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Table of Contents

I. INTRODUCTION

Since 1990, four state supreme courts have interpreted their state constitutions to provide greater protection for religious exercise than is available under the Federal Constitution.[1] Prompting this interpretive independence was the United States Supreme Court's decision in *Employment Division v. Smith*,[2] a decision that has been widely criticized as the virtual repeal of the Free Exercise Clause of the First

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1. *See infra* notes 21-38, 161-187 and accompanying text.
2. 494 U.S. 872 (1990). *See infra* notes 12-13 and accompanying text.

Amendment.[3]

In this article, I attempt to sketch the contours of an emerging post-*Smith* jurisprudence of state constitutions in light of both prior state interpretation and the "new judicial federalism."[4] I also urge state courts to reject *Smith* in order to attain three important goals: first, to ensure the immediate protection of religious exercise within each state; second, to promote a dialogue among state courts and between state courts and the Supreme Court on the meaning of religious liberty;[5] and third, to encourage the development of coherent interpretations of the relationship of religious exercise to disestablishment.[6] *Smith* has ushered in a period of crisis in which a fundamental national value—religious liberty—has lost its substantive meaning.[7] While we may be reluctant to encourage multiple state standards of protection,[8] shifting interpretive activity to the states may produce a more robust understanding of religious liberty, and ultimately serve to reinvigorate federal free exercise jurisprudence.

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3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I (commonly referred to as the Religion Clauses, or separately, as the Establishment Clause and the Free Exercise Clause).

4. *See infra* notes 43-48 and accompanying text.

5. For a discussion of the role of state constitutional interpretation in dialogue with federal constitutional interpretation, see generally G. ALAN TARR & MARY C.A. PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

6. G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 78 (1989).

7. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 536-37 (1991). Glendon and Yanes criticize the federal interpretive process for failing to "com[e] to grips with basic questions about the meaning and purpose of the Religion Clause in the light of text and tradition." *Id.* at 549. Religious exercise is protected through a "complex interplay of free exercise, free speech and equal protection." *Id.* When state constitutions are added to the interpretive mix—independently and in dialogue with the federal process—additional texts and traditions, *and thus* additional meanings are brought to the discussion, and a richer interplay of provisions and narratives result. The success of such an interpretive project depends upon comprehensive treatment; a dialogue over the meaning of religious liberty must include a comprehensive treatment of the "relations within and among texts." *Id.* at 537.

8. To the extent I once found independent state constitutional interpretation troubling, I have changed my mind. *Cf.* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 477 (1991).

II. THE EMERGING POST-*Smith* JURISPRUDENCE

The Supreme Court, in its 1963 decision in *Sherbert v. Verner*, ruled that state regulation that indirectly restrains or punishes religious belief or conduct must be subjected to strict scrutiny under the Free Exercise Clause of the First Amendment.[9] The Court in *Sherbert* and in subsequent cases held that when government action burdens, even inadvertently, a sincerely held religious belief or practice, the state must justify the burden by demonstrating that the law embodies a compelling interest, that no less restrictive alternative exists, and that a religious exemption would impair the state's ability to effectuate its compelling interest.[10] As in other instances of state action affecting fundamental rights, negative impacts on those rights demand the highest level of judicial scrutiny.[11] After *Sherbert*, this strict scrutiny balancing test resulted in court-mandated religious exemptions from facially neutral laws of general application whenever unjustified burdens were found.

But *Sherbert*'s analytical framework was discarded in 1990 when the Court decided *Employment Division v. Smith*.[12] With a sweeping opinion that overturned settled law, the Court abandoned the strict scrutiny standard of judicial review in all but a few categories of free exercise cases.[13] According to

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9. 374 U.S. 398, 402-10 (1963). The strict scrutiny standard of judicial review replaced the minimum rationality standard. In this case, Adele Sherbert, a Seventh-day Adventist, was denied unemployment compensation because she would not take a job that required work on Saturday, her Sabbath. The Supreme Court held that a burden on religious practice had to be justified by a compelling state interest. With respect to Sherbert, the state's interest was not considered sufficiently compelling, and so the state was required to pay Mrs. Sherbert unemployment compensation. *Id.*

10. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 474 (1965) (state cannot criminalize use of contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (state cannot sterilize some criminals and imprison others).

12. 494 U.S. 872 (1990). Plaintiffs were discharged from their jobs with a private drug counseling organization because they ingested peyote in a religious ceremony of the Native American Church. The Supreme Court determined that the State's prohibition of ritual peyote use under generally applicable and facially neutral law was constitutional. Thus, since dismissal resulted from peyote use, the State's denial of unemployment compensation was likewise constitutional.

13. *Smith*, 494 U.S. at 876-82, 885. *Smith* leaves some room for a higher standard of review. In cases of individualized assessment (where exemptions are granted on a case-by-case basis) and in cases of hybrid rights (where free exercise together with some other constitutional right, such as free speech or association, is

Smith, a generally applicable, facially neutral law cannot violate the Free Exercise Clause, no matter how great a burden to religious exercise, and no matter how insignificant the state's interest. To be constitutionally suspect, a law must target religion. Thus, a bright-line test has been chosen over *Sherbert*'s balancing test; a minimum rationality standard of judicial review has replaced strict scrutiny; and any general law that is formally neutral satisfies the minimum rationality test.[14] Legislative exemptions are acceptable, but the opportunity for courts to mandate religious exemptions under the U.S. Constitution is severely limited. Not surprisingly, a tremendous amount of scholarly criticism has emerged following the *Smith* decision.[15]

Smith is dangerous precedent because it subordinates fundamental rights of religious belief and practice to all neutral, general legislation. *Sherbert* recognized the need to protect religious exercise in light of the massive increase in the size of government, the concerns within its reach, and the number of laws administered by it. However, *Smith* abandons the protection of religious exercise at a time when the scope and reach of government has never been greater. Professor Douglas Laycock points out that *Smith* creates the legal framework for persecution: through general, neutral laws, legislatures are now able to force conformity on religious minorities whose practices irritate or frighten an intolerant majority.[16] But there need not be actual animus in such general laws for the implications of *Smith* to cause alarm: *Smith* also creates the framework for ignoring religious persons and groups, and for crushing religious exercise and doctrinal development under the weight of general and neutral laws. By permitting the state to ignore an entire dimension of human activity and meaning, *Smith* has made the state's political processes the unwitting, yet final arbiter of permissible religious conduct.[17]

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implicated), strict scrutiny will continue to be employed. *Id.* at 881-82, 884.

14. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1128 (1990).

15. *See, e.g.*, Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992) [hereinafter Laycock, *Summary*]; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter Laycock, *Remnants*]; McConnell, *supra* note 14.

16. Laycock, *Remnants*, *supra* note 15, at 54.

17. *See generally* Angela C. Carmella, *The Religion Clauses and Acculturated*

Scholars initially thought that the categories left open in *Smith* for continued application of strict scrutiny might be interpreted vigorously by the lower federal courts as a way to avoid *Smith*'s harsh result. Instead, there has been steady use of the new bright-line test of facial neutrality and general applicability.[18] Another proposal for avoiding *Smith*'s harsh result is the Religious Freedom Restoration Act, now pending before Congress.[19] This federal law, if passed, would create a statutory cause of action for claimants whose religious exercise is burdened and would require the government to demonstrate a compelling interest and no less restrictive alternative.

Another route to the "restoration" of strict scrutiny protection for religious exercise cases is state constitutional interpretation. In fact, since *Smith* was decided, state courts have been quite active: while the high courts of Oregon and Vermont have expressly followed *Smith*'s lower standard,[20] the supreme courts of Minnesota, Maine, Massachusetts, and Washington have instead found an independent basis for the strict scrutiny standard in their state constitutions.[21]

Religious Conduct: Boundaries for the Regulation of Religion, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE (James E. Wood, Jr. ed., 1993).

18. *See* Ryan v. United States Dep't of Justice, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992); Living Faith, Inc. v. Commissioner, 950 F.2d 365 (7th Cir. 1991); American Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808 (9th Cir. 1991); St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991); Munn v. Algee, 924 F.2d 568 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 277 (1991); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991); Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990); Church of Scientology Flag Servs. Org. Inc. v. City of Clearwater, 756 F. Supp. 1498 (M.D. Fla. 1991); United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends, 753 F. Supp. 1300 (E.D. Pa. 1990); Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991); Yang v. Sturner, 728 F. Supp. 845, *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990); *see also* People *ex rel.* Meyer v. LaPorte Church of Christ, 830 P.2d 1150 (Colo. Ct. App. 1992); Health Servs. Div. v. Temple Baptist Church, 814 P.2d 130 (N.M. Ct. App.), *cert. denied*, 814 P.2d 103 (N.M. 1991).

19. H.R. 1308 & S. 578, 103d Cong., 1st Sess. (1993). The bill passed the House on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and it was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

20. *See infra* notes 153-156 and accompanying text.

21. Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Cooper v. French, 460 N.W.2d 2 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992).

Presently, the Supreme Court of California has pending before it a case in which it will decide whether its own constitution requires the *Sherbert* standard.[22] In addition, a proposal to amend the Utah Constitution is currently being debated which would explicitly constitutionalize the compelling interest test of *Sherbert*.[23]

The state supreme courts of Minnesota, Maine, Massachusetts, and Washington, which currently require strict scrutiny, have all based their departures from *Smith* on their own states' constitutional language. Unlike the religion clauses of the First Amendment, the texts of these four state constitutions are very detailed. Each contains statements about the right to religious exercise, but in each constitution such a right is qualified by a "proviso," that is, a statement of the government interests capable of infringing on the protected religious exercise. Minnesota and Washington have identical provisos: "the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state."[24] Maine and Massachusetts have a similar proviso which allows for the

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22. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *reh'g granted & opinion superseded*, 825 P.2d 766 (1992).

23. Utah Senate Joint Resolution 8 passed the Senate and was narrowly defeated in the Utah House; however, it will be reconsidered next year. There was no genuine controversy over the compelling state interest provision of the proposed constitutional amendment.

24. The Minnesota Constitution reads as follows:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; *but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state*, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

MINN. CONST. art. I, § 16 (emphasis added). The Washington State Constitution reads as follows:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; *but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.*

WASH. CONST. art. I, § 11 (emphasis added).

protection of religious exercise "provided that that person does not disturb the public peace, nor obstruct others in their religious worship."[25]

From the interpretations given to these provisos, a post-*Smith* jurisprudence has begun to emerge. Such provisos are critical to the restoration of the strict scrutiny standard because they can be interpreted to represent the compelling interest/least restrictive alternative element of the *Sherbert* balancing test.[26] In fact, they have even been interpreted quite literally to mean that the religious conduct at issue must be permitted unless the proviso authorizes the state to prevent it.[27]

Minnesota's Supreme Court was the first state supreme court to take a stand against the new standard of judicial review, doing so twice within just seven months of *Smith*. The court first refused to follow *Smith* in *Cooper v. French*.[28] It had a second opportunity when the U.S. Supreme Court ordered reconsideration of its 1989 *State v. Hershberger* decision (*Hershberger I*) "in light of" Smith.[29] On remand, the Minnesota Supreme Court held in *State v. Hershberger* (*Hershberger II*) that it would not interpret the Federal Constitution, given the "uncertainty" in the Free Exercise Clause jurisprudence in the wake of *Smith*.[30] In its stead, the

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25. The Maine Constitution provides:

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

ME. CONST. art. 1, § 3 (emphasis added). The Massachusetts Constitution reads:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; *provided he doth not disturb the public peace, or obstruct others in their religious worship.*

MASS. CONST. pt. I, art. II (emphasis added).

26. *See infra* note 37 and accompanying text.

27. *See infra* note 38 and accompanying text.

28. 460 N.W.2d 2 (Minn. 1990).

29. State v. Hershberger, 444 N.W.2d 282 (Minn. 1989), *vacated*, 495 U.S. 901 (1990).

30. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990). This is particularly ironic given the way in which the U.S. Supreme Court forced the Minnesota Supreme Court in 1963 to use strict scrutiny in *In re* Jenison Contempt

court chose to employ the religious liberty provision of the Minnesota Constitution.

The Massachusetts Supreme Judicial Court was next to stand against *Smith*, holding at the end of 1990 in *Society of Jesus v. Boston Landmarks Commission* that its own constitution provided free exercise protection. However, it chose an approach different from Minnesota's. Rather than make explicit its discomfort with *Smith*, the court simply analyzed its own constitution and, without mentioning *Smith* or any other federal case, never reached the federal issue.[31]

The high courts of Maine and Washington have analyzed both state and federal constitutions in the post-*Smith* era, and each has explicitly employed an independent standard of review for its state constitution. Maine's Supreme Court, in *Rupert v. City of Portland*,[32] required the state to demonstrate a compelling governmental interest under its own constitution. The Washington Supreme Court decided *First Covenant Church v. City of Seattle* (*First Covenant Church I*) on a dual interpretation of state and federal free exercise provisions only weeks before *Smith*.[33] The U.S. Supreme Court shortly thereafter ordered reconsideration of *First Covenant Church I* in light of *Smith*. On remand, the Washington Supreme Court, in *First Covenant Church v. City of Seattle* (*First Covenant Church II*), employed strict scrutiny under its own constitution.[34] It found that *Smith* had created uncertainty; that it had departed from a long history of established law by adopting a test that placed free exercise in a subordinate, instead of preferred, position; that it had improperly relied on an overruled decision; and that it had accepted a disadvantaged status for minority religions, directly contrary to state positions on the issue.[35] Since Washington State had long before rejected the idea that the political majority may control

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Proceedings, 125 N.W.2d 588 (Minn. 1963) through ordering reconsideration in light of *Sherbert*. *See infra* notes 105-108 and accompanying text.

31. Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (1990).

32. 605 A.2d 63 (Me. 1992). The court applied its 1988 holding in Blount v. Department of Education & Cultural Services, 551 A.2d 1377 (Me. 1988).

33. 787 P.2d 1352 (Wash.), *vacated*, 111 S. Ct. 1097 (1990).

34. 840 P.2d 174 (Wash. 1992). The Washington Supreme Court employed a compelling governmental interest test under its state constitution and under the Federal Constitution. It justified the use of strict scrutiny in the latter analysis by finding that the categories in *Smith* that continued to enjoy strict scrutiny were applicable here. *See supra* note 13.

35. *Id.* at 185-87.

minority rights, it rejected the reasoning and outcome of *Smith*.

The texts of the four state constitutions just discussed recognize free exercise rights *unless* such exercise threatens the public peace or safety, disturbs other worshippers, or causes licentious behavior.[36] The supreme courts in these states have interpreted these provisos in ways that drastically limit the methods by which their respective governments can regulate or influence religion. The provisos have been understood to require a religious exemption in the absence of a compelling state interest.[37] Since *Smith*, Minnesota, Washington and Maine have interpreted their state texts to represent the federal *Sherbert* analysis.

By contrast, Massachusetts, and the concurring opinion in Washington's *First Covenant Church II* decision, have engaged in a very different analysis of their provisos. They have chosen not to adopt *Sherbert*'s federal language of compelling state interest, but instead apply a rather literal, homegrown approach. They ask if the interest the state is trying to promote falls within a category listed on the face of the proviso. If it does not, the government regulation must yield. Therefore, under this interpretation, their constitutions categorically prohibit state restraints on religion when provisos are inapplicable—no balancing is necessary. However, in Massachusetts, even if the proviso *is* applicable, the state interest does not automatically prevail. At that point, the court enters into the balancing test. Such close readings of constitutional texts, combined with strict scrutiny balancing, have the potential to severely limit the scope of state interests that can overbalance religious freedom, and to protect religious exercise via exemptions from laws that do not promote those narrow categories of state interest.[38]

The California Supreme Court currently has pending before it a case in which it can choose either to follow federal

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36. RONALD K.L. COLLINS, THE AMERICAN BENCH, 1985/86, at 2496-99 (1986); Nicholas P. Miller & Nathan Sheers, *Religious Free Exercise Under State Constitutions*, 34 J. CHURCH & ST. 303, 320-23 (1992).

37. This interpretation is consistent with the analysis suggested by Professor Michael W. McConnell in *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455-66 (1990).

38. Because Society of Jesus v. Boston Landmarks Commission, 564 N.E.2d 571 (1990), and Justice Utter's concurrence in First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992), are text-bound, they might have a limited influence on dialogue nationwide.

precedent and apply *Smith*, or to depart from *Smith* and follow its own constitutional provisions on religious liberty. The experiences of Minnesota and Washington are particularly important because the California constitution shares identical proviso language.[39]

The return to a *Sherbert* analysis, or its equivalent, is further justified by another unique aspect of the state constitutional texts: the common use of explicitly religious language. Many of the free exercise provisions are themselves acknowledgments of the right to worship God according to the dictates of one's conscience. In the preambles to forty-five state constitutions, the sovereign people invoke a higher authority, usually God,[40] thereby acknowledging an authority prior to the state, prior to the law, and prior to themselves.[41] They recognize that religious liberty is a prepolitical, fundamental human right. When the constitution acknowledges that religious duties may take precedence over other duties, and that rights to religious exercise are not derived from the state but exist prior to it, religious exemptions in the absence of overriding state interests make sense.[42] Thus, such express recognition of a transcendent authority prior to the state is, in itself, a significant justification for religious exemptions.

III. THE NEW JUDICIAL FEDERALISM AND FREE EXERCISE

Reliance on state constitutions in the free exercise area is

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39. CAL. CONST. art. I, § 4 reads as follows: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."

40. Mechthild Fritz, *Religion in a Federal System: Diversity Versus Uniformity*, 38 KAN. L. REV. 39, 42-43 (1989). The preamble to the New Jersey Constitution of 1947, representative of many preambles, begins:

> We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.

N.J. CONST. pmbl.

41. A constitution is the direct act of the sovereign people, and state constitutions limit the otherwise plenary power of the state government to do anything not forbidden by federal law. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 814-16 (1992).

42. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 156-66 (1991); *see also* McConnell, *supra* note 37, at 1513-17.

part of a larger jurisprudential movement scholars call the "new judicial federalism."[43] During the last twenty years, there has been a resurgence of interest in state constitutional interpretation as a tool for providing greater protection for rights than is available under the Federal Constitution. State supreme courts have actively provided greater civil liberties than the U.S. Supreme Court in areas of criminal law and free speech ever since the Warren Court heyday of individual rights ended.[44]

Under principles of federalism, state courts have tremendous interpretive autonomy regarding individual and group rights.[45] Each state has its own constitution, and the state supreme court is the final arbiter of its meaning. The substance of the interpretation can track the federal courts' interpretation of the comparable federal provision or it can differ significantly.[46] But even though it can differ, the interpretation of state law cannot conflict with federal law.[47] Acknowledging additional rights under state constitutions does not cause conflicts; only an attempt to reduce rights recognized in the federal constitution will do so. If no conflict exists, the state's ruling on its own constitution is authoritative and final, and cannot be overturned by the U.S. Supreme Court. In the case of a conflict, the state supreme court's ruling is subject to U.S. Supreme Court review where the federal interpretation will govern the outcome of the litigation.[48]

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43. *See* TARR & PORTER, *supra* note 5, at 2 n.4.

44. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Guardians of Individual Rights*]; Brennan, *supra* note 5. The success of the new judicial federalism is the topic of some debate, with some commentators seeing the glass half full and others seeing it half empty. *Compare* Gardner, *supra* note 41, *with* Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986).

45. JENNIFER FREISEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1992); Brennan, *Guardians of Individual Rights*, *supra* note 44, at 501; Brennan, *supra* note 5, at 500-02.

46. TARR & PORTER, *supra* note 5, at 7-8.

47. *Id.* "Conflict" refers only to those situations in which the state interpretation yields less protection from government encroachment than does the federal understanding.

48. *Id.*; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 182 (1983). This result is mandated by the Supremacy Clause, which reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

All this assumes that the state court makes clear that it is interpreting its own constitution. In *Society of Jesus v. Boston Landmarks Commission*, the Supreme Judicial Court of Massachusetts interpreted its own fundamental law and never reached the federal constitutional claim. The court made it absolutely clear that it was rendering a final opinion on its own state constitutional law. But in analyses that discuss both federal and state constitutions, confusion often exists over whether the decision is based on state or federal grounds. The U.S. Supreme Court has no jurisdiction to review a decision on state grounds that is not otherwise in conflict with federal law; but it *does* have jurisdiction to review any state court decision based on federal law because state courts must interpret that law in accordance with federal precedent.[49]

Since its landmark decision in *Michigan v. Long*,[50] the U.S. Supreme Court has presumed that state court decisions involving common constitutional protections are interpretations of the federal provision (and thereby within its jurisdiction) unless the state court has made an explicit statement that the decision is based upon "independent and adequate state grounds."[51] The general rule is that if a state court concludes that *both* federal and state constitutions are violated, the final state court decision is not reviewable.[52] But the state court exposes itself to review if, when it finds a violation of both constitutions, it is unclear as to how the state ground stands independent of the federal one (particularly if it relies wholly

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the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

49. TARR & PORTER, *supra* note 5, at 8-9.

50. 463 U.S. 1032 (1983).

51. *Id.* at 1037. The state court is required to provide a plain statement that its decision is grounded in the adequate and independent interpretation of its own constitution. "Otherwise, the Court will assume it has the jurisdiction to review when the state decision is primarily determined by federal law, when it is interwoven with federal law, when national precedents are cited other than for purposes of guidance, or when such precedents are said to compel the result reached." Stanley H. Friedelbaum, *Judicial Federalism: The Interplay of National-State Standards*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTION IN CONSTITUTIONAL POLICY MAKING 18 (Stanley H. Friedelbaum ed., 1988). Other ways of asserting interpretive independence include distinguishing facts and taking advantage of ambiguities in federal precedent. TARR & PORTER, *supra* note 5, at 14-15.

52. Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874) (Supreme Court will not review issues of state law). *See* Sandra D. O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-6 (1984).

on federal precedent in reaching its conclusion).[53] Furthermore, if the state court strikes down a state law or regulation *because* it violates a federal provision comparable to a particular state provision, then the decision is reviewable for lacking an independent state ground.[54] The analysis is simpler when the state court denies relief and holds that *neither* state nor federal law is violated. That judgment is reviewable because it can never be independent of the federal ground. Thus, *Michigan v. Long* acknowledges interpretive autonomy for state courts in their *grants* of relief (based on independent and adequate grounds) but never for their *denial* of relief.[55]

The independent and adequate state grounds emerge from the language, traditions and different institutional positions of the federal and state supreme courts.[56] Differences in text are perhaps the most fertile source of interpretative autonomy. State constitutions differ substantially from the federal text and from each other; many are remarkably detailed and specific.[57] In over forty of the state documents, invocations of a Supreme Being are followed by numerous terms describing religious liberty and protecting the rights of conscience, worship, and religious opinion and exercise from interference, infringement, control, discrimination, preference, persecution or compulsion.[58] Twenty constitutions contain provisos like those

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53. *See Long*, 463 U.S. at 1040-41.

> When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so.

Id.

54. O'Connor, *supra* note 52, at 6.

55. *Id.*

56. TARR & PORTER, *supra* note 5, at 208.

57. For information regarding the sources of language of state constitutions, see Leonard W. Levy, *The Original Meaning of the Establishment Clause of the First Amendment*, *in* RELIGION AND THE STATE 50-52 (James E. Wood, Jr. ed., 1985); McConnell, *supra* note 37, at 1426-27; 3 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 443-44 (1950); State v. DeLaBruere, 577 A.2d 254, 270 (Vt. 1990).

Because of the textual specificity, interpretations in many cases may be easy, unlike the sparse federal text which often must be filled with content. Tarr, *supra* note 6, at 94-95. But compare Gardner's criticism that this reduces the lofty aims of state constitutions because they behave more like statutes. Gardner, *supra* note 41, at 800, 819-21.

58. Miller & Sheers, *supra* note 36, at 312; FREISEN, *supra* note 45, § 4.06.

already mentioned;[59] many also recite religious exemptions from taxation and military service.[60] In addition, the state texts often recognize rights that have no federal counterpart.[61] The history of these specific provisions may inform a state court of a specific intent of the framers that is particularly meaningful to the case before it.[62]

The traditions of the state and its courts may also be significant to interpretive independence. Pre-existing state law—common, statutory and constitutional—may take a court in directions that differ from federal trends. This happened in *First Covenant Church II*, where the Washington Supreme Court criticized *Smith* for placing free exercise in a subordinate, instead of preferred, position and for accepting a disadvantaged status for minority religions, directly contrary to state positions on the issue.[63] States may justify a particular interpretation that differs from the federal understanding by reference to historical experiences of the state, specific socioeconomic or demographic concerns (such as particular ethnic, racial or religious minorities), matters of particular local interest, or the public attitudes of the state's citizens.[64]

Freisen documents the variety of religious liberty provisions found in state constitutions. Those provisions, followed by the number of state constitutions containing such provisions, are as follows: Generally securing toleration of religious sentiment—10; no molestation in person/property for religious opinion—11; right to worship—27; freedom of conscience—38; forbidding discrimination against free exercise or based on religion—34; free exercise clause like federal—9; no compelled church attendance—29; right to refrain from religious services in public schools—5; exemption from military—23; religious exemption from state taxation—34; no religious test for jury, witness, franchise, etc.—19; establishment clause like federal—11; no preference clause—32; ban on religious/sectarian control of publicly funded schools or religious indoctrination in public schools—19; release time—6; no compulsory individual money contributions—30; no gifts/funds/appropriations to religious institutions—34; exemption for transportation/textbooks/grants—8; no religious control of public education funding—3. *Id.* app. 4A at 1-17.

59. Tarr, *supra* note 6, at 77.

60. CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS ch. 6 (1965).

61. *See, e.g.*, Kentucky State Bd. of Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980), discussed *infra* note 134 and accompanying text.

62. *See* Tarr, *supra* note 6, at 94, 95.

63. First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992).

64. *See* State v. Williams, 459 A.2d 641, 650-51 (N.J. 1983); State v. Hunt, 450 A.2d 952 (N.J. 1982); State v. Gunwall, 720 P.2d 808 (Wash. 1986). *See generally* Terence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51 (1984); James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099 (1991).

Particular sensitivities (as well as particular prejudices) are reflected in these interpretive traditions because, as one judge writes, "states demystify constitutional law . . . . [State courts] say precisely what they mean." State constitutions are more frequently amended than the Federal Constitution, and the "democratic process is more likely to be reflected" in them.[65]

Different institutional positions further justify separate state constitutional interpretations. The Federal Constitution must be interpreted on behalf of the nation. Thus, the institutional position of state courts differs from that of federal courts because concerns about a national polity are lacking: the state constitutional decision is not made for the country as a whole. By contrast, since the Supreme Court does rule for the nation, it at times decides an issue in a particular way precisely because it wants to respect or preclude state diversity on that issue—a role not relevant to state courts.[66]

Many other reasons are commonly proffered for giving attention to state constitutions. One of the main reasons is the lack of stability, consistency or coherence in much federal jurisprudence.[67] The high courts of Minnesota and Washington, when independently interpreting their state provisions, both cited the "uncertainty" caused by *Smith* because of its departure from a long history of established law.[68] The state courts that have departed from *Smith* are obviously opposed to the definition of religious liberty now employed by the Supreme Court, and are unpersuaded by the high court's reasoning.[69] Another reason for giving attention to state constitutions is that often there is inadequate guidance at the federal level, perhaps because the Supreme Court has never addressed issues which arise more commonly at the state level.

The propriety of departing from federal precedent has been a matter of great debate. Proponents of a "relational"

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65. Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1, 12-13 (1991).

66. Brennan, *Guardians of Individual Rights*, *supra* note 44, at 546; Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 733, 744, 764, 791 (1982). Additionally, procedural and jurisdictional differences may give broader jurisdiction to state courts.

67. Kauger, *supra* note 65, at 7.

68. State v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992).

69. Brennan, *supra* note 5, at 500; Fritz, *supra* note 40, at 61; Tarr, *supra* note 6, at 106.

understanding of the state and federal constitutions view state constitutions only in relation to the federal text and interpretation. They argue that states, as part of a federal polity, should give great deference to decisions of the U.S. Supreme Court and depart from federal precedent only for "cogent and persuasive reasons,"[70] only where state and federal texts differ, or only where a previously established body of state law leads to a different result.[71] For this "federal-first" school of interpretation, the presumption favors a uniform interpretation of state and federal texts unless a departure is sufficiently justified. Thus, the state text is understood and invoked only in relation to the federal text and merely supplements the federal "floor" of rights.[72]

A non-relational understanding of state constitutional interpretation starts from the opposite position that "there is no basis in constitutional law for *presuming* that the state constitution parallels the federal constitution. The state constitution must be interpreted separately from the federal constitution *unless* there are good reasons of policy to establish a uniform interpretation."[73] The major proponent of this state primacy or "state-first" approach was Justice Hans Linde,

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70. Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 847 (Cal. 1991) (Lucas, C.J., concurring), *cert. denied*, 112 S. Ct. 3026 (1992).

71. Justice Pollack of the New Jersey Supreme Court argues that

> in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights . . . .
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> . . . .
>
> Nonetheless, we proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution. Our caution emanates, in part, from our recognition of the general advisability in a federal system of uniform interpretation of identical constitutional provisions.

Right to Choose v. Byrne, 450 A.2d 925, 931-32 (N.J. 1982) (citations omitted).

72. *See* Brennan, *Guardians of Individual Rights*, *supra* note 44, at 548; Brennan, *supra* note 5, at 491, 502-04; Kauger, *supra* note 65, at 2. These relational views can be further broken down into the following: Equivalence Model (presumption that state constitutional rights are equivalent to federal counterparts); Equivalence Plus Model (the state constitution can recognize greater rights than under federal counterparts); Equivalence Minus Model (federal standards do not control what is found under state constitution). The Equivalence Plus Model is the most popular in the "new judicial federalism." Collins & Galie, *supra* note 44, at 323-34.

73. *Right to Choose*, 450 A.2d at 948 (Pashman, J., concurring in part, dissenting in part); *see also Morongo*, 809 P.2d at 836 (Mosk, J., concurring); Stanley H. Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

former Oregon Supreme Court Justice, who argued that the state constitution should be interpreted without any reference to the federal law; in fact, in his view, it should be analyzed first.[74] If the issue can be disposed of on state constitutional grounds, then the court need not reach the federal issue under the comparable federal provision. If, however, the outcome would differ under the federal analysis, the court would then engage in a federal interpretation. Because of Justice Linde's presence on the state's high court, Oregon uses this non-relational approach.[75] Indeed, it employed just such an approach in the court's 1986 decision in *Smith v. Employment Division*,[76] the same case that eventually made its way to the U.S. Supreme Court and revolutionized federal free exercise doctrine. The Oregon court held that, under the state's constitution, Smith could be denied unemployment compensation because a generally applicable, facially neutral law like the unemployment benefits statute could not violate the religious exercise provisions of the state constitution even if an inadvertent burden on religious exercise resulted. Under the Federal Constitution, however, the Oregon Supreme Court applied the *Sherbert* analysis, which, the court concluded, compelled a different result.

From the Oregon experience it is clear that a commitment to develop an independent body of state constitutional law will not necessarily expand upon the rights given by corresponding federal provisions.[77] Nevertheless, it appears to be the

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74. *See* Hans A. Linde, *E Pluribus*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980). Non-relational, independent forms of state constitutional analysis can be broken down as follows: the Nonequivalent Text Model (the state constitution is interpreted differently because the text, history, and purpose of the provision differs from the federal counterpart), and the Nonequivalent Model (the "state first" analysis that is concerned with the "analytical soundness" of the state constitutional interpretation). Collins & Galie, *supra* note 44, at 328-36.

75. Collins & Galie, *supra* note 44, at 333-36; TARR & PORTER, *supra* note 5, at 30. The "state first" or primacy theory of state constitutional interpretation has also been employed in Washington, Maine, New Hampshire and Vermont. Collins & Galie, *supra* note 44, at 333.

76. Smith v. Employment Div., 721 P.2d 445 (Or. 1986), *vacated*, 485 U.S. 660 (1988); Black v. Employment Div., 721 P.2d 451 (Or. 1986), *vacated sub nom.* Employment Div. v. Smith, 485 U.S. 660 (1988).

77. Neither the federal-first nor the state-first approach necessarily yields expanded constitutional rights. A relational theory like Justice Brennan's justifies resort to state constitutions only for the purpose of more expansive interpretations, but the circumstances that justify such use may be quite limited. *See supra* note 70-72 and accompanying text. Similarly, under a state-first approach, rights might

considered judgment of most commentators on the new judicial federalism that the state-first approach holds the best hope for integrity of interpretation "in the light of text and tradition," wholly independent of the federal analysis.[78] Independent state interpretation has the tremendous benefit of "analytical soundness."[79] The state's high court can build a separate body of consistent constitutional law, thereby avoiding the frequent fluctuations of federal law.[80] "[T]he logic of principled

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be curtailed instead of expanded, as is evidenced by the Oregon Supreme Court's earliest *Smith* decision. Tarr has noted that Oregon has "made important efforts to resuscitate free exercise provisions of its Constitution." But that "resuscitation" refers to the state's independence in interpreting its own fundamental law; it certainly does not refer to expansion of rights. Tarr, *supra* note 6, at 77. Thus, the relational approach might be more sensitive to problems with the federal doctrine, and might produce state decisional law expanding upon federal rights, but it might do so in only a very narrow category of cases. The state primacy approach might be more conducive to developing a coherent religion doctrine that treats free exercise and establishment provisions comprehensively, but would not necessarily enhance the protection of religious liberty. *See infra* notes 207-218 and accompanying text.

78. Glendon & Yanes, *supra* note 7, at 549. *See generally* Collins & Galie, *supra* note 44; TARR & PORTER, *supra* note 5; Emily F. Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions*, 6 J.L. & REL. 225 (1988). *But see* Gardner, *supra* note 41, at 812-30.

79. Collins & Galie, *supra* note 44, at 333. Perhaps the coherence and "analytical soundness" of the state-first model responds adequately to the concerns of the late Professor Paul Bator, who said, "I must confess to some misgivings about the extent to which some of this commentary [on the new judicial federalism] seems to assume that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory." Williams, *supra* note 48, at 189.

80. Commentators continue to argue in favor of the state-first model in the area of religious exercise and church-state relations. *See* FREISEN, *supra* note 45; Fritz, *supra* note 40; Tarr, *supra* note 6. Professor Jennifer Freisen, in her recent treatise on state constitutional law, laments the dilemmas handed to states when they base their interpretation of their own constitutions on federal decisional law. While she concentrates on the establishment provisions, and in particular the state application of the federal test in Lemon v. Kurtzman, 403 U.S. 602 (1971), her comments apply to the free exercise area as well. State courts slide all over the doctrinal landscape because they attempt to track Supreme Court decisions. According to Freisen,

> When a state court simply incorporates the prevailing federal standard into a state interpretation, notwithstanding the difference in text, the clarity and stability of the results is in some doubt. Given the extreme flexibility of many federal standards, it is not surprising that state courts that opt for this approach often render opinions inconsistent with later rulings of the Supreme Court and even inconsistent with the state's own earlier opinions.

FREISEN, *supra* note 45, § 4.04. State application of the federal establishment test has been particularly problematic, and now appears to be problematic with the shift from *Sherbert* to *Smith* at the federal level. *See infra* notes 153-156 and

interpretation at the state level . . . demands that any given argument be tested on its own merits independently of what level of constitutional protection could result."[81] If the result conflicts with federal law, then the litigants could not win under the state constitution.[82] Even if the state interpretation is not controlling because the Supremacy Clause requires application of federal precedent, the state's analysis may apply in future cases if federal jurisprudence changes or if the facts of the next case render federal precedent inapplicable.[83]

Under both the federal-first and state-first approaches, state courts can establish "independent and adequate grounds" for violations of state constitutional guarantees, which would preclude U.S. Supreme Court review under *Michigan v. Long*. Under the federal-first analysis, the independent and adequate grounds requirement would be met when, for instance, the state court finds sufficient justification in its state constitutional text and case history for departing from the federal analysis.[84] Under the state-first analysis, the requirement would be met when the state constitution is analyzed without resort to federal law.[85]

IV. THE HISTORY OF FREE EXERCISE UNDER STATE CONSTITUTIONS

Recent reliance on state constitutions may signal that state courts are moving to reclaim an interpretive role in free exercise cases. With varying degrees, colonial charters and later state constitutions acknowledged the religious rights of citizens in the pre- and post-revolutionary eras.[86] When

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accompanying text. Once states commit themselves to following federal decisional law, the temptation to follow the federal courts in lockstep (including its unpredictable fluctuations) is overwhelming. Fritz, *supra* note 40, at 69, 72.

81. Tarr, *supra* note 6, at 79 n.28 (quoting Ronald Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 15 (1981)).

82. *Id.* at 79-80.

83. *Id.* at 78-79.

84. *See* First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992). *But see* Rupert v. City of Portland, 605 A.2d 63 (Me. 1992) (case is subject to review on the federal determination because court held that neither constitution was violated and a denial of relief is never independent).

85. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Cooper v. French, 460 N.W.2d 2 (Minn. 1990); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990).

86. McConnell, *supra* note 37, at 1425-30, 1455-66.

drafted, the First Amendment restricted only federal action. The Supreme Court reaffirmed this in 1845, when it explicitly stated that the religious liberty of citizens was to be protected by the laws and constitutions of the states.[87] During the next century, state courts created a considerable body of state constitutional law governing such issues as restrictions on religion, Bible reading in public schools, the use of public property for religious purposes, and aid to religious schools.[88] States continued their state constitutional analyses even after 1940, when the U.S. Supreme Court (as part of its broader activity of selective incorporation) applied the Free Exercise Clause of the First Amendment to the states through the Fourteenth Amendment.[89]

Until the 1960s, state courts were consistently unwilling to recognize religious exercise claims made under the state constitutions.[90] Under what Professor Alan Tarr calls the "secular regulation rule," the vast majority of cases upheld the police power of the states to "limit personal liberties in the interest of the public good."[91] Repeated requests for religious exemptions from general laws were denied based on the state's legitimate role in preventing injury to public health, public morality, public safety and the good order of society.[92]

In the mid-twentieth century many assumed the secular

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87. The Court refused to accept jurisdiction over a Louisiana criminal prosecution of a Catholic priest convicted of violating a local ordinance which prohibited corpses to be displayed in churches during funeral services. Permoli v. Municipality No. 1, 44 U.S. 589 (1845), *relying in part on* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (first eight amendments of U.S. Constitution not applicable to the states).

88. *See* ANTIEAU ET AL., *supra* note 60; FREISEN, *supra* note 45, § 4.01; Fritz, *supra* note 40, at 61; Tarr, *supra* note 6, at 89-101.

89. Cantwell v. Connecticut, 310 U.S. 296 (1940).

90. Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 627 (1951); *see also* ANTIEAU ET AL., *supra* note 60, at ch. 6; Marc Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217; G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 21, 23-24 (Stanley H. Friedelbaum ed., 1988).

91. ANTIEAU ET AL., *supra* note 60, at 65.

92. *Id.* at 68-95. Laws challenged involved vaccinations against communicable disease, unauthorized practice of medicine, fluoridation of water supply, contraception, transfusions and medical care, Sunday closing, polygamy, blasphemy, prohibition on alcoholic beverages, use of dangerous instrumentalities in religious ceremonies, fortune telling and spiritualism, distribution of religious literature and solicitation, and zoning.

regulation rule was consistent with religious freedom.[93] It is easy to understand why. During that period there was widespread accommodation of Christianity, the religion of the majority. Accordingly, voluntary Bible reading and prayer in the public schools were upheld,[94] as were anti-blasphemy laws and Sunday closing laws.[95] Moreover, legislative religious exemptions, while not common, existed.[96] For instance, state constitutions often provided for property tax exemptions for churches and military exemptions for conscientious objectors. No state religion was officially established, no taxes supported any worship, and no state interfered with conscience in matters of religious belief.[97] Perhaps most importantly, the secular laws themselves were considered to protect a religio-moral order. "The courts always protect the state against immoral practices that are clearly at variance with the established standards of Christian civilization."[98] If the state courts

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93. *See, e.g.*, STOKES, *supra* note 57, at 446-47.

94. *See, e.g.*, Doremus v. Board of Educ., 75 A.2d 880 (N.J. 1950), *appeal dismissed*, 342 U.S. 429 (1952). In *Doremus*, the New Jersey Supreme Court discussed a state statute requiring "at least five verses from the [Old Testament to] be read, without comment, in each public school classroom," N.J. STAT. ANN. § 18:14-77, while mandating "[n]o religious service or exercise . . . shall be held in any school receiving [public money]," N.J. STAT. ANN. § 18:14-78, "except the reading of the Bible and repeating of the Lord's Prayer." The court held that the statutes did not violate the First or Fourteenth Amendments to the U.S. Constitution regarding the prohibition against the establishment of religion because the statutes

> do not go to the establishment of religion or against the free exercise thereof . . . . [I]t is clear . . . that the sense of the [First] [A]mendment does not serve to prohibit government from recognizing the existence and sovereignty of God . . . . The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God . . . . We consider that the Old Testament and the Lord's Prayer, pronounced without comment, are not sectarian, and that the short exercise provided by the statute does not constitute sectarian instruction or sectarian worship but is a simple recognition of the Supreme Ruler of the Universe . . . .

Doremus, 75 A.2d at 889.

95. ANTIEAU ET AL., *supra* note 60, at 80.

96. *Id.* at 69-70 (Christian Science healers exempt from medical licensing requirements); *id.* at 83 (sacramental use of wine exempt from alcohol prohibition laws).

97. STOKES, *supra* note 57, at 447.

98. *Id.* Stokes lists three "tests to which religious freedom may be put: does its manifestation interfere with freedom of others; does it result in acts/practices detrimental to social welfare or safety of the state; does it run counter to the moral law?" *Id.* at 695.

thought state laws upheld a religio-moral order, exemptions from those laws to permit religious exercise must have seemed an outrageous notion.[99] Furthermore, the argument that limited government could burden free exercise was difficult for courts to comprehend because pre-1940 America was unfamiliar with the expansive bureaucratic apparatus of today's government.

The earliest signs of erosion of the secular regulation rule came in the areas of hand bill distribution and the licensing of literature. State courts in the 1920s and 1930s repeatedly upheld restrictions on the distribution of religious literature, primarily affecting Jehovah's Witnesses. By the late 1930s, the U.S. Supreme Court had begun to strike down these laws under a more expansive free speech jurisprudence, and then later, in 1940, under free exercise doctrine.[100] After incorporation, and with the realization that the Supreme Court's interest in the Jehovah's Witnesses meant a federal override of state laws, some state courts began to hold restrictions on literature distribution unconstitutional under their own constitutions (on the grounds that they infringed religious freedom or lacked fair and adequate standards).[101]

Despite the Supreme Court's attention to rights of religious expression, prior to 1963 state courts continued to 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.[102] But then came *Sherbert v. Verner*.[103] *Sherbert*

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99. *See, e.g.*, Dziatkiewicz v. Township of Maplewood, 178 A. 205 (N.J. Sup. Ct. 1935) (upholding township ordinance prohibiting canvassing and distribution of literature without permit as a reasonable exercise of police power). The supreme court of New Jersey scolded the Jehovah's Witness claimants for not being law abiding:

> It would seem to this court that men and women engaged in the lofty and idealistic work, as the prosecutors claim to have been engaged herein, i.e., of spreading their religious conceptions to the public at large, ought to be among the very first to submit to and comply with all reasonable regulations which, obviously, were enacted in the interest of the public health and safety and which regulations were designed for the good of the greatest number.

Id. at 208.

100. Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise); Schneider v. New Jersey, 308 U.S. 147 (1939) (free speech); Lovell v. City of Griffin, 303 U.S. 444 (1938) (free speech).

101. ANTIEAU ET AL., *supra* note 60, at 88-89.

102. *Id.* at 87, 98-99. Writing in 1951, one commentator lamented,

revolutionized the federal interpretation of the Free Exercise Clause of the First Amendment by requiring a strict scrutiny standard of review for general laws that burden religious exercise.[104] Because of incorporation, it also revolutionized the way states interpreted parallel constitutional provisions.

Sherbert's impact on the states' treatment of religious exercise under their own constitutions is best illustrated by the Minnesota case of *In re Jenison*.[105] Minnesota citizen Laverna Jenison refused to serve as a juror because of the biblical command that we not judge one another. She was sentenced to 30 days in jail for contempt of court, having failed to comply with her civic duties. The Supreme Court of Minnesota, in upholding her conviction and sentence, found that Article 1, Section 16 of the Minnesota Constitution and the First Amendment of the U.S. Constitution did not require an exemption from a law expressing a generally applicable legal obligation.[106] A legislative exemption for religiously inspired conscientious objection would have been upheld, but a judicial exemption would not be mandated. Three months later, the U.S. Supreme Court decided *Sherbert*. On a writ of certiorari, the Supreme Court subsequently remanded *Jenison* to Minnesota's high court, with instructions to reconsider in light

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> Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of "First Amendment Freedoms" is disappointing. Only occasionally do state cases . . . take a position protecting the freedoms beyond what has been required by the United States Supreme Court . . . . Time and time again, the United States Supreme Court has found it necessary to reverse many state courts which were oversolicitous of local attempts to silence unpopular ideas on the ground of traffic control, the administration of public parks or the possibility of violence.

Paulsen, *supra* note 90, at 642. This lack of initiative was not surprising; except for the freedom of expression cases, even federal precedent was itself steeped in the minimum rationality tradition. *See, e.g.*, State v. Perricone, 181 A.2d 751 (N.J.) (blood transfusion ordered for child of Jehovah's Witness parents does not violate state or federal constitution), *cert. denied*, 371 U.S. 890 (1962). Neither Reynolds v. United States, 98 U.S. 145 (1879) (holding prohibition of polygamous practices of Mormons constitutional) nor Prince v. Massachusetts, 321 U.S. 158 (1944) (holding prohibition on literature distribution by Jehovah's Witness child under child labor laws constitutional), both discussed in *Perricone*, suggests a strict scrutiny standard of review for government restrictions on religious conduct. Thus, states did not have much internal or external impetus to depart from the secular regulation rule.

103. 374 U.S. 398 (1963).

104. *See id.* at 406-10.

105. *In re* Jenison, 120 N.W.2d 515 (Minn.), *vacated*, 375 U.S. 14 (1963).

106. Note that after incorporation, states made determinations under both constitutions if the federal claim was pleaded.

of *Sherbert*.[107] The Minnesota Supreme Court, pursuant to the Supremacy Clause, applied the new strict scrutiny standard of review and mandated an exemption from jury duty. The court found that "there has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override [Laverna Jenison's] right to the free exercise of her religion."[108]

A subtle shift of emphasis in the state courts from state to federal constitutional law is observable after *Sherbert*. To use Minnesota as an example, in the pre-*Sherbert* decisions, the Minnesota Supreme Court based its decisions on both the state and federal constitutions. After *Sherbert*, however, there was no longer any mention of the state constitution; it had, in effect, vanished from the opinions' texts and presumably from the court's consideration. If incorporation made it necessary to look at both the state and federal constitutional law, *Sherbert* seemed to require reference only to the federal text. The sheer power of the federal requirement of a drastically higher standard of judicial review—requiring not mere rationality but strict scrutiny—pushed state constitutional texts to the margins.[109]

Hence, during the *Sherbert* years (1963-1990), state courts followed federal doctrine and precedent to the virtual exclusion of their own fundamental law. This is certainly understandable. *Sherbert* required strict scrutiny of laws burdening religion. Consequently, states were required to abandon their well-developed secular regulation rule. Even if a state had attempted independently to ensure generous protection of religious exercise under its own constitution, the controlling federal precedent would make such an attempt largely redundant.[110] Therefore, a separate state constitutional jurisprudence in free exercise was

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107. *In re* Jenison, 375 U.S. 14 (1963).

108. *In re* Jenison, 125 N.W.2d 588 (1963). Note that the instruction to remand for reconsideration was really a requirement to apply the compelling interest standard. Minnesota was not free to apply a lower standard of judicial review because its own constitution had been interpreted in that way; federalism permits state constitutions to provide greater protection, but not less.

109. "Incorporation has had an enormous impact on the constitutional law applied by state courts. After incorporation, there are no entirely independent models of state judicial review." Federal decisions became paramount, and federal decisional law continues to influence much of the thinking of those working with parallel state constitutional guarantees. Collins & Galie, *supra* note 44, at 322.

110. *See infra* notes 118-143 and accompanying text.

unnecessary.[111]

As a result, during the *Sherbert* years most states "rel[ied] on federal law on free exercise issues, even in areas where [the] Supreme Court [had] not ruled."[112] The vast majority did not engage in any separate state analysis because they either completely ignored their state constitutions,[113] or considered state provisions coextensive with the federal counterpart.[114] In this second group of cases it is difficult to determine whether there was any independent state basis for the judgments.[115] Although this lack of independent state jurisprudence is understandable, it was still problematic. One effect of reliance on federal doctrine for all or most of the cases involving religion was to prevent any serious development of a comprehensive state constitutional law of religious liberty grounded in the state's text and tradition. Additionally, by choosing to use state provisions in a piecemeal fashion, if at all, state courts did not have to grapple with significant issues touching on the relationship between the establishment and free exercise concepts in their own state law.[116] And finally, federal courts and interpretations contributed disproportionately to the development of state law.[117]

Despite the fact that controlling federal precedent rendered independent state analysis largely extraneous, a small group of states did explicitly interpret their religious liberty provisions prior to 1990.[118] Maine,[119] Mississippi,[120] Tennessee,[121]

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111. Only in the Establishment Clause area has there been noticeable reliance on state constitutions, but even there federal doctrine and precedent remains predominant. *See* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

112. TARR & PORTER, *supra* note 5, at 21; *see also* State v. DeLaBruere, 577 A.2d 254 (Vt. 1990); Miller & Sheers, *supra* note 36. This has occurred largely because of the assumption that state constitutional guarantees "were mere analogues of the federal guarantees and therefore afforded no independent protection." TARR & PORTER, *supra* note 5, at 21.

State court discussions of constitutional rights usually referred to those of federal constitutional law. *See* Gardner, *supra* note 41.

113. Miller & Sheers, *supra* note 36, at 307.

114. *Id.* at 310-11. Gardner calls this the "lockstep analysis." Gardner, *supra* note 41, at 788.

115. This common problem of obscurity—states failing to specify upon which constitution a holding is grounded—is discussed at length in Gardner, *supra* note 41, at 784-86.

116. Tarr, *supra* note 6, at 77-78.

117. *Id.* at 76-80.

118. Miller & Sheers, *supra* note 36, at 308-10.

119. Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377 (Me.

and Kentucky[122] required the same strict scrutiny standard of review under their own constitutions as that required under the Federal Constitution. And, as indicated above, Oregon determined that its own fundamental law provided a *lower* standard of protection to religious exercise, rejecting the compelling state interest test when generally applicable, facially neutral laws were challenged.[123]

The texts of the religious exercise provisions vary among these states, and all differ from the federal language. Maine and Mississippi are among the twenty states that contain provisos qualifying their religious exercise statement.[124] Tennessee's language differs significantly from the text of the Federal Free Exercise Clause, but does not contain a proviso.[125] Kentucky's provision offers specific protection unavailable under the federal text.[126] Oregon's language,

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1988).

120. *In re* Brown, 478 So. 2d 1033 (Miss. 1985).

121. State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

122. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

123. Smith v. Employment Div., 721 P.2d 445 (Or. 1986), *vacated*, 485 U.S. 660 (1988); Black v. Employment Div., 721 P.2d 451 (Or. 1986), *vacated sub nom.* Employment Div. v. Smith, 485 U.S. 660 (1988); Salem College & Academy, Inc. v. Employment Div., 695 P.2d 25 (Or. 1985).

124. The Mississippi Constitution reads as follows: "the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts . . . dangerous to the peace and safety of the state . . . ." MISS. CONST. art. III, § 18. For the Maine Constitutional provision, see *supra* note 25.

125. The Tennessee Constitution reads:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

TENN. CONST. art. I, § 3.

126. The Kentucky Constitution states:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; *nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed*; and the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching.

which is very detailed, differs from the federal text and contains no proviso.[127] Mississippi and Kentucky have relied entirely on their own constitutions and employed a strict scrutiny standard of review to protect the exercise of religion. Tennessee and Maine have engaged in analyses of both state and federal constitutions and have found the strict scrutiny standard of *Sherbert* required by each document.

The Maine Supreme Judicial Court, in *Blount v. Department of Education & Cultural Services*,[128] interpreted its proviso to be consistent with the compelling state interest/least restrictive alternative analysis of the strict scrutiny standard of review.[129] The Mississippi Supreme Court grounded its decision in *In re Brown*[130] solely on its state constitution but did not focus on the proviso language.

> No human authority shall, in any case whatever, control or interfere with the rights of conscience.

KY. CONST. § 5 (emphasis added).

127. The Oregon Constitution provides: "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences. No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience." OR. CONST. art. I, §§ 2, 3.

128. 551 A.2d 1377, 1385 (Me. 1988).

129. The court held that neither the federal nor state constitution protected home-schooler parents from the state's authority to approve their children's educational program. The court first engaged in a federal analysis, using the burden/compelling interest/least restrictive alternative test to determine that the burden on the Blounts' free exercise was justified by state interests. It then entered into analysis of the state constitutional claim.

The Blounts argued that the provisos in the state text concerning disturbance of the public peace and obstruction of religious worship should be read to provide even greater protection than the compelling interest standard. They argued that the state language so limited the range of governmental interests capable of overbalancing religious practice that *less* protection for the countervailing public interests should be afforded when those interests, though compelling, do not prevent disturbance of the peace or obstruction of the worship of others. The court refused to read the provisos to give greater protection for religious conduct than the federal counterpart, but it made clear that the state and federal constitutions each independently required a compelling interest/least restrictive alternative test. The court concluded

> that the full range of protection afforded the Blounts by the Maine Constitution is also available under the United States Constitution . . . . Maine's qualifying phrase "provided that that person does not disturb the public peace, nor obstruct others in their religious worship" cannot be read as giving *less* weight to "compelling public interests" than does the unqualified language of the First Amendment forbidding any "law . . . prohibiting the free exercise thereof."

Id.

130. 478 So. 2d 1033 (Miss. 1985).

Nevertheless, it severely limited the governmental interests that could override religious claims, announcing a strict scrutiny standard of review.[131] Tennessee's Constitution has neither an obstruction of worship nor a disturbance of peace and safety proviso, but the Tennessee Supreme Court in *State ex rel. Swann v. Pack*[132] explicitly recognized that "Article 1, Section 3 of the Constitution of Tennessee contains a substantially stronger guaranty of religious freedoms" than the First Amendment contains.[133]

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131. The court held that the state free exercise provision protected the plaintiff, a Jehovah's Witness, from being required to accept a blood transfusion. A blood transfusion was ordered for Mattie Brown, the victim of and witness to a violent crime, because the state wanted to ensure she lived to testify. The court held that the blood transfusion should not have occurred without her consent. The state's interest in her testimony did not address any "great and imminent public danger"; only "compelling considerations of public safety and danger" can interfere with her free exercise rights. *Id.* at 1039.

The court's analysis suggests that the state interpretation of what types of interests constitute a compelling interest is more limited than the federal interpretation, bordering on a clear and present danger test. Although it wrote, "we believe [the decision] compelled by a faithful application of First Amendment jurisprudence," *id.* at 1039 n.5, the court's decision is grounded solely on its own constitution, avoids the federal language of burden and compelling interest, refers to federal cases only as examples, and draws distinctions that are not present in the federal jurisprudence. "Religiously grounded actions or conduct are often beyond the authority of the state to control. Where the religiously grounded 'action' is a refusal to act rather than affirmative, overt conduct, the State's authority to interfere is virtually non-existent except only in the instance of the grave and immediate public danger." *Id.* at 1037 (citations omitted).

The court made it clear that the plaintiff's rights would yield only to "conflicting rights vested in others" that are expressed in the law, not "mere interests." *Id.* at 1036. Its constitution therefore "prohibits state interference with most instances of the free exercise of religion." *Id.* at 1039.

132. 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

133. *Id.* at 107. In banning snake handling done in religious services as a public nuisance, the Tennessee Supreme Court held that under both federal and state constitutions a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society. "[T]he scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must be clear and present and so grave as to endanger paramount public interests." *Id.* at 111. The Court relied on the belief/act distinction and then discussed *Cantwell's* clear and present danger doctrine. *Id.* at 108 (citing Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)). The court also recognized that the new balancing test of *Sherbert* was consistent with its prior law. *Id.* at 109 (discussing Harden v. State, 216 S.W.2d 708 (Tenn. 1948)), which upheld the constitutionality of the Tennessee Snake Handler's Act in the face of a grave and immediate danger). According to the Tennessee high court, *Sherbert* did not change *Harden*; it was based on the clear and present danger and substantial interest doctrine of *Cantwell*. Thus, for Tennessee, like Mississippi, the standard of review required under the state constitution is arguably higher than that of *Sherbert*. However, the court, while

In *Kentucky State Board for Elementary & Secondary Education v. Rudasill*, Kentucky's Supreme Court provided an independent state constitutional analysis in its interpretation of a religious education provision that has no parallel federal text.[134] In so doing, the court adopted a least restrictive alternative test to give broad operational latitude to church-affiliated schools.

Oregon's consistent use of the state-first approach in state constitutional adjudication was applied to free exercise in 1985. In that year, Chief Justice Linde wrote the decision in *Salem College & Academy, Inc. v. Employment Division*[135] that applied a minimum rationality test to a generally applicable unemployment tax challenged by a religious school.[136] The court held that the state had not infringed the school's right to religious freedom when all similarly situated employers in the state were subject to the same tax.[137] When an obligation is

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recognizing the constitutions as two independent sources, explicitly finds the state and federal standards consistent. The Tennessee Court made specific note of its textual detail and strength of its religious protections as compared to the federal language. In an earlier decision, the high court found the state and federal provisions relating to religion "practically synonymous. If anything, our own organic law is broader and more comprehensive in its guarantee of worship and freedom of conscience, in that 'no preference shall ever be given, by law, to any religious establishment or mode of worship.' " Carden v. Bland, 288 S.W.2d 718, 721 (Tenn. 1956) (quoting TENN. CONST. art. I, § 3).

134. 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 496 U.S. 938 (1980). Section 5 of the Kentucky Bill of Rights protects parents' interests in directing the religious upbringing of children (and conscientious objection to public schools). The court wrote,

> [I]t is obvious that Section 5 of the Kentucky Constitution is more restrictive of the power of the state to regulate private and parochial schools than is the first amendment to the federal constitution as it has been applied to the states. Consequently, the Supremacy Clause . . . does not require us to ride with the Federales in order to reach a decision.

Id. at 879 n.3 (citations omitted).

After discussing the legislative history, the court found that the state has an interest in controlling religious schools to the extent that all schools must prepare children for citizenship in a democracy. Religious schools can do this while using textbooks and teachers of their choice, and standardized testing can be used to be sure they are accomplishing their educational goals. This is essentially a least restrictive alternative test. Thus, Kentucky must approve a religious school unless the state demonstrates the institution is not a "school" (i.e., it fails to educate future citizens as indicated by the standardized testing).

135. 695 P.2d 25 (Or. 1985).

136. The court could use its own state constitutional analysis because the Supremacy Clause is not applicable where the state runs a federal program that Congress has not made obligatory. The court was thus able to develop and apply a lower standard of protection to religion. *Id.* at 34.

137. Central to the court's reasoning was the notion that the tax was tailored to

generally applicable, the court indicated, there is no need to engage in any balancing to determine whether the state has a compelling interest. Rather, the legislature is free to exempt religious schools from the generally applicable statute requiring the unemployment tax payment, as long as all similarly situated religious schools are treated the same. But the court, it concluded, will not mandate such an exemption.[138]

A year later, in the Oregon Supreme Court's first decision in *Smith v. Employment Division*[139] and *Black v. Employment Division*[140] (companion cases), the court expanded *Salem College*'s holding on taxation to include general and neutral regulations. Since a generally applicable, facially neutral tax law had already been held constitutional as applied to religious organizations,[141] the Oregon court went further and ruled that the denial of unemployment benefits through the operation of a generally applicable statute that is neutral both on its face and as applied did not violate the Oregon religious freedom provision.[142]

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the non-religious, economic aspects of the school's activities, and therefore the school was unaffected in its religious aspects. The taxes are not flat taxes on religious activities; they affect the economic and social aspect of the schools, not any activities peculiarly characteristic of schools or religious programs; the burdens are simply financial and clerical. *Id.* at 34-35. Thus, compliance with general financial obligations was no different from a required compliance with a host of other secular health, safety and licensing regulations.

138. *Id.* at 40-41.

139. 721 P.2d 445 (Or. 1986), *vacated*, 485 U.S. 660 (1988). Plaintiff Smith, discharged for misconduct from his job with a private drug-counseling organization because he had ingested peyote in a religious ceremony of the Native American Church, argued that the resulting denial of unemployment benefits burdened his free exercise of religion. The state rule requires denial of unemployment benefits whenever the job is terminated for misconduct as defined by the employer.

140. 721 P.2d 451 (Or. 1986), *vacated sub nom.* Employment Div. v. Smith, 485 U.S. 660 (1988).

141. Salem College & Academy, Inc. v. Employment Div., 695 P.2d 25, 34, 39 (Or. 1985).

142. The court held that the unemployment compensation statute and state rule regarding termination for misconduct are "completely neutral toward religious motivations for misconduct. If the statute or rule did discriminate for or against claimants for worshipping as they chose, we would be faced with an entirely different issue." *Smith*, 721 P.2d at 448. The parallel between the two cases of *Salem College* and *Smith* to the two cases of Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) and Employment Division v. Smith, 494 U.S. 872 (1990) is uncanny. But it does not seem that a law targeting religion is automatically subject to strict scrutiny. In Cooper v. Eugene School District, 723 P.2d 298 (Or. 1986), where a religious garb law targeted religion, the court held that a teacher could be denied the right to dress in the distinctive attire of the Sikh religion because that was necessary to maintain religious neutrality in public

However, the Oregon Supreme Court provided no textual analysis in either *Salem College* or *Smith* to justify its departure from the *Sherbert* standard. Oregon's constitutional language, on its face, is even stronger than the Tennessee Constitution's text, in that it protects religious exercise and enjoyment of religious opinion in addition to conscience and worship. And yet Tennessee found that its constitutional provisions were "substantially stronger" than the federal language and required strict scrutiny.[143] Obviously, text alone will not be dispositive.

The Oregon decision in *Smith* reintroduced the secular regulation rule into the national dialogue. Ultimately, the U.S. Supreme Court adopted it and thereby restored an earlier understanding of religious liberty, the very same understanding it had required states to abandon decades ago. As a result, the scope and nature of religious liberty are once again contingent upon the states. And it is to them that the nation must look for definitions of religious liberty.

V. THE CURRENT STATUS OF POST-*Smith* STATE JURISPRUDENCE

What makes it possible today for state supreme courts to interpret their constitutions to require a strict scrutiny standard of judicial review when fifty years ago the same constitutions were interpreted to uphold virtually every governmental action affecting religious practice? If the texts of these documents so obviously embody protection for religious exercise, why didn't courts see the obvious fifty, or even thirty, years ago? Perhaps the "obvious" was a nation intolerant of religious pluralism and confident that legislation reflected its unassailable viewpoint. In that context, the secular regulation rule served as a framework for persecution; now, after *Smith*, it threatens to become a framework for extreme marginalization of religious conduct, and for a severe form of statist uniformity. The secular regulation rule failed before; it is now all the more incompatible with increases in religious pluralism and in government regulation. When states begin to look at their texts through the informed lens of recent history, they should see

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schools; the teacher's expression was found incompatible with performance of the official role. Oregon has not employed the balancing test, but it has independently used an "incompatibility with teaching" test. *Id.* at 311.

143. *See supra* note 132-133 and accompanying text.

something different from what they saw fifty years ago.

The central example of this "new reading" in the post-*Smith* era is the understanding of the provisos as the enumeration of state interests capable of overbalancing free exercise. Before and during the *Sherbert* years, the provisos failed to impress most state courts as a source of protection for religious liberty. State courts apparently understood them to express the state's power to restrict religion and thus to justify the secular regulation rule.[144] Commentators in the 1960s considered the proviso language "probably no more than precatory in nature. Many of the states have not thought it necessary to include it in their constitutions. Yet the great majority in one fashion or another have made positive efforts to restrict certain religious practices."[145] After *Sherbert*, states with provisos in their constitutions did not consider them to be consistent with the new, higher standard. Writing during the *Sherbert* years, Professor Tarr stated that the language of these provisos "seems to afford less protection for religiously motivated conduct than is now available under the federal constitution."[146] In fact, he went so far as to suggest that the failure to develop state constitutional law and the heavy reliance on federal doctrine under the *Sherbert* rule "may reflect the judgment that, given the police power exception found in many state constitutions and precedent, state constitutions offer less protection of religiously-motivated conduct than the first amendment."[147]

Professor Michael McConnell has reasoned instead that these provisos recognize the acceptability of religious exemptions from general laws by specifying those classes of laws from which exemptions are not available. If the language meant that any law could override the free exercise of religion, a proviso would completely swallow up the statement of protected rights.[148] The only plausible interpretation, then, is

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144. Tarr writes, "Relying on such constitutional language, state courts have generally sustained state laws challenged as violative of religious liberty." Tarr, *supra* note 90, at 23.

145. ANTIEAU ET AL., *supra* note 60, at 67.

146. Tarr, *supra* note 90, at 23.

147. *Id.* at 24.

148. McConnell, *supra* note 37, at 1455-66. McConnell also detects in these provisos historical justification for religious exemptions, finding evidence that exemptions from generally applicable laws were a natural part of the scheme from the time of the original drafting of state constitutions. *Id.* at 1461-66.

The inclusion of a balance on the face of the constitutional provision is not

that free exercise can be infringed only by specific categories of governmental interests. Laws that address unenumerated categories cannot likewise infringe upon religious exercise; religious exemptions are necessarily required from such laws. State courts departing from *Smith* have arrived at the same conclusion, thereby giving special weight to the proviso language.

Since the current federal constitutional interpretation of free exercise is unreceptive to religious exemptions, state constitutional claims and arguments will inevitably become more common.[149] Thus, each state ultimately will have to make the substantive determination under its own constitution whether to follow the new, drastically lower standard of *Smith*, or to continue to follow the higher *Sherbert* standard. Of particular concern is a group of thirty-five states that considered state and federal religious protections to be coextensive during the *Sherbert* years, employing the *Sherbert* analysis "to such an extent that it is unclear whether their state constitutions would independently support a compelling governmental interest test. These states may or may not switch their level of scrutiny to coincide with the federal judiciary's new approach."[150] The four states that required a high level of review under their own constitutions prior to *Smith* will likely continue to employ strict scrutiny post-*Smith*. Maine's high court has already done so,[151] and Tennessee, Kentucky and Mississippi will likely follow.[152]

A. *States Following* Smith's *Minimal Scrutiny*

Two state supreme courts have explicitly decided to follow

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limited to these types of provisos. Over forty states guarantee protection to speech on any subject, but then declare that a person may be held responsible for the abuse of that right. COLLINS, *supra* note 36, at 2502.

149. Laycock, *Summary*, *supra* note 15, at 854. For discussion of a parallel shift to state litigation in the Establishment Clause context, see G. Alan Tarr, *Religion Under State Constitutions*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. March 1988, 65, 74-75.

150. Miller & Sheers, *supra* note 36, at 310-11.

151. Rupert v. City of Portland, 605 A.2d 63 (Me. 1992).

152. If we assume that those pre-*Smith* states that protected religion under their own constitutions will continue to do so, and combine them with the post-*Smith* states that have refused to follow *Smith*, we arrive at a total of seven: Tennessee, Kentucky, Mississippi, Minnesota, Massachusetts, Maine, and Washington. Against those seven we have three states following *Smith*'s minimum rationality standard of review: Oregon, Vermont and Iowa.

the federal lead in *Smith*: Oregon and Vermont.[153] When, in 1990, the U.S. Supreme Court remanded *Employment Division v. Smith* to the Oregon Supreme Court for implementation of the final decision, the Oregon Supreme Court welcomed the federal adoption of the lower standard of review and therefore maintained the state constitutional position announced four years earlier when it had first considered *Smith*.[154]

Similarly, Vermont also decided explicitly not to interpret its own constitution in a way that expands the scope of free exercise rights.[155] In *State v. DeLaBruere*,[156] Vermont's Supreme Court chose to follow federal constitutional analysis as set forth in *Smith*. The case involved parents who were homeschooling their children and who refused to comply with certain state regulations. Under *Smith*, these facts fall within the so-called "hybrid" category which involves a constitutional right in addition to the free exercise of religion—here, the rights of parents to control the religious upbringing of their children. Hybrid cases continue to enjoy strict scrutiny review by the courts, and so the Vermont Supreme Court required the state to show a compelling governmental interest implemented through the least restrictive alternative. The chosen standard of review is not at issue here. For purposes of this article, the significant move of the state court was that it declined to employ the strict scrutiny standard under its own constitution and

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153. Employment Div. v. Smith, 799 P.2d 148 (Or. 1990) (on remand to the Oregon Supreme Court after the U.S. Supreme Court issued its decision in Employment Div. v. Smith, 494 U.S. 872 (1990)); State v. DeLaBruere, 577 A.2d 254 (Vt. 1990).

154. Employment Div. v. Smith, 799 P.2d 148 (Or. 1990). Oregon originally denied compensation because the *unemployment compensation statute* was facially neutral, and generally applicable. The U.S. Supreme Court would deny compensation because the *criminal statute* was facially neutral and generally applicable.

155. The Vermont Constitution states:

> That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.

VT. CONST. ch. 1, art. 3.

156. 577 A.2d 254 (Vt. 1990).

instead employed it under *Smith*.

Iowa might be considered the third state to have adopted the *Smith* analysis under its own constitution, yet this remains unclear. Unlike Oregon and Vermont, each of which stated that its state constitution would not provide for a higher standard of judicial review in free exercise cases, the Iowa Supreme Court's opinion in *Hope Evangelical Lutheran Church v. Iowa Department of Revenue & Finance* makes no such statement.[157] In this case a church challenged a use tax assessment on the purchase of out-of-state church supplies on both federal and state constitutional grounds. Interestingly, the language of free exercise protection in the Iowa Constitution is identical to that of the First Amendment.[158] However, after reproducing the language of both constitutions, the court proceeded to uphold the assessment as a valid exercise of state taxing authority on wholly federal grounds without separately analyzing the state constitutional provision.[159] Thus, the court relied exclusively on federal precedent to find that compliance with this generally applicable, facially neutral tax law was no different from compliance with other generally applicable, facially neutral laws.

This case is a classic example of a court's failure to clarify whether its judgment rests on federal grounds alone or on both state and federal grounds.[160] If the Iowa court intended to interpret its state constitutional provision to be coextensive with the federal interpretation, then Iowa could be added to those states refusing to find a higher standard of review in their fundamental law. On the other hand, the lack of clarity regarding the specific constitutional basis for its decision could mean that it still retains the opportunity to make an independent judgment about free exercise under its own constitution in areas outside the tax field.

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157. 463 N.W.2d 76 (Iowa 1990), *cert. denied*, 111 S. Ct. 1585 (1991).

158. The Iowa Constitution reads as follows:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.

IOWA CONST. art. I, § 3.

159. The court applied the Supreme Court's *Swaggart* analysis to reject the free exercise claim in this case. *Hope*, 463 N.W.2d at 80 (citing Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990)). Although *Swaggart* is applied (because of the factual similarities), *Smith* is mentioned. *Id.*

160. *See supra* notes 50-55 and accompanying text.

B. States Departing from Smith*'s Minimal Scrutiny*

Minnesota and Washington have adopted the federal language of "compelling state interest" and "least restrictive alternative" to interpret their provisos. Only the state's interest in preventing licentiousness and ensuring peace and safety can override religious freedom, which mirrors *Sherbert*'s requirement that there be a compelling state interest to override free exercise rights. The Minnesota Supreme Court held that Minnesota's citizens are "afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution" because the federal language precludes only the "prohibition" of free exercise, while the state language "precludes an infringement on or an interference with religious freedom and limits the permissible countervailing interests of the government."[161]

In applying these notions to actual cases, the Minnesota Supreme Court employs a highly structured balancing analysis. For example, in *Hershberger II*, Amish citizens sought exemption from the state's "slow-moving vehicle" law.[162] Rather than place an orange triangle on their buggies, the Amish (whose religious convictions prevent them from using gaudy colors and symbols) requested that they be permitted to outline their buggies in silver reflecting tape. The state conceded that the reflecting tape was equally suitable for safety, but wanted to preserve uniformity. The court did not simply accept the assertion by the state that safety was involved to override the denial of a religious exemption. It had indicated in *Cooper v. French* that the "plain language" of the proviso "commands [the] court to weigh the competing interests."[163] The court borrowed this "weighing" analysis from federal free exercise precedent, stating that the proviso "invites the court to balance competing values in a manner that the compelling state interest test we relied on [earlier] ably articulates: . . . the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means."[164] If any accommodation can be reached through the use of a less restrictive al-

161. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990).
162. *Id.* For procedural history, see *supra* notes 29-30 and accompanying text.
163. Cooper v. French, 460 N.W.2d 2, 9 (Minn. 1990).
164. *Hershberger*, 462 N.W.2d at 398.

ternative that will enable both the religious interest and the state interest to be protected, such an accommodation must be accepted.[165] Only if the state can show that safety cannot be achieved through any less restrictive alternative will the religious liberty interest yield. In the strictest sense then, to infringe permissibly upon a religious practice, the practice must be fully inconsistent with public safety.[166]

In a plurality opinion in *Cooper v. French*, the Minnesota Supreme Court also upheld the rights of a landlord to deny an apartment to an unmarried cohabiting couple on the grounds that such a rental would violate the landlord's religious convictions.[167] The court held that protecting cohabitation was not a compelling interest sufficient to override the landlord's religious exercise.

The Washington Supreme Court also interprets its proviso to mean that religious practice can be outweighed only by a compelling state interest implemented through the least restrictive alternative. In *First Covenant Church II*,[168] a church challenged the designation of the exterior of its house of worship as a landmark. The court found that the designation did indeed burden religious practice under both the federal and state constitutions and that historic preservation did not embody a compelling governmental interest sufficient to justify the burden.[169]

Justice Utter of the Washington Supreme Court, in his concurring opinion in *First Covenant Church II*, was concerned

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165. *Id.* at 399.

166. Minnesota vigorously develops the least-restrictive-alternative element of the strict scrutiny standard. Before a compelling interest can interfere with free exercise, the religious practice must be *fully inconsistent* with the state's interest. Any accommodation of both religious practice and the state's goal must be accepted. This shares similarities with the analysis of Kentucky and Tennessee. *See supra* notes 132-134 and accompanying text. A required choice of the least restrictive alternative leads Kentucky to grant broad autonomy to church schools, and calls on Tennessee's Supreme Court to analyze numerous alternatives to the outright prohibition on snake handling before making its final determination.

167. *Cooper*, 460 N.W.2d at 9.

168. 840 P.2d 174 (Wash. 1992). For procedural history, see *supra* notes 33-34 and accompanying text.

169. The Washington Supreme Court relied on an earlier state case to determine what constitutes a compelling state interest. *See* State *ex rel.* Holcomb v. Armstrong, 239 P.2d 545, 548 (Wash. 1952) (only a danger which is "clear and present, grave and immediate" justifies infringement of free exercise of religion, where government's interest in protecting specified persons from disease outweighs individual's right to refuse an x-ray).

that the court had unnecessarily adopted federal concepts of compelling state interest and least restrictive alternative, and even the concept of "balancing." He emphasized that the specific language of the Washington Constitution expressly limited the governmental interests that may outweigh the otherwise absolute right to liberty: preventing licentiousness and ensuring peace and safety. Since historic preservation involves neither interest of the state, the court need not reach the issue of whether the state's interest is compelling.[170]

While this interpretive method did not command a majority in Washington, it did in Massachusetts. Massachusetts' constitutional proviso precludes government interference with religious freedom unless the religious practice disturbs the public peace or obstructs others in their religious worship. In *Society of Jesus v. Boston Landmarks Commission*,[171] the Jesuits challenged the designation of the interior of their church as a landmark. The historic preservation commission had become involved in the placement of altars; because of this, the Jesuits claimed a constitutional violation. In agreeing that the state constitution was violated, the high court set out a two-tiered test. If government is found to have restrained worship "in the manner and season most agreeable to the dictates of conscience," the court looks to see if the religiously motivated conduct disturbs the peace or the worship of others. If it does not, the government regulation must yield. Therefore, the Massachusetts Constitution provides a categorical prohibition against governmental restraints of religious worship when the "escape clauses" are inapplicable.[172] This is very similar to Washington Supreme Court Justice Utter's suggested approach.[173] The Massachusetts Supreme Judicial Court went on to say that in the event the religious practice does disturb the peace or the worship of others, the court is required to engage in a balancing of the religious and state interests.[174] Note again the sensitivity to religion: even when the proviso is applicable, the state regulation may still be required to yield.

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170. *First Covenant Church*, 840 P.2d at 191-92 (Utter, J., concurring).
171. 564 N.E.2d 571 (Mass. 1990).
172. *Id.* at 574.
173. *See supra* notes 168-170 and accompanying text.
174. "The constitutionality of a law that would interfere with the exercise of religion must depend on a balancing of the State's interest in the law's enforcement against the individual's interest in practicing his religion as he chooses." Commonwealth v. Nissenbaum, 536 N.E.2d 592, 595 (Mass. 1989).

Moreover, although no balance was required under its test, the court nonetheless offered its judgment that state historic preservation "is not sufficiently compelling to justify restraints on the free exercise of religion."[175]

The Maine Supreme Court's discussion of its state constitution in *Rupert v. City of Portland*[176] is not as fully developed as in these other decisions because in *Rupert* the religious claimant lost. The plaintiff argued that he smoked marijuana only for religious purposes, and therefore sought return of the pipe that police had confiscated from him. The court continued to employ the language developed in the *Sherbert* federal context, finding under its state constitution that Maine had a compelling governmental interest and no less restrictive alternative that would avoid the burden placed on plaintiff.[177] Under its separate federal analysis, the Court held that the state satisfies *Smith*'s lower standard because the criminal statute under which the pipe was taken is generally applicable.[178]

The California Supreme Court currently faces the question of what standard of review to employ in free exercise cases. In *Donahue v. Fair Employment & Housing Commission*, a landlord refused to rent to an unmarried, cohabiting couple.[179] The couple sued under rent discrimination laws. The appellate court held that a religious exemption from those laws was required under the state constitution because religion was burdened and because non-discrimination against unmarried cohabitors is not a compelling state interest justifying the burden.[180] The appellate court also found that prior to *Smith*, the California Supreme Court had repeatedly used the compelling interest test based upon both federal and state constitutional grounds and had considered the interpretations of state and federal free exercise coextensive. The appellate court held that despite the change in federal interpretation after *Smith*, the pre-*Smith* compelling interest test (which incorporates the least

175. *Society of Jesus*, 564 N.E.2d at 574.
176. 605 A.2d 63 (Me. 1992).
177. *Id.* at 66-67.
178. *Id.* at 67-68.
179. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *reh'g granted & opinion superseded*, 825 P.2d 766 (1992). The *Donahue* case is factually identical to Cooper v. French, 460 N.W.2d 2 (Minn. 1990), in which a plurality opinion of the state's high court rejected *Smith* and applied its own constitutional law to find protection for religion that explicitly exceeded the federal level.
180. *Donahue*, 2 Cal. Rptr. 2d at 33.

restrictive alternative requirement) continues to be the controlling analysis under state constitutional law.[181]

One of the most significant aspects of this independent religious exercise jurisprudence, both during the *Sherbert* years (in Tennessee, Kentucky, Mississippi and Maine) and in the post-*Smith* period (in Minnesota, Massachusetts, Maine and Washington), is the more sophisticated treatment of religious activity than in the federal arena. After *Sherbert* and its immediate progeny, the U.S. Supreme Court became increasingly wooden in its applications of the *Sherbert* approach, understanding "burden" in overly narrow terms, or too readily finding a compelling state interest. Often the institutional and associational aspects of religion were not fully appreciated as something to be protected.[182] In addition, *Smith*'s rejection of judicially mandated religious exemptions has completely ignored the dynamic interaction between church and culture, and thus threatens the ability of religious groups to make the theological choice of the appropriate type of interaction with the culture, whether friendly, critical, engaged, or withdrawn.[183]

State interpretation has been far more hospitable to these associational and ecclesiological issues and generally more open to the complexity of religion and the variety of its forms. Most significantly, in none of the state cases is religion understood as narrowly as it came to be in federal cases—that is, as obedience to a set of rules. Rather, most of the state cases address group rights: the free exercise rights of churches to design their buildings, inside and out, free of historic preservation restrictions (Washington, Massachusetts); the free exercise rights of the Amish to use alternative safety measures when riding their buggies in public streets (Minnesota); and the free exercise rights of church schools to choose their own teachers and textbooks (Kentucky). These cases have taken the integrity of the religious community as a paramount value. Even the snake

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181. *Id.* at 39-41. "The California Supreme Court has not yet addressed the application of *Smith*. Unless the California Supreme Court adopts the approach in *Smith*, even if we found the approach in *Smith* preferable, we are bound to continue to follow the balancing test and compelling state interest analysis as a matter of state constitutional law." *Id.* at 40.

182. *See* Glendon & Yanes, *supra* note 7, at 537 (advocating a "structural" approach to religious liberty that accounts for the "institutional and associational, as well as the individual, aspects of religious freedom").

183. *See* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 784-95 (1992).

handlers of Tennessee, whose practice was ultimately held unlawful, were given the most careful attention. Moreover, state courts have recognized and protected manifestations of religious life that are deeply connected with the wider society. For example, Minnesota and California have permitted landlords to refuse rentals to cohabiting couples, thereby protecting religious liberty in a commercial context.[184]

States now have the opportunity to engage in the interpretation of their own constitutions and thus to enter the decisional dialogue with other state and federal courts, not only to "restore" the pre-*Smith* standard, but to reshape it as well. In so doing, state constitutional interpretation might avoid some of the weaknesses of the pre-*Smith* jurisprudence, in particular its overly narrow interpretation of burden and its overly generous interpretation of compelling state interest.[185] State constitutional interpretation has the potential to better address the associational and institutional aspects of free exercise,[186] and thus might ensure that the church-culture interaction, and the ecclesiological judgments that flow from that interaction, are better protected from unwarranted governmental interference.[187]

C. Encouraging Departure from Smith

This article has emphasized the use of provisos as textual sources of "compelling governmental interest" requirements (or of some other interpretation that limits the types of state interests that can override religious exercise). This emphasis, however, is not intended to suggest that interpretive independence is limited to states with provisos. More than half of the states in the nation have no such language, and other states, like Iowa, have texts mirroring the federal language. Even without proviso language, textual differences alone provide a tremendous source of independent interpretation. Such was the case in Tennessee and Kentucky, which, during the *Sherbert* years,

184. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *reh'g granted & opinion superseded*, 825 P.2d 766 (1992); Cooper v. French, 460 N.W.2d 2, 9 (Minn. 1990).

185. For discussion of some of those weaknesses, see Glendon & Yanes, *supra* note 7; *see also* Carmella, *supra* note 183, at 795-99.

186. Glendon & Yanes, *supra* note 7, focus on these aspects of free exercise. For many examples of the ways in which state constitutional interpretation can more authentically serve all areas of the law, see Hartigan, *supra* note 78, *passim*.

187. *See* Carmella, *supra* note 17.

found an independent basis for strict scrutiny.[188] As for those states whose language mirrors that of the Federal Free Exercise Clause, nothing precludes them from making an independent analysis. Three years ago the federal language was interpreted by the U.S. Supreme Court to require strict scrutiny review; simply because the Court has departed from the earlier understanding does not compel the states to follow suit. Here the debate between relational and non-relational approaches to state court interpretation becomes significant: a non-relational approach affords state courts the appropriate freedom to give meaning to their texts independent of federal choices.[189] The states with provisos may be the leaders in the movement to depart from *Smith*, but nothing prevents the interpretive autonomy of other states.

States yet to make a decision about *Smith* should not fear that a lack of interpretive autonomy in the past compels them now to follow federal precedent. Minnesota and Massachusetts never exhibited interpretive independence before *Smith*; Washington did, but in a very limited way. The fact that the states' interpretations of their own constitutions are shaped by the *Sherbert* analysis leads more persuasively to the conclusion that the *Sherbert* analysis remains the state constitutional interpretation, even though the current federal interpretation has changed. To conclude otherwise would mean that any change by the U.S. Supreme Court automatically amends state constitutions and their interpretations.[190] As Justice

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188. *See supra* notes 133-134 and accompanying text. See also Miller & Sheers, *supra* note 36, at 311-18, for a comprehensive discussion of available textual arguments.

189. *See* Miller & Sheers, *supra* note 36, at 311-18.

190. Thanks to Professor Laycock for this observation. This is precisely the mistake the Vermont Supreme Court made in State v. DeLaBruere, 577 A.2d 254 (Vt. 1990). The court discussed constitutions and cases from more than a dozen states, which, at first glance, looks like a rather sophisticated treatment of texts from sister states. But upon closer review, it serves to make only one point: during the *Sherbert* years, state religious exercise provisions were typically understood as coextensive with the Federal Free Exercise Clause. It concludes unnecessarily from this fact that it therefore should now continue to follow the federal analysis and not invoke its own constitution. But it could have concluded just as easily that if its own constitution has been understood to support a strict scrutiny standard in the past, now that the federal doctrine has changed, it can continue to understand its state constitution to require strict scrutiny. Its analysis of sister states is further undermined because two states it placed on its list—Minnesota and Maine—have explicitly departed from the federal standard since *Smith*. *See supra* notes 21-37 and accompanying text. In fact, Maine had already established an independent standard, but the Vermont Supreme Court misread Blount v. Depart-

Pashman of the New Jersey Supreme Court wrote,

> The United States Supreme Court, by defining liberties in a more limited manner, cannot prevent future decisions by state supreme courts that interpret state constitutions to go further. If this were true, the Supreme Court would effectively be the final arbiter, not only of federal constitutional law, but of much state constitutional law. Yet both the Supreme Court and this Court have consistently rejected this position.[191]

Minnesota gave no indication during the *Sherbert* years that it might depart from federal precedent. After *In re Jenison* was remanded in 1963, Minnesota followed the lead set by the U.S. Supreme Court, either interpreting its own constitution in tandem with the federal interpretation or ignoring it completely. In fact, *Hershberger I* was based solely on the First Amendment.[192] Only a dissenting opinion in a 1985 decision argued for a more expansive protection of free exercise rights under the state constitution on the grounds that the text of Minnesota's provision is stronger.[193]

Similarly, Massachusetts had no prior history of departing from Supreme Court precedent in the free exercise area. In fact, Justice Wilkins of the Massachusetts Supreme Judicial Court wrote in 1980 that "[t]he pervasive impact of the Supreme Court's treatment of the freedom of religion under the first amendment seemingly has made unnecessary any consideration of the scope of article 2 in recent decades."[194] As late as 1989 its high court wrote that federal analysis

> aids us in analyzing the scope of religious freedom under our own Constitution . . . . While it is possible that, in the future, we may conclude that there are circumstances in which art. 2 provides protection for religious practices not protected by the

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ment of Education & Cultural Services, 551 A.2d 1377 (Me. 1988).

191. Right to Choose v. Byrne, 450 A.2d 925, 948-49 (N.J. 1982) (Pashman, J., concurring in part, dissenting in part). In the speech context, see State v. Schmid, 423 A.2d 615 (N.J. 1980); in the unlawful search context, see State v. Hunt, 450 A.2d 952 (N.J. 1982).

192. State v. Hershberger, 444 N.W.2d 282 (Minn. 1989), *vacated*, 495 U.S. 901 (1990). *See supra* notes 29-30 and accompanying text.

193. McClure v. Sports & Health Club, 370 N.W.2d 844, 873-75 (Minn. 1985) (Peterson, J., dissenting).

194. Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 897 (1980).

> First Amendment as construed and applied by Federal courts, we perceive nothing in the language or history of art. 2 that suggests that art. 2 affords more protection in connection with [the religious practice in this case] than does the First Amendment.[195]

Washington has a history of sensitivity to its own constitutional provisions in the immediate post-incorporation era. In 1943, when a Jehovah's Witness flag-salute case came before it, the Washington Supreme Court decided emphatically not to follow the U.S. Supreme Court's example in *Minersville School District v. Gobitis*.[196] Washington's decision in *Bolling v. Superior Court*[197] came down nearly six months before *West Virginia Board of Education v. Barnette*[198] overruled *Gobitis*. The Washington Supreme Court was aware that support for *Gobitis* had eroded on the U.S. Supreme Court, that the federal district court in *Barnette* had refused to recognize *Gobitis* as controlling, and that the Kansas Supreme Court had recently found expanded religious protection under its own constitution.[199] Rather than anticipate a federal turnaround, however, the state court based its decision solely on its state constitutional protections in order to announce a decision that would be stable and final despite fluctuations at the federal level. After this case, Washington followed the lead of the U.S. Supreme Court, interpreting its own constitution in tandem with the federal interpretation, but it continued to provide a robust interpretation of free exercise within the federal framework. In its 1982 decision in *City of Sumner v. First Baptist Church*,[200] for instance, the state's highest court required the type of accommodation that Minnesota demanded in *Hershberger II*: if any accommodation can be reached through the use of a less restrictive alternative that will serve both the religious interest and the state interest, it must be accepted. Relying heavily on

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195. Commonwealth v. Nissenbaum, 536 N.E.2d 592, 595 (Mass. 1989).

196. 310 U.S. 586 (1940).

197. 133 P.2d 803 (Wash. 1943).

198. 319 U.S. 624 (1943).

199. The Washington Supreme Court said in *Bolling*, "Under all the circumstances, [*Gobitis*] can scarcely be deemed to have become authoritative." *Bolling*, 133 P.2d at 808.

200. 639 P.2d 1358 (Wash. 1982). Enforcement of the building code against the church school would have resulted in its closing. The court therefore held that the municipality must attempt to accommodate the church school by relaxing its standards while still meeting the goals of fire safety for children.

Sumner, the court in *First Covenant Church I* based its decision in favor of the church on a single, vigorous interpretation of both the First Amendment and article 1, section 11.[201]

Thus, on the eve of *Smith*, only Maine had explicitly articulated a separate standard of review under its own constitution.[202] Minnesota, Massachusetts, and Washington had assumed that their state free exercise protection was redundant and coextensive with that of the federal constitution. This is the current position of thirty-five states,[203] all of which possess the interpretive autonomy to depart from *Smith*, just as these states have done.

VI. FREE EXERCISE AND ESTABLISHMENT CONCEPTS: STATE AND FEDERAL

Professor Mary Ann Glendon and Raul Yanes have written about the need to analyze the relationships within and among texts.[204] Applying their concerns to the issues raised in this article, one must analyze developments in state free exercise jurisprudence in relation to establishment texts within the state document. The same analysis is also needed when considering the relationship between state and federal texts. A vigorous expansion of religious exemptions under a strict scrutiny standard of judicial review is, I submit, fully compatible with these other texts.

State courts have been far more comfortable departing from federal precedent in the area of state establishment provisions than their analyses of free exercise suggest.[205] Since states have had considerable experience in developing their own jurisprudence in the establishment area, they ought not be reluctant to do the same in the free exercise area. In fact, the major implication of independent interpretation of state religion provisions is the opportunity to develop a comprehensive and coherent religious liberty doctrine, one which integrates

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201. First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash.), *vacated*, 111 S. Ct. 1097 (1990). *See supra* notes 33-34 and accompanying text.

202. Maine was among the handful of states that held during the *Sherbert* years that its own constitution required the burden/compelling interest/least restrictive alternative test; but this decision was rendered quite recently—1988. Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377 (Me. 1988).

203. *See supra* note 150 and accompanying text.

204. *See generally* Glendon & Yanes, *supra* note 7.

205. *See* FREISEN, *supra* note 45, §§ 4.01-4.05.

the treatment of free exercise and establishment issues.[206]

The language of the state constitutional texts clearly suggests such an integrated analysis. In fact, the wording and placement of establishment provisions in state constitutions show that they were intended to promote freedom of religious exercise. They do this by prohibiting compulsory church attendance, compulsory support of ministers or places of worship, state preferences for particular sects, societies or denominations, and state support for any particular creed, mode of worship or system of ecclesiastical polity.[207] In addition, although the provisions provide tax exemptions for religious organizations, they also prohibit public funds from going directly to religious organizations, societies or schools.[208] The U.S. Supreme Court in *Everson v. Board of Education* referred to these issues as "establishment" concerns, ignoring their important role in protecting voluntary religious exercise.[209]

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206. Tarr, *supra* note 6, at 77-78.

207. *Id.* at 85-86.

208. In addition to the "no compelled church attendance/support of minister" and "no-preference" language, most state constitutions were amended in the nineteenth century to bar the use of public funds for any religious institution, society, or school and to prevent the public schools from being used for sectarian purposes. This resulted from the anti-Catholic sentiment of the time and ensured the continued Protestant hegemony. *See* Laycock, *Summary*, *supra* note 15, at 845; Tarr, *supra* note 149, at 67-68.

209. 330 U.S. 1 (1947). The Court wrote:

> The "establishment of religion clause" of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). The Court captures these limits on state action under the "establishment" rubric since these were precisely the types of abuses of personal liberties caused by governments that had an established church. But these are, at bottom, "free exercise" concerns. If I am compelled to pay for a church my free exercise has been burdened by the state's established religion because in the free exercise of my religion I may choose to support another church or no church at all. The establishment is

The language of most state constitutions does not separate the establishment provisions from the freedom of worship, conscience, and religious exercise provisions.[210] For most, in fact, the provisions are so interconnected that to name some "establishment" and others "free exercise" artificially divides unified concerns and imports the federal problem of the "tension between the Free Exercise and Establishment Clauses."[211] Because of the variety of textual sources for the protection of religious exercise and for non-establishment, some states have not been overly concerned with categorizing a case under the label of "free exercise" or "establishment" so as to limit themselves to one or the other body of case law.[212] Sometimes state courts even jump back and forth between the federal analysis of one concept and the state analysis of another.[213] Precisely because the texts of state constitutions weave together and overlap their free exercise and establishment provisions (as opposed to creating neatly divided categories in theoretical tension with each other), a greater possibility exists for developing coherent and comprehensive religious liberty doctrines at the state level. Professor Tarr suggests that "given the greater specificity of state constitutional guarantees, such tensions [between establishment and free exercise concepts] are less likely to arise. Certainly, they have not yet arisen . . . ."[214]

The history of independent interpretation of state establishment provisions suggests that the main prohibition is against institutional support or aid to religion.[215] From this

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the state's action that burdens free exercise, but there is no "compelling state interest" to have an established church because the Establishment Clause has forbidden it.

210. *See supra* notes 206-207 and accompanying text.

211. Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting).

212. *See, e.g.*, Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978) (holding cross on city hall unconstitutional under California Constitution, violating both the no-preference and establishment provisions).

213. *See, e.g.*, Heritage Village Church & Missionary Fellowship, Inc. v. State, 263 S.E.2d 726 (N.C. 1980), where the North Carolina Supreme Court applied the Federal Establishment Clause test because it read state freedom-of-conscience and no-religious-discrimination provisions together with *federal* establishment as " 'coalesc[ing] into a singular guarantee of [the] . . . principle of separation of church and state.' " *Id.* at 730 (quoting Braswell v. Purser, 193 S.E.2d 90, 93 (N.C. 1972).

214. Tarr, *supra* note 6, at 78.

215. After incorporation in the 1940s, and to the present, "some state courts followed the [U.S. Supreme Court's] results and reasoning in interpreting and applying diverse state clauses. Others continued to issue independent interpretations and some rejected the Supreme Court's lead." FREISEN, *supra* note 45, § 4.01. Pro-

institutional emphasis,[216] Professor Tarr concludes that governmental accommodation of religion is constitutional as long as it does not involve favoritism, monetary aid, or interference with religious freedom.[217] Thus, at the state level, there is room for the development of a coherent understanding of man-

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visions regarding no compelled attendance or support of a church and no preference rarely serve as the basis of stricter interpretation. In fact, states interpreting the no-preference clauses typically find that they are either less strict than the federal standard or consistent with the federal analysis of the *Everson-Lemon* line of cases. *See, e.g.*, Clayton v. Kervick, 267 A.2d 503, 506, 528 (N.J. 1970) ("Our state provision is less pervasive, literally, than the federal provision. Hence our discussion will be limited to the federal provision as interpreted by the United States Supreme Court."), *vacated*, 403 U.S. 945 (1971); *see also* FREISEN, *supra* note 45, § 4.03; Fritz, *supra* note 40, at 58-60 (indicating that in most cases the state equates federal and state provisions, despite differences in text, and therefore has same interpretation of no-preference clause as Establishment Clause in Federal Constitution). Some states have developed the no-preference doctrine into one of equal access to ensure that religious as well as secular groups are eligible for government aid generally available for public purposes. *See, e.g.*, Fort Sanders Presbyterian Hosp. v. Health & Educ. Facilities Bd., 453 S.W.2d 771 (Tenn. 1970) (finding the no-preference provision of the state constitution to mean that state aid to religiously affiliated institutions was constitutional when available on equal footing with secular and educational institutions as part of a general program fostering a public purpose).

Specific no-aid provisions from the nineteenth century have been the source of most independent interpretation that goes beyond the federal interpretation to strike permissible accommodations of religion. *See* FREISEN, *supra* note 45, § 4.05; Note, *supra* note 111, at 639-40. Of fifteen states interpreting these no-aid provisions, twelve have been interpreted more broadly than the Federal Establishment Clause. *Id.* at 640. "These 'no aid' clauses are unique to state constitutions, and have frequently required invalidation of state financial aid programs that would be tolerated by the first amendment." FREISEN, *supra* note 45, § 4.01. A Massachusetts Supreme Judicial Court justice has gone so far as to assert that the "restrictive impact of [the Massachusetts anti-aid provision] has rendered the federal anti-establishment provision relatively insignificant in certain respects." Wilkins, *supra* note 194, at 897. The no-aid provisions have therefore given the state courts the right to limit governmental accommodation of religion more severely than is required at the federal level.

216. Professor Tarr indicates

> Early state constitutions did not seek to circumscribe the influence of religion in society or to eliminate religious influence on government but rather to prevent governmental intrusion into the religious sphere . . . . State courts continued to recognize Christianity as part of the common law and to sustain convictions for blasphemy when speakers disparaged Christian beliefs . . . . Thus, state constitutions were interpreted so as to protect Christianity and to enforce the prevailing, Protestant consensus."

Tarr, *supra* note 149, at 67. Constitutions were not neutral; they were very much in favor of religion as long as no preference was shown to a particular religious group, no money aid was given to any religious groups, and the recognition of religion did not interfere with anyone else's freedom of belief and worship. *Id.* at 73.

217. Tarr, *supra* note 6, at 105-06.

datory and permissible accommodations. Aggressive exemptions of religious practice, resulting from the use of a strict scrutiny review of laws burdening religion, are fully compatible with this institutional separation—both protect the integrity of religion.[218]

A return to strict scrutiny at the state level is completely compatible not only with establishment provisions within state texts, but with the Free Exercise Clause and Establishment Clause of the First Amendment. *Smith* provides a low standard of review which the states are free to exceed with the use of their own strict scrutiny standard. The Federal Establishment Clause does not preclude this for several reasons. First, *Smith* itself retains strict scrutiny review for several categories of cases. Moreover, *Smith* did not overrule any earlier free exercise cases, and its adoption of a lower standard was not related to any developments in establishment jurisprudence. Second, religious exemptions have repeatedly been held constitutional[219] and are clearly permissible when they are "designed to

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218. The fact that the opportunity for coherent jurisprudential development exists does not mean it has been achieved. Washington's tradition of independence in the no-aid area and more recent independence in the free exercise area illustrate some inconsistencies. In Witters v. State, 689 P.2d 53 (Wash. 1984), the state high court refused to consider Larry Witters' study for the ministry religious exercise because it was not mandatory. The Washington Supreme Court held unconstitutional, under the Federal Establishment Clause, the availability of public funding for Larry Witters, under a general program of funding education for the blind, because he planned to use the money to study for the ministry. The U.S. Supreme Court reversed, explaining that this particular form of aid was a permissible accommodation. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1985). But the Court refused to hold that the Federal Free Exercise Clause required the result:

> On remand, the state court is of course free to consider the applicability of the "far stricter" dictates of the Washington State Constitution . . . . We decline [Witters'] invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to [Witters] regardless of what the State Constitution commands.

Id. at 489 (citations omitted). Practically at the invitation of the U.S. Supreme Court, the Washington high court, on remand, reinstated its original holding, this time on the grounds that the aid was unconstitutional on state non-establishment grounds. 771 P.2d 1119, 1123 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989). This plainly contradicts the broad understanding of religious exercise in First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1990). Definitional inconsistencies must be resolved or explained if the integrity of religious conduct is to find protection in state texts.

219. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989); Employment Div. v. Smith, 494 U.S. 872 (1990).

alleviate governmental intrusions on [religious practices]."[220] State court decisions to exempt religious behavior from generally applicable laws are, by definition, based upon a determination that a burden on religious practice must be alleviated. If general legislative exemptions are welcomed in both Free Exercise and Establishment Clause jurisprudence without any specific showing by religious claimants of a burden then all the more reason to welcome court-mandated exemptions issued after careful review of the burden and state interests at stake. Finally, the U.S. Supreme Court has never reversed a state supreme court for giving too much protection to religious exercise under its own constitution. In fact, the two occasions on which it has reversed state court decisions based on state constitutional interpretations have involved states which violated the First Amendment because they were trying to avoid violating state (and federal) establishment provisions.[221]

States choosing to employ a strict scrutiny standard of review can serve to engender dialogue on the meaning of religious liberty among state courts and between state and federal courts. But meaningful dialogue will require proponents of the non-relational and relational approaches to compromise on their methodology. State-first theorists should acknowledge the damage *Smith* has caused and will continue to cause to the free exercise of religion; they must be willing to look seriously at the gap in substantive protection that this decision has created at the federal level. Likewise, federal-first theorists should not underestimate the profound interpretive independence available under state constitutions and the urgent need to mine those state constitutions as sources of rights in the post-*Smith* period.

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220. *Texas Monthly*, 489 U.S. at 18 n.8. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 696-708 (1992).

221. In McDaniel v. Paty, 435 U.S. 618 (1978), the Tennessee Constitution disqualified ministers from legislative positions. The state legislature applied this provision to candidates for delegate to the Tennessee limited constitutional convention in 1977 in a separate statute, "[a]ny citizen of the state who can qualify for membership in the House of Representatives . . . may become a candidate for delegate to the convention." *Id.* at 621. The Supreme Court held this attempt to ensure no state establishment violated the Free Exercise Clause. Similarly, Missouri argued in Widmar v. Vincent, 454 U.S. 263 (1981), that if the state university permited a religious group to meet on campus it would be violating the establishment provisions of the federal and state constitutions. The U.S. Supreme Court held that this violated federal free speech protections. *Id.* at 276-77.

VII. CONCLUSION

Professor Emily Fowler Hartigan has written,

> [State constitutions are] being interpreted into being in fifty different states. The "new federalism" has an unpredictable reality, which does not neatly follow anyone's political agenda. It has the means for authenticity; it practices the core virtue of American local government, participation. . . . We are taking back our texts, living our laws.
>
> . . . .
>
> In our federal constitutional jurisprudence, we have forgotten what gives life to the reading of the text and the commentary on the text. . . . [But with state constitutions] new ways of talking and reclamation of fundamental law have loosed new streams of life-giving spirit to enflesh the "mere skeleton[s]" of the words of text.[222]

While it may be too soon to determine whether the emerging post-*Smith* decisional law is an authentic act of "taking back our texts," several themes—or at least their rough outlines—emerge from it. The foregoing has shown how the free exercise texts in many state constitutions refer explicitly to multiple dimensions of religious exercise, explicitly limit the state's authority in the area of religious exercise, and explicitly acknowledge that the state is not the ultimate source of authority. By reclaiming those texts, state courts courageous enough to depart from *Smith* can provide robust protection for religious liberty through strict limits on the government's ability to interfere in religious exercise. What appear to be arising from this emerging state jurisprudence are a more authentic definition of religious liberty, a more genuine application of the compelling interest standard, and new, clearer textual bases for the definition of a compelling state interest. Taken together, these factors may portend a new atmosphere of respect for religious liberty.

222. Hartigan, *supra* note 78, at 273-74 (footnotes omitted).