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What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses

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WHAT GOES AROUND COMES AROUND: THE NEW RELEVANCY OF STATE CONSTITUTION RELIGION CLAUSES

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Among his many contributions to the creation of our constitutional system, Thomas Jefferson deeply influenced the way in which Americans think about the relationship between religion and the state. First, Jefferson was among the most vocal advocates of the separation of church and state. In his famous letter to the Danbury Baptist Association, Jefferson argued that the First Amendment's Establishment Clause created a "wall of separation" between civil and religious life.[1] Second, Jefferson's beliefs influenced the meaning and scope of the right to the free exercise of religion within the state. In Jefferson's rationalist view, the right to the free exercise of religious *belief* was beyond the reach of governmental control, but he believed government could control religious *conduct* that might conflict with otherwise neutral general laws.[2] Both popular thinking and recent United States Supreme Court doctrine suggest that Jefferson's role in forging American thought on religion and the state should not be underestimated. For generations of Americans, the notion of a "wall of separation" between church and state has provided the most forceful visual image of the meaning of the First Amendment's Establishment Clause.[3] The Supreme Court's 1990 holding in *Employment Division v. Smith*,[4] that facially neutral general laws (e.g., drug laws) can be used to punish conduct that is undertaken for religious purposes (e.g., Native American peyote worship), suggests that Jefferson's belief/conduct distinction now also defines (at least for the Court) the meaning of the First Amendment's Free Exercise Clause.

To the extent *Smith* embodies the Jeffersonian ideal, it is an ideal that has been widely criticized as a "virtual repeal of the Free Exercise Clause

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1 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002).

2 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451 (1990). This essay owes a tremendous debt to Judge McConnell's exacting historical research and this section closely tracks his work.

3 HAMBURGER, *supra* note 1, at 482.

4 Employment Div. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

of the First Amendment."[5] The influence of Jefferson's "wall of separation" argument has also received scrutiny as a historically inaccurate portrayal of the meaning of the First Amendment.[6] However, neither the Jeffersonian ideal nor *Smith* supply the last word on the meaning of religious liberty in the United States. Every state in the nation has its own constitution, and each of those documents contains language that protects religious liberties.[7] Though the fact is not widely known, many of the state constitutions embody broader understandings of religious liberty advocated by another giant of the founding era, James Madison. These early state religion clauses, which often provide expansive protection of religious liberties, both pre-dated and influenced the creation of the First Amendment. Thus, as the Supreme Court restricted the federal constitution's protection of religious conduct, the religion clauses of state constitutions have taken on a new relevance, providing a potentially powerful vehicle for the protection of religious liberties.

Beginning with an examination of their historical roots, this essay briefly traces the evolution of state religion clauses in the American constitutional framework and examines the dynamic between state and federal courts in protecting (or not) religious liberty since the nation's founding. If an image is helpful in describing the result of this analysis, it is not Jefferson's wall, but a circle; the surest guarantees of religious liberty in the twenty-first century may be most thoroughly rooted in the ideas of the late-eighteenth.

I. HISTORICAL SOURCES OF STATE RELIGION CLAUSES

Douglas Laycock has suggested that when we talk about religious liberty, "[w]e are talking about the right to be let alone in the exercise of religion," indeed, "we are simply talking about liberty."[8] To understand why state constitutions provide extensive coverage of religious liberty, we must first try to understand how the framers of state constitutions

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5 Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 275-76.

6 *See* HAMBURGER, *supra* note 1, at 482 (arguing throughout that Jefferson's role in the history of separation issues has been overstated and that his work is "less important for what he wrote than for the significance later attributed to it").

7 *See generally* EDD DOERR & ALBERT J. MENENDEZ, RELIGIOUS LIBERTY AND STATE CONSTITUTIONS (1993).

8 Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 846 (1992).

understood that concept in the founding era. Laycock's statement is insightful in this regard, since, as Michael McConnell observes, many of the framers of the early state constitutions considered religious liberty to be not merely another civil right, but a much more fundamental liberty that both preceded and was superior to other rights secured to the people by the rule of law.[9] How this idea came to be embodied in the first state constitutions requires a brief look at the history of the disestablishment and free exercise movements.

A. From Establishment to Disestablishment: A Very Brief History

The movement from establishment to disestablishment has a rich and fascinating history about which much has been written,[10] but most of that history is beyond the scope of this essay. The primary interest here is in how the calls for disestablishment and free exercise of religion came to be embodied in state constitutions, particularly those written at the time of the nation's founding.

"On the eve of the American Revolution most of the colonies maintained establishments of religion."[11] That is to say, preferred religions were engaged in an "exclusive legal union with the state."[12] The New England colonies were most often tethered to the Congregational church, while Southern colonies maintained Anglican establishments.[13] Supported by public taxation that paid for the building of churches and other religious emoluments,[14] the establishment religions also served a restrictive gatekeeping function in colonial society, determining what would be taught in schools and who would be allowed to serve in public office.[15] John Witte, Jr. summarized the day-to-day influence of early establishments this way:

> State officials provided various forms of material and moral aid to churches and their officials. Public properties were donated to church groups for meeting

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9 McConnell, *supra* note 2, at 1459.

10 *See, e.g.*, THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d ed. 1994); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000).

11 LEVY, *supra* note 10, at 1.

12 *Id.*

13 McConnell, *supra* note 2, at 1440.

14 LEVY, *supra* note 10, at 2-3.

15 *Id.* at 3-5.

> houses, parsonages, day schools, and orphanages. Tax collectors collected tithes and special assessments to support the ministers and ministry of the congregational church. Tax exemptions and immunities were accorded to some of the religious, educational, and charitable organizations that they operated. Special subsidies and military protections were provided for missionaries and religious outposts.... Sabbath day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days, and required faithful attendance at worship services.[16]

With such extensive influence, the colonial establishments also freely discriminated against Catholics, Jews, and even other Protestants.[17] In both Massachusetts and Virginia, for example, simply being a practicing Baptist could land one in jail.[18]

It was the American Revolution itself that began to sever the ties between the soon-to-be states and the establishment churches.[19] Particularly in the South where connections to the Church of England were strongest, the Revolution exposed the "loyalist sympathies" of its clergy and discredited the church for its "connection to the Crown."[20] In the wave of constitution writing that followed the Revolution, most of the states of the South abandoned any official support for the Anglican church.[21] In the North, where Congregational establishments were more entrenched and even emboldened by the church's support for the Revolutionary cause, the establishments were much slower to disappear.[22] When the First Congress met in 1789, the New England states still maintained establishment affiliations.[23] Nevertheless, by 1834, "no state in the Union would have an established church, and the tradition of separation between church and state would seem an ingrained and vital part of our constitutional system."[24]

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16 John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 379-80 (1996).

17 LEVY, *supra* note 10, at 3-5.

18 *Id.*

19 McConnell, *supra* note 2, at 1436.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 1437.

Still, the manner in which the separation of church and state would ultimately become enshrined in our national consciousness is, according to one commentator, "not pretty."[25] By the middle of the nineteenth century, the immigration of Catholics into the United States had skyrocketed,[26] giving rise to a fervent movement "to prevent the Catholic church from exercising political or religious authority in America."[27] Believing Catholics to be ruled by the papacy and therefore incapable of independent judgment,[28] a rising tide of "nativist" Protestants sought to ensure a strict separation between church and state in order to prevent an increasing Catholic population from influencing, or even dominating American public life.[29] The classic example of the Protestant resistance to Catholic influence was the battle in the 1840s over the funding of public schools in New York.[30] New York's Protestant public schools included both religious exercises and curriculum, which posed a barrier to the integration of Catholic children.[31] A legislative proposal was introduced to establish and fund public schools, specifically for Catholic children, which would hire Catholic teachers and offer a Catholic curriculum. Out of fear that Catholic public schools would contribute to the growth of Catholic influence, Protestant opposition swelled and generated heated nativist sentiment.[32] Rather than support the creation of the Catholic schools, the New York legislature chose to prohibit funding for public schools of any religious denomination. The idea of strict separation, as we know it today, was largely conceived during this period.

G. Alan Tarr notes that the issue of funding to public schools was the "flashpoint" issue that gave rise to a number of constitutional provisions promoting the separation of church and state.[33] The inclusion of particular constitutional language to address a specific area of the separation issue, such as funding to religious schools, is a typical feature of state constitutions, which generally do not have an "establishment clause" that mirrors the First Amendment's language. In this way, the separationist movement has had a remarkable impact on the content of

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25 Laycock, *supra* note 8, at 845.
26 HAMBURGER, *supra* note 1, at 202.
27 *Id.* at 193.
28 *Id.*
29 *Id.* at 201-19.
30 *Id.* at 219-20.
31 G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).
32 *Id.*
33 *Id.*

state constitutions. Today, some twenty-five states have constitutional provisions explicitly prohibiting aid to parochial schools.[34] Church/state separation principles are expressed in many other ways in state constitutions as well. Twenty-nine states ban required church attendance, thirty-one states ban religious tests for public office, and eighteen states ban religious tests for witnesses and jurors.[35] Forty-two states have constitutional prohibitions against appropriation of public money for religious institutions, and twenty-five states ban public aid for religious schools.[36]

B. The Development of Free Exercise Principles in State Religion Clauses

Michael McConnell traces the development of modern free exercise principles to the emergence of newer colonial-era Protestant sects that demanded increasing protection of their religious practices.[37] These sects, such as Baptists, Quakers, Presbyterians, Lutherans, and others, "had the most to gain from breaking the monopoly of the old established church."[38] While the advocates of establishment churches believed that public morality was best promoted through a strong connection between church and state, the new evangelicals believed that such connections ultimately subordinated religion to politics, using religious obligations to serve entirely secular civic and political objectives.[39] To be sure, the evangelicals believed that religion had an important role to play in civic life, but they also believed that "voluntary religious societies—not the state—are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue."[40] This emphasis on the voluntary nature of religious worship found expression in the movement for the free exercise of religion.

The belief that religious duty can and should be separated from civic obligation is a critical thread running through the religion clauses of the state constitutions. Rejecting laws that would provide for the mere "toleration" of minority faiths (which implied religion could be practiced only upon the good will of the state), the evangelicals boldly called for full protection of the "free exercise" of religion or "full and equal rights

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34 DOERR & MENENDEZ, *supra* note 7, at 15.
35 *Id.*
36 *Id.*
37 McConnell, *supra* note 2, at 1436-55.
38 *Id.* at 1439-40.
39 *Id.* at 1441-42.
40 *Id.* at 1443.

of conscience."[41] The evangelical free exercise argument, which McConnell traces to permutations of Lockean thought,[42] clearly placed duties to God before and above duties to man.[43] The clearest distillation of the argument that "religious liberty is a pre-political, fundamental human right"[44] comes from James Madison, the principal architect of the Constitution and the First Amendment. In his *Memorial and Remonstrance Against Religious Assessments*,[45] Madison argued that "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him" is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and "therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society."[46] This argument is forceful in both its language and its implications. Eschewing any real distinction between belief and conduct, Madison's argument affords wide protection to both, protecting the right of each individual to obey God however conscience requires. Where duties to God conflict with the duties to man, the latter must yield to the former. But the implications of Madison's view are also troubling. For instance, what might become of society when citizens hear God calling upon them in ways that disturb the basic conditions required for civic harmony? In giving voice to the call for free exercise, was Madison also laying the groundwork for a kind of faith-based anarchy?

The text of state constitutional religion clauses both generally reflect the Madisonian view and answer these critical objections. Indeed, the state constitutions drafted immediately after the Revolution all contained protections of the free exercise of religion, even in those states that maintained an establishment of religion.[47] To ameliorate the risk that religious liberties would be used to supplant peace within the state, the drafters of state constitutions often included provisos that permitted governmental interference with religion only when, for example, such practices jeopardized peace and safety. While such "peace and safety" clauses can be read as restrictions on religious liberty, they are more accurately interpreted as restrictions on state power, since they narrowly

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41 *Id.*

42 *Id.* at 1445.

43 *Id.*

44 Carmella, *supra* note 5, at 284.

45 J. Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 THE WRITINGS OF JAMES MADISON 183, 188 (G. Hunt ed., 1901) (quoted in McConnell, *supra* note 2, at 1453).

46 *Id.*

47 McConnell, *supra* note 2, at 1455-56.

confine the interests that states may use to justify any restriction on free exercise.[48] McConnell points to New York's 1777 Constitution as a typical example of the period:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[49]

Importantly, this language is almost precisely the same as New York's current religion clause.[50]

As states have changed their constitutions over time,[51] the theme of the primacy of religious obligations has endured. For example, the sweeping protection of religious liberty adopted in New Hampshire's 1784 constitution is both typical of the period and precisely the same as the clause in effect today:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshiping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.[52]

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48 Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 263 (1998).

49 N.Y. CONST. art. XXXVIII (1777), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1328, 1338 (B. Poore 2d ed. 1878) (quoted in McConnell, *supra* note 2, at 1456).

50 New York's current religion clause adds the phrase "and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." N.Y. CONST. art. I, *reprinted in* DOERR & MENENDEZ, *supra* note 7, at 69.

51 WITTE, *supra* note 10, at 87. Witte notes that from 1787 to 1947 the various states adopted 135 different state constitutions. *Id.*

52 N.H. CONST. (1784), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1270, 1281 (B. Poore 2d ed.

Not surprisingly, newer states of the Union employed language similar to the earliest constitutions in their own documents. Most state constitutions recognize the existence of God,[53] and more than thirty states explicitly recognize some formulation of the "natural and inalienable right to worship God, each according to the dictates of his own conscience."[54] Several states have made the primacy of religious obligations even more explicit, stating, for example, that "no human authority should, in any case, control or interfere with such right of conscience."[55] This emphasis on protecting the right to worship God according to the dictates of conscience strongly resembles Madison's argument in the *Memorial and Remonstrance* that each individual must be allowed to worship "as he believes to be acceptable to him."[56]

This brief review of the history and content of state religion clauses shows that they generally embrace a particularly broad understanding of the nature of religious liberty, one that is rooted in understandings of the nature of religious liberty prevalent at the time of the nation's founding. Indeed, McConnell argues that these state constitutions "provide the most direct evidence of the original understanding" of the meaning of free exercise of religion.[57] The following section examines how, over time, the responsibility for protecting religious liberty has shifted between the states and the federal government.

II. RELIGIOUS LIBERTY AND FEDERALISM

Until the middle of the twentieth century, the "principal responsibility for the American experiment in religious rights and liberties lay with the states."[58] The First Amendment originally applied only to the federal government, and in 1845 the Supreme Court made

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1878) (quoted in McConnell, *supra* note 2, at 1456); N.H. CONST. Bill of Rights, *reprinted in* DOERR & MENENDEZ, *supra* note 7, at 69.

53 Tarr, *supra* note 31, at 95.

54 *See* DOERR & MENENDEZ, *supra* note 7, *passim*. These states include: Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. The language quoted in the text is taken from the GA. CONST. art. I, § I, *reprinted in* DOERR & MENENDEZ, *supra* note 7, at 34.

55 *Id.* Other states that refer to the limitations on "human authority" include: Arkansas, Missouri, North Carolina, Tennessee, Texas, and Vermont. *Id.* at 24, 56, 71, 86, 88, 93.

56 Madison, *supra* note 45, at 188.

57 *Id.*

58 WITTE, *supra* note 10, at 87.

clear that protecting religious liberty was first and foremost a state responsibility.[59] Until the middle of the twentieth century, state courts heard "[l]iterally thousands of ... cases ... raising questions of state power over religious matters."[60] The early state cases addressed issues familiar to modern Americans. These cases typically involved "restrictions on religion, Bible reading in public schools, the use of public property for religious purposes, and aid to religious schools."[61]

From the outset, state courts were willing to develop their own jurisprudence for religious establishment claims.[62] This is a reflection of the textual diversity of state constitutions, which often include "language aimed at the specific evils which brought them forth."[63] The many amendments of state religion clauses have focused on addressing these specific concerns, providing state courts with firm textual bases for religious establishment decisions.[64] Historically, these cases have involved issues such as aid to religious schools and symbolic expressions of religious preferences.[65] Many state courts have been willing to decide cases exclusively under their state constitutions—considering the Supreme Court's Establishment Clause cases not to be binding.[66]

However, state courts have not always used the protections for religious freedoms in their state constitutions to protect religious liberty. Despite having ample ammunition in the text of the religion clauses of their state constitutions, many state courts "were consistently unwilling to recognize religious exercise claims made under state constitutions."[67] This resistance is described in part as a reaction to perceived threats posed by growing religious pluralism in America.[68] Also, many states were inclined to follow the religion-unfriendly "secular regulation rule." The Supreme Court solidified the secular regulation rule in its 1879 decision in *Reynolds v. United States*[69]—a case recognizing the right to

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59 *See* Permoli v. Municipality 1, 44 U.S. 589 (1845) (cited in Carmella, *supra* note 5, at 294).

60 WITTE, *supra* note 10, at 87.

61 Carmella, *supra* note 5, at 294.

62 *Id.*

63 Tarr, *supra* note 31, at 95.

64 *Id.*

65 Linda S. Wendtland, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 634 (1985).

66 *Id.*

67 Carmella, *supra* note 5, at 294.

68 *Id.* at 305.

69 98 U.S. 145 (1897).

exercise religious belief, but allowing the restriction of religious conduct—in that case, polygamy—as contrary to the public interest.[70] The effect of the secular regulation rule was to permit states to use their police powers to "limit personal liberties in the interests of the public good."[71] As incongruous as it sounds today, Angela Carmella notes that the secular regulation rule was once widely considered to be consistent with principles of religious freedom.[72] At a time in which Christian influence in American society was still great, restrictions on perceived "immoral practices" outside the Christian mainstream helped to reinforce the existing "religio-moral" order.[73]

The secular regulation rule continued to exert influence on state courts until the Supreme Court began to strike down restrictions on religious exercise beginning in the late 1930s.[74] In the 1940s, the Court significantly gutted *Reynolds*, deciding two cases in that decade that both laid the groundwork for modern free exercise doctrine, and through the incorporation doctrine, started a gradual shift in responsibility for protecting religious liberty from the state courts to the federal. The Court's 1940 decision in *Cantwell v. Connecticut*[75] was the first to apply the First Amendment's religion clauses to the states,[76] holding that while free exercise is not an absolute right, the government's power to limit religious conduct was nonetheless limited.[77] In 1947, the Court decided *Everson v. Board of Education*,[78] the first case to apply the establishment clause to the states,[79] invoking Jefferson's "wall of separation" argument.[80]

In the years following *Cantwell* and *Everson*, a few state courts began to hold that restrictions on religious conduct violated the terms of their constitutions.[81] However, the general trend in the state courts was to

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70 *Id.* at 167. The Court stated in *Reynolds* that laws "cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.* at 168.

71 CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 65 (1965) (quoted in Carmella, *supra* note 5, at 294).

72 Carmella, *supra* note 5, at 294.

73 *Id.* at 295.

74 *Id.*

75 310 U.S. 296 (1940).

76 DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 89 (1991).

77 *Cantwell*, 310 U.S. at 303-04.

78 330 U.S. 1 (1947).

79 DRAKEMAN, *supra* note 76, at 89.

80 *Everson*, 330 U.S. at 18.

81 Carmella, *supra* note 5, at 296.

"interpret their constitutions to require only that limits on religion be minimally rational, meet due process requirements, and not contain unnecessary, unfair, unreasonable, or discriminatory standards."[82] The most important shift in the state/federal dynamic came in 1963, when the Supreme Court decided *Sherbert v. Verner*.[83] In *Sherbert*, the Court held that a Seventh Day Adventist's free exercise of religion was violated by a South Carolina regulation that required her to work on Saturday (her Sabbath) in order to receive unemployment compensation.[84] The Court "revolutionized"[85] Free Exercise doctrine in *Sherbert* by applying strict scrutiny analysis to strike down South Carolina's regulation, holding that absent a compelling governmental interest, any government regulation that substantially burdens a sincere religious practice violates the Free Exercise Clause.[86]

Sherbert was the catalyst for a shift from reliance by state courts on the secular regulation doctrine under their own constitutions toward adoption of the more protective federal standard for free exercise claims.[87] The reason for the shift was simple enough. Since the Supreme Court had ruled that a compelling governmental interest was required for the state to abridge religious freedoms, state courts, under the Supremacy Clause, could no longer rely on the lower level of protection afforded by the secular regulation rule.[88] Furthermore, because the federal precedent was binding on state courts, it would have been perceived as redundant for state courts to use their own constitutions to provide the same level of protection as the federal standard.[89] Gradually, state courts began to move in lockstep with the federal courts, resulting in a "federalization of state free exercise jurisprudence."[90] Indeed, in the years following *Sherbert*, the "vast majority" of state courts deciding religious liberty cases failed to undertake any state constitutional analysis at all.[91]

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82 *Id.*
83 374 U.S. 398 (1963).
84 *Id.* at 406-09.
85 Carmella, *supra* note 5, at 297.
86 *Sherbert*, 374 U.S. at 403.
87 Carmella, *supra* note 5, at 298.
88 *Id.*
89 *Id.*
90 Crane, *supra* note 48, at 245.
91 Carmella, *supra* note 5, at 299.

A negative consequence of the shift away from state-based decision-making was that many states were never able to develop a body of case law interpreting their state constitutions to provide the kind of extensive protection of religious liberty afforded under *Sherbert.*[92] Perhaps most state court judges never anticipated that the Supreme Court would retreat from the protections given to religious liberty under *Sherbert.* However, in 1990 the Supreme Court did just that. In *Employment Division, Department of Human Resources of Oregon v. Smith,*[93] the Court ruled that Oregon could deny unemployment benefits to members of the Native American Church discharged from their jobs because they had taken peyote as part of their religious ceremonies, in violation of Oregon's drug laws.[94] Abandoning strict scrutiny analysis, the Court held that adherence to neutral laws of general applicability trumps an individual's right to engage in forms of religious conduct that violate those otherwise neutral laws.[95] In effect, the Court returned to the secular regulation doctrine of *Reynolds,* relying on that case as support for its holding.[96]

The scope of this essay does not permit a catalogue of the many reactions to *Smith;* suffice it to say that opposition to *Smith* in the legal community was "thunderous."[97] Because *Smith* permits the government to incarcerate individuals for engaging in explicit and sincere religious behavior, Douglas Laycock has argued that "*Smith* creates the legal framework for persecution."[98] Congress's attempt to repeal *Smith* with the Religious Freedom Restoration Act ("RFRA") is regarded by many as a partial fix at best, and in *City of Boerne v. Flores,*[99] the Supreme Court invalidated RFRA's application to the states.

Smith left many wondering seriously about the future of religious liberty under the First Amendment. Soon after *Smith,* however, scholars began to turn to state constitutions, with their expansive textual protections of religious liberty, as potentially viable alternatives to

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92 *Id.*; Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism,* 1993 BYU L. REV. 259, 270.

93 494 U.S. 872 (1990).

94 *Id.* at 890.

95 *Id.* at 879.

96 *Id.*

97 Crane, *supra* note 48, at 236.

98 Laycock, *supra* note 8, at 849.

99 521 U.S. 507 (1997).

Smith's restrictive federal doctrine.[100] This renewed interest in state constitutions symbolizes yet another shift in the dynamics of federalism in the American system.[101] The final section of this essay examines ways in which state constitutional religion clauses have taken on a new relevancy, and looks generally at some of the benefits and drawbacks of developing state constitutional law as a primary foundation for safeguarding religious liberty.

III. RE-EMERGENCE OF RELIGIOUS LIBERTY UNDER STATE CONSTITUTIONS

Following the Supreme Court's decision in *Smith*, interest in state constitutional protections for religious liberty surged. Scholars writing in the period immediately following *Smith* pointed to the expansive protections of religious liberty in state constitutions as an alternative to the revitalized secular regulation doctrine.[102] Indeed, almost immediately after *Smith*, several state courts began to discard their history of reliance on federal precedent and to turn to the language of their state constitutions in religious liberty cases. At least ten state supreme courts have used a heightened scrutiny standard in their state constitutional analysis, either reaffirming that the *Sherbert* standard reflects the proper standard under their own religion clauses, or applying those religion clauses without considering federal precedent at all.[103] Considering that the chances of succeeding on a religious liberty claim are now much greater under state constitutions than the federal,

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100 *See* Carmella, *supra* note 5, *passim*.

101 One explanation of the general legitimacy of such shifts is offered by Akil Amar, in *Of Sovereignty and Federalism*, where he uses language from the Federalist Papers No. 28 to argue that constitutional federalism is designed to provide "double security" for the people's rights. Akil Amar, *Of Soverignty and Federalism*, 96 YALE L.J. 1425, 1493 (1987).

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the revival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either side, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

Id. at 1494. This notion of "double security" is described and discussed by Randall Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996).

102 *See* Carmella, *supra* note 5, at 276; Laycock, *supra* note 8, at 854; Lupu, *supra* note 92, at 269.

103 For a summary of specific cases decided on state constitutional grounds after *Smith*, see Crane, *supra* note 48, at 244-47.

one commentator has noted that "[a]fter *Smith*, it is malpractice for an attorney to file a claim under the Religion Clauses of the federal Constitution without also pleading the state constitution."[104]

State courts are, of course, free to decide questions of religious liberty entirely on state constitutional grounds.[105] So long as state courts do not restrict individual rights below the minimum standard provided by federal protection, state courts are unconstrained in their power to interpret their own constitutions to provide greater protections of individual rights.[106] The natural question, however, is how state courts can now interpret their state constitutions to provide expansive protections of religious liberty when, for most of the nation's history, state constitutions were generally interpreted to constrain religious liberty.[107] In considering this question, it is helpful to recall James Madison's argument in his *Memorial and Remonstrance* concerning the pre-political nature of religious obligations.[108] As noted earlier, the acknowledgment that religious duty precedes civic obligation was a principle that was enshrined in early state constitutions and influenced the development of later state constitutions as well. While state religion clauses themselves are textually well-equipped to stand effectively between the exercise of state power and the exercise of religion, the judges interpreting that language historically have arguably failed to give the religion clauses their deserved force. Now that extensive religious pluralism is as much a fact of American life as Protestantism was at the nation's founding, contemporary judges may "look at their texts through the informed lens of recent history"[109] and increasingly give greater effect to their original sense.

State courts may indeed be persuaded to interpret state religion clauses in ways that bring into the twenty-first century the principle that government has a limited interest in constraining religious freedom. Importantly, deferring to the specific text of a state constitution can help state courts overcome the post-*Smith* problem that "the majority of states . . . [had] used the federal analysis of free exercise claims to such an extent that it is unclear whether their state constitutions would

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104 Laycock, *supra* note 8, at 854.

105 *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).

106 *See* William J. Brennan Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

107 Carmella, *supra* note 5, at 305.

108 *See supra* notes 44-46 and accompanying text.

109 *Carmella*, *supra* note 5, at 305.

independently support a compelling interest test."[110] Angela Carmella argues that states can derive a compelling interest test from their own state constitutions by reading the "provisos" in state constitutions (those clauses that limit governmental restrictions to situations where religious exercises jeopardize peace and safety or acts of licentiousness) as the only compelling interests that might justify state interference with religious exercise.[111] The Supreme Judicial Court of Massachusetts has given effect to this interpretation of its provisos, holding that "the specific language of [the state free exercise provision] ... guarantees freedom of religious belief and religious practice subject only to the conditions that the public peace not be disturbed and the religious worship of others not be obstructed."[112] The Minnesota Supreme Court has rendered a similar holding.[113] States without such provisos might also derive a compelling interest test (or an equivalent) from their state constitutions without being constrained by developments in federal law. All that is required is a willingness to make decisions based on an independent analysis of the state constitutional text, untethered from developments in federal law. Federal strict scrutiny analysis was the norm for more than a generation and had a tremendous impact in shaping state court jurisprudence, but the Supreme Court's more recent decision to reverse course need not determine the path state courts follow.[114]

Giving effect to the specific textual commands of state religion clauses offers other advantages as well. Perhaps the most compelling advantage is the possibility of bringing together the disparate lines of thought in religious establishment and free exercise cases to create a singular body of state constitutional law. Remarkably, many state constitutions do not make any textual distinctions between "free exercise" and "establishment provisions."[115] Instead, many "weave together and overlap their free exercise and establishment provisions."[116]

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110 Nicholas P. Miller & Nathan Sheers, *Religious Free Exercise Under State Constitutions*, 34 J. CHURCH & STATE 303, 310 (1991).

111 Carmella, *supra* note 5, at 306.

112 Society of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990) (quoted in Crane, *supra* note 48, at 263).

113 *Id.*

114 Miller and Sheers have analyzed the ways in which several clauses that are common to state constitutions, such as "no interference" and "peace and safety" clauses might be used to justify compelling interest tests under state constitutions that had not previously been interpreted to provide such protection. Miller & Sheers, *supra* note 110, at 310-18.

115 Carmella, *supra* note 5, at 321.

116 *Id.*

As mentioned, states have been willing to depart from federal law in deciding religious establishment issues in some cases because of the specificity of their texts. Giving similar effect to free exercise protections may help to create a more coherent, text-based jurisprudence that both recognizes the intimate relationship between establishment and free exercise issues and more completely reconciles the two by eliminating the "artificial"[117] distinction that predominates in federal law. As illustrated by the discussion of New York's public school problems in the 1840s, limitations on the free exercise of one group can create a climate for religious establishments to protect that group, which can in turn be used to justify anti-establishment claims made by another group in the name of protecting free exercise for all. State constitutions, with their very specific textual commands,[118] can perhaps provide better navigation in the murky waters that engulf religious establishment and free exercise claims.

Giving effect to state religion clauses will also enable state courts to play a more prominent role in our federal constitutional system. It has been noted that recent reliance on state constitutions in religious liberty cases is part of the larger trend of the "new judicial federalism."[119] When state courts rely on their own constitutions to provide substantive protections for individual rights, they are reinforcing the sovereignty of the individual state in its power to guarantee to its citizens freedoms greater than those protected under federal law alone. In a nation founded upon principles of both state autonomy and religious liberty, the reassertion of state religion clauses is a powerful tool for promoting the principles of federalism. As James A. Gardner noted recently:

> By construing the provisions of the state constitutions that both empower and restrict the state legislative and executive branches, state courts can influence the facility with which state government responds to threats originating at the national level; the tools that state actors have at their disposal to resist encroachments by national power; and the ways in which state officials

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117 *Id.*

118 One writer noted that the more precise a state's establishment provisions, "the more likely a state court is to adopt a stricter church-state standard than the Supreme Court." Wendtland, *supra* note 65, at 639.

119 Carmella, *supra* note 5, at 285.

> may deploy those tools in intergovernmental power struggles.[120]

Gardner advocates a very aggressive, activist form of state-court federalism to counterbalance national authority. However, it may be misleading to apply the "activist" label to state courts that assume the role as agents of federalism in relying on their own state constitutions in religious liberty cases. As one commentator notes, the states are not being activist, they are "merely . . . retaining an established free exercise analysis that was discarded by the Supreme Court."[121] Furthermore, there are reasons to argue that they are returning to constitutional values legitimately rooted in the origins of the documents themselves.

Of course, there may be some drawbacks to relying on state constitutions rather than the Federal Constitution to decide religious liberty cases. The most obvious problem is that state courts are under no obligation to interpret their own constitutions more broadly than the Supreme Court interpreted the First Amendment in *Smith*, and some states have chosen to adopt the *Smith* standard, thus neutralizing any text-based emphasis on religious liberty.[122] Furthermore, reliance on state constitutions may have a tendency to justify peculiar practices that are unique to an individual state and against the grain nationally. Ultimately, while unlikely, reliance on state constitutions could create bodies of religious liberty jurisprudence so distinct from one state to the next that the absence of "decisional certainty" could create a state of flux just as troubling as that arguably generated by *Smith*.[123]

IV. CONCLUSION

Regardless of the approach adopted by any individual state, it is evident that, generally, state constitutions currently afford a friendlier venue for litigants in religious liberty cases. Likewise, in establishment clause cases, the specific language of state constitutions will generally provide better guidance than the federal constitution and federal cases in

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120 James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1731 (2003).

121 Stuart G. Parsell, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 773 (1993).

122 In fact, immediately after *Smith*, the supreme courts of both Oregon and Vermont chose to adhere to *Smith*'s free exercise interpretation. Carmella, *supra* note 5, at 308.

123 Stanley H. Friedelbaum, *Free Exercise in the States: Belief, Conduct and Judicial Benchmarks*, 63 ALB. L. REV. 1059, 1097 (2000).

deciding the proper balance between church and state within the states themselves. State constitutions generally embody understandings of religious liberty that were historically expansive, often explicitly asserting that religious obligation is precedent to civil obligation. This broad notion of religious liberty, when given effect in today's pluralistic society, may turn out to be instrumental in allowing those with beliefs outside the mainstream to honor their own consciences in the way the founders of this nation sought to honor theirs.