U.S. at 402; Palmer v. Palmer, 249 Neb. 814, 817–18, 545 N.W.2d 751, 755 (1996), *overruled by In re* Interest of Anaya (*Anaya II*), 276 Neb. 825, 758 N.W.2d 10 (2008); *see also* Laycock, *supra* note 36, at 32 (noting that the problem of evaluating centrality is a "manufactured difficulty.").

161. 485 U.S. 439, 473–74 (1988) (Brennan, J., dissenting).

162. *Smith*, 494 U.S. at 886.

163. *Lyng*, 485 U.S. at 457–58.

many neutral, generally applicable laws, the court was wrong to reject it.

IV. CONCLUSION

Anaya II gives away Nebraskans' power over their own constitutional provision and places religious minorities in a precarious position that is contrary to the very purpose of a free exercise provision. By tying the meaning of Nebraska's Section Four to the U.S. Supreme Court's interpretations of the First Amendment, the Nebraska Supreme Court has effectively allowed the U.S. Supreme Court to amend the Nebraska Constitution without the people's consent. This is contrary to both the text and the history of the Nebraska Constitution. In addition, the Nebraska Supreme Court has robbed Section Four of its power by implementing the rational basis test. Neutral, generally applicable laws now can impose extreme burdens on religious freedom, even if the state has no compelling need to do so. Individuals are no longer exempt from forced choices between their religious obligations and their civic duties. Finally, the decision allows the majority to determine the amount of religious freedom enjoyed by religious minorities by subjecting religious freedom to the political process.

The harm done by *Anaya II* can, however, be corrected by legislatively reestablishing the compelling interest standard. The compelling interest standard protects essential religious liberties to a much greater extent than the current *Anaya II* standard and does so without significantly impairing judicial efficiency. Therefore, in order to safeguard the rights of Nebraskans, the Unicameral Legislature should follow the lead of other states[164] and pass its own state Religious Freedom Restoration Act. Such an act of legislative courage would reestablish the compelling interest test for *all* free exercise claims under Section Four, even when religious freedom is burdened by a neutral law of general applicability.[165] Short of the Nebraska

164. *See, e.g.*, ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. § 52-571b (2009); FLA. STAT. §§ 761.01 to 761.05 (2008); 775 ILL. COMP. STAT. 35/1 to 35/99 (2008); OKLA. STAT. tit. 51, §§ 251 to 258 (2010); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2006). For further discussion of state RFRAs, see *supra* note 67.

165. Such a statute could be modeled on Connecticut General Statute section 52-571b, which reads:

> (a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

Supreme Court overruling *Anaya II*, such a statute is the only means of remedying the damage done by *Anaya II*.

(c) A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state.
(d) Nothing in this section shall be construed to authorize the state or any political subdivision of the state to burden any religious belief.
(e) Nothing in this section shall be construed to affect, interpret or in any way address that portion of article seventh of the constitution of the state that prohibits any law giving a preference to any religious society or denomination in the state. The granting of government funding, benefits or exemptions, to the extent permissible under the constitution of the state, shall not constitute a violation of this section. As used in this subsection, the term "granting" does not include the denial of government funding, benefits or exemptions.
(f) For the purposes of this section, "state or any political subdivision of the state" includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state, and "demonstrates" means meets the burdens of going forward with the evidence and of persuasion."

CONN. GEN. STAT. § 52-571b (2009).