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STATE CONSTITUTIONS WITHIN THE UNITED STATES 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. 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 fifty states. As most other papers presented at this conference reveal, federal law dominates religious liberty jurisprudence and scholarship in the United States. States have not truly developed understandings of autonomy under their respective religious freedom clauses. Nonetheless, state constitutional freedoms cannot be completely ignored for they offer potentially distinctive protection while

also serving as a venue for further development of religious liberty jurisprudence.

This chapter 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 overview that follows, I suggest that state constitutions initially were adopted with 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, 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]

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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 protections and restrictions of the First Amendment apply 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 state and local government activity); Everson v. Board of Educ., 330 U.S. 1 (1947) (similarly holding the establishment clause binding on state and local governments). For purposes of clarity, 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 Et Al.,* 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 thirty years, many scholars and commentators have 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); *Tarr*, supra note 2; *Carmella*, supra note 2. But see *James A. Gardner*, The Failed

In primarily examining state constitution free exercise equivalents, this chapter first discusses the means by which states within the federalist system may analyze religious autonomy issues differently from the national government. This chapter 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.[4] 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. This chapter then 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 of religion, and freedom of conscience.[5] This chapter next examines how some courts have parted from following federal jurisprudence. Finally, it concludes that despite these possibilities for distinction, with few exceptions, the many state courts have not interpreted state constitutions to bring forth a "new federalism" that would have strengthened and redefined civil liberties, including religious freedom and autonomy for religious institutions.

Discourse of State Constitutionalism, 90 Mich. L. Rev. 761 (1992); *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.

5 See *Michael McConnell*, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1421 (1990) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) [Brandeis, J., dissenting]) ("If the states can serve as 'laboratories of democracy,' the American colonies surely served as laboratories for the exploration of different approaches to religion and government." [footnote omitted]).

I. PRINCIPLES OF FEDERALISM: THE DISTINCTION BETWEEN THE UNITED STATES CONSTITUTION AND STATE CONSTITUTIONS

The federal Constitution 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 operated under their own constitutions for years 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] As Donald Lutz has calculated, 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 and 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 powers of sovereignty

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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, 17 U.S. (4 Wheat.) 316, 405 (1819); United States v. Cruikshank, 92 U.S. 542, 551 (1876). For an example of how one state supreme court enunciated this distinction, see First Covenant Church v. City of Seattle, 840 P.2d 174, 186 (Wash. 1992):

> The United States Constitution is a grant of limited power, authorizing the federal government to exercise only those constitutionally enumerated powers that the States expressly delegate to it. Our state constitution imposes limitations on the otherwise

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 *Washington 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, 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 does not automatically result in greater religious liberty: 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.

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.

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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 (Wash. 1997).

14 U.S. Const. art. VI, § 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. (1 Cranch) 137 (1803).

15 463 U.S. 1032 (1983).

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 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, the court held:

> [W]hen, 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] Primacy involves examining

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16 *Id.* at 1040-41.

17 *Id.*

18 See, e.g., State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) (holding that it is unnecessary to rest decision on uncertain developments in federal law when the Minnesota constitution provides an 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 & Academy, Inc. v. Employment Div., 695 P.2d 25, 34 (Or.

the state constitution first and ignoring the federal precedents if the state constitution analysis results in protecting the liberty interest. Dual sovereignty examines 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 dips 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.

II. 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

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1985) (ruling that Oregon courts should "determine the state's own law before deciding whether the state falls short of federal constitutional standards"). In Minnesota v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985), the court declared:

> 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.'
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> 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 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. City of Seattle, 840 P.2d 174 (Wash. 1992); Hershberger, 462 N.W.2d at 393.

[21] See, e.g., In re Springmoor, Inc., 498 S.E.2d 177 (N.C.1998); Board of Educ. 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).

teaching".[22] In addition, like many of the state constitutional provisions, Article 18 also limits such protections under public health and safety provisions.[23] The framers of the United States Constitution first considered protecting conscience instead of religion, prompting Michael McConnell to note that conscience was "presumably a broader term".[24] Thus, state constitutional protection of conscience would seem to invite an expanded interpretation.[25] For purposes of this chapter, I will mention briefly some of the variations in state provisions, but will specifically address institutional autonomy under the Free Exercise equivalents under the expansive state protection of worship and conscience.[26]

Neither religion nor God receives scant mention within the United States Constitution.[27] In contrast, to read the text of state constitutions alone, one would presume 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 the aid of God or a Supreme Being to meet those goals for the

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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)). See also *W. Cole Durham, Jr.,* State RFRAs and the Scope of Free Exercise Protection, 32 U.C. Davis L. Rev. 665, 683-84 (1999).

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 *Michael McConnell*, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 12 (2000).

25 Few courts have truly expanded protection. Courts have often skirted the issue by claiming that, notwithstanding major textual differences between the First Amendment and the state constitution, precedent and historical developments suggest that state protections were not more extensive. See, Vermont v. DeLaBruere, 577 A. 2d 254, 264-69 (Vt. 1990).

26 State courts have provided expanded protection to individuals under their free exercise clauses. See, State v. Hershberger, 462 N.W. 2d 393, 399 (Minn. 1990) (Amish permitted accommodation to escape requirement of bright orange safety signals when driving horse and carriage in public roads); Humphrey v. Lane, 728 N.E. 2d 1039, 1045-46 (Oh. 2000) (Native Americans correction officer's claim that being forced to cut his hair violated his religious freedom claim upheld under the Ohio state constitution.)

27 The First Amendment protects religious exercise and prohibits religious establishment. In addition, Article VI, Section 3 prohibits a religious test for office. According to 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).

good of a society.[28] 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.[29] 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.[30] Many states' clauses bar or limit funding to sectarian institutions.[31] Thus, the very presence of these acknowledges that

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[28] 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 Constitution:
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 for our civil and religious liberty . . ." represented the Minnesota framers designation of "religious liberty as coequal with civil liberty". Hershberger, 462 N.W.2d at 398.

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

[30] 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 . . .

[31] 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):
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

religious institutions have a role in society – necessarily a voluntary and privately funded one – but a place in society nonetheless. 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.[32] Some states protect not just the free exercise of religion, but "conscience",[33] the "exercise of conscience", "worship",[34] "public worship"[35] and "dictates of conscience",[36] among others. Ten states

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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.

[32] 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. The New Jersey Constitution also provides:

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

N.J. Const. art. I, § 4.

[33] 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.

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

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

[35] The "public worship" provision is illustrated in the Massachusetts Constitution, article 3.

[36] 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.

emulate the Constitution's "establishment" language, leaving forty others to formulate exactly what they prevent religion and state from doing.[37] Many limit the protection of religious liberty by stating that liberty of conscience is not an excuse for acts of licentiousness or justification for practices inconsistent with peace and safety of the state.[38]

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.[39] 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.[40] 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 were thus more likely to contain much more concrete language to address those problems.[41] Given the frequent amendment or adoption of new state constitutions, these societal changes may have permitted states to adopt new understandings of religious liberty.

Minn. Const. art. I, §16.

37 See *Tarr*, supra note 2, at 85-88.

38 The many provisions including this public health and safety language also demonstrate another way state constitutions may impact judicial interpretation of the First Amendment. In City of Boerne v. Flores, 521 U.S. 507 (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).

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

40 *Emily Fowler Hartigan*, Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions, 6 J.L. & Religion 225 (1988).

41 *Tarr*, supra note 2, at 94.

The tremendous changes in colonial life caused by the American Revolution provided an 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.[42] 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.[43]

Significantly, for purposes of this conference, institutional autonomy more than the force of law frequently led to disestablishment. Mark DeWolfe Howe suggests that this state disestablishment arose from a general trend of increasing tolerance for new faith communities responding freely to God's grace.[44] 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.[45]

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".[46] Instead, society provided all citizens with freedom to choose so that their beliefs would be unfettered by state restriction and 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 expansion through 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, sovereignty and representation contributed to the growth of evangelical fervor and popular sovereignty.[47] This fervor

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42 *John K. Wilson*, Religion Under the State Constitutions 1776-1800, 32 J. Church & State 753, 755 (1990).

43 *Id*. at 754.

44 *Mark DeWolfe Howe*, The Garden and the Wilderness 88 (1965).

45 *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.").

46 *Tarr*, supra note 2, at 87-88.

47 *Nathan O. Hatch*, The Democratization of Christianity and the Character of

accelerated Christianization of American society while simultaneously "allowing indigenous expressions of faith to take hold among ordinary people, both white and black".[48] Hatch concludes that this democratization of Christianity had less to do with polity or governance, and more to do with "the very incarnation of the church into popular culture".[49] With all this new growth, religions adapted, turning voluntary associations into more complex organizations and denominations.

However, by the end of the first century of the Republic, state constitutions reflected the will of the people, by enacting new provisions that precluded any funding of religious, private, or sectarian schools or institutions.[50] The influx of Catholic immigrants, the resulting fear of Catholicism, and the political exploitation of that fear 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.[51]

III. 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[52] for dealing with pluralism and changed circumstances of modern life. Moreover, state constitutional jurisprudence also offers a window on examining how distinct sovereignties within a federal system allocate understandings of religious freedom.

American Politics, in Religion in American Politics 93-94 (*Mark Noll* [ed.], 1990).

48 *Id.* at 95.

49 *Id.* at 96.

50 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.

51 See, e.g., Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 934 (Utah 1993).

52 See *Tarr*, supra note 2, at 76.

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.[53] Political and religious discourse began, not with the premise of a free human, but a free God.[54] H. Richard Niebuhr suggests that, during 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.[55]

The earliest colonists, especially in the New England colonies, saw themselves building a church first, not a government.[56] 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.[57] 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",[58] and "constructive Protestantism".[59] Perry Miller warns, however, that these constitutions and compacts do not readily fit modern political definitions and instead contain contradictory elements of democracy, aristocracy, and hierarchy.[60]

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.[61] Grounded in biblical understanding, these documents reflect the immediacy of the relationship with God and the unequal

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53 *Christopher Hill*, The English Bible and Seventeenth-Century Revolution 7, 34 (1994).
54 *H. Richard Niebuhr*, The Kingdom of God in America 24 (1988).
55 *Id.* at 17.
56 *Id.* at 68; see also Perry Miller, Errand Into the Wilderness 38 (1956).
57 *Niebuhr*, supra note 51, at 30.
58 *Miller*, supra note 53, at 35.
59 *Niebuhr*, supra note 51, at 43.
60 *Miller*, supra note 53, at 23.
61 *Gerhard von Rad*, Old Testament Theology 130 (D.M.G. Stalker trans., 1962).

covenantal relationship between humans and divine authority.[62] 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.[63]

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.[64] The locus of authority and sovereignty with the people and the ability to amend frequently were Whig hallmarks.[65] 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 knew and agreed upon the rules. Community rights could trump individual rights, because, as a homogenous community, they were virtually identical.[66] Even under Whig political philosophy, religion required a distinctive approach because religious rights, especially the right to worship and believe in God, were considered inalienable.[67] The state could not control religious beliefs because these rights were only accountable to the Creator.[68] But with a coalescing of interests, Puritan understandings of the Reformation and Whig thinking came together in early state constitutions.[69] 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

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62 *Id.* at 129.
63 *Niebuhr*, supra note 51, at 46.
64 *Lutz*, supra note 6, at 10.
65 *Id*. at 8.
66 *Id.* at 50.
67 *Id.*
68 *Id.*
69 *Id*. at 10.

the "existence of God was the ultimate constraint on the great engine of humanity".[70] Ultimately, democracy was subject to the Kingdom of God.[71]

In the latter part of the nineteenth century and early into the twentieth century, Protestant culture dominated government and society. This was often recognized, implicitly and explicitly, by most state courts. An early commentator, Carl Zollman, pointed out that Christianity became part of the law of the land.[72] Niebuhr demonstrates that Christians, although still employing the metaphor of the Kingdom of God changed their interpretation 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.[73] 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,[74] thus calling for laws to control behavior.

With the substantial overlay of Protestant culture and the law, few in power saw the 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 nineteenth and twentieth centuries, under the Protestant consensus,[75] state courts saw nothing incongruous or unconstitutional in denying claims, for example, religious freedom for challenges against Bible reading in schools.[76] Moreover, requests for exemptions from laws were

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70 *James Washington*, The Crisis in Sanctity of Conscience in American Jurisprudence, 42 DePaul L. Rev. 11, 12 (1992).

71 *Id.*

72 *Zollman*, supra note 2, at 12.

73 *Neibuhr*, supra note 51, at 170.

74 *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." *Id.*

75 *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.

76 See, e.g., Kaplan v. Independent Sch. Dist., 214 N.W. 18 (Minn. 1927) (holding that no constitutional right is infringed by requiring teachers to read extracts from the Bible); *id.* at 22 (Stone, J., Concurring) ("Liberty of conscience, whatever else it may mean, does not include license to remain wholly ignorant".). For other cases, see *Zollman*, supra note 2, at 32.

routinely denied based on the public safety language.[77] With the Supreme Court's decision in *Sherbert v. Verner*[78] in 1963, 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.[79] Both this federal strict scrutiny test and the power of federal doctrine led state courts to ignore state constitutional standards, as state courts with little analysis in regard to the distinction between federal and state constitutions applied *Sherbert's* analysis under both federal and state constitutions.

Employment Division v. Smith[80] reawakened some courts to analyze claims independently under their own state constitutions. In *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.[81] After *Smith*, few claimants could show that the government actions were specifically aimed at their religious practice, and therefore, most, if not all failed to prevail.[82] 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.

Surprisingly, independent analysis does not always lead to greater protection. 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

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77 See, e.g., New York v. Brossard, 33 N.Y.S.2d 369 (Co. Ct. 1942); Lyon v. Stong, 6 Vt. 219 (1834). But cf. Ferriter v. Tyler, 48 Vt. 444 (1876).

78 374 U.S. 398 (1963).

79 *Carmella*, supra note 2, at 36. 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.

80 494 U.S. 872 (1990).

81 *Id.* at 884-85.

82 But see Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding that city specifically discriminated against the religious practices of the church and, therefore, violated the Constitution).

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.[83] That theory had been first postulated in *Salem College & Academy, Inc. v. Employment Division*: "the judicial responsibility [is] to determine the state's own law before deciding whether the state falls short of federal constitutional standard."[84]

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 that 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 the statutory definition, although it was religiously oriented. The college officials cherished the autonomy that its nondenominational status brought. It claimed, therefore, that the unemployment compensation law carved an improper divide between church-related and independent religious schools, thus forcing Salem College to either restructure itself as a church or affiliate with a specific church to escape its responsibility to pay unemployment compensation taxes.[85] The court first noted that Oregon's religious freedom clauses addressed rights to worship and enjoyment of religious opinions, neither naming religion in the singular nor referring specifically to churches, and then 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".[86] Accordingly, the court refused to rule whether religious institutions should be treated differently than other not-for-profits and instead held that the unemployment

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83 See, e.g., *Linde*, supra note 3; *Hans Linde*, First Things First: Rediscovering the States' Bill of Rights, 9 U. of Bal. L. Rev. 379 (1980).

84 695 P.2d 25 (Or. 1985).

85 *Id.* at 36.

86 *Id*. at 37. 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.

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.

compensation tax should be extended to all schools, religious or otherwise, thus avoiding the discriminatory distinction and upholding religious pluralism.[87]

Subsequently, the Oregon Supreme Court in *Employment Division V. Rogue Valley Youth for Christ*[88] 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).[89]

The court resolved the problem by taxing all religious organizations. Despite the Oregon's court adherence to primacy theory, its *Salem College* decision proves that primacy theory does not necessarily result in expanded autonomy from government regulation.

In *Smith v. Employment Division*,[90] 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's

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87 *Id.*

88 770 P.2d 588 (Or. 1989).

89 *Id*. at 591.

90 721 P.2d 445 (Or. 1986), rev'd, Employment Div. v. Smith, 494 U.S. 872 (1990), on remand, Smith v. Employment Div., 799 P.2d 148 (Or. 1990). In addition, see Or. Const. 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.

free exercise language that, on its face, is broader than the First Amendment's protections.[91] The 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".[92] 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.[93]

In contrast, state cases involving land use regulation have emphasized religious institutional autonomy through an independent 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. 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".[94] The court further noted that the text of the constitution protected not only belief, but also religious practice, contemplating "broad protection for religious worship".[95]

Similarly in another post-Smith case, *First Covenant Church v. City of Seattle*,[96] (*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

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91 721 P.2d at 448. See also footnote 86 supra.
92 *Id.*
93 Smith v. Employment Div., 799 P.2d 148, 149 (Or. 1990).
94 Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990).
95 *Id.*
96 840 P.2d 174 (Wash. 1992).

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.[97] The church sought a declaratory judgment that such application violated its religious freedom under the state constitution.[98] In *First Covenant Church v. City of Seattle*,[99] 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'".[100]

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

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97 *Id.* at 178.

98 Article 1, section 11, of the Washington State Constitution provides:
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.

99 787 P.2d 1352 (Wash. 1990), vacated, 499 U.S. 901, on remand, 840 P.2d 174 (Wash. 1992).

100 First Covenant Church v. City of Seattle, 840 P.2d 179, 186 (Wash. 1992) (citation omitted).

6. Matters of particular state interest or local concern.

Gunwall, at 61-62, 720 P.2d 808.[101]

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, found the ordinance unconstitutional.[102]

In his concurrence, Justice Utter complained that the majority failed to "devote enough attention to the unique language of our state constitution".[103] Fearing that an independent state analysis could not occur when the court "reverts" to federal First Amendment jurisprudence, such as simply adopting the *Sherbert* federal test, Utter suggested some alternate ways of examining the language. He noted that the Washington constitution protected both belief and conduct, as such are closely related.[104] 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".[105] 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".[106] It further expanded 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". Traditional zoning outside of landmark designation has since been recognized in Washington as providing that compelling

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101 *Id*.
102 *Id.* at 187. See also First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 916 F. 2d 374 (Wa. 1996) (en banc).
103 *Id.* at 191.
104 *Id.* at 192.
105 *Id.*
106 *Id.* at 187.

interest. In *Open Door Baptist Church v. Clark Cty.*, the court denied the church's request to be free of a zoning application process, upholding government's ability to include churches within reasonable zoning regulations.[107]

These decisions reveal the diversity of ways that 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* and *Hershberger* state a claim for independent analysis, 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. Accordingly, even when state supreme courts chartered a state specific analysis of autonomy, the final results failed to show significant differences in protecting institutional religious autonomy.

IV. CONCLUSION

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. Notwithstanding textual differences and different histories, most state courts have not interpreted their constitutions to provide, at a minimum, the strict scrutiny test like *Hershberger* or *Society of Jesus*, nor embark on a uniquely independent test called for by Justice Utter in *First Covenant*. Several reasons suggest that religious autonomy may not receive much greater protection under state constitutional law 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.[108] Even the historical record of state constitutions does not necessarily provide a good litmus test for discerning unique understandings of the state.[109] Some have also expressed concern that

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[107] 955 P. 2d 33, 46 (Wa. 2000) (en banc).

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

[109] In Kotterman v. Killian, the majority opinion of the Arizona Supreme Court details a considerably different understanding of the history and culture of Arizona than the

the constitutional protection of a right such as religious liberty is too important to carve into distinct protections, thus necessitating a federal standard.[110] Douglas Laycock further argues, federalism and federal doctrine have become a powerful engine for federal law to dominate religious liberty issues.[111] James Gardner stresses the powerful paradigm of the federal Constitution and its landmark decision on fundamental rights that have minimized attention to state constitutions.[112]

On a pragmatic level, religious institutions may find such federal decisions beneficial for denominations with national constituencies, because seeking particular protection for religious autonomy in specific states will not necessarily adhere to the benefit of all members or the institution itself. Moreover, litigation on a state-by-state basis raises the costs of litigation while also raising potentially different or unequal treatment of local institutions within the same national denomination.[113] Litigants will also incur the expense of repeated litigation in many forums.[114]

The current tumult in First Amendment jurisprudence reveals a nation truly wrestling with competing ideas over how to protect religious liberty in the United States. The Supremacy Clause and the powers of federalism may ultimately lead to a federal jurisprudence governing the autonomy of religious institutions that influence and encourage state courts to follow the federal lead. Until that occurs, however, the laboratory of life in the states

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dissenting opinion. 972 P.2d 606 (Ariz.), cert. denied, 120 S. Ct. 283 (1999), and cert. denied sub. nom. Rhodes v. Killian, 120 S. Ct. 42 (1999). The majority claims it cannot speculate on the meager history of ratification. *Id.* at 621. The dissent strenuously details Arizona's history in arguing that Arizona's prohibition that "[n]o public 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". *Id*. at 631-33 (Feldman, J., dissenting).

110 *Hans Linde*, First Things First: Rediscovering the States' Bill of Rights, 9 U. of Bal. L. Rev. 379, at 393 (1980).

111 *Douglas Laycock*, Federalism as a Structural Threat to Liberty, 22 Harv. J.L. & Pub. Pol'y 67 (1998).

112 *James R. Gardner*, The Failed Discourse of State Constitutions, 90 Mich. L. Rev. 761, 805 (1992) (noting how the Fourteenth Amendment has marginalized stated constitutional discourse).

113 See, e.g., *Douglas Laycock*, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841, 854, (1992).

114 *Id*.

may require religious institutions to fully litigate state constitutional protections on a state-by-state basis to explore more fully that autonomy.