Cornell Law Review

Volume 84
Issue 4 *May 1999*

Article 4

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NOTE

FREE EXERCISE OF RELIGION UNDER THE NEW YORK CONSTITUTION

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INTRODUCTION

The right to the free exercise of religion is one of the first freedoms the First Amendment to the United States Constitution protects.[1] The Free Exercise Clause[2] reflects the Framers' sensitivity to the threat of governmental interference with the beliefs and practices of religious minorities.[3] A critical virtue of this constitutional right is the extent to which it grants religious believers exemptions from statutes that impose burdens on their free exercise of religion.[4] These exemptions protect the religious liberty of people who profess faith in small or unpopular religions.[5] For example, constitutional free exer-

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1 *See* U.S. CONST. amend. I. *See generally* BARRY LYNN ET AL., AMERICAN CIVIL LIBERTIES UNION, THE RIGHT TO RELIGIOUS LIBERTY (2d ed. 1995) (giving guidance to the right to free exercise); THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS (James E. Wood, Jr. ed., 1990) [hereinafter THE FIRST FREEDOM] (collection of works) (organizing several articles discussing the importance of the free exercise of religion).

2 U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

3 *See* Douglas Laycock, *Original Intent and the Constitution Today*, *in* THE FIRST FREEDOM, *supra* note 1, at 87, 106 ("The memory of serious religious conflict was more recent to the founders than the memory of slavery is to us, and minor persecutions continued into their political lifetimes."); *see also* CONSTITUTIONAL LAW RESOURCE CTR., LAW, RELIGION AND THE "SECULAR" STATE 103 (1991) (remarks of Michael W. McConnell) ("Religious accommodations, almost without exception, involve religious minorities of one sort or another."). *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-71 (1990) (describing the historical underpinnings of the Free Exercise Clause and the important role toleration of diverse religious beliefs played in the development of free exercise provisions in the constitutions of the original states and in the First Amendment).

4 *See* McConnell, *supra* note 3, at 1418 (describing the "no-exemptions view" of the Free Exercise Clause, which contends that the clause exists "to prevent the government from singling out religious practice for peculiar disability," and the "exemptions view" that the clause serves to "[protect] religious practices against even the incidental or unintended effects of government action").

5 *See* Laycock, *supra* note 3, at 106 ("The religion clauses are designed in part to protect these unusually fervent believers . . . . Religious minorities need not be reasonable; the religion clauses exist in part because religious minorities are not reasonable."); *see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 59-68 (1991) (describing instances of past persecutions of religious groups, including Quakers, Catholics, Mormons, and Jehovah's Witnesses, and those contemporary religious groups, such as believers in Santeria, Hare Krishnas, Scientologists, and other groups loosely labeled cults, who face persecution for their beliefs and whose religious freedom, he argues, the Free Exercise Clause should protect).

cise provisions permit members of the Old Order Amish faith exemption from mandatory public school attendance laws that required enrollment beyond the eighth grade and avoidance of traffic laws that required them to mount a gaudy orange triangle on their buggies because both laws conflict with their religious beliefs.[6] Rastafarians and Mohawks, who attach important religious significance to hair length and style, have constitutional exemption from hair-length regulations for prisoners and prison guards that conflict with their religious beliefs.[7] Also, Athabascans are exempt from Alaskan hunting laws when they kill moose for use in traditional religious burial services.[8] The availability of these exemptions has been an important component of the right to religious liberty.[9]

When the majority passes laws that conflict with religious minorities' free exercise of religion, it threatens repression and persecution of the minority religions, even if the conflict is unintentional.[10] This threat to religious minorities motivated the framers of the early colonial charters and state constitutions to include clauses protecting the free exercise of religion.[11] These framers were probably familiar with the proposition that individuals who invoke their free exercise rights should be exempt from generally applicable laws.[12]

Unlike in the colonial period, when the Federal Bill of Rights and the New York Constitution were drafted, religious freedom for minority religions is no longer a matter of critical concern for most people

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6 *See* Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972) (exempting the Amish from mandatory public school attendance after graduation from the eighth grade); State v. Hershberger, 462 N.W.2d 393, 395-97 (Minn. 1990) (exempting the Amish from mounting orange triangles on their buggies and instead permitting the use of white reflective tape); State v. Miller, 549 N.W.2d 235, 242 (Wis. 1996) (same).

7 *See* Benjamin v. Coughlin, 905 F.2d 571, 575-77 (2d Cir. 1990) (permitting Rastafarian prisoners to keep their dreadlocks in contravention of prison rules); Francis v. Keane, 888 F. Supp. 568, 572 (S.D.N.Y. 1995) (denying prison officials' motion for summary judgment and allowing Rastafarian prison guards an exemption from correctional services hair-length regulations); Rourke v. New York State Dep't of Correctional Servs., 615 N.Y.S.2d 470, 472 (App. Div. 1994) (exempting a prison guard who belonged to the Longhouse religion from cutting his hair in spite of correctional services hair-length regulations based on the New York Constitution's free exercise clause).

8 *See* Frank v. State, 604 P.2d 1068 (Alaska 1979).

9 *See* Laycock, *supra* note 3, at 106-07 (arguing that the history of religious persecution and early controversies over conscientious objection to oath taking, military conscription, and payment of religious taxes inform the meaning of the Free Exercise Clause).

10 *See* Laycock, *supra* note 5, at 4 (arguing that even "facially neutral" laws will yield "religious oppression").

11 *See* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION 31 (1997) ("The absence of religious tests would, the New York constitution claimed, 'guard against the spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind.'"); Laycock, *supra* note 3, at 106-08; McConnell, *supra* note 3, at 1424-30.

12 *See* McConnell, *supra* note 3, at 1511.

in the United States.[13] But, like the Baptists, Quakers, Lutherans, and Presbyterians of the colonial era,[14] those individuals and groups whose religious beliefs and practices leave them outside the mainstream of contemporary American religious and political society benefit from the rights free exercise clauses afford. Free exercise of religion claims continue to be relatively common.[15] Many involve prisoners, and most involve minority religions that lack the political clout to protect their practices from the democratic majority, which often enacts generally applicable laws that conflict with those practices.[16]

Recent free exercise claims in New York courts include Muslim prisoners' claims that prohibitions on prayer in the prison yards infringed their religious duty to pray five times a day,[17] an Amish man's claim that a state requirement to photograph him for a pistol license

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13 *See generally* KRAMNICK & MOORE, *supra* note 11, at 13 (describing "religious correctness" as the notion that the United States is a Christian nation and that the government should recognize this "fact" as the major concern for Americans today in the enforcement of free exercise rights).

14 *See* McConnell, *supra* note 3, at 1437-40.

15 An electronic database search gives a rough idea of how often free exercise is mentioned in court decisions, compared to other First Amendment rights. On the Westlaw NY-CS-ALL database, which includes state and federal decisions of New York courts, the Second Circuit Court of Appeals and the United States Supreme Court, 69 decisions between January 1, 1997 and February 1, 1999 mention the phrases "freedom of religion" or "free exercise of religion." Reading these decisions indicates that 56 actually involve individuals' claims based on their free exercise right. The remaining decisions mention this right without deciding a claim based on it. Without a date restriction, the database contains 664 decisions that mention one of the two phrases, without necessarily deciding a free exercise claim. By comparison, 824 decisions in the NY-CS-ALL database mention the term "freedom of the press," and 2799 mention "freedom of speech," also without necessarily deciding claims based on these rights. Between January 1, 1997 and February 1, 1999, only 23 decisions mention "freedom of speech," and 200 mention "freedom of the press." Of the 664 decisions which mention either "freedom of religion" or "free exercise of religion," 123 are Supreme Court cases and seven are from Second Circuit decisions that originated in states other than New York. Therefore, at least 430 decisions that mention the right to free exercise of religion are from New York courts. As noted above, some of these 430 cases only mention the right, without deciding a claim based on it. Nevertheless, these figures suggest that cases involving free exercise claims occur fairly often in New York courts and that cases involving other First Amendment rights do not exceed free exercise cases by an overwhelming margin.

16 *See* CONSTITUTIONAL LAW RESOURCE CTR., *supra* note 3, at 103 (remarks of Michael W. McConnell) (stating examples of religious "accommodations" in the early years of the United States); Laycock, *supra* note 3, at 106 (describing the freedom of religion clause's intent to prevent conflict, especially among religious minorities). Of the 56 cases in the Westlaw NY-CS-ALL database that involved a free exercise claim between January 1, 1997 and February 1, 1999, 28 involved prisoners and 47 involved non-Christian religions or small Christian sects, such as the Amish or Quakers.

17 *See* Withrow v. Bartlett, 15 F. Supp. 2d 292, 295 (W.D.N.Y. 1998) ("Constitutional protections extend to prisoners insofar as the inmates must be given 'reasonable opportunities . . . to exercise the religious freedom guaranteed by the First and Fourteenth Amendment[s].'" (citing Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (alterations in original))); Chatin v. New York, No. 96 Civ. 420(DLC), 1998 WL 196195 at *8 (S.D.N.Y. Apr. 23, 1998)

violated his religious convictions,[18] Muslim proselyters' claims that a New York City vending law requiring licenses for selling oils and incenses burdened their free exercise of religion,[19] and a Jehovah's Witness's claim that the tort law's mitigation of damages requirement infringed on her religious convictions by forcing her to either accept blood transfusions against her beliefs or forego a damage award.[20] These claims are similar because the overwhelming majority of the United States population does not share the claimants' particular religious beliefs.

For nearly three decades, the United States Supreme Court's settled interpretation of the Free Exercise Clause reflected an understanding of the importance of this right. Beginning with *Sherbert v. Verner*,[21] its cases required a compelling governmental interest to justify burdens on religious free exercise.[22] Although the Court did not grant exemptions often,[23] the standard for review recognized free exercise of religion as an important substantive right.[24] This understanding changed dramatically in 1990 when the Court, in *Employment Division v. Smith*,[25] altered its interpretation of the Free Exercise Clause to restrict the availability of religion-based exemptions from generally applicable laws.[26] Instead of the *Sherbert* compelling state interest balancing test, the *Smith* standard denies exemptions from "neutral laws of general applicability."[27] This doctrinal change raises the

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(finding the rule "unconstitutionally vague as applied to the conduct for which the plaintiff was punished" on due process grounds).

18 *See In re* Miller, 656 N.Y.S.2d 846, 846 (Allegany Co. Ct. 1997).

19 *See* Al-Amin v. City of New York, 979 F. Supp. 168, 170-71 (E.D.N.Y. 1997) (finding no violation of religious rights).

20 *See* Williams v. Bright, 658 N.Y.S.2d 910, 912 (App. Div. 1997).

21 374 U.S. 398 (1963).

22 The United States Supreme Court announced the "compelling interest" test for burdens on the free exercise of religion in *Sherbert*. *Sherbert* involved a Seventh-Day Adventist's claim that she was denied unemployment benefits because she refused to work on Saturdays, based on her religious convictions. *See id.* at 399-402. The Court held that "to condition the availability of benefits upon this appellant's willinguess to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. After *Sherbert*, religious groups and believers were able to challenge generally applicable laws that imposed on their beliefs or on their religiously motivated conduct on the ground that the laws unconstitutionally penalized their conduct. *See* McConnell, *supra* note 3, at 1412-13.

23 *See infra* note 50 and accompanying text.

24 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) ("In practice, . . . the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling."); *see also* Laycock, *supra* note 5, at 13-17 (describing the difficulty of treating this substantive entitlement neutrally).

25 494 U.S. 872 (1990).

26 *See* Laycock, *supra* note 5, at 1-2; McConnell, *supra* note 24, at 1110.

27 *Smith*, 494 U.S. at 879 (internal quotation marks omitted); *infra* notes 54-64 and accompanying text.

prospect that individuals or groups whose religious beliefs are not accommodated through the legislative process will be left without constitutional protection for any religious conduct at odds with generally applicable legislation.[28]

In reaction to *Smith*, several state supreme courts interpreted their state constitutions to provide more expansive protection for religious liberty than the Federal Free Exercise Clause allows under its current narrow reading.[29] The *Smith* decision also prompted a backlash from Congress, which passed the Religious Freedom Restoration Act of 1993 ("RFRA")[30] in an attempt to use its Fourteenth Amendment enforcement power[31] to restore the compelling interest balancing test and provide greater protection for the free exercise of religion. In the 1997 case *City of Boerne v. Flores*,[32] the United States Supreme Court, without addressing its own free exercise jurisprudence, struck down RFRA on the ground that it exceeded Congress's Fourteenth Amendment power.[33] *Flores* effectively restored the *Smith* test for assessing First Amendment free exercise claims; as a result, state constitutions are crucial to providing heightened protection for freedom of religion.[34]

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28 *See Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."); *see also* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 851 (1997) (decrying the effect of *Smith* on the religious practices of Native Americans); Laycock, *supra* note 3, at 108 (noting that "religious minorities will suffer for conscience in America, and the federal courts are closed to them").

29 *See* Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992) (explaining that Maine's constitution calls for a compelling interest test); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 572 (Mass. 1990) (providing that a "public safety question" must exist to allow regulation); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (same); First Covenant Church v. City of Seattle, 840 P.2d 174, 186 (Wash. 1992) (en banc) ("Our state constitutional and common law history support a broader reading of [Washington's constitution], than of the First Amendment.").

30 Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to bb-4 (1994)), *declared unconstitutional by* City of Boerne v. Flores, 521 U.S. 507 (1997).

31 U.S. CONST. amend. XIV, § 5; *see Flores*, 521 U.S. at 516-17. The Supreme Court found that the Free Exercise Clause applied to the states through the Due Process Clause of the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

32 521 U.S. 507 (1997).

33 *See id.* at 536.

34 *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275, 278 ("*Smith* has made the state's political processes the unwitting, yet final arbiter of permissible religious conduct."); Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1026 (1994) (suggesting that states "should consider the historical scope and meaning of free exercise under their own constitutions, as well as policies, practices, and principles common to their states . . . to define their states' free exercise standards"); Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 754-55 (1993) (advising that "individuals seeking religiously

The New York Constitution, adopted twelve years before the United States Constitution, proclaims that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."[35] The New York Court of Appeals has relied primarily on federal law for its free exercise rulings in the past fifty-eight years.[36] Despite a tradition of religious toleration dating to colonial times, New York courts in recent years have only rarely invoked the state constitution to decide free exercise claims.[37] Although the court of appeals never decided a case involving RFRA,[38] New York's lower courts relied on RFRA to decide free exercise cases.[39] Since the Supreme Court's decision in *Smith*, New York's highest court has not faced the issue of whether the New York Constitution affords a higher level of protection for religious liberty than the Federal Free Exercise Clause does.[40] Given the restrictive federal test announced in *Smith* and reinstated in *Flores*, the New York Court of Appeals may have to decide free exercise claims that are based solely on the state constitution and, in rendering these decisions, may have to reassess the continued validity of a parallel construction for the state and federal free exercise provisions. One commentator has argued that heightened protection of the free exercise of religion under the New York Constitution is "questionable" and

based exemptions from generally applicable laws should argue under both federal and state constitutions in order to obtain their fullest free exercise protection").

35 N.Y. CONST. art. I, § 3.

36 *See* David E. McCraw, *"Free Exercise" Under the State Constitution: Will the Exception Become the Rule?*, 12 TOURO L. REV. 677, 694-95 (1996). Possibly due to unfamiliarity with the interpretation of the state constitution's free exercise provision, relatively few free exercise claims invoke it. Reading the 56 free exercise claims in the Westlaw NY-CA-ALL database between January 1, 1997 and February 1, 1999, *see supra* note 15, it appears that only three included claims based on the New York Constitution.

37 *See infra* Parts II, III.B, VI.A.

38 In *New York State Employment Relations Board v. Christ the King Regional High School*, 682 N.E.2d 960, 963-65 (N.Y. 1997), the court of appeals relied solely on *Smith* to support its Free Exercise Clause holding, without mentioning RFRA. The court of appeals decided no other free exercise cases while RFRA was enforced.

39 *See, e.g.*, Kenneth R. v. Roman Catholic Diocese, 654 N.Y.S.2d 791, 796 (App. Div. 1997) (deciding a negligence claim against the diocese in light of RFRA); Geisinsky v. Village of Kings Point, 640 N.Y.S.2d 212, 214 (App. Div. 1996) (upholding a zoning ordinance under RFRA because it did not substantially abridge the plaintiff's free exercise rights).

40 The only case since 1990 in which the court of appeals directly addressed a claim based on the free exercise of religion was *Christ the King Regional High School*, 682 N.E.2d at 963-65. In that case, the school argued that the New York State Labor Relations Act interfered with parents' free exercise rights. *See id.* at 963. This claim was "invoked with sweeping, threshold cloakage" and relied solely on the federal First Amendment, not on RFRA nor on the state constitution. *Id.* at 964. Deciding the case based on the *Smith* standard, the court of appeals both rejected the claim because the New York State Labor Relations Act was a neutral law of general applicability and refused to address whether it would sustain a more specific claim, including one involving a particularized burden on free exercise. *See id.*

that the free exercise protection embodied in the New York Constitution may remain "largely forgotten."[41]

An examination of the history and precedent of free exercise in New York, of persuasive authority from other jurisdictions, of the protection the court of appeals affords to other personal liberties under the New York Constitution, and of lower court cases in New York that interpret the state's free exercise clause compels a different interpretation of the possibility for heightened protection of religious freedom in New York State. If free exercise claimants realize that the New York Constitution may offer a higher level of protection than the Federal Constitution, they probably will begin to base their claims on the state provision. These challenges ultimately may be successful, even when the law at issue is one of general applicability.[42]

Part I of this Note examines the Supreme Court's Free Exercise doctrine to provide a backdrop for the interpretation of states' constitutional provisions that endorse free exercise. Parts II through V construct the theoretical framework within which the New York Court of Appeals would interpret the free exercise clause of the state constitution. Part II applies this framework and provides the historical background for the development of free exercise principles in New York State, which culminated in the adoption of article I, section 3 of the New York Constitution. Part III analyzes the cases in which the New York Court of Appeals has interpreted the state's constitutional provision. Part IV examines the development of free exercise jurisprudence in other states, which is based on provisions of those states' constitutions, and analyzes the extent to which these provisions might provide guidance to the court of appeals. Part V catalogues the protections the New York Court of Appeals has afforded other civil liberties under the state constitution. Part V's analysis will help assess whether the court's doctrine in these areas provides guidance for how it will treat challenges to state laws that burden religious practices. Part VI discusses post-*Smith* cases in New York's lower courts, considers the principles the court of appeals would probably use to analyze a free exercise claim under the state constitution, and describes how claimants should employ the court's probable interpretation to increase their odds of success.

41 McCraw, *supra* note 36, at 707.

42 *See infra* Part VI.C.

I

THE CURRENT STATE OF FREE EXERCISE JURISPRUDENCE UNDER THE FEDERAL CONSTITUTION

A. The Balancing Test and the *Smith* "Law of General Applicability" Test

Prior to its 1963 decision in *Sherbert*, the Supreme Court had decided relatively few cases involving the construction of the Free Exercise Clause.[43] The Court had held that freedom of belief, as distinct from freedom of religious conduct, had absolute protection under the First Amendment.[44] The Court, however, upheld generally applicable laws that indirectly burdened religious conduct only to the extent that the conduct did not conflict with the law, provided that the state had no less burdensome means to accomplish its purpose.[45]

In *Sherbert*, the Supreme Court increased the level of scrutiny for laws that burdened the free exercise of religion.[46] The *Sherbert* test required the state to show a compelling interest in burdening, even indirectly, the plaintiff's free exercise of her religion.[47] In addition, the decision required the state to prove that its means of protecting

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43 *See generally* A.E. Dick Howard, *The Wall of Separation: The Supreme Court as Uncertain Stonemason*, *in* RELIGION AND THE STATE 85, 86-87 (James E. Wood, Jr. ed., 1985) (discussing the evolution of the Court's free exercise jurisprudence). The first case in which the Court confronted the Free Exercise Clause was *Reynolds v. United States*, 98 U.S. 145 (1878), which involved a claim by Mormons that a federal anti-polygamy law impermissibly burdened their freedom of religion. *See* Howard, *supra*, at 86. Except for *Davis v. Beason*, 133 U.S. 333 (1890), which also involved the religious freedom of Mormons, "the Supreme Court had little further occasion to explore the First Amendment's religion clauses until the 1940s," when the Court considered (and rejected) claims by Jehovah's Witnesses, such as *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Howard, *supra*, at 86; *see also* WILLIAM C. SHEPHERD, TO SECURE THE BLESSINGS OF LIBERTY 8-11 (1985) (discussing Supreme Court free exercise cases prior to *Sherbert* and arguing that "until the 1960s, important decisions that attempted to balance first amendment religious rights against legitimate concerns of the state were weighted in favor of the latter").

44 *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute.").

45 *See id.* at 607. The Court noted that

> if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id.

46 *See* Carmella, *supra* note 34, at 277; McConnell, *supra* note 3, at 1412; McCraw, *supra* note 36, at 680-681.

47 *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (framing the issue as "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

the compelling interest were the least restrictive possible.[48] For twenty-seven years, the Supreme Court applied this standard to free exercise challenges of federal and state laws, which resulted "in court-mandated religious exemptions from facially neutral laws of general application whenever unjustified burdens were found."[49] Nevertheless, few free exercise claims in the Supreme Court were successful.[50] Despite the limited success of claimants in the high court, the compelling interest test found broad application in lower federal courts, in state courts, and in informing the decisions of legislatures and executive agencies.[51]

Despite the infrequency with which the Supreme Court validated religious exemptions, its analysis of free exercise cases under the *Sherbert* test remained both consistent and relatively uncontroversial.[52] The *Sherbert* standard offered at least the possibility that an individual could claim a constitutional exemption from a law solely because it burdened the right to free exercise of religion.[53] But in 1990, the Supreme Court rejected *Sherbert*'s compelling interest standard for free exercise claims,[54] effectively foreclosing claims based solely on the Free Exercise Clause. Replacing its previous test, the Court "held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[55] In order for a law to be unconstitutional under the *Smith* standard, it must either be specifically intended to burden the practice of a religion[56] or fall within some exception to the rule of "general applicability."[57] The *Smith* ma-

48 *See id.* at 407 (holding that "it would plainly be incumbent upon the [Government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

49 Carmella, *supra* note 34, at 277.

50 *See* McConnell, *supra* note 24, at 1109-10 ("[T]he free exercise doctrine was more talk than substance."). Professor McConnell contends that "it must be conceded that the Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test," but instead applied a more relaxed standard. *Id.* at 1127. Nevertheless, he insists that the balancing analysis employed was a form of heightened scrutiny with more teeth than the standard announced in *Smith*. *See id.* at 1128.

51 *See id.* at 1110.

52 *See id.* at 1109.

53 *Cf. id.* at 1109-10 ("In its language, it was highly protective of religious liberty.").

54 *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to such challenges.").

55 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

56 *See* Carmella, *supra* note 34, at 278 ("To be constitutionally suspect, a law must target religion."). The Supreme Court struck down a city ordinance on these grounds in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

57 Douglas Laycock has identified six exceptions to the general *Smith* standard. These include two instances of "hybrid situations" (when freedom of religion is being exercised

jority, however, held that the *Sherbert* balancing test "would not apply . . . to require exemptions from a generally applicable . . . law," which narrowed the range of possible exemptions.[58]

Smith effectively forced courts deciding free exercise cases under the Constitution to apply the "general applicability" standard, unless the claimant could persuade the court that the free exercise claim was tied to another constitutional right, thereby falling within one of the *Smith* exceptions.[59] Claimants who cannot do so lose their claims, without the court considering either the extent to which the law burdens their freedom of religion or the state's interest in imposing the burden.[60] For example, a federal district court following *Smith* held that the Free Exercise Clause did not protect a Hmong couple, whose religious faith strictly prohibits desecration of the deceased, from a state law that mandated an autopsy on their son's body.[61] Another federal court upheld a city ordinance that prohibited churches from operating in commercial areas, even though the law significantly impaired the ability of one congregation to participate in religious services.[62] Regulators relying on *Smith* forced Sikhs to remove the turbans required by their religion to work on construction sites.[63] *Smith* effectively removed from the Free Exercise Clause any substantive protection for religion per se, leaving a formal neutrality that reduced freedom of religion to a special case of equal protection and which eviscerated it as an independent constitutional right.[64] After *Smith*, the Free Exercise Clause is no longer available as a means of seeking an exemption to a law of general applicability.

B. The RFRA, *Flores*, and the Reinstatement of the *Smith* Test

Three years after the *Smith* decision, Congress passed RFRA.[65] This statute forbade the government (federal or state) from "substantially burden[ing] a person's exercise of religion [unless] it demon-

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either as speech or in the context of parental control of a child's education) and "regulatory schemes that require an 'individualized governmental assessment of the reasons for the relevant conduct.'" Laycock, *supra* note 5, at 41 (quoting *Smith*, 494 U.S. at 884).

58 *Smith*, 494 U.S. at 884.

59 *See* Laycock, *supra* note 5, at 41.

60 *See id.* at 54 & n.218 (noting that, after *Smith*, "the Court . . . is unlikely to be vigorous about checking for bad [legislative] motive or religious gerrymander").

61 *See* Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

62 *See* Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654 (D. Minn. 1990) (dismissing that part of the church's claim that relied solely on a violation of the Free Exercise Clause), *aff'd in part and rev'd in part*, 948 F.2d 464 (8th Cir. 1991).

63 *See* John W. Whitehead, *Religious Freedom in the Nineties: Betwixt and Between* Flores *and* Smith, 37 WASHBURN L.J. 105, 106 (1997).

64 *See* Laycock, *supra* note 5, at 4, 54-55.

65 RFRA was backed by an ideologically diverse coalition of organizations, including the National Association of Evangelicals, the American Civil Liberties Union, the National Conference of Catholic Bishops, and the American Jewish Congress, and was sponsored in

strates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[66] RFRA was intended to restore the *Sherbert* test for free exercise cases.[67] For four years, courts decided free exercise cases by relying on RFRA's reiteration of the *Sherbert* compelling interest standard.[68]

In 1997, the Supreme Court decided in *Flores* whether RFRA was constitutional.[69] The Catholic Archbishop of San Antonio sued the City of Boerne, Texas, after the city denied a building permit to expand a historic church to accommodate an expanding congregation.[70] The Archbishop relied on RFRA, claiming the city's action violated the congregation's free exercise of religion.[71] The Court's opinion addressed neither the limits of free exercise nor the appropriate constitutional test under which to analyze the Archbishop's claim.[72] Instead, it examined the narrow issue of whether Congress's enacting RFRA was a constitutional use of its power.[73] The Court held that by enacting RFRA, Congress unconstitutionally exceeded its Fourteenth Amendment power[74] and intruded into the judiciary's realm.[75] Only the dissenting and concurring Justices engaged in a substantive discussion of Free Exercise Clause jurisprudence.[76] By striking down RFRA, the Court effectively restored the *Smith* standard as the applica-

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the Senate by Senators Orrin Hatch and Ted Kennedy. *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

66 42 U.S.C. § 2000bb-1(b) (1994).

67 *See* McCraw, *supra* note 36, at 683; *see also* City of Boerne v. Flores, 521 U.S. 507, 512-16 (1997) (discussing the legislative history and congressional intent underlying the passage of RFRA).

68 *See, e.g.*, Weir v. Nix, 114 F.3d 817, 822 (8th Cir. 1997) (analyzing a prisoner's claim according to the statutory language in RFRA and determining that the state did not "substantially burden" his free exercise of religion by limiting inmates to three hours of group worship per week); Belgard v. Hawai'i, 883 F. Supp. 510, 516-17 (D. Haw. 1995) (finding RFRA constitutional as applied to a Native American prisoner's claim for a religious exemption to prison haircutting requirements); Campos v. Coughlin, 854 F. Supp. 194, 206-07 (S.D.N.Y. 1994) (granting a preliminary injunction based on RFRA for a prisoner who was prohibited from wearing beads in conformity with his Santeria beliefs); Hunt v. Hunt, 648 A.2d 843, 854 (Vt. 1994) (analyzing a claim that incarceration to enforce a support order violated a father's free exercise rights under RFRA and the Vermont Constitution and determining that both required the government to use less restrictive means to enforce the order to avoid infringing on plaintiff's religious liberty).

69 *See Flores*, 521 U.S. at 511.

70 *See id.* at 512.

71 *See id.*

72 *See id.* at 512-36.

73 *See id.* at 516-36.

74 *See id.* at 535-36.

75 *See id.*

76 Justice O'Connor's dissent in *Flores* vigorously challenged the holding in *Smith*: "I believe that we should reexamine our bolding in *Smith*, and do so in this very case." *Id.* at 548 (O'Connor, J., dissenting). Her dissent included an extensive history of the original understanding of the Free Exercise Clause. *See id.* at 548-64 (O'Connor, J., dissenting).

ble test for assessing claims against state actors for violating the Free Exercise Clause.

Despite the *Flores* decision, a plaintiff challenging a *federal* law that burdens her free exercise of religion may still invoke the RFRA standard in limited situations.[77] But by striking down those sections of RFRA based on the Fourteenth Amendment, *Flores* leaves free exercise claimants with the *Smith* neutral law of general applicability test. Believers whose religious practices collide with laws of general applicability must argue either that the law in question is intended to burden religious practice[78] or that a "hybrid" situation exists in which the freedom of religion is burdened along with another fundamental right.[79] In addition, claimants can assert that their state constitution protects the free exercise of religion to a greater extent than the Constitution does after *Smith*. The balance of this Note discusses the basis on which free exercise claimants in New York should argue that its constitution currently affords their religious practices greater protection than the Federal Constitution.

II

FREE EXERCISE OF RELIGION IN NEW YORK—INTRODUCTION AND HISTORY

The return to the *Smith* standard,[80] which allows no exceptions to laws of general applicability for religious exercise, and the passionate debate within the current Supreme Court over the interpretation of the Free Exercise Clause,[81] suggest that state constitutions may provide a better route than the Federal Constitution to heightened protection for religious free exercise.[82] Echoing Justice O'Connor's

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Justice Scalia's concurrence (joined by Justice Stevens) defended the *Smith* holding. *See id.* at 537-44 (Scalia, J., concurring).

77 *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 860-61 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998) (noting that *Flores* did not decide the constitutionality of RFRA as applied to federal law and holding "that Congress had the authority to enact RFRA and make it applicable to the law of bankruptcy"). *In re Young* involved a claim that a bankruptcy court, by requiring a church to turn over a bankrupt member's tithes to the bankruptcy trustee as a fraudulent conveyance, violated the member's free exercise of religion. *See id.* at 857.

78 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

79 *See supra* note 57.

80 *See supra* Part I.A.

81 *See* Levy, *supra* note 34, at 1024-26 (detailing the divergent positions of the Justices in their various opinions in *Church of the Lukumi Babalu Aye*); *supra* note 76.

82 *See* Carmella, *supra* note 34, at 279; *see also* 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, 548 (1986) (arguing "that the [Supreme] Court's contraction of federal rights and remedies" led, in the fifteen years following 1970, to "over 250 published [state court] opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law").

assessment of the Free Exercise Clause's historical underpinnings in her *Flores* dissent,[83] one commentator has urged that "as the state courts seek to interpret their own free exercise provisions in the wake of *Smith*, they should consider the historical scope and meaning of free exercise under their own constitutions."[84]

The New York Court of Appeals traditionally has exercised independent judgment about the content of the New York Constitution.[85] Chief Judge Kaye of the court of appeals has stated that "where we conclude that the Supreme Court has changed course and diluted constitutional principles," the court of appeals has the "responsibility to support the State Constitution when [it] examine[s] whether [it] should follow along as a matter of state law."[86] Chief Judge Kaye has repeatedly articulated in carefully considered concurrences her firm belief that the court of appeals should independently interpret the New York Constitution.[87] Her presence as the chief judge may signal a renewed commitment in the court of appeals to state constitutional protection for free exercise rights.[88]

Historically, the New York Court of Appeals has accounted for many factors when determining whether a constitutional right has a broader scope under the state constitution than under the Federal Constitution.[89] These factors include the following: "differences in the text, structure, or historical underpinnings between the State and Federal Constitutions";[90] distinctive local attitudes concerning the right; whether the issue is of particular state or local concern; and whether the right has historically received greater protection under the New York Constitution than under the Federal Constitution.[91] This Part assesses the scope of free exercise in New York by examining the history of freedom of religion in New York and the state constitution's free exercise clause.

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83 *See* City of Boerne v. Flores, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting).

84 Levy, *supra* note 34, at 1026.

85 *See infra* Part V.

86 People v. Scott, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring).

87 *See generally* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163 (1994) (discussing Judge Kaye's concurrences and dissents in cases that significantly curtailed state constitutional protections of various rights and liberties during the era of previous Chief Judge Wachtler).

88 *See id.* at 1205 (describing it as "clear, from the post-Wachtler voting and decisional records, that the court has moved in [Judge Kaye's] direction").

89 *See* People v. Alvarez, 515 N.E.2d 898, 899 (N.Y. 1987) (listing factors); *see also infra* Parts IV.B, VI.B (discussing how the New York Court of Appeals would analyze a free exercise claim).

90 *Alvarez*, 515 N.E.2d at 899.

91 *See id.*

A. Origins of Free Exercise in New York

New York had a high degree of religious diversity at the end of the colonial period.[92] In its early years as New Amsterdam, the colony was extremely intolerant of several religious groups and established the Dutch Reformed Church as its official religion.[93] The Dutch colonial rulers eventually developed tolerance for the Puritan beliefs of New England immigrants who settled on Long Island, mainly because of their need to encourage trade and settlement in the colony.[94] After the British seized New Amsterdam from the Dutch in 1664, the colony did not establish an official church.[95] Instead, the English rulers of New York extended a "promise of religious toleration to all Christians."[96] In 1674, the Duke of York, who held the patent to the colony, instructed his governor to permit the free exercise of "what Religion soever," as long as the religion did not disturb the public peace.[97] The Colonial Assembly, which first convened in 1683,[98] enacted a Charter of Liberties establishing a bill of rights for the colony[99] and "confirm[ing] the substance of the Duke's Laws regarding religion."[100]

During the next ninety years, colonial authorities ineffectively attempted to promote the Anglican Church in the face of a diverse majority of believers in other faiths, which resulted in effective religious toleration.[101] "New York continued to provide a haven for diverse

92 *See* PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 10 (1996); *see also* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 7 (1964) (including New York in an elite group of provinces that "provided more of a melting pot of religious and national groups than any other part of America and consequently were generally ahead of other sections in developing religious freedom"); Edwin S. Gaustad, *Religion and Ratification*, *in* THE FIRST FREEDOM, *supra* note 1, at 41, 56 (including New York as one of the original states most representative of religious diversity).

93 *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 62 (1986).

94 *See id.* at 62; GALIE, *supra* note 92, at 16-17.

95 *See* CURRY, *supra* note 93, at 62. Four counties in the metropolitan New York area claimed to have established the Anglican church, but non-Anglicans denied this claim. *See id.* at 161; *see also* GALIE, *supra* note 92, at 29 (detailing the history of religious toleration in New York between 1665 and the adoption of the New York State Constitution in 1777, including the period following the Glorious Revolution of 1688 during which the colonial government "pursued an active policy of ensuring that the Anglican Church had a privileged position in the colony").

96 GALIE, *supra* note 92, at 18; *see also* CURRY, *supra* note 93, at 62 (describing this guarantee as one of the provisions of the Duke's Laws of 1665).

97 GALIE, *supra* note 92, at 29 (quoting 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 218 (Edmund B. O'Callaghan & Berthold Fernow eds., 1853-1887)) (internal quotation marks omitted); *see* CURRY, *supra* note 93, at 62.

98 *See* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION 2 (1991).

99 *See* Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, *in* CONTEXTS OF THE BILL OF RIGHTS 3, 4 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

100 CURRY, *supra* note 93, at 63.

101 *See id.* at 62-72.

groups,"[102] including Quakers and Jews.[103] One exception to this "benign neglect"[104] was the oppressive treatment of Catholics, who in 1691 were the only denomination expressly excluded from the "liberty of Conscience" in New York.[105] The restriction on Catholics' free exercise in New York remained until the adoption of the Constitution of 1777.[106] The Constitution of 1777 also nullified any establishment that had taken place.[107] Thus, "New York was the first state to abandon, by constitutional provision, the previously established churches. Of the first wave of state constitutions adopted between 1776 and 1784, New York came closest to establishing complete religious freedom."[108]

B. The Free Exercise Clause of the New York Constitution

The New York Constitution, article I, section 3, reads:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; 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 this state.[109]

The first and last clauses of this provision are virtually the same as they were in the state's first constitution.[110] This broadly worded free exercise protection reflected New York's tradition of toleration and pro-

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102 *Id.* at 71.

103 *See id.*

104 McConnell, *supra* note 3, at 1424 (referring to the policy of lukewarm religious toleration of Protestant dissenters, Quakers, and Jews).

105 CURRY, *supra* note 93, at 64 (internal quotation marks omitted); *see also* GALIE, *supra* note 92, at 50 (noting the continued hostilities toward Catholics, even in 1777); 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 542 (photo. reprint 1994) (1906) (indicating that the royal instructions to Governor Sloughter were to permit a "liberty of Conscience to all persons except Papists" (internal quotation marks omitted)).

106 *See* 1 LINCOLN, *supra* note 105, at 541-45 (noting that the protection of the free exercise rights of Catholics was "a marked change from the policy concerning religious toleration which then prevailed in the colony"); GALIE, *supra* note 92, at 50. *But cf.* CURRY, *supra* note 93, at 162 (arguing that both a constitutional citizenship requirement and a later statutory test oath that required renouncing foreign ecclesiastical powers effectively curtailed Catholics' free exercise of their religion).

107 *See* N.Y. CONST. of 1777, art. XXXV, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2636 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] ("[A]ll such parts of the said common law, and . . . statutes . . . as may be construed to establish or maintain any particular denomination of Christians or their ministers . . . are, abrogated and rejected.").

108 GALIE, *supra* note 92, at 50.

109 N.Y. CONST. art. I, § 3.

110 *See* N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 107, at 2637; GALIE, *supra* note 98, at 38. The second clause was added during the 1846 Constitutional Convention. *See id.*

tection of religious liberty.[111] The New York Constitutional Convention that drafted the Constitution of 1777 ranked with Virginia's in importance because of both its deliberations and the language it adopted to guarantee the free exercise of religion.[112]

By 1789, twelve of the original states had provisions in their state constitutions protecting religious liberty.[113] New York was one of only four states that unambiguously extended constitutional protection to all religious believers.[114] During the New York Constitutional Convention, John Jay made two proposals to exclude Catholics from the free exercise provision.[115] Jay withdrew one proposal because of fierce opposition from other members of the convention and saw the other proposal fail by a vote of nineteen to ten.[116] The convention's success in extending protection to unpopular faiths indicates "the determination then manifest by many of the patriots to incorporate in the Constitution a provision that should absolutely insure religious freedom."[117]

"[P]articular, defined state interests" limit the right to free exercise of religion in the New York Constitution.[118] The final clause of article I, section 3 provides that "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 this state."[119] Nine of the original states adopted constitutions that contained some restriction on the right to the free exercise of religion to protect the peace or safety of the states.[120] The last clause of article I, section 3 of the New York Constitution is a good example of the manner in which

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111 *See* GALIE, *supra* note 92, at 49.

112 *See* STOKES & PFEFFER, *supra* note 92, at 72-73.

113 *See* McConnell, *supra* note 3, at 1455 (noting that Connecticut was the only exception).

114 The provisions in two states protected only Christians and those in five other states confined the protection to believers in God. *See id.* & n.237. The first draft of the constitution presented to the New York Constitutional Convention mandated "that free Toleration be forever allowed in this State . . . to all denominations of Christians without preference or distinction and to all Jews, Turks and Infidels." 1 LINCOLN, *supra* note 105, at 541 (alteration omitted). This phrase was ultimately excluded from the Constitution of 1777, but the breadth of religious freedom it represents is reflected in the phrase "free exercise and enjoyment of religious profession and worship, without discrimination or preference." N.Y. CONST. art. 1, § 3.

115 *See* 1 LINCOLN, *supra* note 105, at 544; *see also* GALIE, *supra* note 92, at 50 (noting that Jay "pressed ardently for provisions which would have restricted Catholicism in the state").

116 *See* 1 LINCOLN, *supra* note 105, at 544-45.

117 1 *id.* at 543-44.

118 McConnell, *supra* note 3, at 1461.

119 N.Y. CONST. art. I, § 3.

120 *See* McConnell, *supra* note 3, at 1461 & n.257.

early state constitutions limited rights by restricting the extent to which the right could be exercised.[121]

Several authorities argue that a court must weigh a claimant's right against the state's interest when a constitutional provision grants a broadly defined freedom but qualifies it with a public safety restriction.[122] Justice O'Connor contends that article I, section 3 of the New York Constitution, and similar provisions of other early state constitutions, "make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes."[123] The language of the New York Constitution explicitly invokes "peace or safety" as the important government purpose that limits the free exercise of religion. Under this interpretation of the limiting clause, a court must give religiously motivated conduct an exemption from a generally applicable "law[ ] up to the point that such conduct breache[s] public peace or safety."[124]

The history of religious toleration and freedom in colonial New York and the language of article I, section 3 of the New York Constitution, as limited by the last clause of that section, suggest that New York courts should balance a claimant's right to religious freedom against the state's interests in preventing "licentiousness" and in protecting "the peace or safety of [the] state."[125] An early New York court decision that construed the state constitution's free exercise clause recognized this tension between the right and the corresponding limitation and decided in favor of the free exercise claimant because the government's interest was insufficient.[126] The next Part of this Note details the New York courts' interpretations of article I, section 3, which indi-

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121 *See* GALIE, *supra* note 98, at 38 (positing that the peace or safety clause "is typical of early state constitutions in correlating a right with the responsibility for abuse of that right").

122 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 548-64 (1997) (O'Connor, J., dissenting); McConnell, *supra* note 3, at 1464; Nicholas P. Miller & Nathan Sheers, *Religious Free Exercise Under State Constitutions*, 34 J. CHURCH & ST. 303, 314-15 (1992) (implying that a court will have to weigh the interests to give meaning to a peace or safety clause because "the boundary [the clause] sets out must be different in some way from the boundary set down for all general activity"); G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, *in* HUMAN RIGHTS IN THE STATES 21, 24 (Stanley H. Friedelbaum ed., 1988); *see also* CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 65-99 (1965) (surveying the common law history of state constitutional limitations imposed upon the free exercise of religion and noting that a balancing test is applied in many of the cases).

123 *Flores*, 521 U.S. at 555 (O'Connor, J., dissenting).

124 McConnell, *supra* note 3, at 1462.

125 N.Y. CONST. art. I, § 3.

126 *See* People v. Phillips (N.Y. Ct. Gen. Sess. 1813), *in Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199-209 (1955) [hereinafter People v. Phillips]. This case is also discussed in GALIE, *supra* note 92, at 49, and in McConnell, *supra* note 3, at 1410-12, 1504-05. The defendant's name is variously spelled "Phillips" and "Philips" in the original decision. *See* People v. Phillips, *supra*, at 199.

cate that though "the religious exception-seeker has rarely prevailed,"[127] the test remained basically the same.

III
INTERPRETATIONS OF NEW YORK CONSTITUTION, ARTICLE I, SECTION 3

A. Cases Decided Before the Incorporation of the First Amendment: The Origins of Balancing Personal Religious Freedom Against State Interests

Despite New York's history of religious freedom and the broadly worded free exercise provision of article I, section 3, state courts since 1777 rarely have upheld free exercise claims under the state constitution.[128] In 1813, a New York court directly applied the state constitution's free exercise clause in *People v. Phillips*,[129] in which the government attempted to force a Catholic priest to testify in court regarding what he had heard in a confessional.[130] The priest contended that an order requiring him to breach the secrecy of the confessional would violate his conscience, his duties as a minister of the Catholic Church, and the Church's sacred tenets, thereby burdening his free exercise of religion.[131] The court asked whether "the natural tendency of [withholding evidence obtained in the confessional] is to produce practices inconsistent with the public safety or tranquillity."[132] It concluded that the secrecy of the confessional, which is critical to the free exercise of the Catholic faith, does not conflict with the peace or safety of the state.[133]

In 1903, the New York Court of Appeals decided a free exercise challenge under the New York Constitution for the first time. In *People v. Pierson*,[134] the defendant appealed a conviction under a statute that criminalized a parent's failure to furnish medical assistance to his

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127 McCraw, *supra* note 36, at 686.

128 *See* GALIE, *supra* note 98, at 38; McCraw, *supra* note 36, at 680.

129 *See* People v. Phillips, *supra* note 126, at 199-201.

130 *See id.*

131 *See id.* at 200.

132 *Id.* at 208.

133 *See id.* at 209; *see also* GALIE, *supra* note 92, at 49 (discussing the decision of the court in *Phillips*); McConnell, *supra* note 3, at 1505-06 (same). The decision in an earlier case, *People v. Ruggles*, 8 Johns. 290 (1811), which affirmed a conviction for blasphemy and relied on common law restrictions on the right of free speech, also included dicta which maintained that the free exercise provision should be read narrowly, *see id.* at 295-96, and held blasphemy to be "an offense against the public peace and safety." *Id.* at 297; *see* GALIE, *supra* note 98, at 38.

134 68 N.E. 243 (N.Y. 1903). Apparently, no earlier court of appeals cases were brought under the state's free exercise clause. David McCraw notes that neither the parties nor the court in *Pierson* cite earlier court of appeals cases. *See* McCraw, *supra* note 36, at 686 n.50.

child.[135] The defendant claimed that his failure was religiously motivated[136] and asserted that the criminal statute violated article I, section 3.[137] The court, noting that "[t]he peace and safety of the state involve[s] the protection of the lives and health of its children,"[138] held that the state constitution does not guarantee protection to "acts which are not worship."[139] The court's subsequent reference to the constitutionally permissible prohibition against polygamy, even when practiced as part of a religious faith,[140] indicated the meaning of its holding: the act of withholding medical care from one's child, even on religious grounds, is not an act of worship because it conflicts with the state interest in protecting children's lives and health.[141] The state may use its police power to override a religious claim of a parent who denies medical care to a child.[142] The defendant's claim to constitutional protection for his religiously motivated action (or inaction) failed because that action was inconsistent with the peace or safety of the state.

The court of appeals next decided a free exercise claim in 1916 in *People v. Cole*.[143] A Christian Scientist appealed his conviction under a statute that prohibited the practice of medicine without a license.[144] The statute included a provision that it should "not be construed to affect . . . the practice of the religious tenets of any church."[145] In deciding that the appellant's practice of faith healing fell within the exception, the court asserted that "the exception to the prohibition in the statute is broader than the provision of the Constitution of this state"[146] and that "[t]he exception in the statute is not confined to worship or belief, but includes the practice of religious tenets."[147] While apparently narrowing the scope of actions that fall under the free exercise provision, the court failed to decide whether the dis-

135 *See Pierson*, 68 N.E. at 244.

136 *See id.*

137 *See id.* at 246.

138 *Id.*

139 *Id.* McCraw argues that by this phrase, the court "chose to impose a narrow definition of religious freedom." McCraw, *supra* note 36, at 687. In the context of the reference to the "lives and health of its children," *Pierson*, 68 N.E. at 246, and the example of polygamy as a religious practice that may be criminalized, however, the phrase "acts which are not worship," *id.*, does not limit the range of behavior that may be protected under the free exercise clause; rather, it outlines what religious behavior is subject to the "peace or safety" limitation of the clause.

140 *See Pierson*, 68 N.E. at 246.

141 *See id.*

142 *See id.* at 246-47.

143 113 N.E. 790 (N.Y. 1916).

144 *See id.* at 791.

145 *Id.* (quoting Public Health Law § 173) (internal quotation marks omitted) (alteration in original).

146 *Id.* at 794.

147 *Id.*

puted Christian Science practice constituted "religious profession and worship."[148] Instead, it decided the case exclusively on statutory grounds and did not reach the question of the state's countervailing interest.[149]

In 1939, the court of appeals considered the case of *People ex rel. Fish v. Sandstrom*.[150] The parents of a girl whom the school had sent home after she refused, on religious grounds, to salute the flag appealed their conviction for permitting their daughter's truancy.[151] Reversing the conviction on the ground that the student, rather than the parents, should face discipline under the education laws,[152] the court noted that "[w]hile legislation for the establishment of religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. The States, like Congress, are free to reach actions which are in violation of social duties or subversive of good order."[153] After using this language to compare the countervailing values of religious free exercise and "actions which are in violation of social duties," the court, without analysis, concluded that the flag salute requirements did not violate any constitutional rights.[154] In his concurrence, Judge Lehman contended that the State's "powers may not . . . be asserted to prohibit beliefs and practices which are not in conflict with good order or to compel acts which have no reasonable relation to the peace or safety or even the general welfare of the State or Nation."[155] The majority implicitly, and the concurrence explicitly, recognized that a free exercise claim required weighing the individual right against the interests of the state, even though the majority indicated that the free exercise claim, by itself, would have failed in this case.[156]

B. Cases Decided After Incorporation: Balancing Continued and Some Independent Bases for Decision Under the State Constitution

In 1940, the United States Supreme Court held that the First Amendment applied to state actions through the Fourteenth Amendment.[157] Thereafter, until the 1980s, individuals rarely invoked the state constitution when bringing free exercise claims before the New

148 N.Y. CONST. art. I, § 3.
149 *See Cole*, 113 N.E. at 794.
150 18 N.E.2d 840 (N.Y. 1939).
151 *See id.* at 841.
152 *See id.* at 842.
153 *Id.* at 843 (citations omitted).
154 *Id.* at 843-44.
155 *Id.* at 846 (Lehman, J., concurring).
156 *See id.* at 844.
157 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

York Court of Appeals, and the court decided most cases on the basis of the Federal Constitution alone.[158] In the few cases in which the New York Court of Appeals considered both the state and federal free exercise provisions, it used language indicating that it considered the analysis and result under both provisions to be identical.[159] But in several cases, including the most recent court of appeals case to construe the state free exercise provision, the court of appeals applied a balancing test for the state claim and indicated that the scope of state protection is not coterminous with that of the Federal Constitution.

In 1943, the court of appeals first articulated the possibility of divergent standards applicable to state and federal free exercise claims. *People v. Barber*[160] involved the appeal of a Jehovah's Witness convicted of selling religious tracts without a license.[161] In deciding not to construe the licensing statute as prohibiting the free exercise of religion, Chief Judge Lehman stated that the right to freedom of worship was guaranteed both by the Federal Constitution, and "in perhaps even plainer language by the Constitution of the State of New York."[162] He asserted

> that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.[163]

The court held that the statute should be construed not to pertain to the sale of religious tracts, allowing it to avoid the balancing of personal religious interests against state interests.[164]

In most of the cases it decided after the incorporation of the First Amendment, the New York Court of Appeals found that the state's interests outweighed the individual's free exercise rights and there-

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158 *See* GALIE, *supra* note 98, at 38; McCraw, *supra* note 36, at 694-95 (listing cases).

159 *See, e.g.*, La Rocca v. Lane, 338 N.E.2d 606, 612-13 (N.Y. 1975) (holding that the state's interest in ensuring a fair trial outweighed the right of an attorney, who was also a priest, to exercise his freedom of religion by wearing clerical garb in the courtroom); Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 79 N.E.2d 433, 434-35 (N.Y. 1948) (holding that Jehovah's Witnesses' claim that a regulation that prohibited their entrance into apartment complexes for the purpose of proselytizing violated their right to free exercise under both constitutions was unsustainable).

160 46 N.E.2d 329 (N.Y. 1943).

161 *See id.* at 329-30.

162 *Id.* at 331.

163 *Id.*

164 *See id.* at 332-33 (declining to rule on the constitutionality of a literal construction of the statute because if the statute were "so construed[,] it might be applied in [a] manner which would seriously burden or destroy fundamental rights" and therefore concluding "that the ordinance should not be construed as intended to apply to the activities of the defendant").

fore denied the free exercise claim.[165] However, the court consistently has balanced the individual's right to free exercise against the state's countervailing interests in protecting the public.[166] A lower court decision, which the court of appeals subsequently affirmed, articulated the test in New York:

> [I]t has been long held that the peace and safety of society may not be interfered with by religious scruples, as indeed our State Constitution expressly prescribes.
>
> We balance, then, the interest of the individual right of religious worship against the interest of the state which is sought to be enforced. The process of the balancing of interests is twofold: first, a determination whether a restriction will be thus imposed on the individual's freedom of worship; and secondly, a determination whether the presence of a restriction is justified, after a consideration of the social and constitutional values involved.[167]

In several subsequent cases, which the court of appeals decided exclusively under the Free Exercise Clause, free exercise claims

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165 *Cf.* McCraw, *supra* note 36, at 694 (noting that the claimants in "the more recent free exercise cases before the court of appeals . . . have continued to fare poorly").

166 *See, e.g.* La Rocca v. Lane, 338 N.E.2d 606, 612-13 (N.Y. 1975) ("[T]he particular limited religious practice has been found to conflict with the State's paramount duty to insure a fair and impartial trial. The respective interests must be balanced to determine whether the incidental burdening is justified."); Westchester Reform Temple v. Brown, 239 N.E.2d 891, 896 (N.Y. 1968) ("We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety, or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion . . . ."); Joseph Burstyn, Inc. v. Wilson, 101 N.E.2d 665, 672 (N.Y. 1951) ("States may validly regulate the manner of expressing religious views if the regulation bears reasonable relation to the public welfare. Freedom to believe—or not to believe—is absolute; freedom to act is not. 'Conduct remains subject to regulation for the protection of society.'" (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)), *rev'd*, 343 U.S. 495 (1952) (failing to consider the free exercise claim, but reversing the ruling that rescinded a license to show a film that was considered "sacrilegious" on the grounds that such a rescission violated the claimant's constitutional rights of free speech and freedom of the press). In *La Rocca*, the court quoted first to *Sherbert* for the federal compelling interest standard and then described *Sherbert* and *Yoder* as cases in which religious exemptions were granted because the petitioners' free exercise came into conflict with state interests that were "not of paramount importance." *La Rocca*, 338 N.E.2d at 612. The court found that the "paramount duty to insure a fair and impartial trial" was much more important and therefore denied the free exercise claim. *Id.* at 612-13. The contrast between interests that are "paramount" and those "not of paramount importance," *id.* at 612, suggests that the court was applying a version of the *Sherbert* compelling interest test to a free exercise claim under the New York Constitution, though the language used in the opinion is that of simple balancing. *See id.* at 612-13.

167 People v. Woodruff, 272 N.Y.S.2d 786, 789 (App. Div. 1966) (citations omitted), *aff'd*, 236 N.E.2d 159 (N.Y. 1968). In this case, the court denied a claim that the free exercise of the Hindu faith precluded a witness from receiving a contempt citation for refusing to testify against her teachers. *See id.* at 789-90.

failed.[168] Nevertheless, in two cases, the court of appeals argued that it could construe the state's free exercise clause independently of the federal clause, which would allow a claimant to bring a successful free exercise claim under the state constitution even if the claim would fail under the Federal Constitution.[169] One year before the Supreme Court established the free exercise "compelling interest" test in *Sherbert v. Verner*,[170] the New York Court of Appeals decided *Brown v. McGinnis*.[171] In *Brown*, a prison warden denied a group of Muslim prisoners permission to seek spiritual advice from the Temple of Islam headed by Malcolm X. The trial court dismissed the prisoners' free exercise claim without a hearing.[172] Reversing the dismissal, the court of appeals discussed the appropriate standard for deciding a free exercise claim based on the New York Constitution and instructed the trial court to determine on remand whether the restriction on the prisoners' free exercise of religion was "reasonable."[173] The court noted that the final clause of article I, section 3 explicitly limited the free exercise of religion in New York[174] and described the right to free exercise of religion as "not an absolute but rather a preferred right."[175] Because the court was construing a corrections statute[176] that "implemented" the state constitution's free exercise provision,[177] its decision provides an independent test that applies to free exercise claims under the New York Constitution.

The court of appeals expanded its independent analysis of the state provision in *Rivera v. Smith*.[178] In *Rivera*, a prisoner claimed that a pat search by a female guard violated his Islamic beliefs and thereby his free exercise of religion.[179] The prisoner based his claim on the corrections statute and on the free exercise clause of the New York

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168 Between 1972 and 1980 the court of appeals decided six free exercise cases on federal grounds, denying the claim in each case. *See* McCraw, *supra* note 36, at 694-95 & nn.100-05 (listing cases).

169 *See* Rivera v. Smith, 472 N.E.2d 1015, 1019-20 (N.Y. 1984) (analyzing the right without addressing the Federal Constitution's impact on the statute); Brown v. McGinnis, 180 N.E.2d 791, 792-93 (N.Y. 1962) (analyzing the claim solely under the New York Constitution).

170 374 U.S. 398 (1963).

171 180 N.E.2d 791 (N.Y. 1962).

172 *See id.* at 791.

173 *Id.* at 793.

174 *See id.* at 792 (noting that New York's free exercise clause excluded "'acts of licentiousness, or . . . practices inconsistent with the peace or safety of this state'" (quoting N.Y. CONST. art. I, § 3)).

175 *Id.* at 793 ("Thus freedom of exercise of religious worship . . . 'cannot interfere with the laws which the State enacts for its preservation, safety or welfare.'" (quoting People *ex rel.* Fish v. Sandstrom, 18 N.E.2d 840, 842 (N.Y. 1939))).

176 *See* N.Y. CORRECT. LAW § 610 (McKinney 1987).

177 *Brown*, 180 N.E.2d at 792-93.

178 472 N.E.2d 1015 (N.Y. 1984).

179 *See id.* at 1016.

Constitution.[180] Citing *Brown*, the court of appeals declared that "provisions of New York law manifest the importance which our State attaches to the free exercise of religious beliefs, a liberty interest which has been called a 'preferred right.'"[181] Despite the importance of this right, the court stated that prison officials may impose reasonable restrictions on a prisoner's exercise of religion.[182] The court declared that "such restrictions must be weighed against the institutional needs and objectives being promoted."[183] In other words, the court had to determine whether legitimate state interests outweighed the burden on the prisoner's religious free exercise.[184] The court decided that the prisoner's free exercise rights outweighed the state's interest in security and in equal opportunity for female guards.[185] The balance weighed in favor of the prisoner, even though the court found that a prisoner's free exercise rights are more restricted than those of someone who is not incarcerated.[186] This result implied the state would have to show an even greater state interest to override the free exercise rights of a nonprisoner.

The *Rivera* decision confirmed the basic approach of the New York Court of Appeals in free exercise cases.[187] Rather than relying on the "law of general applicability" standard,[188] the court balanced the claimant's free exercise right against the state's interests. The court has used this balancing analysis in cases in which it has independently considered the state constitution's free exercise clause.[189] Even

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180 *See id.* at 1018.

181 *Id.* at 1020.

182 *See id.*

183 *Id.*

184 *See id.* at 1020-21.

185 *See id.* at 1021-22.

186 *See id.* at 1020.

187 McCraw contends that *Rivera* is an exceptional case, one that "effectively wrenched *Brown* from its legal foundation by misreading the term 'preferred right.'" McCraw, *supra* note 36, at 698. Yet the court in *Rivera* uses the same balancing approach it used in *Brown* and other earlier free exercise cases. Compare the test used by the court in *Rivera*, *supra* notes 183-85 and accompanying text, and in *Brown*, *supra* note 173 and accompanying text; also compare the court's language in *Rivera* with that used in earlier cases, *supra* notes 132, 138-42, 153-54, 163-64 and accompanying text.

188 Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) (internal quotation marks omitted)).

189 In addition to the cases cited in the text of this Note, the court of appeals decided a line of cases involving free exercise challenges to zoning ordinances and applied a balancing test that gave great weight to the free exercise claim. *See* Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968); Diocese of Rochester v. Planning Bd., 136 N.E.2d 827 (N.Y. 1956); *see also* McCraw, *supra* note 36, at 699-701 (listing cases). The most recent of these, *Cornell University v. Bagnardi*, 503 N.E.2d 509 (N.Y. 1986), involved a dispute between a university and a zoning board, but the court of appeals used the case to eviscerate the previous blanket exemption for religious organizations seeking variances from zoning regulations. *See id.* at 514-15. The *Bagnardi* court concluded that "educational and religious uses which would unarguably be contrary to the public's health, safety or welfare need not

though the Supreme Court, in *Smith*, abandoned the balancing test for analyzing the Free Exercise Clause,[190] the New York Court of Appeals still is free to consider the appropriate approach under article I, section 3. The next Part of this Note considers examples of how the highest courts in other states have analyzed their own free exercise clauses in the wake of *Smith*.

IV
HORIZONTAL FEDERALISM: FREE EXERCISE JURISPRUDENCE IN OTHER STATES

As the Supreme Court has become less dependable in protecting constitutional liberties,[191] state courts have become increasingly independent in interpreting their state constitutions' provisions that protect civil liberties.[192] States' high courts might employ one of four different analytical methods to interpret state constitutional clauses protecting rights that also are enumerated in the United States Constitution.[193] If the state court's analysis of parallel provisions differs, it will be more likely to afford greater protection to a given right under its constitution than is available under the Federal Constitution. Constitutional interpretations of other states' high courts may become a benchmark for constitutional decisions in the New York Court of Appeals;[194] thus, interpretations of free exercise provisions from other states help define the analytical framework the court of appeals would adopt in interpreting article I, section 3.

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be permitted at all." *Id.* at 515. Although the holding in *Bagnardi* alters the relative weights of the state's interests and religious uses in the context of zoning laws, it nevertheless requires that courts balance the harm to the community caused by the religious institution's use of the land against the religious institution's free exercise rights. *See id.*; LYNN ET AL., *supra* note 1, at 92 (describing the change *Bagnardi* wrought in New York law).

190 *See Smith*, 494 U.S. at 879; *supra* Part I.A.

191 *See, e.g.*, Stanley H. Friedelbaum, *Judicial Federalism: The Interplay of National-State Standards*, *in* HUMAN RIGHTS IN THE STATES, *supra* note 122, at 1, 2; Brennan, *supra* note 82, at 546-48.

192 *See* Brennan, *supra* note 82, at 548-49; Carmella, *supra* note 34, at 284-85; *see also* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 106-110 (1989) (arguing for independent review of state constitutional provisions that prohibit the establishment of religion because the Supreme Court decisions regarding the Establishment Clause are too inconsistent).

193 *See, e.g.*, Levy, *supra* note 34, at 1019 (describing the four analytical methods).

194 *See, e.g.*, *In re* Raquel Marie X., 559 N.E.2d 418, 427 n.3 (N.Y. 1990) (analogizing the constitutional validity of other states' paternal rights statutes to a New York statute); People v. Kern, 554 N.E.2d 1235, 1243 n.2 (N.Y. 1990) (noting with approval other state courts' interpretations of their state constitutions to prohibit "racially discriminatory peremptory challenges"); People *ex rel.* Arcara v. Cloud Books, Inc., 480 N.E.2d 1089, 1098 (N.Y. 1985) (agreeing with the determinations of constitutionality of bookstore closure provisions in three other states), *rev'd*, 478 U.S. 697 (1986), *aff'd on state constitutional grounds*, 503 N.E.2d 492 (N.Y. 1986).

A. Four Models of State Court Analysis of Free Exercise Claims

Four models characterize the way that state courts interpret their own constitutions' free exercise provisions in comparison to the Supreme Court's interpretation of the parallel provision: "lockstep,"[195] "interstitial,"[196] "dual reliance,"[197] and "primacy."[198] Under the lockstep approach, a state court decides that it will use the *Smith* standard, which states that a "neutral law of general applicability" is constitutional regardless of any incidental burden on the free exercise of religion, to assess its state constitution's free exercise clause. An example of the lockstep approach appears in the Tennessee case *State v. Loudon*,[199] in which the free exercise claimant challenged a state law that required him to present his social security number when applying for a driver's license.[200] The court "disregarded the import of prior state constitutional precedents, and tied its analysis entirely to the United States Supreme Court's most recent free exercise decisions."[201]

The Minnesota Supreme Court has adopted the interstitial approach to deciding free exercise cases. Under this approach, the court first looks to the Constitution to determine whether it affords protection to the claimant and analyzes the claim under the state constitution if and only if the Federal Constitution provides no protection.[202] For example, in *Hill-Murray Federation of Teachers v. Hill-Murray High School*,[203] the Minnesota Supreme Court first assessed the facts under the federal standard[204] and only examined the claim under its own constitution after finding that the Federal Constitution offered

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195 Levy, *supra* note 34, at 1035. Under a lockstep approach, a state court "allows the United States Supreme Court to 'dictate the content of state constitutional doctrine.'" *Id.* (quoting Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 104 (1988)).

196 *Id.* The interstitial approach "look[s] first to the federal free exercise standard," *id.*, and only then analyzes whether the state constitution provides a different level of protection. *See id.* at 1040.

197 *Id.* at 1040. A dual reliance analysis "moves beyond this extreme deference to federal constitutional interpretation. . . . reflect[ing] the view that state and federal courts should work together 'in a partnership for the protection of individual rights.'" *Id.* (quoting Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985)).

198 *Id.* at 1044. A primacy approach determines the state's constitutional protection for a right before assessing the federal standard. *See id.* at 1044-45.

199 857 S.W.2d 878 (Tenn. Crim. App. 1993); *see also* Levy, *supra* note 34, at 1033-35 (discussing *Loudon*).

200 *See Loudon*, 857 S.W.2d at 882-83.

201 Levy, *supra* note 34, at 1035.

202 *See id.* at 1039-40.

203 487 N.W.2d 857 (Minn. 1992).

204 *But cf.* State v Hershberger, 462 N.W.2d 393, 398-99 (Minn. 1990) (determining that the Minnesota free exercise clause afforded greater protection than the federal clause).

no protection.[205] This approach treats the Federal Constitution as the primary protector of rights and the state constitution as the secondary protector.[206]

The Washington Supreme Court, in *First Covenant Church v. City of Seattle*, adopted the dual reliance approach, which simultaneously considers both the federal standard and the state constitution.[207] The supreme court's analysis of the state clause under the dual reliance standard was more thorough than Minnesota's was under the interstitial model. Washington's dual reliance approach considered six factors in determining that the state constitution mandated a compelling state interest to override a free exercise claim.[208] Because the Washington Supreme Court found for the claimant under the federal standard, however, its full consideration of the state constitutional provision arguably was unnecessary.

A primacy approach permits a state court to declare that a right has protection under the state constitution without considering the federal standard.[209] At least four states have adopted the primacy approach since the Supreme Court decided *Smith*.[210] In Massachusetts, the Supreme Judicial Court relied exclusively on the state constitution to uphold a free exercise claim made by a church seeking a religious

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205 *See Hill-Murray Fed'n of Teachers*, 487 N.W.2d at 862-67; *see also* Levy, *supra* note 34, at 1039 (discussing *Hill-Murray Fed'n of Teachers*).

206 *See* Levy, *supra* note 34, at 1040; *see also* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984) ("The effect [of this approach] is to make independent state grounds appear not as original state law, but as a kind of supplemental rights that require an explanation.").

207 840 P.2d 174 (Wash. 1992); *see also* Levy, *supra* note 34, at 1042-44 (discussing *First Covenant Church*).

208 *See* Levy, *supra* note 34, at 1042-44. The six factors the court considered in deciding whether the Washington Constitution extended broader rights than the Federal Constitution were: "1. The textual language of the state constitution; 2. Significant differences in the texts of parallel provisions of the federal and state constitutions; 3. State constitutional and common-law history; 4. Preexisting bodies of state law, including statutory law; 5. Differences in structure between the federal and the state constitutions; and 6. Matters of particular state interest or local concern." *First Covenant Church*, 840 P.2d at 185-86 (citing State v. Gunwall, 720 P.2d 808 (Wash. 1986)).

209 *See* Levy, *supra* note 34, at 1044.

210 *See id.* at 1045-50. The states are Montana, Massachusetts, Maine, and Oregon. *See id.* California appears to take the same approach, declaring in a recent case that assessed both federal and state free exercise claims that

> [w]e may take it for granted that the meaning of article I, section 4, of the California Constitution is not dependent on the meaning of any provision of the federal Constitution. . . . "Respect for our Constitution as 'a document of independent force' forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter."

Smith v. Fair Employment and Hous. Comm'n, 913 P.2d 909, 930 (Cal. 1996) (citations omitted). The court then declined to decide the issues raised under the state constitution; rather, it used the RFRA standard, which it saw as equal to the highest standard available under the California Constitution. *See id.* at 930-31.

freedom exemption from a historical landmarks ordinance.[211] The court did not discuss how the federal free exercise standard might apply.[212]

New York Court of Appeals precedents in other civil liberties cases[213] as well as explicit statements the court has made when interpreting parallel constitutional provisions, strongly suggest that the court of appeals would interpret article I, section 3 more broadly than would the Supreme Court. In a 1988 case involving a journalist's privilege to protect photographs from disclosure, the court stated that

> [o]ur decision is based on an adequate and independent ground under our State Constitution. Nevertheless, we are noting our agreement with the Federal courts that have reached the same result under the Federal Constitution in order that we might express our own view of the federal guarantee of a free press which, of course, we are also bound to uphold. This practice is in accord with our proper role in helping to expound the Federal, as well as our State, Constitution . . . .[214]

The journalist presented the court with free speech claims under both the New York and Federal Constitutions, but the court decided the case solely under the New York Constitution, while only "noting" that it would have reached the same result under the federal provisions.[215] Judge (now Chief Judge) Kaye concurred with the opinion, stating, however, that she believed "the case is correctly resolved under the State Constitution alone."[216]

The court of appeals has also interpreted the New York Constitution independently of the Federal Constitution in a number of other cases by using either a primacy or dual reliance analysis.[217] In fact, the last time the court of appeals applied the state free exercise provision,

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211 *See* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); *see also* Levy, *supra* note 34, at 1045-46 (discussing *Society of Jesus*).

212 *See Society of Jesus*, 564 N.E.2d at 574.

213 *See infra* Part V.

214 O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 278 (N.Y. 1988).

215 *Id.*

216 *Id.* at 282 (Kaye, J., concurring).

217 *See, e.g.*, Patchogue-Medford Congress of Teachers v. Board of Educ., 510 N.E.2d 325, 328 (N.Y. 1987) (using the dual reliance standard because the plaintiffs' claims, which maintained that mandatory blood tests interfered with their right to privacy, dealt with public employees' expectation of privacy, an important state constitutional issue); People v. Stith, 506 N.E.2d 911, 912 n.* (N.Y. 1987) (employing a dual reliance analysis and deciding that the "inevitable discovery" exception to the evidentiary exclusionary rule would be the same under both federal and state law); Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (usimg a primacy analysis to determine that state due process rights of an involuntarily committed mental patient were violated); People v. Donovan, 193 N.E.2d 628, 629 (N.Y. 1963) (holding, under a primacy approach, that the strong state constitutional protection against self-incrimination was sufficient grounds to decide the case without discussing federal constitutional safeguards).

it did not consider the outcome under the federal standard.[218] Although the court has used a variety of analytical approaches for interpreting parallel provisions,[219] issues involving significant language differences between the state and federal constitutions, unsettled federal law, and a balancing of individual interests against state interests are particularly suited for resolution under the state constitution alone.[220] This reasoning suggests that the court of appeals would adopt a primacy approach when analyzing a free exercise claim under the New York Constitution.

How a state court compares its free exercise clause to that of the Constitution does not necessarily determine what standard of scrutiny a court will apply. For example, Minnesota maintains a compelling interest standard for free exercise claims under the state constitution, even though it first considers the claim under the federal standard.[221] Similarly, the Oregon Supreme Court found the "law of general applicability" standard independently appropriate under its constitution, although other states that have adopted a similar primacy approach maintain a higher level of scrutiny.[222] It is evident that the primacy approach affords a state's highest court the most flexibility to interpret its constitution without regard to what the Federal Constitution provides on an issue.[223] The jurisprudential independence of the New York Court of Appeals[224] gives it substantial leeway to develop a standard for analyzing free exercise claims that departs from the *Smith* standard.

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218 *See* Rivera v. Smith, 472 N.E.2d 1015, 1019-20 (N.Y. 1984) (mentioning the Federal Constitution in passing, but analyzing the case under the state constitution).

219 *See O'Neill*, 523 N.E.2d at 282 (Kaye, J., concurring) ("[I]n resolving issues raised under parallel provisions of the State and Federal Constitutions, this court has not been wedded to any particular methodology.").

220 *See id.* (Kaye, J., concurring); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 420 (1987) (noting that "there may in particular instances be principled basis for broader protection within this State").

221 *See supra* notes 202-06 and accompanying text.

222 *See* Carmella, *supra* note 34, at 303-05; Levy, *supra* note 34, at 1047-50.

223 Under the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court will not review cases that a state court has decided on "adequate and independent state grounds" in deciding whether that case implicates both state and federal rights, as long as the state court relies explicitly on state law in its decision. *Id.* at 1041-42. Therefore, a state court that adopts a primacy approach is free to develop its state constitutional law without reference to the analogous federal provision. Of course, a state court could not decide in an area of civil liberties to apply the lower protection of a state constitution to a claimant in which a higher protection afforded by the Federal Constitution reaches state actions through the Fourteenth Amendment.

224 *See infra* Part V.

B. Indications of How the New York Court of Appeals Would Analyze a Free Exercise Claim

Which standard a court chooses to analyze a state constitutional protection depends on a historical analysis of the constitutional provision, differences in text between the state and federal constitutions,[225] and state precedent.[226] In addition, courts may consider precedents from other states that have analyzed their own constitutional provisions, particularly if the language of the states' constitutions is similar.[227] The New York Court of Appeals has applied all of these factors in cases considering whether a state constitutional provision offers more protection to a civil liberty than does the analogous federal provision.[228]

No sources that indicate the legislative intent behind article I, section 3 are available.[229] Nevertheless, the historical evidence of religious toleration during the colony's early years,[230] and the breadth of the free exercise provision which the Constitutional Convention of 1777 adopted after significant debate,[231] suggest that New York's free exercise provision should be read broadly to protect religious freedom.[232] Although the precedents in the court of appeals indicate that it usually rejects free exercise claims,[233] a full assessment of the historical evidence is consistent with the court's statement in its most recent free exercise case that article I, section 3 "manifest[s] the importance which our State attaches to the free exercise of religious beliefs."[234]

The textual differences between article I, section 3 and the Free Exercise Clause are pronounced.[235] The language of the New York

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225 *See* Kaye, *supra* note 220, at 412; Levy, *supra* note 34, at 1032.

226 *See* Levy, *supra* note 34, at 1034-36, 1043.

227 *See* ANTIEAU ET AL., *supra* note 122, at viii. Commentators have noted:

> In many instances the wording of the constitutional clause will control the outcome. . . . [M]any of the states have identically worded clauses. In such a case, an interpretation given a constitutional clause in one state may very well provide a clue as to how the court in a neighboring state would react.

Id.

228 *See supra* notes 89-91 and accompanying text; *infra* Parts V, VI.B.

229 *See* ROBERT ALLAN CARTER, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 3 (1988) (reporting that article I, section 3 had "[n]o statement of legislative intent").

230 *See supra* Part II.A.

231 *See supra* Part II.B.

232 *See* GALIE, *supra* note 92, at 50.

233 *See* GALIE, *supra* note 98, at 38; McCraw, *supra* note 36, at 685-96.

234 Rivera v. Smith, 472 N.E.2d 1015, 1020 (N.Y. 1984).

235 The New York Constitution's free exercise clause reads:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; . . . 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 this state.

provision's first clause is more expansive, protecting the free exercise of "religious profession and worship, without discrimination or preference,"[236] whereas the Federal Constitution simply protects "religion."[237] Unlike the Free Exercise Clause, the New York provision is not facially limited to protection against government action.[238] Another important difference is that the New York Constitution expressly limits the expansive rights that the first clause recognizes; the Federal Constitution speaks in absolute terms.[239] These significant textual differences strongly suggest the New York Constitution's free exercise provision be interpreted differently than the Supreme Court has interpreted the federal clause.

The court of appeals would also consider other high courts' constitutional interpretations as a source of authority for interpreting New York's free exercise clause because it has considered various states' constitutional jurisprudence in other civil liberties cases.[240] Differences between the language of state constitutions and of the Federal Constitution have factored prominently into state courts' analyses of free exercise claims since *Smith*.[241] Several states that have decided their constitutions mandate a higher level of scrutiny than the federal standard in *Smith* have provisions in their constitutions explicitly limiting the free exercise of religion by providing that the free exercise must not interfere with the "public peace" or the "peace and safety of the state."[242] States that have adopted a standard similar to

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N.Y. CONST. art. I, § 3. In contrast, the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

236 N.Y. CONST. art. I, § 3.

237 U.S. CONST. amend. I.

238 *See* GALIE, *supra* note 98, at 38. *But cf.* Zlotowitz v. Jewish Hospital, 84 N.Y.S.2d 61, 63 (Sup. Ct. 1948) (interpreting the free exercise provision to apply only to governmental action).

239 *See* GALIE, *supra* note 98, at 38. According to Galie, this limitation "mandates balancing the free exercise of religious liberty against the interests of the state in preserving the peace and welfare of the community." *Id.*

240 *See, e.g.*, Brown v. State, 674 N.E.2d 1129, 1140 (N.Y. 1996) (discussing the similarity of a New York constitutional provision with provisions in the Federal Constitution and other state constitutions); People v. Kern, 554 N.E.2d 1235, 1243 n.2 (N.Y. 1990) (noting that a court of appeals's decision regarding racially discriminatory peremptory challenges was consistent with other states' constitutional interpretations).

241 *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 400 (Minn. 1990) (Simonett, J., concurring) (noting the state's "peace or safety" provision, which is absent from the Federal Constitution); First Covenant Church v. City of Seattle, 840 P.2d 174, 185-86 (Wash. 1992) (en banc) (noting that the Washington Constitution is more expansive than the Federal Constitution).

242 Carmella, *supra* note 34, at 280-81 (internal quotation marks omitted). The states are Maine, Massachusetts, Minnesota, and Washington. *See* ME. CONST. art 1, § 3; MASS. CONST. pt. I, art. II; MINN. CONST. art. I, § 16; WASH. CONST. art. I, § 11. A total of 21 states have this limitation in their state constitution. *See* Miller & Sheers, *supra* note 122, at 322

that in *Smith* have no balancing provisions.[243] In particular, decisions involving the limitation clauses of the Washington and Minnesota Constitutions, which are identical to and were copied from the New York Constitution, which predates both, would be persuasive.[244] Because of these distinctions, it is reasonable to conclude that the New York Constitution also textually requires a balancing approach to deciding free exercise claims and may well require a test closer to the "compelling interest" test, which courts currently apply in Minnesota, Washington, Maine, and Massachusetts.

If the New York Court of Appeals decides to develop an independent free exercise jurisprudence, it would not be taking an unprecedented step. The next Part of this Note examines several cases that represent areas in which the court of appeals has held that a provision of the New York Constitution should be interpreted differently than its analogue in the Federal Constitution.

V

NEW YORK COURT OF APPEALS PROTECTIONS FOR OTHER INDIVIDUAL LIBERTIES

The New York Court of Appeals often parts company with the Supreme Court when it interprets state constitutional provisions that parallel those in the Federal Constitution.[245] The court stated that it

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tbl.2. Miller and Sheers erroneously report that 22 states have this limitation, but Iowa, which they include, does not. *See* Carmella, *supra* note 34, at 309 & n.158.

243 These states are Iowa, Oregon, Tennessee, and Vermont. *See* IOWA CONST. art. I, § 3; OR. CONST. art. I, §§ 2-3; TENN. CONST. art I, § 3; VT. CONST. ch. 1, art. 3; Carmella, *supra* note 34, at 307-09 (describing the Oregon decision in Smith v. Employment Div., 799 P.2d 148 (Or. 1990), *remand by* 494 U.S. 872 (1990); the Vermont decision in State v. DeLaBruere, 577 A.2d 254 (Vt. 1990); and the Iowa decision in Hope Evangelical Lutheran Church v. Iowa Dep't of Revenue & Fin., 463 N.W.2d 76 (Iowa 1990)); Levy, *supra* note 34, at 1033-35 (describing the Tennessee decision in State v. Loudon, 857 S.W.2d 878 (Tenn. Crim. App. 1993)). The supreme courts of two other states that have constitutions without balancing provisions have instead adopted a compelling interest analysis under their state constitutions. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 (Alaska 1994); State v. Miller, 549 N.W.2d 235, 239-40 (Wis. 1996).

244 *See* MINN. CONST. art. I, § 16; WASH. CONST. art. I, § 11; *see also First Covenant Church*, 840 P.2d at 187 (finding that a state infringement on a citizen's free exercise of religion can be justified only by showing a "compelling state interest" under the state constitution); *Hershberger*, 462 N.W.2d at 398 (determining that a "compelling state interest" test applies to free exercise claims under the state constitution).

245 *See, e.g.*, GALIE, *supra* note 98, at 44, 46, 48, 52, 60-61 (discussing various court of appeals decisions that have granted greater protection to the rights to counsel, against self-incrimination, to due process of law, of the freedom of the press, and to be protected from unreasonable searches and seizures under the New York Constitution); *see also* People v. Harris, 570 N.E.2d 1051, 1054 (N.Y. 1991) (describing the right-to-counsel clause of the New York Constitution, N.Y. CONST. art. I, § 6, as being "far more expansive than the Federal counterpart" (citations and internal quotation marks omitted)); Doe v. Coughlin, 518 N.E.2d 536, 553 (N.Y. 1987) (Alexander, J., dissenting) (noting that "this court has frequently enforced the protection of individual rights under our State Constitution even

is "bound to exercise its independent judgment" when it considers constitutional law issues,[246] and it expressly "decline[d] to adopt any rigid method of analysis which would, except in unusual circumstances, require [it] to interpret provisions of the State Constitution in 'Lockstep' with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution."[247] The court stated that it usually must "analyze the particular case and the Federal constitutional rule at issue . . . in order to determine whether under established New York law and traditions some greater degree of protection must be given."[248]

In *People v. Scott*,[249] the court of appeals considered both the state and the federal constitutional protections against unreasonable searches and seizures.[250] At issue was the scope of the state constitutional protection from searches and seizures on a person's private property beyond the curtilage of the person's house or other structures.[251] The Supreme Court standard limited the Fourth Amendment protection to those areas of the property where a person has a "legitimate expectation of privacy."[252] The property beyond the curtilage, or "open fields" on a property, is not within the sphere in which one has an expectation of privacy and therefore is not protected under the Fourth Amendment.[253] The New York Court of Appeals decided that the New York Constitution's protection against unreasonable searches and seizures[254] immunizes owners of property from warrantless searches and seizures in areas beyond their homes and other structures. This interpretation gives a much higher level of protection than the Federal Constitution.[255]

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where the Federal Constitution either did not or might not afford such protection" and that it has not "hesitated to accord to individuals protection under our State Constitution from governmental intrusion into intimate and private aspects of their lives").

246 People v. Barber, 46 N.E.2d 329, 331 (N.Y. 1943). See *supra* notes 160-64 and accompanying text for a discussion of this case. For later court of appeals cases that cited the language in *Barber* with approval, see, for example, *People v. Alvarez*, 515 N.E.2d 898, 899 (N.Y. 1987), and *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494 (N.Y. 1986).

247 People v. Scott, 593 N.E.2d 1328, 1338 (N.Y. 1992).

248 *Id.*

249 593 N.E.2d 1328 (N.Y. 1992). The decision consolidated two cases involving the construction of article 1, section 12 of the New York Constitution. *See id.* at 1330-39; People v. Keta, 593 N.E.2d 1328, 1339-46 (N.Y. 1992).

250 *See Scott*, 593 N.E.2d at 1330-38.

251 *See id.* at 1330. The defendant was convicted of growing marijuana on his property after an investigator and a helpful citizen made several unauthorized, warrantless entries onto the property to verify the presence of the marijuana before deciding to obtain a warrant. *See id.*

252 Oliver v. United States, 466 U.S. 170, 182-83 (1984) (quoting Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978)).

253 *See id.* at 182-84.

254 N.Y. CONST. art. I, § 12.

255 *See Scott*, 593 N.E.2d at 1338.

The court of appeals has also offered more protection for a criminal defendant's right to counsel under the New York Constitution than the Supreme Court has under the Federal Constitution.[256] The claimants in *People v. Harris*[257] asked the court of appeals whether the state constitutional protection against unlawful searches and seizures requires the suppression of a criminal defendant's statement at a police station following his arrest by policemen who unlawfully had entered his apartment.[258] The United States Supreme Court had previously ruled in this case that the statement should not be suppressed under the Fourth Amendment because the statement at the police station and the illegal entry had no causal connection and the officers had probable cause to arrest the defendant, even though they had no warrant.[259] On remand, the New York Court of Appeals held that the statement must be suppressed on state constitutional grounds.[260] An important underpinning of this decision is the disparity between federal and state law on when the defendant's right to counsel attaches. Under New York law, it attaches "once an arrest warrant is authorized."[261] The court of appeals noted that under federal law, police do not violate a suspect's right to counsel if they simply interrogate the suspect without a lawyer present.[262] In determining that the New York standard was higher than the federal standard, the court stated that

> [t]he safeguards guaranteed by this State's Right to Counsel Clause are unique (N.Y. CONST. art. I, § 6). By constitutional and statutory interpretation, we have established a protective body of law in this area resting on concerns of due process, self-incrimination and the right to counsel provisions of the State Constitution which is substantially greater than that recognized by other State jurisdictions and "far more expansive than the Federal counterpart." The Court has described the New York rule as a "cherished principle", rooted in this State's prerevolutionary constitutional law and developed "independent of its Federal counterpart."[263]

The court of appeals has treated free speech issues similarly. In *O'Neill v. Oakgrove Construction, Inc.*,[264] the court of appeals noted that "[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum re-

256 *See* GALIE, *supra* note 98, at 44 (noting that "the right-to-counsel protection in New York is the most expansive in the nation").
257 570 N.E.2d 1051 (N.Y. 1991).
258 *See* N.Y. CONST. art. 1, § 12; *Harris*, 570 N.E.2d at 1051-52.
259 *See* New York v. Harris, 495 U.S. 14, 19 (1990).
260 *See Harris*, 570 N.E.2d at 1055.
261 *Id.* at 1054.
262 *See id.*
263 *Id.* (citations omitted).
264 523 N.E.2d 277 (N.Y. 1988).

quired by the First Amendment."[265] The court analyzed separately the relevant state constitutional protection and the parallel federal provisions.[266] Ultimately, the court decided the case on "an adequate and independent state ground under our State Constitution."[267] In discussing the relative protections that the state and federal constitutions afford to First Amendment rights, the court reasoned that

> [t]he expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States, the recognition in very early New York history of a constitutionally guaranteed liberty of the press, and the consistent tradition in this State of providing the broadest possible protection to "the sensitive role of gathering and disseminating news of public events" all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.[268]

The court of appeals often cites to these factors to support an independent state constitutional jurisprudence.[269]

In *People v. P.J. Video*,[270] the court of appeals decided that the showing required to attain probable cause to issue a search warrant under the New York Constitution is greater than that required under the Federal Constitution.[271] The Court also set out several factors that it may consider when determining the protection that the state constitution affords relative to the Federal Constitution.[272] One factor is an "interpretive" analysis of the textual differences between the state constitutional provision and the parallel federal provision.[273] This interpretive analysis may identify rights enumerated under the state constitution that are not present in the Federal Constitution[274] or declare the language of the state constitution "sufficiently unique to support a broader interpretation of the individual right."[275] The history of the state provision may indicate that it is meant to be broader than the federal clause, and the structure and purpose of the state constitu-

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265 *Id.* at 280 n.3.

266 *See id.* at 278, 280-81; *see also supra* notes 197, 207-08 and accompanying text (describing an example of the dual reliance method of analysis in First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)).

267 *O'Neill*, 523 N.E.2d at 278.

268 *Id.* at 280-81 (citations and footnotes omitted).

269 *See* Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277-78 (N.Y. 1991); People v. Alvarez, 515 N.E.2d 898, 899 (N.Y. 1987); People v. P.J. Video, Inc., 501 N.E.2d 556, 560-61 (N.Y. 1986).

270 501 N.E.2d 556 (N.Y. 1986).

271 *See id.* at 563.

272 *See id.* at 560-61.

273 *See id.* at 560.

274 *See id.*

275 *Id.*

tion can provide insight into how strongly it protects rights.[276] The court distinguished these from "nonmterpretive" factors, which attempt

> to discover . . . any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.[277]

The court of appeals has also indicated that it will consider the consistency of Supreme Court jurisprudence in deciding the level of state constitutional protection: "An independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright."[278] The court of appeals has held that such a change in Supreme Court jurisprudence is a significant motivation to extend greater protection under the New York Constitution.[279] The drastic shift and consequent narrowing of the scope of liberty in the Supreme Court's religious free exercise jurisprudence[280] offers the court of appeals such a "particularly appropriate" situation.

The next Part of this Note considers recent lower court cases in New York that have attempted to apply state constitutional jurisprudence to free exercise claims. It also predicts what approach the court of appeals would likely take if it heard a free exercise claim under the New York Constitution in light of the changes in federal free exercise interpretation, the history of religious freedom in New York, and the court's precedents in this area and for other civil liberties.

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276 *See id.*

277 *Id.*

278 People v. Scott, 593 N.E.2d 1328, 1342 (N.Y. 1992).

279 *See P.J. Video,* 501 N.E.2d at 562 (imposing a higher standard for New York after stating that "[w]e see the Supreme Court's present ruling as a . . . dilution of the requirements of judicial supervision in the warrant process and as a departure from prior law on the subject").

280 *See supra* Part I.

VI

THE CURRENT STATE OF FREE EXERCISE IN NEW YORK AND ITS RELEVANCE FOR INDIVIDUALS BRINGING FREE EXERCISE CLAIMS

A. Recent Interpretations of Article I, Section 3 in Lower Courts and Federal Courts in New York

Lower courts in New York have analyzed several cases[281] under article I, section 3 since the court of appeals's last free exercise decision in *Rivera v. Smith*.[282] The United States District Court for the Southern District of New York has also applied the New York free exercise provision in two recent cases.[283] These cases indicate that these courts' current understanding of the New York Court of Appeals jurisprudence in the area of state constitutional free exercise is inconsistent.

In *Bunny v. Coughlin*,[284] the appellate division addressed an inmate's free exercise claim. The appellant claimed that the New York Department of Correctional Services violated his free exercise of religion by prohibiting him from wearing his Rastafarian religious crown and by not permitting him to eat a special diet consonant with his religious beliefs.[285] Citing a court of appeals case that upheld a restriction on prisoner's free speech rights upon a finding of a "legitimate penological goal,"[286] the appellate division decided that a higher level of scrutiny was not appropriate in adjudicating a prisoner's free exercise claim.[287] As a result, the court denied the prisoner's claims.[288]

In *Rourke v. New York State Department of Correctional Services*[289] the supreme court clearly stated its view of and the applicable test under the state constitutional free exercise provision. The case involved a

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281 *See, e.g.*, Williams v. Bright, 658 N.Y.S.2d 910 (App. Div. 1997); Rourke v. New York State Dep't of Correctional Servs., 615 N.Y.S.2d 470 (App. Div. 1994); Bunny v. Coughlin, 593 N.Y.S.2d 354 (App. Div. 1993); Jackson v. Coughlin, 595 N.Y.S.2d 631 (Sup. Ct. 1993); *In re* Miller, 656 N.Y.S.2d 846 (Allegany County Ct. 1997).

282 472 N.E.2d 1015 (N.Y. 1984). The court of appeals has applied the Free Exercise Clause in a few cases since 1984. *See, e.g.*, New York State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963-64 (N.Y. 1997); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426-30 (N.Y. 1989). In two cases, the court has specifically noted that the plaintiffs had not submitted a claim under the state free exercise clause. *See* Hope v. Perales, 634 N.E.2d 183, 186 (N.Y. 1994); *Ware*, 550 N.E.2d at 426 n.3.

283 *See* Muhammad v. City of New York Dep't of Corrections, 904 F. Supp. 161 (S.D.N.Y. 1995); Francis v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995).

284 593 N.Y.S.2d 354 (App. Div. 1993).

285 *See id.* at 356.

286 Lucas v. Scully, 521 N.E.2d 1070, 1075 (N.Y. 1988).

287 *See* Bunny v. Coughlin, 593 N.Y.S.2d 354, 357 (App. Div. 1993).

288 *See id.* at 360.

289 603 N.Y.S.2d 647 (Sup. Ct. 1993), *aff'd* 615 N.Y.S.2d 470 (App. Div. 1994). The author is grateful to Professors Glenn Galbreath and Gary Simson, Co-Directors of the Cornell Law School Religious Liberties Clinic, for making available to him the briefs they

free exercise claim by a Mohawk corrections officer who was fired because he refused to comply with regulations and written directives ordering him to cut his hair.[290] The claimant belonged to the Longhouse religion, in which not cutting one's hair "symbolizes spirituality."[291] In finding that the claimant's state constitutional right to free exercise outweighed the state's interests in order and discipline among guards, the court articulated its understanding that the New York Constitution requires a compelling interest balancing test.[292] The supreme court acknowledged the United States Supreme Court's decision in *Smith,* but stated that it could not

> ignore the New York Court of Appeals' long history and commitment to the protection of individual rights and liberties beyond those afforded by the U.S. Constitution, and federal constitutional law. Given this history and commitment . . . and the importance of this free exercise right, it is hard to imagine that New York would not continue to apply a "strict scrutiny" standard of review, and a balancing of the state's competing interests and the fundamental rights of the individual.[293]

On appeal, the appellate division affirmed the decision, but appeared to suggest a more lenient balancing test.[294] The court determined that the state had failed "to demonstrate that requiring petitioner to comply with the policy further[ed] a legitimate State interest which outweigh[ed] the negative impact upon his religious freedom," but failed to outline further the applicable test.[295] Both the trial court's strict scrutiny standard and the appellate division's balancing test are more protective than the federal free exercise standard in *Smith.* A court applying the *Smith* standard could not grant an exemption to the generally applicable hair regulation solely on the basis that the regulation violated the claimant's right to free exercise of his religion.[296] The application of any test under the state constitution that requires a court to weigh the burden on religious freedom against the strength of the state's interest in imposing such a burden represents a substantially greater opportunity for religious-exemption seekers than does the rule in *Smith.*

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submitted in *Rourke,* which were of great assistance in thinking about the issues discussed in this Note.

290 *See id.* at 648.

291 *Id.*

292 *See id.* at 649-50.

293 *Id.*

294 *See* Rourke v. New York State Dep't of Correctional Servs., 615 N.Y.S.2d 470, 472 (App. Div. 1994).

295 *Id.*

296 If the claimant could show that the regulation violated *both* the Free Exercise Clause *and* another constitutional right, the regulation might be unconstitutional as one of the "hybrid" situations recognized in *Smith. See supra* note 57 and accompanying text.

The United States District Court for the Southern District of New York has expressed uncertainty regarding the appropriate test for a free exercise claim under New York law.[297] After declaring that "[w]ith respect to the plaintiffs' free exercise claim under the New York State Constitution, the appropriate test to be applied is not clear,"[298] the district court discussed both the supreme court's holding in *Rourke* and the appellate division's affirmance. The district court ultimately declined to articulate which standard of review it should apply.[299]

In an interesting application of the state constitution's free exercise clause, the court in *In re Miller* recently authorized a religious exemption to a requirement that an applicant for a pistol permit must submit a photograph.[300] An Amish man refused to allow himself to be photographed for the permit on the ground that being photographed was against his religion.[301] In lieu of a photograph, he offered to allow himself to be fingerprinted.[302] The court balanced "the importance of the right asserted" against the governmental "needs and objectives being promoted"[303] and concluded that the defendant's right to free exercise justified an exemption from the photograph requirement.[304] Although the court did not explicitly spell out a compelling interest test, it did note that "the Assistant Attorney General has argued very ably and cogently that the State's interests in requiring a photograph are 'compelling,' extending beyond mere administrative convenience."[305] Nevertheless, the court decided that the applicant's free exercise interest outweighed these compelling state interests because a less restrictive means of identification was available.[306]

From these recent lower court applications of the New York free exercise clause, which postdate the court of appeals's *Rivera* decision, it appears that no clear precedent outlines what degree of scrutiny should apply in free exercise cases. However, all of the cases indicate that a balancing of interests, now apparently abandoned at the federal level,[307] is necessary to assess free exercise claims under the New York Constitution. The following section of this Note considers how the

297 *See* Francis v. Keane, 888 F. Supp. 568, 578 (S.D.N.Y. 1995).
298 *Id.* (footnote omitted).
299 *See id.* at 579-80.
300 *See In re* Miller, 656 N.Y.S.2d 846, 849 (Allegany Co. Ct. 1997).
301 *See id.* at 846.
302 *See id.* at 848.
303 *Id.* at 847 (quoting Lucas v. Scully, 521 N.E.2d 1070, 1073 (N.Y. 1988)) (internal quotation marks omitted).
304 *See id.* at 849.
305 *Id.* at 848.
306 *See id.* at 849.
307 *See supra* Part I.

court of appeals would most likely analyze a free exercise claim brought under the New York Constitution.

B. Article I, Section 3: The New York Court of Appeals's Likely Approach

The New York Court of Appeals has actively participated in the increased level of judicial federalism over the past two decades.[308] Its decisions have provided higher levels of protection for a variety of constitutionally guaranteed liberties under the New York Constitution than the Federal Constitution affords.[309] In assessing state free exercise claims, the court of appeals has consistently applied a test that balances the claimant's interest in the free exercise of religion against the state's interests in protecting society.[310] Numerous reasons indicate that the court of appeals would maintain this approach to the state free exercise clause despite the sea-change in federal free exercise jurisprudence and that it would afford greater protection to religious freedom under the state constitution than is currently available under the Federal Constitution.

An interpretive analysis[311] of the New York free exercise provision indicates that its structure explicitly contemplates balancing the "free exercise and enjoyment of religious profession and worship" with the "peace or safety of this state."[312] In addition, the New York Constitution speaks more broadly of the free exercise right, before it limits that right by the final clause, than does the Federal Constitution.[313] Other states with similar or identical limiting language in their free exercise clauses have interpreted these clauses to require a "compelling interest" test similar to that in federal jurisprudence prior to *Smith*.[314]

A noninterpretive analysis[315] of article I, section 3, which focuses on the policy, history, and tradition of the provision, also suggests that the provision requires a heightened protection of religious freedom. Colonial New York was a haven of tolerance for several different religious groups, and the state generally avoided an establishment of a particular religion.[316] The first state constitution provided the broadest freedom of religion provision of any of the original states.[317]

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308 *See supra* Part V.
309 *See supra* Part V.
310 *See supra* Part III.
311 *See supra* notes 273-76 and accompanying text.
312 N.Y. CONST. art. I, § 3; *see supra* Part II.B.
313 *See supra* notes 235-39 and accompanying text.
314 *See supra* Part IV.
315 *See supra* note 277 and accompanying text.
316 *See supra* Part II.A.
317 *See supra* note 108 and accompanying text.

The variety of religious groups within the state and the clear evidence from the Constitutional Convention that even the free exercise rights of unpopular religious groups were to enjoy protection[318] indicate that the right to free exercise is "one of peculiar State or local concern,"[319] which evinces "distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right."[320] Furthermore, in interpreting the Minnesota free exercise clause, which was identical to and derived from the New York Constitution, the Minnesota Supreme Court considered New York's history of religious freedom and concluded that a compelling interest test was appropriate.[321]

The New York Court of Appeals has frequently stated that it is willing to look first to the state constitution for the protection of individual liberties.[322] Because the Supreme Court has drastically curtailed the availability of free exercise exemptions under the First Amendment, the court of appeals should be open to the application of a higher standard of scrutiny under the New York Constitution.[323] Older New York precedents rejected most free exercise claims under the state constitution, just as the Supreme Court rejected most claims in which it purported to apply the *Sherbert* compelling interest test.[324] Yet the most recent precedent available in New York, *Rivera*, indicates that the New York Court of Appeals is willing to offer free exercise exemptions from generally applicable laws under article I, section 3.[325] Taken together, these factors indicate that the New York Court of Appeals probably would depart from the current federal free exercise standard and grant a claimant a broader free exercise right under the New York Constitution and would have strong grounds for announcing a compelling interest test. By granting free exercise exemptions from generally applicable laws under the New York Constitution, the court of appeals would be fulfilling the letter and spirit of article I, section 3 in a way that the Supreme Court has rejected to the detriment of religious liberty at the federal level.

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318 *See supra* notes 114-18 and accompanying text.

319 People v. P.J. Video, 501 N.E.2d 556, 560 (N.Y. 1986).

320 *Id.*

321 *See* State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J., concurring).

322 *See supra* Part V.

323 *See supra* notes 158-63 and accompanying text.

324 *See* GALIE, *supra* note 98, at 38; McConnell, *supra* note 24, at 1127.

325 *See supra* notes 178-90 and accompanying text.

C. The Value of Free Exercise Claims Under the New York Constitution

The Supreme Court's approach in *Smith* wrenched the Free Exercise Clause from its historic underpinnings and rejected the idea that religious practice, standing alone, may justify an exemption from a generally applicable law. The New York Constitution, as the New York Court of Appeals would likely interpret it, provides a better means of protecting the rights of religious minorities against the majoritarian state than does the Free Exercise Clause under the *Smith* standard. Likewise, a preferable interpretation of article I, section 3 is one that ensures that a court will weigh the burden on religious freedom against the state's interests. This interpretation is both more consonant with the historical origin of free exercise clauses and more likely to make these clauses meaningful in protecting religious freedom as a unique right.[326] Individuals who seek vindication of their free exercise rights are more likely to succeed when their religious freedom interest is balanced against the state's interests than when that interest is overridden by a law of general applicability, even when the burden is great and the cost of accommodation to the state is insignificant.[327]

The value to a litigant of the state standard as compared to the federal standard can be illustrated by applying both to the facts of several free exercise claims. The Amish pistol permit applicant in *In re Miller* succeeded under the compelling interest balancing test, which the New York trial court applied to his state free exercise claim.[328] A court applying the *Smith* standard to the same facts would find that the pistol permit law is a neutral law of general applicability and consequently that the free exercise claim must fail. Miller would face the choice of foregoing his permit or acting against his religious beliefs.

The guard who challenged prison hair-length regulations in *Rourke* also prevailed under the state constitution.[329] A federal free exercise analysis under *Smith* would require the guard to cut his hair because the regulation is neutral toward religion and is generally applicable to all prison guards in New York.[330] The state constitutional analyses, both the compelling interest test the trial court applied and the less-strict balancing test applied on appeal, gave this claimant an exemption from the regulation to protect his freedom of religion.[331]

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326 *See supra* Part II.

327 *See* Carmella, *supra* note 34, at 325; Laycock, *supra* note 5, at 15.

328 *See In re* Miller, 656 N.Y.S.2d 846, 848-49 (Allegany Co. Ct. 1997); *supra* notes 300-06 and accompanying text.

329 *See* Rourke v. New York State Dep't of Correctional Servs., 615 N.Y.S.2d 470, 472 (App. Div. 1994); *supra* notes 289-96 and accompanying text.

330 *See supra* text accompanying notes 289-96.

331 *See Rourke*, 615 N.Y.S.2d at 472; *supra* notes 293-96 and accompanying text.

In a case decided without the balancing test, Muslim street vendors were prohibited from selling perfumed oils and incense without a vendor license.[332] The plaintiffs contended that the oils and incense were important to the practice of their religion, while the City presented extensive evidence that these items are merely recommended for Islamic prayer.[333] The federal district court held that "this issue is not a material fact for purposes of deciding the instant motion."[334] After finding that the vendor law was a valid, neutral law of general applicability, the court held that the law's "application to plaintiffs' vending activity arguably impinges on their religious practice. As such, the vending regulations fall squarely within the holding of *Smith*, and raise no free exercise claim."[335] Had the plaintiffs also brought a claim under New York's free exercise clause, the district court would have had to at least balance the interests at stake by determining whether the City's interest in requiring vendors to obtain permits outweighed the plaintiffs' interests in offering items of religious significance to their fellow believers. While a court might have found for the City on either a rational basis or a compelling interest ground, the plaintiffs would have had an opportunity—one they would not have under the *Smith* test—to show how governmental action burdened their sincere beliefs.

People pursuing free exercise claims involving state acts should make a claim based on article I, section 3 in addition to any federal free exercise claim they might make. By invoking the state constitution, the claimant will receive an opportunity to balance his or her religious liberty interest against the state's interests and can probably force the state to prove a compelling interest to defeat the claim.[336] Individuals who neglect the state free exercise claim risk being left under the Federal Constitution without a chance to show either party's interest if the law at issue is one of general applicability.[337] A substantial amount of precedent in New York and other states militates in favor of a balancing test, and even a compelling interest test, in state free exercise jurisprudence.[338] More generally, a claimant can argue that the history and text of article I, section 3 mandate a higher standard of review than is currently available under First Amendment jurisprudence.[339] Finally, the New York Constitution protects other civil liberties more stringently than does the United States Constitu-

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332 *See* Al-Amin v. City of New York, 979 F. Supp. 168, 170 (E.D.N.Y. 1997).
333 *See id.* at 171.
334 *Id.*
335 *Id.*
336 *See supra* Part VI.B.
337 *See supra* notes 54-60 and accompanying text (discussing the *Smith* standard).
338 *See supra* Parts III, VI.A.
339 *See supra* Parts II, IV.B, VI.B.

tion, particularly in areas for which the Supreme Court has cut back the scope of the federal rights.[340] An individual who claims that the state has intruded on her free exercise of religion should make these arguments to persuade a New York court that the state must show a compelling interest to burden her free exercise rights.

CONCLUSION

Religious liberty is enhanced by a constitutional analysis that balances the personal interest in free exercise of religion against the government's interests in restricting or imposing burdens upon religious free exercise.[341] Individuals and groups whose religious beliefs and practices do not coincide with those of the majority and who are politically powerless should be able to seek exemptions from those laws that burden their ability to worship as they choose. Persons claiming an exemption from a generally applicable law that allegedly violates their free exercise of religion now find their claims under the First Amendment foreclosed because of the Supreme Court decision in *Smith*, which was reinstated as the federal free exercise standard in *Flores*. However, a person in New York seeking to challenge a state or local law under the provisions of article I, section 3 will be able to argue the strength of his interest against the countervailing state interests. In line with the history of free exercise in New York, the commitment of the New York Court of Appeals to protecting other individual liberties under the state constitution, and the trend of post-*Smith* jurisprudence in those states with free exercise language resembling New York's, a claimant most likely can force the state to show that it has a compelling interest in burdening the claimant's free exercise of religion. Even a prisoner making a claim under the *Rivera* standard will have his free exercise interest balanced against the state's interests through a reasonableness test that involves genuine judicial inquiry. Religious-exemption seekers in New York are more likely to succeed if they bring their claims under the state constitution than if they do so under the First Amendment.

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340 *See supra* notes 84-87 and accompanying text; *supra* Part V.

341 *See* Carmella, *supra* note 34, at 325; Laycock, *supra* note 5, at 15; McConnell, *supra* note 24, at 1152-53.

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