STATE CONSTITUTIONS AND THE AUTONOMY OF RELIGIOUS INSTITUTIONS
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Autonomy of religious institutions within a democratic society suggests institutional freedom from governmental interference to translate a particular tradition or sacred authorities into practice. Autonomy permits religious organizations to define a specific mission, to decide how ministry and ecclesiastical government fulfill their mission and to determine the nature and extent of institutional interaction with the larger society. Governments influence religious institutions through legislation and administrative regulation as permitted or limited by constitutional authority. Within the United States, state constitutions have governed colonies and states for over three hundred years. For the last two hundred years, the United States Constitution has instituted a federal system, establishing a national jurisprudence without eliminating the right of the states to interpret their respective laws. However, the federal government has gradually delineated the relationship between the federal and state courts as well as the respective sovereignties of a national government and its now fifty states.

This paper highlights the means by which state constitutions have enhanced or inhibited religious institutional autonomy within the United States, while also examining the current shortcomings of state constitutions to provide conceptions of religious autonomy significantly different from those set forth under the First Amendment of the United States Constitution.[1] In the descriptive overview that follows, I suggest that state constitutions

[1]The First Amendment of the Constitution states, in relevant part, „Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....“ U.S. CONST., amend. I. Since the middle of this century, the United States Supreme Court, by means of the doctrine of incorporation of the Fourteenth Amendment's protections, has held that the protection and restrictions of the First Amendment applies to all government activity, not just congressional legislation. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding the free exercise provisions of the First Amendment binding on all

initially were permitted different understandings of religious freedom, followed by a century of convergence between government and religion that offered significant autonomy only to predominantly Protestant entities.[2] During the nineteenth century and first part of the twentieth century, however, state constitutional jurisprudence left little ground for freedom for other religious groups. Since 1990, some states have opened tantalizing possibilities for expanded religious freedom, yet that goal remains elusive and unfulfilled.[3]

This paper first discusses the means by which states within the federalist system may analyze religious autonomy issues differently from the national government. This paper summarizes how federalism permits states, through interpretation of their constitutions, to assert an independent jurisprudence over religious institutions, and then examines the distinctive and expansive language of state constitutions, suggesting an approach that differs from First Amendment jurisprudence. Many state constitutions presuppose, and in some cases actually set forth, a duty of religious activity as an institutional event in contrast to the relative silence of the United States Constitution. Moreover, the breadth and choice of language suggests possibilities that only can be assumed or advocated from within the United States Constitution.[4] Notwithstanding the judicial interpretation of the federal Constitution, the states have already demonstrated the different ways the fifty different sovereignties seek to interpret the relationship between government and religion. Finally, this paper examines the origins, context, and history of state constitutional protection of religion. The colonies had engaged in constitution-making prior to the adoption of the Constitution, thus providing a ready laboratory for balancing rights and understanding the impact of establishment, freedom

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state and local government activity) *and* Everson v. Board of Education, 330 U.S. 1 (1947) (similarly holding the establishment clause binding on state and local governments). For purposes of clarity references the United States Constitution will hereafter be referred to as „Constitution," „United States Constitution," or „federal constitution," and references to state constitutions will be clarified by actual state reference or „state constitution."

[2]For a more thorough history and description of specific state constitutional jurisprudence, *see generally*, CARL ZOLLMAN, AMERICAN CIVIL CHURCH LAW (1917)(photo. reprint 1969); CHESTER JAMES ANTIEAU, PHILLIP MARK CARROLL, AND THOMAS CARROLL BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965); G. Alan Tarr, *Church and State in the States*, 64 WASH. L.REV. 73 (1989); Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275 (1993).

[3]In part, this movement reflects developments in First Amendment jurisprudence since 1990. In addition, over the last twenty years, many scholars and commentators have also proclaimed a new federalism where civil and individual rights will receive state recognition and protection beyond the scope of the Constitution. *See generally*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90. HARV. L. REV. 489 (1977); Hans Linde, *E Pluribus*, 18 GA. L. REV. 165 (1984); G. Alan Tarr, *supra* note 2; Carmella, supra note 2. *But see*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) *and* James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L. J. 1025 (1993).

[4] Former Supreme Court Justice Brennan, in describing this dual system of law, wrote, „This is both necessary and desirable under our federal system–state courts no less than federal are and ought to be the guardians of liberties." Brennan, *supra* note 3, at 491.

of religion, and freedom of conscience.[5]

Despite these possibilities, with few exceptions, the many state courts have not interpreted state constitutions. This would bring forth a „new federalism“ that would have strengthened and redefined civil liberties, including religious freedom and autonomy for religious institutions. This paper will conclude with several suggestions why state constitutions have not been more effective in ensuring autonomy of religious institutions.

1. Principles of Federalism: The Distinction Between the United States Constitution and State Constitutions

The federal and state constitutions differ substantively in how they protect religious autonomy. The thirteen states achieved independence from Great Britain and transformed themselves from colonies into sovereign states prior to the ratification of the Constitution. Significantly, many had developed sophisticated understandings of constitutional law and the relationship between the people, the states and a new federal government.[6] Indeed, many states had years of operating under their own constitutions prior to the drafting of the federal Constitution and Bill of Rights. For example, Massachusetts has governed under a written constitution since 1780.[7] Moreover, the Massachusetts constitution has served as a model for many of the other states over the last two centuries.[8] Prior to 1789, the colonists had developed and worked under at least 95 documents regarding governance that included thirty-six charters, forty-one colonial documents that resembled constitutions, and eighteen state constitutions.[9] Between 1776 and 1789 when the states ratified the constitution, the original thirteen states as well as Vermont drafted and ratified eighteen state constitutions.[10] The state sovereignty that existed prior to federal sovereignty would not be yielded lightly.[11] Through the ratification process the existing states transferred significant aspects of their respective sovereignties, but not without retaining certain powers. The United States Constitution defines itself as one of enumerated powers, limiting the federal government to exercise only those constitutionally delegated powers expressly granted by the states.[12] States possess all

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[5] *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1421 (1990) („If the states can be laboratories of democracy,(New State Ice Co. v. Lieberman, 285 U.S. 262, 311 (1932) Brandeis, J., dissenting) the American colonies surely served as laboratories for the exploration of different approaches to religion and government.“ (footnote omitted).

[6] Donald Lutz, POPULAR CONSENT AND POPULAR CONTROL 31, 50, 61 (1980).

[7] *Id.* at 84.

[8] *Id.*

[9] *Id.* at 31.

[10] *Id*. at 43.

[11] *See generally*, PATRICK T. CONLEY & JOHN P. KAMINISKI, THE CONSTITUTION AND THE STATES (1988).

[12] McCulloch v. Maryland, 117 U.S. (1 Wheat.) 316, 405 (1819); U.S. v. Cruickshank, 92 U.S. 542, 551 (1876). For an example of how one state supreme court enunciated this distinction, *see* First Covenant Church v. Seattle, 840 P.2d 174, 186 (Wash. 1992):

> The United States Constitution grants of limited power, authorizing the

powers of sovereignty such as police powers not given to the federal government by the Constitution, nor prohibited by that document to the states, nor reserved to the people. The State of Washington's Supreme Court in *State v. Gunwall* contrasted the qualitative distinction between the federal Constitution's limit of enumerated powers with the state constitution's understanding of sovereign power inherent directly in the people, concluding, „the explicit affirmation of fundamental rights in our state constitution may seem as a guarantee of those rights rather than as a restriction on them."[13]

Despite these differences, however, the Supremacy Clause of the U.S. Constitution makes the First Amendment the minimum standard for protection, but does not preclude greater protection so long as a state does not, by granting greater protection, infringe another constitutional right.[14] Thus litigants have often challenged state courts to hold that the state language provides greater protection than provided under the First Amendment. Greater protection, however, does not automatically result in greater religious liberty or religious interaction involvement in state affairs. For example, any state court finding that its free exercise equivalents provide greater religious freedom must still be careful to avoid violating the Constitution's Establishment Clause restrictions. A converse example would be those state charters that restrict state funds for sectarian religious purposes, which can lead state courts to develop distinctive jurisprudence that limits government far more than federal Establishment Clause jurisprudence permits, thus arguably restricting institutional autonomy more than the federal Constitution would.

Given these distinct possibilities, two federalism guidelines, one federally driven, the other chosen by the states, temper how state supreme courts address state constitutional claims in light of the First Amendment. First, in *Michigan v. Long*,[15] the United States Supreme Court chartered the parameters for judicial review of state court decisions. Under the Supremacy Clause, the Supreme Court has the authority and the responsibility for reviewing all federal questions. Thus, if a state supreme court were to decide an issue under federal precedent, its decision would be subject to review. However, Justice O'Connor, writing for the majority, stated that if an independent analysis under state law clearly provided the basis for the decision, the decision would be immune from review by the United States

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> federal government to exercise only those constitutionally enumerated powers that the States expressly delegate to it. Our state constitution imposes limitations on the otherwise plenary power of the State to do anything not expressly forbidden by the state constitution or federal law. Gunwall, 106 Wash. 2d at 66, 720 P.2d 808.

[13]720 P.2d 808, 812 (Wash. 1986). *See also,* Maylon v. Pierce County, 935 P.2d 1272, 1277 (Wa. 1997).

[14]U.S. CONST. art. VI, Sec. 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

See also Marbury v. Madison, 5 U.S. 137 (1803).

[15]463 U.S. 1032 (1983).

Supreme Court.[16] Ambiguity in the decision would leave it open to review, but a clear statement of the grounds for the holding would suffice to preclude review. Specifically, Justice O'Connor held:

> [When, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the Court has reached....If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[17]

Thus, under *Michigan v. Long*, state supreme courts have permission to determine issues under their state constitutions without fear of review if the decision clearly reveals an independent and adequate analysis.[18] Not all states have accepted that invitation, raising the second point of how each state decides the order and relevance it gives the jurisprudence of the respective federal and state constitutions.

As state courts have examined their own constitutions in the federal system, various theories have developed to describe how state supreme courts have balanced their interpretive role between two bodies of law. Commentators and courts have described them differently, but most agree upon the three categories of primacy,[19] dual sovereignty,[20] and lockstep.[21]

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[16] *Id.* at 1040-41.

[17] *Id.* at 1040-41.

[18] *See, e.g.*, State v. Hershberger, 562 N.W.2d 393, 396 (Minn. 1990) (holding unnecessary to rest decision on uncertain developments in federal law when the Minnesota constitution provides and independent and adequate state constitutional basis to protect Amish religious belief resulting in a practice contrary to state law.)

[19] *See, e.g.*, Salem College and Academy, Inc. v. Employment Div., 695 P.2d 25 (Or. 1985) (Oregon courts should „determine the state's own law before deciding whether the state falls short of the federal constitutional standard.") *Id.* at 484. *See also*, State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985):

> It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution. Indeed, as the highest court of this state, we are 'independently responsible for safeguarding the rights of [our] citizens.'
>
> State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, does not mean that we will or

Primacy involves examining the state constitution first and ignoring the federal precedents if the state constitution analysis results in protecting the liberty interest. Dual sovereignty necessitates always examining both constitutions. Lockstep typically looks to the federal jurisprudence as providing the appropriate understanding of the state constitution. Of course, regardless of the analysis applied, the Supremacy Clause necessitates that no state protection dip below that of the United States Constitution. Accordingly, federalism permits but does not require a separate state analysis of religious freedom under state constitutions. As will be discussed below, choice of the theory applied does not automatically predict outcome with regards to institutional autonomy.

2. Textual Differences Between Federal and State Constitutions

The sixteen words of the First Amendment pale in comparison to the diversity and length of state constitutional texts addressing religion or religious issues. Indeed, many of the state constitutional provisions sound more like the protections of Article 18 of the International Covenant on Civil and Political Rights, which protects, among other rights, „freedom of thought, conscience, and religion" and assures individuals the right to „manifest his religion or belief in worship, observance, practice and teaching."[22] In addition, like many of the state constitutional provisions, Article 18 also limits such protections under public health and safety provisions.[23]

For purposes of this paper, I will mention briefly some of the variations in state provisions, but will specifically address only the Free Exercise equivalents under the expansive state protection of worship and conscience, as well as the Establishment Clause equivalents frequently found in the absolute or partial ban on funding sectarian institutions of state constitutions.

Neither religion nor God receives scant mention within the United States Constitution.[24] In contrast, to read the text of state constitutions alone, one would presume

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> should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution. Indeed, a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling force. (Footnote and citations omitted.)

[20]*See*, First Covenant Church v. Seattle, 840 P.2d 174 (Wa. 1921); *Hershberger*, 562 N.W.2d 393.

[21]*See, e.g.*, *In re* Springmoor, Inc., 1998 WL 151240 NC (1998); Board of Education v. Bakalis, 299 N.E.2d 737 (Ill. 1973). *See also*, Michael S. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion Under the Illinois Constitution*, 21 LOY. U. CHI. L. J. 91 (1989).

[22]*See*, Rodney K. Smith, *Converting the Religious Equality Amendment Into a Statute With a Little Conscience*, 1996 BYU L.REV. 645, 657, n. 42, *citing* MICHAEL J. PERRY, RELIGION IN POLITICS 28 (1997).

[23]Acts of licentiousness or practices inconsistent with peace and safety of the state will not be protected under the guise of liberty of conscience in many state constitutions.

[24]The First Amendment protects religious exercise and prohibits religious establishment. In addition, Art. VI, Sec. 3 prohibits a religious test for office. According to

that the realm of God can be found alive and well within the vast majority of states. Although sharing the same vision as that of the United States Constitution to secure the blessings of liberty by forming a constitution, most states in their preambles to their respective constitutions expressly seek God's or a Supreme Being's aid to meet those goals for the good of a society.[25] From preambles and clauses protecting religious liberty to clauses precluding state funding of private, sectarian, or religious education, state constitutional language suggests a participation of divine authority in the daily lives of each state's citizens. God or the Supreme Being is acknowledged as a transcendent force, alive and sovereign, in at least forty-seven state constitutions.[26] Several state constitutions hold that citizens possess the „duty to worship God" while others simply acknowledge that public worship constitutes a necessary condition to the overall good of the state and its citizens.[27] Many states' clauses bar or limit funding to sectarian institutions.[28] Thus, the very presence of these acknowledge

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John Wilson, Article VI contained all the founders believed necessary to be said about federal control of religion. John Wilson, *Religion, Political Control, and the Law*, 41 DEPAUL L.REV. 821, 822 (1992).

[25]Compare, for example, the Preamble of Maine's Constitution:

> „We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the SOVEREIGN Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring GOD'S aid and direction in its accomplishment...."

to that of the United States:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. U.S. Const. Preamble.

In *Hershberger*, the Minnesota court also noted that the state constitution's preamble opened with „We the people of the State of Minnesota, grateful to God four our civil and religious liberty..." represented the Minnesota framers designation of „religious liberty as coequal with civil liberty." *Hershberger*, 562 N.W.2d 393, 398 (1990).

[26]*See* Carmella, *supra* note 2, at 287.

[27]Examples of such a constitutional provision is found in the Massachusetts Constitution, article 3, which provides:

> As the public worship of God and instruction in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;–therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support....

[28]Thirty-four states have enacted provisions that prohibit gifts, funds or appropriations to churches, religious schools, or religious institutions. Examples include:

ARIZ. CONST. art. II, § 12 (Arizona Constitution),

that religious institutions have a role in society, necessarily a voluntary and privately funded one, but a place in society. Several states also specifically warn that no preference shall be given to any denomination or religion, providing, at least textually, equal footing for all denominations or religious institutions.[29] Some states protect not just the free exercise of religion, but „conscience“,[30] the „exercise of conscience“, „worship“,[31] „public worship“[32]

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to support of any religious establishment.

ILL. CONST. art. X, § 3 (Illinois Constitution),

> Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriations or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

N.Y. CONST. art. XI, § 3 (New York State Constitution)

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from school or institution of learning.

[29]Thirty-two state constitutions contain provisions that forbid giving preference to one religious denomination over another. Examples of such state constitutional provisions are found in the Minnesota State Constitution, article I, section 16, which provides:

> [n]or shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship;

MINN. CONST. art. I, § 16

and in the New Jersey Constitution, which provides:

> There shall be no establishment of one religious sect in preference to another.

N.J. CONST. art. I, § 4.

[30]An example of such a state constitutional provision is Arizona:

> The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State.

ARIZ. CONST. art. II, §12.

Thirty-seven other states also provide for freedom of „conscience“ from official interference. *See, e.g.*, CAL. CONST. art. I, §4; N.Y. CONST. art. I, §3.

and „dictates of conscience“[33] among others. Ten states emulate the Constitution's „establishment“ language, leaving forty others to formulate exactly what they prevent religion and state from doing.[34] Many limit the protection of religious liberty by stating that liberty of conscience is not an excuse for acts of licentiousness or to justify practices inconsistent with peace and safety of the state.[35]

The wide choice of language, moreover, presents a more complex understanding of government's protection and limitations on its interference with religious autonomy than that of the two poles of free exercise and non establishment under the First Amendment. The specificity of state language has also led courts to view the issue without immediately labeling the case as either a free exercise or establishment clause case.[36] Without such pigeonholing, courts and litigants have the additional opportunity to provide distinctive analysis to the relationship of government and religion. Proponents fostering state constitutions for expanded autonomy of religious institutions often claim that proximity to the local or state community permits the law to respond to actual community interests and needs.[37] The relative ease of amending those constitutions when compared to the federal Constitution furthers their argument. Alan Tarr points out that as state constitutions developed over time, they responded to specific problems within the states, and thus, were more likely to contain much more concrete language to address those problems.[38] Given the frequent amendment or adoption of new state constitutions, these societal changes may have

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[31]All men shall be secure in their Natural right, to worship Almighty God....

OR. CONST. art. I, § 2 (freedom of worship provision.)

[32]The „public worship“ provision is illustrated in the Massachusetts Constitution, article 3.

[33]The right to worship according to one's „dictates of conscience“ is guaranteed in twenty-seven different states. An example of such language is found in the Minnesota Constitution:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed.

MINN. CONST. art. I, §16.

[34]*See* Tarr, *supra* note 2, at 85-88.

[35]The many provisions including this public health and safety language also demonstrates another way state constitutions may impact judicial interpretation of the First Amendment. In *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) (Scalia, J., concurring in part), Justice Scalia pointed out that the public safety language in state constitutions supported the Court's decision in Smith. *Compare* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores,* 39 WM. & MARY L. REV. 819 (1998) *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective,* 60 GEO. WASH. L. REV. 915 (1992).

[36]*See* Carmella, *supra* note 2, at 321 *citing* Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978).

[37]Emily Fowler Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions,* 6 J. LAW & RELIGION 225 (1988).

[38]Tarr, *supra* note 2, at 94.

permitted states to adopt new understandings of religious liberty.

The tremendous changes in colonial life caused by the American Revolution provided a excellent example of this adaptive process. Of the nine states that had constitutionally established religions prior to the American Revolution, five quickly moved to disestablish religion with a new constitution.[39] Subsequent to the ratification of the Constitution, which at that time only prohibited federal establishment, Connecticut (1818) and Massachusetts (1833) became the last two states to disestablish religion under their constitutions.[40]

Significantly, for purposes of this conference, institutional autonomy more than the force of law frequently led to disestablishment. Mark DeWolfe Howe suggests that disestablishment at this time arose from a general trend of increasing tolerance for new faith communities to allow individuals to respond freely to God's grace.[41] New faith communities developed pursuant to typically American responses to restrictions on liberty. Dissenters could leave the restrictions of the homogenous communities that had established religions and move to new lands to worship in communities more aligned with their beliefs or to start new communities or religious traditions.[42]

Unlike some of the criticism of federal establishment clause jurisprudence, Alan Tarr argues that state constitutional language, although more detailed than the First Amendment's establishment clause, „did not move to secularize society."[43] Instead, society provided all citizens with freedom to choose, their beliefs unfettered by state restriction, and without the influence of state funding.

Religious life in the new United States took advantage of this freedom in conjunction with the freedom to travel and expand with all the new settlements arising after the American Revolution. Nathan Hatch states that new communities that had tasted the freedom of thinking for themselves about issues of freedom and sovereignty and representation contributed to the growth of evangelical fervor and popular sovereignty.[44] This fervor accelerated Christianization of American society while simultaneously „allowing indigenous expressions of faith to take hold among ordinary people, both white and black."[45] Hatch concludes that this democratization of Christianity had less to do with polity or governance, and more with „the very incarnation of the church into popular culture."[46] With all this new growth, religions adapted, turning voluntary associations into more complex organizations and denominations.

By the end of the first century of the Republic, however, state constitutions reflected

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[39]John K. Wilson, *Religion Under the State Constitutions 1776-1800*, 32 J. CHURCH & STATE 753, 755 (1990).

[40]*Id*. at 754.

[41]MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 88 (1965).

[42]Lutz, *supra* note 6, at 56. (The pluralism of society allowed settlements, although homogenous in themselves, to differ from other settlements, offering dissidents choices of places to locate.)

[43]Tarr, *supra* note 2, at 87-88.

[44]Nathan O. Hatch, *The Democratization of Christianity and the Character of American Politics, in* RELIGION IN AMERICAN POLITICS 93-94 (Mark Noll, ed., 1990).

[45]*Id.* at 95.

[46]*Id* at 96.

the will of the people, by enacting new provisions that precluded any funding of religious, private, or sectarian schools or institutions.[47] The influx of Catholic immigrants and the resulting fear of Catholicism led most states to enact constitutional amendments that forbade the public funding of religious, sectarian, or in some cases, private schools. Thus, state constitutions provide, at least through the textual analysis, the unusual combination of a strict protection of a wide variety of religious activities with a high wall of separation precluding taxes and public funds from aiding any religious institutions.[48]

3. Protecting Religious Liberty and Worship

Several reasons suggest that analysis of state constitutions could provide fruitful grounds for religious institutional life, or at the very least, an alternative or beneficial jurisprudence that may provide a different lens to view the meaning of the First Amendment. The nature of state constitutions and their role in responding to specific problems within the state may provide a helpful laboratory[49] for dealing with pluralism and changed circumstances of modern life.

A remarkable convergence of events at the time of the drafting of the first state constitutions led to a radically new and „American" understanding of the relationship between religion and government. The early years of state constitution drafting occurred in an era when the Bible still remained the primary source book for understanding life and society. Christopher Hill points out that God and the Bible were the main reference points in life.[50] Political and religious discourse began, not with the premise of a free human, but a free God.[51] H. Richard Niebuhr suggests that in the colonial days, the Kingdom of God was understood as the sovereignty of God, with the Reformation understandings of the „present sovereignty and initiative" of God in daily life.[52]

The earliest colonists, especially in the New England colonies, saw themselves building a church first, not a government.[53] But that quickly raised the question of how to constrain the radical freedom unleashed by the Reformation. Niebuhr calls this the Protestant dilemma, moving newly emancipated persons and institutions into a constructive life that provided more order than simply relying on the belief of a sovereign God.[54] Anarchy threatened if new disciplines were not developed. Balancing these new freedoms with a God active in daily life led to colonial and state constitutions that scholars have called „biblical commonwealth,"[55] and „constructive Protestantism."[56] Perry Miller warns, however, that

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[47]*See generally*, Antieau, *supra* note 2. Although somewhat dated, this work provides a good summary of the many constitutional provisions and cases that dealt with state preclusion of funding of sectarian institutions.

[48]*See, e.g.*, Society of Separationists v. Whitehead, 870 P.2d 916, 934 (Ut. 1993).

[49]*See* Tarr, *supra* note 2, at 76.

[50]CHRISTOPHER HILL, THE ENGLISH BIBLE AND SEVENTEENTH-CENTURY REVOLUTION 7, 34 (1994).

[51]H. RICHARD NIEBUHR, THE KINGDOM OF GOD IN AMERICA 24 (1988).

[52]*Id.* at 17.

[53]*Id.* at 68. *See also* Perry Miller, ERRAND INTO THE WILDERNESS 38 (1956).

[54]NIEBUHR, *supra* note 51, at 30.

[55]MILLER, *supra* note 53, at 35.

these constitutions and compacts do not readily fit modern political definitions and instead contain contradictory elements of democracy, aristocracy, and hierarchy.[57]

State constitutional language recalls the classic biblical covenants grounded in a societal thanksgiving for God's saving role and promise of benefits for continuing that life.[58] Grounded in biblical understanding these documents reflect the immediacy of the relationship with God and the unequal covenantal relationship between humans and divine authority.[59] Inclusion of this language does not simply suggest an established church that would rule society. Rather, the key point is the recognition of complete dependence on God. Niebuhr points out that no human plan could be identified with a universal kingdom. Given human self-interest, all human attempts at governance, either by the state or by religion, would be undermined by human finitude and corruption.[60]

At the same time, political theory developed quickly in response to the colonial attempts to understand the colonies' place in the British Empire and eventually the need for rebellion and self-rule. Although the federal constitution resulted in the triumph of the Federalists and a national government, state constitutions drafted up to the time of the adoption of the federal Constitution are essentially the triumph of Whig and radical Whig political theory.[61] The locus of authority and sovereignty with the people and the ability to amend frequently were Whig hallmarks.[62] Whigs set their political philosophy in the midst of homogeneous communities. Whereas Federalists saw self-interest as the guiding principle and check on any one faction gaining too much power, Whigs believed in the power of the homogeneous community where each member that knew and agreed upon the rules. Community rights could trump individual rights, because as a homogenous community, they were virtually identical.[63] Critically, however, even under Whig political philosophy, religious rights, especially the right to worship and believe in God, were considered inalienable.[64] The state could not control religious beliefs because these rights were only accountable to the Creator.[65] But with an interesting coalescing of interests, Puritan understandings of the Reformation and Whig thinking came together in early state constitutions.[66] Moreover, Whigs could believe that homogenous communities could work, again because of this belief that a transcendent God, active in daily life, could constrain conscience. According to James Washington, the prevailing view was that the „existence of God was the ultimate constraint on the great engine of humanity."[67] Ultimately, democracy

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[56]NIEBUHR, *supra* note 51, at 43.

[57] MILLER, *supra* note 53, at 23.

[58]GERHARD VON RAD, OLD TESTAMENT THEOLOGY, VOL. I , 130 (D. M.G. Stalker, trans. 1962).

[59]*Id.* at 129.

[60]NIEBUHR *supra* note 51, at 46 *passim*.

[61]Lutz, *supra* note 6, at 10.

[62]*Id*. at 8

[63]*Id.* at 50.

[64]*Id.*

[65]*Id*.

[66]*Id*. at 10.

[67]James Washington, *The Crisis in Sanctity of Conscience in American Jurisprudence*,

was subject to the Kingdom of God.[68]

Before incorporation, state courts were the final arbiter for state regulation of religious activity within the states. In the latter part of the nineteenth century and early into the current one, Protestant culture came to dominate government and society. This was often recognized, implicitly and explicitly by most state courts. An early commentator, Carl Zollman pointed out Christianity became part of the law of the land.[69] Niebuhr demonstrates that Christians, although still employing the metaphor of the Kingdom of God changed their interpretation of that language to mean the Kingdom of Christ and saw nothing wrong with the state regulating the moral code of the land, imbued as it was with Christian values.[70] Significantly, James Washington notes that the loss of a belief in God's divine activity in daily life coincided with a loss of belief in conscience as tool for social control or moral guidance.[71]

With the substantial overlay of Protestant culture and the law, few in power saw a problem of the state enforcing Protestant norms as hindering religious liberty. Most states in the early part of this century looked to the provisos of public safety, health, and restrictions against licentiousness to forbid most non-Protestant claims for religious liberty within the states. During most of the 19th and 20th Centuries, under the Protestant consensus,[72] state courts saw nothing incongruous or unconstitutional in denying claims for example, of religious freedom for challenges against Bible reading in schools.[73] Moreover, requests for exemptions from laws were routinely denied based on the public safety language.[74] With the Supreme Court's decision in *Sherbert v. Verner*[75] in 1963, however, the simple acceptance of the public safety clauses came under attack. With its strict scrutiny standard and the recognition that exemptions were constitutionally permissible, many state courts adopted the *Sherbert* analysis for free exercise claims.[76] Both the strict scrutiny test and the power of federal doctrine led to a period of benign neglect of state constitutional standards as state

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42 DEPAUL L. REV. 11, 12 (1992).

[68]*Id.*

[69]ZOLLMAN, *supra* note 2, at 12.

[70]NEIBUHR, *supra* note 51, at 170.

[71]Washington, *supra* note 67, at 28. „By the end of the nineteenth century, it was evident that the juridical use of conscience had been diminished by the decline of its authority. It was no longer considered by some to be a transcendent reality brokered by the human will. It had been reduced to a state of individual consciousness."

[72]ROBERT HANDY, UNDERMINED ESTABLISHMENT 25 (1991). Handy notes that it was normative at the turn of that century that the United States was, „a state without a church, but not without a religion" and that religion was predominantly Protestant.

[73]*See, e.g.*, Kaplan v. Independent School Dist. of Virginia, 171 Minn. 142, 214 N.W. 18 (Minn. 1927)(no constitutional right is infringed by requiring teachers to read extracts from the Bible) („liberty of conscience , whatever else it may mean, does not include license to remain wholly ignorant." Stone, J. concurring). For other cases, *see* ZOLLMAN, *supra* note 2, at 32.

[74]*See, e.g.*, People v. Brossard, 33 N.Y.S.2d 369 (1942); Lyon v. Stong, 6 Vt. 219 (1834), *but cf.* Ferriter v. Tyler 48 Vt. 444 (1876).

[75]374 U.S. 398 (1963).

[76]Carmella, *supra* note 2, at 36.

courts without too much analysis about the distinction between federal and state constitutions applied the Sherbert's analysis both for federal and state constitutions.[77]

Employment Div. v. Smith[78] led to a reawakening in some courts requiring them to analyze claims under both the federal and their own state constitutions. Under *Smith*, the Supreme Court held that *Sherbert* and its exemptions had never been the law of the land, but had only been limited to isolated administrative hearings and hybrid cases involving other constitutional rights. Thus, neutral laws of general applicability that burdened religious behavior were not unconstitutional, having only an incidental impact on such conduct. After *Smith* few claimants could show that the government actions was specifically aimed at their religious practice, and therefore, most, if not all failed to prevail.[79] Although most state courts still followed the federal precedent, a few states engaged in independent analysis to find heightened protection under the state constitutions. Significantly, for purposes of this conference, most of the states that have independently addressed this issue separately from *Smith* examined it within the context of institutional autonomy. Independent analysis, however, does not always lead to greater protection. Ironically, the state that probably led the nation in advocating for a state first interpretation of its constitution, started the line of cases that led to the federal retrenchment in
Smith. Justice Hans Linde of the Oregon Supreme Court has long been regarded as one of the leading proponents of the primacy theory, that is interpreting the state constitution first before analyzing federal constitutional rights.[80] That theory had been first postulated in *Salem College & Academy, Inc. v. Employment Div.*:[81] „the judicial responsibility [is] to determine the state's own law before deciding whether the state falls short of federal constitutional standard."

In *Salem College*, a nondenominational school had requested exemption from the unemployment tax requirements under Oregon statute, arguing that its free exercise guarantees were violated when churches and other religious organizations which were operated, supervised, controlled or principally supported by a church or convention of churches received the exemption, but Salem College did not. All agreed that Salem College did not meet either definition, although it was religiously oriented. The college officials sought the freedom from control that its nondenominational status brought. It claimed, therefore, that „the distinction made by the unemployment compensation law between church-related and independent religious schools in effect compels the Academy to „reorganize as a church" or affiliate with a church in order to avoid liability for unemployment compensation."[82] Noting that Oregon's religious freedom clauses do not

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[77]*Sherbert's* strict scrutiny test was invoked when a claimant alleged that government had burdened a religious belief. The government then had the burden to show both a compelling interest necessitating the government action and no less restrictive means to accomplish that end. 374 U.S. at 406-08.

[78]494 U.S. 872 (1990).

[79]*But see*, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2217 (1993) (City specifically discriminated against the religious practices of the church, and therefore, violated the Constitution.)

[80]*See, e.g.*, Linde, *supra* note 3.

[81]695 P.2d 25 (Or. 1985)

[82]695 P.2d at 36.

address religion in the singular or refer specifically to churches, but rather rights to worship and enjoyment of religious opinions, the court emphasized Oregon's religious pluralism recognizing that the state was settled by pioneers of every opinion on the subject of religion from „half-crazed fanatic to the unbelieving atheist."[83] The court refused to rule whether religious institutions should be treated differently than other not-for-profits and instead held that the unemployment compensation tax should be extended to all schools, religious or otherwise, thus avoiding the discriminatory distinction and upholding religious pluralism.[84]

Subsequently, the Oregon Supreme Court in *Employment Div. V. Rogue Valley Youth for Christ*,[85] faced a similar issue of how to define a church, stating:

> It may be possible to expound a judicial test for "church" consistent with both the intent of the Oregon legislature and with FUTA. Any such definition, however, would still face the problem discussed in *Salem College*--that is, Oregon would still be put in the position of treating unequally what, at least for Oregon constitutional purposes, are religious organizations. Creating such a "distinction contravenes the equality among pluralistic faiths and kinds of religious organizations embodied in the Oregon Constitution's guarantees of religious freedom." *Salem College & Academy, Inc. v. Emp. Div., supra*, 298 Or. at 495, 695 P.2d 25. Therefore, we hold that Oregon must treat all religious organizations similarly whether or not they would qualify as churches under FUTA or OAR 471-31-090(1)(a).[86]

The court resolved the problem by taxing all religious organizations. Primacy theory, therefore, does not necessarily result in broader protections.

In *Smith v. Employment Div.*,[87] the Oregon Supreme Court took its first look at whether discharge for religious use of peyote was discharge for misconduct, and therefore, grounds for ineligibility for unemployment compensation benefits. When Smith first was heard in Oregon, the Oregon Supreme Court denied Alfred Smith relief under the state constitution, but granted relief under the *Sherbert* analysis of First Amendment protection the court, first examined Mr. Smith's claims under the Oregon constitution which includes free exercise language that on its face is broader than the First Amendment's protections.[88] The

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[83] *Id*. at 37.

[84] *Id.*

[85] 770 P.2d 588 (OR. 1989).

[86] *Id*. at 591.

[87] 721 P. 2d 445 (Or. 1986), *rev'd*, Employment Div. v. Smith, 494 U. S. 872 (1990), *remanded to,* Smith v. Employment Div., 799 P.2d 148.

[88] OR. CONST., art. I, §§ 2-5:

> All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> No law shall in any case whatever control the free exercise, and enjoyment of religious (sic) opinions, or interfere with the rights of conscience.
>
> No religious test shall be required as a qualification for any office of trust or profit.

court stated, „The statute and the rule are completely neutral toward religious motivations for misconduct. If the statute or the rule did discriminate for or against claimants who were discharged for worshiping as they chose, we would be faced with an entirely different issue“ but here „[c]laimant was denied benefits through the operation of a statute that is neutral both on its face and as applied.“[89] Because the Oregon constitution did not make the law unconstitutional, the court then examined federal law under the First Amendment. Applying the *federal* test, the court held that Mr. Smith was improperly denied employment benefits. On remand, after the United Supreme Court decision in *Smith*, Alfred Smith lost under both the federal and state constitution.[90]

In contrast, state cases involving land use regulation have emphasized religious institutional autonomy through a separate state analysis. In Massachusetts, the Jesuits sought to renovate the interior of a large urban cathedral that Boston had designated as a historical landmark. Recognizing that declining numbers had made the cathedral inhospitable for worship, the Jesuits wanted to change the interior to provide a smaller worship space. However, the designation as a landmark restricted the Jesuits' ability to define their own worship. In deciding the case solely on the Massachusetts constitution, the court recognized that the Massachusetts constitution's language and original intent recognized „the right freely to exercise one's religion to an uncompromising principle.“[91] The court further noted that the text of the constitution protected not just belief, but also religious practice, contemplating „broad protection for religious worship.“[92]

Similarly in another post-Smith case, *First Covenant Church v. Seattle*,[93] (*First Covenant II*), the supreme court of Washington faced on remand from the United States Supreme Court the issue of whether Seattle's landmarks ordinance was unconstitutional as applied to that church. First Covenant owned and used its church building exclusively for religious purposes. Under the city's landmarks ordinance, churches could be nominated for landmark designation, but the city's plan included a process whereby alteration of the exterior of buildings when required by liturgical reasons required the Landmarks Preservation Board and the owner to engage in discussion to explore alternative design solutions.[94] The church sought a declaratory judgment that such application violated its religious freedom under the

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> No money shall be drawn from the Treasury for the benefit of any religious (sic), or theological institution, nor shall any money be appropriated for the payment of any religious (sic) services in either house of the Legislative Assembly.
>
> art. I, § 20:
>
> No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

[89]721 P.2d at 448.

[90]Smith v. Employment Div., 799 P.2d 148, 149 (or. 1990).

[91]Society of Jesus of New England v. Boston Landmarks Commission, 400 Mass. 38, 564 N.E.2d 571, 573 (1990).

[92]*Id.*

[93]840 P.2d 174 (Wa. 1992).

[94]*Id.* at 178.

state constitution.[95] In *First Covenant Church v. Seattle*,[96] the Washington court held that the ordinance violated both the First Amendment and art. 1, Sec. 11 of the state constitution. The Supreme Court remanded for review in light of *Smith.*

On remand, the court again held the ordinance unconstitutional, but engaged in an independent analysis under both *Smith* and its understanding of the First Amendment, as well as the Washington state constitution. The court stated, „Washington, like all the states, may provide greater protection for individual rights, based on its 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'"[97]

Six nonexclusive factors govern whether the Washington State Constitution extends broader rights to citizens than the federal Constitution:

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.

Gunwall, at 61-62, 720 P.2d 808.[98]

In analyzing the *Gunwall* factors, the court held that art. I clearly protects both belief and conduct in contrast to the First Amendment under *Smith.* Although holding that the state constitution could be more expansive than the federal Constitution, the majority decision analyzed Art. 1, section 11 under a compelling interest and least restrictive test comparable to the *Sherbert* analysis, holding the ordinance unconstitutional.[99]

In his concurrence, Justice Utter complained that the majority failed to „devote enough attention to the unique language of our state constitution."[100] Fearing that an independent state analysis could not occur when the court „reverts" to federal First Amendment jurisprudence, Utter suggested some alternate ways of examining the language.

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[95]Article 1, section 11, of the Washington State Constitution provides that:

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

WASH. CONST. art. 1, §11.

[96]787 P.2d 1352 (1990), *cert. granted and judgement vacated in* 499 U.S. 901, *remanded* 840 P.2d 174 (1992).

[97]840 P.2d 179, 186 (1992) (citation omitted).

[98]*Id.*

[99]*Id.* at 187.

[100]*Id.* at 191.

He noted that the Washington constitution protected both belief and conduct, as such are closely related.[101] Moreover, in terms of institutional autonomy, Utter stated, „Religion is to some extent a communal matter. Ritual in many religions is inseparable from one's spiritual experience in faith."[102] Second, Utter stressed that only the government's interest in peace and safety or in preventing licentious acts can excuse an imposition on religious liberty, thus limiting the governmental interests that would justify any imposition to religious belief or practice.

Although using compelling interest and least restrictive means test language, to be fair to the majority decision the court held that a „compelling interest is one that has a 'clear justification...in the necessities of national or community life'...that prevents a 'clear and present, grave and immediate' danger to public health, peace, and welfare."[103] It further seemed to expand the least restrictive means test by requiring the State to „demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." Some of the limitations of state constitutional jurisprudence can be seen in those states that suggest that their own analysis will follow federal analysis. With the relatively rapid changes in law from the *Smith* decision in 1990, the enactment of RFRA in 1993[104] and the 1997 *City of Boerne v. Flores* decision,[105] states relying on federal analysis have often decided cases under their state constitutions without full development of the federal law. For example, in *State of Vermont v. DeLaBruere,*[106] parents sought a religious exemption from state truancy laws to permit children to be educated at home. The Vermont Supreme Court held that state compelling interest in education outweighed the parents' rights and the state provided the least restrictive means to permit parents an option. The Vermont Supreme Court refused to extend the state constitution beyond the limits of the federal constitution. It noted that other states with similar constitutional language had previously interpreted parallel language to be read only as broad as the United State constitution. Although the Court noted that the Vermont Constitution possessed major textual differences with the First Amendment, both Vermont precedent and the historical development of the Vermont constitution led the court to conclude that Vermont's protections were not more extensive than the protections of the First Amendment. Angela Carmella has critiqued how this lockstep analysis of simply following the federal lead has abdicated Vermont's role to truly interpret its constitution.[107]

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[101]*Id.* at 192.

[102]*Id.*

[103]*Id.* at 187.

[104]Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq*.(1993).

[105]117 S.Ct. 215F (1997) (holding the Religious Freedom Restoration Act unconstitutional, at least as it applies to the states).

[106]154 Vt. 237, 577 A.2d 254 (Vt. 1990).

[107]Carmella, *supra* note 2, at 316-17 citing *DeLaBruere* to demonstrate that the unfortunate that the unfortunate result of such analysis „automatically amends state constitutions and their interpretations" whenever the Supreme Court makes a change in the law. *See also*, Hunt v. Hunt, 648 A. 2d 843 (Vt. 1994). Notice, however, the distinctiveness of the Vermont constitutional language:

> That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in

These states have shown the diversity of ways state courts can analyze distinctive language. Certainly, in addressing religious pluralism, Oregon foreshadowed the equality of religion issues of *Smith* that resulted in treating religious institutions the same as other not-for-profit institutions. *First Covenant II* an *Hershberger* follow an independent mode yet apply old federal tests. *Society of Jesus* does, indeed, carve out a special place for protecting worship, but even that court limited its discussion to the interior of the worship space.

4. State Constitutional Preclusion of State Funding of Religious Institutions

Education of children and the inculcation of values through the control of education has been a major battleground in the states over the last two centuries. In the mid-nineteenth century, with the increasing wave of Catholic immigration, states began to restrict funding of sectarian institutions to prevent support of Catholic institutions. In 1846, New Your ratified a new constitution that included a ban on any public funds for non-public schools.[108] Subsequently, Congressman Blaine proposed a constitutional amendment that would make the Establishment Clause binding on the states and also prohibit states from supporting denominational schools.[109] The proposal failed in the United States Senate, but more than half of the states subsequently have enacted similar provisions expressly prohibiting public aid to sectarian or religious schools.[110]

The 1990s have seen an increase in public debate over the control of public education institutions, and the concomitant wrestling over the funding of sectarian schools, involving such issues as tax credits, vouchers, and transportation subsidies. As the federal case law evolves over the meaning of the Establishment Clause, these state provisions have taken on a new emphasis. Both the weakness and strength of state constitutional adjudication of these issues has already been exposed in the cases that have been decided. Litigants have specifically argued both federal and state constitutional provisions, and therefore, the courts have been compelled to look at both areas of law. It is quite likely that soon one of these cases will come before the United States Supreme Court. The decisions reflect the deep divisions within individual state courts and the distinct role state courts will have in deciding these issues that go to the heart of society. Many consider public education, especially for the urban poor in this nation, to be at a crisis point. States can be the laboratories for finding constitutional ways to improve public education and permit sectarian and private education to flourish. In Wisconsin, for example, up to 15% of Milwaukee's public school membership could apply for aid to attend private schools. The payments would be made to the student's

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

[108]Tarr, *supra* note 2, at 92.

[109]*Id.*

[110]*Id.* at 95. *See,* Antieau, *supra* note 2 for a review of how the states have analyzed this language.

parents or guardians and they would have complete freedom of choice of what private school to attend.[111] An Ohio scholarship program provided parents tuition assistance for private schools. In Ohio, however, although public schools were eligible, only religious schools applied for the program.[112] Maine, on the other hand, precludes any religious schools from accessing its tuition assistance program, even in rural towns that have no public schools.[113] Arizona provides parents with a $500.00 tax credit[114] and Kentucky provides transportation assistance to those attending sectarian schools.[115]

Each of the recent state decisions demonstrates how different states have attempted to resolve these issues. For example, the Wisconsin Supreme Court has held that although its state constitutional language is more terse and explicit than the federal one, the two constitutions share the same purpose. Thus, although the language is different, the respective analysis remains co-extensive.[116] In contrast, when faced with a statute that precluded state funding of religious schools, the Maine Supreme Court also held its distinctive state constitutional language co-extensive with the First Amendment, but upheld the law, thus denying the funding.[117] The Kentucky Supreme Court has held its language more restrictive of funding than the federal counterpart, but nonetheless, held that a transportation subsidy benefitted the child rather than the religious school when combined with the public safety concerns ensuring the safe transit to schools, the funding survived a challenge under both the federal and state constitutions.[118] Based on its review of the history of the ratification of the state constitution in Arizona, the *Kotterman* court held that it could not speculate that the drafters intended the explicit text of the Arizona constitution necessitated a more „stringent prohibition against aid than did their federal counterparts."[119]

These cases are requiring state courts to examine their text, history, and relationship not only to the federal constitution, but also to other states that possess similar constitutional texts. Although not agreeing on history or even text, they have begun to flesh out an evolving relationship between government, religion, and between the states and the federal government. One common denominator in the midst of these most recent cases stems from the litigants raising both federal and state claims. The national education debate which some have called culture wars in this nation, are being fought on many different battle grounds. The overwhelming concentration by many national organizations may diminish independent state analysis and lead state courts to substantially rely on federal law.

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[111]Jackson v. Benson, 578 N.W.2d 602, 608-09, (Wi. 1998), *cert. denied*, 119 S.Ct. 466, 142 Ed. 2d 419 (U.S. Wis. Nov. 9, 1998).

[112]Simmons-Harris v. Goff, 1997 WL 217583 at 1, (Ohio App. 10 Dist.), *appeal allowed* 80 Oh.St. 3d 1413 (Oh. 1997).

[113]Bagley v. Raymond School Dept., No. CUM-98-281, 1999 WL 236464 (Me. 1999).

[114]Kotterman v. Killian, 972 P.2d 606 (Az. 1999), *petition for certiorari filed*, 132 Ed. Law Rep. 938 (April 26, 1999) (No. 98-1716).

[115]Neal v. Fiscal Court, Jefferson County, 986 S.W.2d 907 (Ky. 1999).

[116]Jackson v. Benson, 578 N.W.2d 602, 621 (Wi. 1998).

[117]Bagley v. Raymond School Dept., No. CUM-98-281, 1999 WL 236464 (Me. 1999).

[118]Neal v. Fiscal Court, Jefferson County. 986 S.W.2d 907, 912-13 (1999).

[119]Kotterman v. Killian, 972 P.2d 606, 621 (Az. 1999).

5. Concluding Thoughts

The harbingers of new federalism had hoped that attention placed on state constitutions would result in expanded judicial interpretations of religious liberty. Although some courts have staked out grounds that go beyond federal interpretations, on balance, those hopes have been undercut. Several possible reasons may suggest that religious autonomy may not receive much greater protection under individual states than the Constitution.

Although some suggest that the fifty states within the United States are truly distinct cultural communities fostering different understandings of how religion and law interact, state boundaries by themselves do not necessarily establish that cultural distinctiveness.[120] Moreover, even the historical record of state constitutions does not necessarily provide a good litmus test for discerning unique understandings of the state.[121] As Professor Laycock argues, federalism has become a powerful engine for federal law to dominate religious liberty issues.[122]

For religious institutions, that have national constituencies, it is no longer clear that seeking distinct autonomy in specific states will adhere to the benefit of all members. Thus, the interest of at least national denominations will be to obtain national understandings of religious liberty wherever possible. Moreover, litigation on a state by state basis is expensive and hard to predict.[123] Given the uncertainty of federal developments, litigants may be forced to that end.[124]

Both the uncertainly of the First Amendment jurisprudence and the lack of clear direction for state constitutions to truly set out independent grounds for religious institutional autonomy can be seen in many state-wide efforts to pass state Religious Freedom Restoration Acts.

Although over two thirds of the states have had state RFRAs proposed, to date only four states have enacted legislation[125] and one has amended its constitution by popular ballot.[126] The effort to gain legislative support of religious freedom has many causes, but it certainly also speaks to the concern that notwithstanding textual differences and different histories, most state courts have not interpreted their constitutions to, at a minimum provide the strict

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[120]*See, e.g.*, Robert A. Shapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

[121]In *Kotterman*, the majority opinion details a considerably different understanding of the history and culture of Arizona than the dissenting opinion. The majority claims it cannot speculate on the meager history of ratification. 972 P. 2d 606, 621. The dissent strenuously details Arizona's history in arguing that Arizona's prohibition that „no pubic money... shall be applied to any religious worship, exercise, or instruction or to the support of any religious establishment." Article II, Sec. 12...contains a stringent proscription on educational aid." (Feldman, J., dissenting, at 28–38.

[122]Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. PUB. POLICY 67 (1998).

[123]*See, e.g.*, Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 854, (1992).

[124]*Id.*

[125]FLA. STAT. Ch. 761 (1998); 775 ILL. COMP. STAT. ANN. 35/1; R.I. GEN. LAWS Sec. 42-80.1 (West 1998).

[126]AL. CONST., RELIGIOUS FREEDOM AMENDMENT (1998).

scrutiny test like *Hershberger* or *Society of Jesus*, nor embark on a uniquely independent test called for by Justice Utter in *First Covenant*.

One conclusion, however, is certain. The recent public education cases reveal a nation truly wrestling with competing factions over how to raise children to be good citizens. Whether religious institutions receive government funding to participate in that training may well be played out on a state by state basis until the Supreme Court resolves some of the conflicting experiments that have been proposed to date. State constitutions, therefore, by necessity will continue to be interpreted during that state by state review.