"OUR CONSTITUTION, OUR PRECEDENTS, AND [OUR] OWN BEST HUMAN JUDGMENTS:" A SURVEY OF FREE EXERCISE STATE CONSTITUTIONAL INTERPRETATION IN THE WAKE OF *OREGON V. SMITH*.

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I. INTRODUCTION

For decades, the United States Supreme Court stood as a national defender of the free exercise of religion. In the 1960s, the Court was unflinchingly adamant that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation,"[1] and reviewed any burden on religion through the searching inquiry of strict scrutiny.[2] However, in 1990 the Court abruptly turned its back on the Free Exercise Clause in *Oregon v. Smith*.[3] The Court refused to acknowledge the precedent of the 1960s and 1970s for what it was, and lowered the standard of review to mere rational basis for facially neutral, generally applicable legislation, regardless of the burden it placed on a religious entity.[4]

The removal of federal protections still allows state courts to adopt the federal pre-*Smith* tests through the use of their state constitutions. Even by the time *Smith* was decided, many state courts had "rediscover[ed] [their] state constitutions" and were becoming more and more accustomed to the role of state courts in the system of "New Federalism"[5] in place following the Supreme

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[1] Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[2] *See id.* at 406.

[3] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) [hereinafter Oregon v. Smith or *Smith*].

[4] *Id.* at 882–84.

[5] *See generally* Ronald K. L. Collins, *Reliance on State Constitutions—Away From A Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 1–3 (1981).

Court's decision *Michigan v. Long*.[6] Some state courts immediately transitioned and quickly built a body of state constitutional case law providing heightened protections for free exercise.[7] Others were plunged into a state of uncertainty, and would not define the protections of religion for decades.[8]

It is the purpose of this article to articulate the state of state constitutional protections for free exercise of religion after *Oregon v. Smith*. The focus will start on the history of religious protections federally and will analyze the underlying rationale of the federal precedent. It will then analyze the role of state courts in the federalist system and describe how other state courts have interpreted constitutional provisions that mirror the strengthened language in New York State Constitution article I, section 3. Ultimately, it is concluded that *Smith* should be scrutinized by state courts, legislatures, and practitioners, and that these individuals and entities can and should employ a number of methods to restore the historic level of protection for religious liberties.

II. The Federal History and Traditions

The history of the Supreme Court's handling of the First Amendment's Free Exercise Clause is somewhat varied, although over the years certain trends emerge. In the late nineteenth century, the Court rejected two free exercise challenges to laws that directly targeted polygamy. The cases were heard over a decade apart, with the first, *Reynolds v. United States*,[9] decided in 1878, and the second, *Davis v. Beason*,[10] decided in 1890. In both cases, a unanimous Supreme Court upheld statutes criminalizing the Mormon practice.[11] In *Beason*, Justice Field drew parallels between bigamy and the practices of human sacrifice and sati (widow burning).[12] The Court ultimately dispelled with the free exercise

[6] Michigan v. Long, 463 U.S. 1032 (1983). In *Long*, the Court revised its standard for reviewing decisions of state high courts and placed the burden on state courts to affirmatively claim that the decision was on state law grounds. *See id.* at 1040–41. The court held:

> 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.

Id. at 1041.

[7] *See infra* notes 177–263 and accompanying text.

[8] *See infra* notes 114–61 and accompanying text.

[9] Reynolds v. United States, 98 U.S. 145 (1878).

[10] Davis v. Beason, 133 U.S. 333 (1890).

[11] *Beason,* 133 U.S. at 341, 348; *Reynolds*, 98 U.S. at 161–62, 168.

[12] *Beason*, 133 U.S. at 344.

challenge stating, "[the crime of bigamy] is not the less odious because [it is] sanctioned by what any particular sect may designate as 'religion.'"[13]

In the decades that followed the Mormon polygamy cases, the Court struck similar chords with regard to free exercise. In *United States v. Schwimmer*,[14] the Seventh Circuit Court of Appeals held against a Hungarian-born Quaker, who in her application for citizenship, claimed that she "would not take up arms personally" in defense of the United States.[15] Her application was subsequently denied, and she eventually appealed to the Supreme Court.[16] A divided Court upheld the statute, with Justice Holmes dissenting.[17] Holmes, joined by Justice Brandeis, suggested that "many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."[18]

While glimmers of hope occasionally shone in an occasional dissent,[19] heightened protections for free exercise were not fully articulated until the mid-twentieth century. Generally, the Court's major cases involve fact patterns in which, at least in the Court's view, the government's interests were immensely important. In *Reynolds*, the Court held against an interest that it compared to human sacrifice.[20] In *Schwimmer*, the majority held that the failure to take up arms on behalf of the country was contrary to a "fundamental principle of the Constitution."[21] While it is true that the Court also upheld blue laws,[22] it is safe to say that the Court's review in the area of free exercise was mainly in areas that it felt

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[13] *Id.* at 345.

[14] United States v. Schwimmer, 279 U.S. 644 (1929).

[15] *Id.* at 646, 647.

[16] *Id* at 646. The Court of Appeals, Seventh Circuit, reversed and remanded with directions to grant Schwimmer's petition for citizenship. Schwimmer v. United States, 27 F.2d 742, 744 (7th Cir. 1928), *rev'd*, 279 U.S. 644 (1929). However, they reversed not on religious liberty grounds but rather on the fact that Schwimmer, a fifty year old woman, should not have had her citizenship determined based on hypothetical wars "that never have occurred and probably never will occur." *Id.*

[17] *Schwimmer,* 279 U.S. at 653.

[18] *Id.* at 655 (Holmes, J., dissenting).

[19] *See generally* Vincent M. Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interest to Any Law Otherwise Valid*, 70 ALB. L. REV 1399, 1403–07 (2007) (discussing cases preceding *Sherbert* and the Court's compelling interest standard).

[20] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[21] *Schwimmer*, 279 U.S. at 650. The Court spoke at length about the importance of defense of the United State, thus indicating that it clearly felt that this governmental objective was massively important. *Id.* at 650–51.

[22] *See Bonventre*, *supra* note 19, at 1406.

society had a significant interest in regulating.[23] This is not to say that the Court had by any means expressly adopted a heightened standard, but rather that a reading of these cases shows that the Court did not tread lightly into the arena of free exercise.

In *West Virginia State Board of Education v. Barnette*,[24] the Court took its first steps in heightening its standard of review for free exercise infringements. In that case, Jehovah's Witness children declined to salute the flag and recite the pledge of allegiance on the ground that their religion considered the flag to be an "image" and therefore that the pledge constituted worship.[25] The children were expelled from school and the parents were threatened with prosecution for violating a criminal delinquency statute.[26] The Supreme Court affirmed the injunction of the regulation over a three judge dissent.[27] Justice Jackson's majority opinion *specifically rejected* that First Amendment freedoms were subjected to lower rational basis review:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.[28]

While Justice Jackson did not take the final step of explicitly requiring that the State produce a compelling interest, he did specifically reject rational basis review.[29] Ultimately, the

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[23] The fact that the Court did not expressly adopt "strict scrutiny" as a standard of review should not be viewed as a rejection of the standard. The Court did not articulate this test as it is currently understood until the 1940s at the earliest. *See* Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 352–53 (2011).

[24] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[25] *Id.* at 628–30.

[26] *Id.* at 629–30.

[27] *Id.* at 646–71 (Frankfurter, J., dissenting). Justices Roberts and Reed dissented in a one sentence opinion. *Id.* at 642–43. Frankfurter was the only justice that penned a dissent. He upheld the statute as promoting the legitimate governmental objective of "good citizenship." *Id.* at 647 (Frankfurter, J., dissenting).

[28] *Id.* at 639.

[29] *See id.* Jackson was clearly referring to protections for religion:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

significant state objective of patriotism failed to meet Jackson's heightened standard.[30] This opinion seemingly set the footing for the Court's unequivocal adoption of the compelling state interest test in *Sherbert v. Verner*[31] and *Wisconsin v. Yoder*.[32]

In *Sherbert*, the Supreme Court reviewed the case of a Seventh-Day Adventist who was discharged by her employer after refusing to work on her Sabbath.[33] The State Employee Security Commission denied the appellant's claim for unemployment compensation,[34] and the lower courts affirmed the commission's decision.[35] The Supreme Court reversed, finding that any incidental burden on free exercise must be justified by a "compelling state interest."[36] In analyzing its own justification for the heightened standard, the Court remarked that historically it had rejected free exercise challenges in instances where the "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[37] The Court cited to *Reynolds* in drawing this distinction.[38] Notably, the standard of review was not diminished "even though the burden may be characterized as being only indirect."[39]

Nine years later, the compelling state interest test was unambiguously reaffirmed in *Wisconsin v. Yoder*.[40] In this case, Amish parents were convicted of violating the state's compulsory public school attendance law.[41] They challenged the law as violating their free exercise, namely that their religion required them to remain "aloof from the world . . . ."[42]

The Wisconsin Supreme Court applied federal law and overturned the convictions, and the State appealed to the federal

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Id. at 642. As noted earlier, the lack of explicit language indicating strict scrutiny should not be viewed as a rejection of the standard. *See* Bunker et al., *supra* note 23, at 352–53.

[30] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. at 642.

[31] Sherbert v. Verner, 374 U.S. 398 (1963).

[32] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[33] *Sherbert*, 374 U.S. at 399.

[34] *Id.* at 399–401.

[35] *Id.* at 401.

[36] *Id.* at 403, 410.

[37] *Id.* at 403 (citing Cleveland v. United States, 329 U.S. 14, 16 (1946); Prince v. Massachusetts, 321 U.S. 158, 159 (1944); Jacobson v. Massachusetts, 197 U.S. 11, 25–26 (1905); Reynolds v. United States, 98 U.S. 145, 161 (1878)).

[38] *Id.*

[39] *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (internal quotation marks omitted).

[40] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[41] *Id.* at 207.

[42] *Id.* at 209–10.

Supreme Court.[43] The Court again held that the compelling state interest test applied and, despite the State's "high responsibility for education of its citizens,"[44] the State's argument failed to sustain its burden.[45]

For nearly three decades, the compelling interest test remained undisturbed and was applied in a variety of settings.[46] This well-functioning jurisprudence would come to a grinding halt in 1990 in *Oregon v. Smith*.[47] In *Smith*, the appellees/claimants were dismissed from their employment for taking peyote in accordance with a ceremony of their Native American Church.[48] The claimants sought review after they were denied unemployment compensation.[49]

Writing for the majority, Justice Scalia referred to *Yoder* as a "hybrid situation" as it implicated both free exercise and the fundamental right of parents to determine the best interest of their children.[50] *Barnette* was similarly distinguished on the ground that it also concerned fundamental free speech rights.[51] This rationale was criticized by Justice O'Connor's concurring opinion[52] and in subsequent reviews, which note that the "hybrid" rationale "has never been central to another Supreme Court decision"[53] and that *Smith* itself may have logically implicated the fundamental right of association.[54] Justice Scalia additionally (and somewhat summarily) distinguished *Sherbert* and similar cases in which

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[43] State v. Yoder, 182 N.W.2d 539, 547 (Wis. 1971), *aff'd* 406 U.S. 205 (1972).

[44] *Yoder*, 406 U.S. at 213–15.

[45] *Id.* at 233–34.

[46] *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718, 719 (1981) (applying *Sherbert* and finding denial of unemployment benefits violated claimant's free exercise rights where he quit a job manufacturing weapons due to his religious belief).

[47] Oregon v. Smith, 494 U.S 872 (1990).

[48] *Id.* at 874. Claimants were employed by a private drug rehabilitation clinic. *Id.*

[49] *Id.*

[50] *Id.* at 881–82; Piero A. Tozzi, *Whither Free Exercise:* Employment Division v. Smith *and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. CATH. LEGAL STUD. 269, 272–73 (2009).

[51] *Smith*, 494 U.S. at 882. Justice Scalia made no mention of Justice Frankfurter's dissent, which clearly dissented on the grounds that the majority found protections for religious liberties. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting).

[52] *Smith*, 494 U.S. at 896 (O'Connor J., concurring) ("The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause. . . .").

[53] Tozzi, *supra* note 50, at 273. Tozzi acknowledges that the passage of the Religious Freedom Restoration Act in 1993 may have impeded the development of any "hybrid" line of cases. *Id.* at 273 n.16.

[54] *Id.* at 272 n.15 (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J. concurring)).

religious practices were treated in a different manner than secular interests.[55] Overnight, the protections for free exercise against laws of general applicability were reduced, from the most searching review a court can engage in, to mere rational basis.[56]

Congress reacted swiftly to the *Smith* decision, and by 1993 it passed the Religious Freedom Restoration Act (RFRA).[57] This act specifically addressed the *Smith* decision[58] and attempted to reinstate the compelling interest test.[59] However, part of this act was deemed unconstitutional. In *City of Boerne v. Flores*,[60] the Court held that the application of the law to the states exceeded congressional authority.[61] So, while the congressional heightened standard is still applicable to the federal government,[62] states are left free to review legislation according to rational basis review.

III. An Analysis of the States' Role

It is unquestioned that one of the most important roles of the state court is the interpretation of that specific state's constitution.[63] A well-functioning state court should engage in a full and robust interpretation of its own state constitution, even if this requires the court to interpret the state constitution in a way that differs from how it would interpret (or be required to interpret) the federal Constitution. This allows the state court to disagree with the federal Constitution, so long as the decision does not create a standard which violates the federal Constitution.[64] Put differently,

[55] *See* Bonventre, *supra* note 19, at 1412–13. See Tozzi, *supra* note 50, at 274–75 for an explanation of the effect of the ruling using various hypothetical factual scenarios.

[56] The author acknowledges that an argument can be raised that the language in *Oregon v. Smith* does not fully reduce the standard of review in all cases involving facially neutral legislation. Assuming, *arguendo*, that this was the intent of *Smith*, the state courts and obviously Congress have wholly interpreted the case to mean that the federal protections are mere rational basis. As such, this article will operate under the assumption that the test is rational basis and analyze the state constitutional adjudication under that assumption.

[57] Religious Freedom Restoration Act, 42 U.S.C. ch. 21B (2012).

[58] 42 U.S.C. § 2000bb(a)(4) (2012).

[59] 42 U.S.C. § 2000bb-1 (2012).

[60] City of Boerne v. Flores, 521 U.S. 507 (1997).

[61] *Id.* at 535–36.

[62] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006); *see also* Tozzi, *supra* note 50, at 274 (explaining RFRA is still applicable to the federal government).

[63] *See generally* Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 St. John's L. Rev. 431, 433–35 (1987) (noting the important role state courts play when interpreting their state constitution).

[64] Commonwealth v. Blood, 507 N.E.2d 1029, 1032–33 (Mass. 1987). In *Blood*, the Massachusetts Supreme Judicial Court disagreed with federal precedent in *United States v. Caceres*. *Id.* (citing United States v. Caceres, 440 U.S. 741, 755–57 (1979)). The

the federal Constitution provides the minimum requirements and a state may not provide fewer protections under its state constitution without being overturned by the federal court.[65]

This role of states and state courts was contemplated at the nation's inception. Judge Titone of the Court of Appeals of New York once noted, "[t]he nation's founding fathers 'recognized the primacy of the states in protecting individual rights.' State Courts have long been recognized as laboratories for 'social and economic experiments' and 'guardians of our liberties.'"[66] Similarly, Judge Hancock wrote of the historic role of state courts, stating:

> For most of our nation's history, state courts have been the principal protectors of the rights and liberties of the people from encroachment by state and local governments. Prior to the Philadelphia Constitutional Convention in 1787, the states—as independent and sovereign governments—had their own well-established systems of courts.[67]

More recently, Judge Hancock referred to state constitutional interpretation as "the logical and imminently fair doctrine" where a court "concludes that an individual has rights that are not protected under the federal Constitution, but should be under the [state c]onstitution, [and] the court . . . afford[s] that person the greater protection . . . ."[68] In a way, looking first and foremost to the state constitution respects the historic importance of state autonomy and sovereignty.

This recognition of the role of state courts is hardly unique to New York courts and judges.[69] Justice Appel of the Iowa Supreme Court

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Massachusetts court acknowledged that there were no federal protections under the Fourth Amendment for statements made under electronic surveillance when "one party" to the conversation consented. *Id.* at 1032. However, it found that federal precedent unpersuasive and thus found greater privacy interests existed under the state constitution and suppressed the evidence. *Id.* at 1037–39.

[65] For example, the Alabama Constitution continues to provide that schools may be segregated. ALA. CONST. art. XIV, § 256. But any attempt by an Alabama state court to hold as such would be preempted by federal law. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[66] Titone, *supra* note 63, at 434 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative.*, 63 TEX. L. REV. 1081, 1082 (1985)).

[67] Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271, 277 (1993).

[68] Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 ALB. L. REV. 1331,1332 (2014).

[69] *See generally* Symposium, *Exceeding Federal Standards*, 77 ALB. L. REV 1247 (2013/2014).

recently issued a lengthy special concurrence in which he spoke of the history and the status of independent state constitutional law.[70] He remarked as to how:

> The rebirth of state constitutional law has advanced constitutional dialogue both horizontally and vertically within the federal system. Consistent with Justice Louis Brandeis's famous declaration that a state in the federalist system amounts to a "laboratory" of democracy, the vibrancy of state constitutional law has been a salutary development in promoting horizontal federalism, or dialogue among the states.[71]

Notably, Justice Appel remarked that state constitutional adjudication is neither conservative nor liberal, but rather "recognition of the independent nature of state constitutions and the obligation of state courts in our federal system."[72]

The importance of the role of state courts has also been recognized from the federal bench. In his seminal law review article, Justice William Brennan noted, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[73] Brennan pointed to the distinction between federal and state law and was adamant that questions of federal constitutional law are not "dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[74] Importantly, Brennan seemed to invite separate state constitutional analyses, including the "scrutiny" of federal cases.[75] This seems to be rooted somewhat in his respect for the role of state courts but also in the notion that federal courts were at times potentially restricting federal rights out of respect for the states.[76] Other Supreme Court Justices have invited separate state constitutional analyses, and even critiqued state courts for "inviting Supreme Court review."[77]

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[70] State v. Baldon, 829 N.W.2d 785, 803–34 (Iowa 2013) (Appel, J., concurring).

[71] *Id.* at 818.

[72] *Id.* at 817 (citing Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 Alb. L. Rev. 1399, 1403–10 (1998)).

[73] Brennan, *supra* note 66, at 491.

[74] *Id.* at 502.

[75] *Id.* at 502, 503.

[76] *See id.* at 502–03.

[77] *See* People v. Scott, 593 N.E.2d 1328, 1347–48 (N.Y. 1992) (Kaye, J., concurring). Judge Kaye's concurrence, discussed in greater detail, *infra*, noted the criticism of Justice White in

The constitutions themselves offer reasons to reach differing conclusions. State constitutions often contain numerous provisions analogous to federal provisions. In many of these provisions, the wording between the federal Constitution and the state constitutions differ drastically.[78] Generally, the state constitution will contain language that indicates a stronger protection for the right than the federal Constitution.[79] It seems somewhat bizarre that a state high court would read and interpret two differently worded provisions and yet apply exactly the same interpretation to a given set of facts. Certainly if two statutes were worded differently it would have an impact on the how the court would interpret them;[80] constitutional interpretation should be no different.

Even assuming that a constitutional provision is worded exactly the same as its federal counterpart, certain interpretive methods could result in different interpretations or outcomes. For example, if a judge rigidly applies an originalist interpretive method, she generally attempts to interpret the words of a document as they would have been interpreted at the time of the creation of that document.[81] Many state constitutions have been reevaluated over time, and state constitutional conventions are relatively common.[82]

California v. Greenwood, 486 U.S. 35, 43 (1988), and Justice Stevens' concurrence in Massachusetts v. Upton, 466 U.S. 727, 737 (1984) (Stevens, J., concurring). *Id.* at 1347; *see infra* note 97–99 and accompanying text.

[78] *Compare* U.S. Const. amend. IV (discussing the right against "unreasonable search and seizure" under federal law), *with* N.Y. Const. art I, § 12 (expanding the right against "unreasonable search and seizure" to include communications). The New York search and seizure provision contains the language of the federal provisions, but also contains an additional paragraph which reads:

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

N.Y. Const. art I, § 12.

[79] *See infra* note 160 (listing New York's and other states' constitutional provisions on freedom of religion).

[80] *See, e.g.*, State v. Keller, 19 P.3d 1030, 1036 (Wash. 2001) (quoting *In re* Pers. Restraint of Sietz, 880 P.2d 34, 37 (Wash. 1994) ("If the Legislature uses 'specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred.' When the Legislature uses different words in the same statute, it usually means it intended the words to have different meanings.")).

[81] *See generally* Emily C. Cumberland, *Originalism, in a Nutshell*, 11 Engage: J. Federalist Soc'y Prac. Groups 52, 52 (2010) (describing the background of the term "originalism").

[82] *See, e.g.*, Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 Alb. L. Rev. 1285, 1289–95 (2001) (describing various

Should a recent constitution have pulled language from the federal Constitution, it is arguable that the language should be interpreted at the time of the adoption. As such, the meaning of the words in a constitution adopted in the 1970s[83] could differ wildly from their meaning in the 1790s.

If the modern provision is rooted in historic language, many courts will still interpret state provisions with identical wording to their federal counterpart to provide greater protections for citizens. This recognizes the state court's right to interpret the provision as the court sees fit[84] and also implicitly acknowledges that reasonable minds could differ as to the intent of what words meant two hundred years ago.[85]

Lastly, and most importantly, a court should feel free to look to its own constitution when it is not persuaded with the rational and logic of the federal courts or otherwise desires a more stable or well-articulated standard to apply.[86] Perhaps the most illustrative case

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constitutional conventions in New York focused on constitutional reform). For example, New York State's search and seizure provision was not added to the state constitution until 1938. People v. P.J. Video, Inc., 501 N.E.2d 556, 561 n.4 (N.Y. 1986). The protection was previously contained in a statute. *Id.*

[83] *See generally* James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 270 (2010) (noting that state constitutions must be a "good fit for the present and the foreseeable future" and that "a state constitution must allow for appropriate change to address evolving needs and conditions").

[84] *E.g.*, State v. Johnson, 346 A.2d 66, 68 n.2 (N.J. 1975) ("It is recognized that Art. I, par. 7, is taken almost verbatim from the Fourth Amendment and until now has not been held to impose higher or different standards than those called for by the Fourth Amendment. However, we have the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning."). The court felt strongly enough about this issue to raise it *sua sponte*. *Id.* at 68.

[85] *See generally* Morgan Cloud, *How Important Should History Be to Resolving Fourth Amendment Questions, and How Good a Job Does the Supreme Court Do in Construing History?: A Conclusion in Search of a History to Support It*, 43 TEX. TECH L. REV. 29, 33 (2010) (noting that a major difficulty with originalist interpretation is that it is "impossible to discover and aggregate the various intentions held by numerous framers"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–22 (1980) (arguing and explaining the difficulties in determining the single intent of the collective framers of the constitution).

[86] State v. Baldon, 829 N.W.2d 785, 831 (Iowa 2013) (Appel, J., concurring). In reviewing a search and seizure case, the Iowa Supreme Court departed from the federal standard in part because:

> The incoherence of the Supreme Court's Fourth Amendment doctrine was recently on full display in [*United States v.*] *Jones*, where the Court considered whether the government violated the Fourth Amendment by placing a Global Positioning System tracking device on a suspect's vehicle. Justice Scalia, relying on his brand of originalist interpretation of the Fourth Amendment, found that the government action amounted to a trespass and was thus an unlawful search.

Id. The *Jones* case resulted in a number of opinions and provided state courts with such a lack of guidance that Justice Appel felt looking to them for uniformity was "untenable." *Id.* at 832–33.

in Court of Appeals history is *People v. Scott*.[87] In *Scott*, the Court of Appeals suppressed evidence of defendant's marijuana plants, which were on defendant's property and approximately 300–400 yards from defendant's house.[88] In suppressing the evidence, Judge Hancock rejected the Supreme Court case *Oliver v. United States*,[89] in which the Court held that there was no expectation of privacy in open fields under the Fourth Amendment.[90] Specifically, the Court of Appeals rejected the notion that society would not recognize as reasonable a claim to privacy in open land on one's own property.[91] In rejecting this, the court noted that such a rule allowed government law enforcement officers to "invade" individual's private property without any reason.[92] This, the court reasoned, failed to "adequately preserv[e] fundamental rights of New York citizens."[93] Additionally, the court cited several New York statutes that evinced a high respect for individual property rights.[94] Overall, in *Scott* the court demonstrated its ability to reject federal precedent, both because the federal rationale failed to logically persuade the court and also because of developments in New York that did not square with the federal rule.

The *Scott* court also defended the right of a state court to reject federal precedent.[95] In her concurring opinion, Judge Kaye responded to the dissenting judges' view that disregarding federal precedent "reject[ed] uniformity of Federal and State law," "discard[ed] the United States Supreme Court's guidance," and "undermin[ed] stare decisis."[96] Judge Kaye disagreed with the notion that the Court of Appeals acted "improperly in *discharging our responsibility* to support the State Constitution,"[97] reasoning

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

[88] *Id.* at 1330–31. Defendant also posted no trespassing signs throughout his property. *Id.* at 1330. The no trespassing signs were approximately twenty to thirty feet apart around the perimeter of defendant's 165 acres. *Id.*; People v. Scott, 565 N.Y.S.2d 576, 576 (App. Div. 3d Dep't 1991), *rev'd* 593 N.E.2d 1328 (N.Y. 1992).

[89] Oliver v. United States, 466 U.S. 170 (1984).

[90] *Id.* at 179 ("In contrast, open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."); *see Scott*, 593 N.E.2d at 1330.

[91] *Scott*, 593 N.E.2d at 1335–36.

[92] *Id.* at 1335.

[93] *Id.*

[94] *Id.* at 1335–36 (citing Penal Law prohibiting trespass and property owner rights under the Environmental Conservation and General Obligations laws).

[95] *See id.* at 1347 (Kaye, J., concurring).

[96] *Id.* at 1348 (Bellacosa, J., dissenting).

[97] *Id.* at 1347 (Kaye, J., concurring) (emphasis added).

that "[t]he dissent errs in its suggestion that rejecting Supreme Court precedents somehow disdains the Supreme Court. That suggestion shortchanges both the role of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions."[98] In Kaye's opinion, the Court of Appeals did not merely have the option to consider alternative persuasive arguments under the state constitution but rather had the *affirmative obligation* to the state and the state constitution to protect fundamental rights "consistent with our Constitution, our precedents and own best human judgments in applying them."[99] With this in mind, the role of state courts becomes clear in the federalist system. The courts should protect rights and liberties under the state constitution by critiquing and analyzing federal precedent as persuasive authority. In this regard, federal precedent is similar to the precedent of a sister state. A Michigan court could consider precedent from the federal Supreme Court much in the same way that it would interpret a case from the Iowa Supreme Court and reach a conclusion that best fits the nature of rights and liberties under the state constitution.

Whether the rationale is rooted in sovereignty, history, textual differences, or persuasiveness, the obligations of a state court are clear. Judges should consider state precedent in a way that is open to expanding protections for citizens beyond the federal constitutional standards. Importantly, this role of the state courts should shape the manner in which practitioners present arguments. Recently, state courts have admonished attorneys for failing to adequately brief state constitutional grounds, and the results range from awkward to time consuming to devastating. Courts are quick to include a footnote indicating that the state issues have not been briefed but will be addressed nonetheless.[100] Other courts have issued lengthy opinions criticizing the attorneys and requiring them to submit supplemental briefs addressing state grounds.[101] The worst-case scenario is when a court outright refuses to address an un-briefed or inadequately briefed issue, leaving a potential

[98] *Id.* at 1348.

[99] *Id.*

[100] *See* State v. Dold, 722 P.2d 1353, 1357 n.3 (Wash. Ct. App. 1986).

[101] *See, e.g.*, State v. Jewett, 500 A.2d 233, 234 (Vt. 1985). In *Jewett*, the court also lamented the fact that Vermont attorneys missed an opportunity to aid in the development of a body of state constitutional law. *Id.* at 235.

winning argument on the table.[102] Some courts have discretion to consider an un-briefed issue; others are statutorily barred from doing so under certain circumstances.[103] Forgetting these arguments has, under the wrong circumstances, resulted in malpractice claims.[104] As such, petitioners should fully brief these issues. Where no state constitutional case is available, it is recommended that the attorney consider the text of the constitution itself, or resort to well-reasoned state law developments in nearby states.[105] It is acknowledged that this article focuses heavily on religious liberties, and the above discussion delves mainly into search and seizure laws, but state constitutional issues should be briefed (and have proved successful) in nearly every other area of constitutional law, including free speech,[106] cruel and unusual punishment,[107] protections against governmental regulatory takings,[108] and of course, equal protection rights.[109]

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[102] *See, e.g.*, Saldana v. State, 846 P.2d 604, 623–24 (Wyo. 1993) (citing Dworkin v. L.F.P., Inc., 839 P.2d 903, 909 (Wyo. 1992) ("The Wyoming Supreme Court continues to be willing to independently interpret the provisions of the Wyoming Constitution. But it is imperative that Wyoming lawyers properly brief this court on relevant state constitutional questions.")); State v. Ashe, 745 P.2d 1255, 1257 n.2 (Utah 1987) ("[Defendant] advances only an analysis of the protections granted under the fourth amendment to the federal constitution. Therefore, we reserve for another day analysis of the Utah Constitution's prohibition against unreasonable searches and seizures.").

[103] Keehn v. State, 279 S.W.3d 330, 334 (Tex. Crim. App. 2009). The Texas rules of appellate procedure hold that the Court of Criminal Appeals of Texas may only review decisions of the state intermediate court of appeals. TEX. R. APP. P. 66.1. As such, if a state constitutional issue is not briefed adequately and the intermediate court does not reach it, it may not be addressed by the higher court. *Keehn*, 279 S.W.3d at 334 nn.12–13.

[104] Commonwealth v. Kilgore, 719 A.2d 754, 757 (Pa. Super. Ct. 1998) (finding ineffective assistance of counsel where counsel failed to raise state constitutional issue); State v. Baldon, 829 N.W.2d 785, 816 (Iowa 2013) (Appel, J., concurring). Oregon Justice Hans Linde has opined that failing to address these issues may also be "skating on the edge of malpractice." *Jewett*, 500 A.2d at 234.

[105] *See* David Blumberg, *High Court Study: Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982-1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1586 (1998) (explaining horizontal federalism and how courts will look to decisions of other states where there is an absence of precedent in their respective state).

[106] *E.g.*, Holmes v. Winter, 3 N.E.3d 694, 698, 707 (N.Y. 2013); Durando v. Nutley Sun, 37 A.3d 449, 457–58 (N.J. 2012).

[107] *E.g.*, *In re* C.P., 967 N.E.2d 729, 744–45 (Ohio 2012) (finding an Ohio statute which required mandatory "lifetime sex-offender registration and notification" violated the Ohio and federal constitutions).

[108] *E.g.*, Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006) ("We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution."); Manufactured Hous. Cmtys. of Wash. v. State, 13 P.3d 183, 185, 197 (Wash. 2000) ("[T]he well-intentioned effort of the Legislature to encourage the conversion of mobile home parks to resident ownership conflicts with

The focus of this article is state constitutional adjudication of religious liberties in the wake of *Oregon v. Smith*. *Smith* stands on unsteady theoretical grounds.[110] As noted by Justice O'Connor in her concurring opinion, the notion that free exercise of religion is an unprotected First Amendment right is unsupported in the Supreme Court's precedent and forces the Court to "not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine. . . ."[111] As such, litigants and state supreme courts should be willing to question the persuasiveness of this non-binding case. Many state constitutions contain different language from the First Amendment, only strengthening the arguments for finding additional protections. The remainder of this article is intended to provide a survey of different developments in state constitutional adjudication of free exercise as a means of demonstrating arguments that have been accepted or rejected by various high courts. As this area of the law continues to develop, individuals should look to these precedents to shape arguments in the future.

IV. The New York State Constitution and *Catholic Charities v. Serio*

In contrast to the somewhat bland wording of the federal Free Exercise Clause, article I, section 3 of the New York State Constitution contains vigorous language, which proclaims the importance of religious liberty:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices

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Washington State's constitutional prohibition against taking private property solely for a private use.").

[109] *E.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411–12, 431–32 (Conn. 2008) (applying intermediate scrutiny and determining that laws restricting civil marriage to heterosexual couples violated state equal protection rights); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (applying rational basis standard of review and finding that state ban on gay marriage violated both equal protection and due process).

[110] *See supra* notes 47–63 and accompanying text.

[111] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring).

inconsistent with the peace or safety of this state.[112]

Historically, New York courts have interpreted article I, section 3 and the federal First Amendment alongside one another, in a sort of dual approach. The court often settled free exercise claims by looking to its own precedent as well as federal precedent when it was helpful.[113] This approach was most important prior to *Smith* because the heightened federal standard increased the chances that state constitutional decisions would violate the federal Constitution. In *La Rocca v. Lane*[114] the Court of Appeals reviewed the case of an ordained Roman Catholic priest who was not permitted to wear his clerical garb during his representation of an indigent criminal defendant.[115] The court looked to the state and federal constitutions, as well as state and local precedent,[116] concluding that the federal precedent was "not particularly helpful."[117] The court ultimately cited to New York precedent and established that the fundamental right to a fair and impartial trial was of paramount importance.[118]

In *Ware v. Valley Stream High School District*,[119] a case decided mere months before *Smith*, the court relied exclusively on federal law and precedent.[120] The court went out of its way, however, to include a footnote, which explained that the court relied solely on federal precedent because the parties did not brief claims under the state constitution.[121] Prior to *Smith*, it is fair to say that the court approached free exercise issues by looking equally at the state and federal sources, which again was important because of the looming

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[112] N.Y. CONST. art I, § 3.

[113] *See supra* notes 87–95 and accompanying text. For an intensely historical detailed study on the Court of Appeals' treatment of Religious Liberties see So Chun, *A Decade After Smith: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305, 1336–1349 (2000).

[114] La Rocca v. Lane, 338 N.E.2d 606 (N.Y 1975).

[115] *Id.* at 608–09.

[116] *Id.* at 612.

[117] *Id.*

[118] *Id.* at 612–13.

[119] Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420 (N.Y. 1989).

[120] *See id.* at 426–29 (reviewing federal precedent and standards under the Free Exercise Clause).

[121] *Id.* at 426 n.3. "Plaintiffs have asserted no claim under the Free Exercise Clause of the State Constitution (N.Y. CONST., art. I, § 3)." *Id.* It is hardly atypical for courts to refuse to consider state constitutional claims that are not sufficiently argued or briefed. *See e.g.*, State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986) (quoting *In re* Request of Rosier, 717 P.2d 1353, 1359 (Wash. 1986)) ("In a recent opinion, we declined to discuss state constitutional grounds because they had not been thoroughly briefed and discussed, stating that 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'").

possibility of federal strict scrutiny review.

Following *Smith*, New York was free to analyze free exercise constitutional claims according to rational basis review. For nearly a decade, the question as to what standard of review applied under the state constitution remained unanswered. New York State clearly has a history of finding heightened protections in its constitution, despite federal precedent to the contrary.[122] In the interim, state constitutional scholars speculated, with some stating that it remained largely "questionable" as to whether the New York free exercise clause would become more than mere "dead letter."[123] It was not until 1997, in *New York State Employment Relations Board v. Christ the King Regional High School*,[124] that the court addressed the issue of religious liberties. However, in this case, the court cited exclusively to the federal Constitution and precedent, and applied the *Smith* test in language that reflected the deferential stance of the court and the minimal protections afforded to religion, stating, "Now, a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment."[125]

This case, however, did not definitively state that the New York courts would now apply only the federal standard of review, and the state courts remained in a state of confusion as to freedom of religion claims. A year after *Christ the King*, the Fourth Department lamented the lack of guidance in *Miller v. McMahon*:[126]

> The Court of Appeals has not definitively stated whether the scope of that provision is coextensive with the Free Exercise Clause of the First Amendment of the U.S. Constitution, nor has it decided whether the analytical approach adopted by the United States Supreme Court in . . . *Smith* should be applied in resolving claims that N.Y. Constitution, article I, § 3 has been violated.[127]

The court in *Miller* eventually held that even the pre-*Smith* test

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[122] *See, e.g.*, People v. Scott, 593 N.E.2d 1328, 1330 (N.Y. 1992).

[123] David E. McCraw, *"Free Exercise" Under the State Constitution: Will the Exception Become the Rule?*, 12 Touro L. Rev. 677, 707 (1996) ("Whether [article I, section 3 of the New York Constitution] can become a vital part of the state's Bill of Rights remains questionable.").

[124] N.Y. State Emp't Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960 (N.Y. 1997).

[125] *Id.* at 963.

[126] *In re* Miller, 684 N.Y.S.2d 368 (N.Y. App. Div. 1998).

[127] *Id.* at 370.

would not protect the appellee's claim that photograph requirements for a gun permit violated his free exercise.[128]

The Court of Appeals offered a brief glimpse at its view of the state constitution in the 1998 case *People ex rel. DeMauro v. Gavin*.[129] In this case, the court concisely considered a free exercise challenge to a zoning board determination.[130] The memorandum decision hinted at some form of intermediate scrutiny, holding that religious freedom requires the balancing of "the interest of the individual right of religious worship against the interest of the State which is sought to be enforced."[131] In reaching this conclusion, the court quoted *People v. Woodruff*,[132] a Second Department case, which in turn cited to *Sherbert v. Verner*[133] and *People v. Woody*[134] for the proposition that the court should employ a balancing-test inquiry.[135] In *Woodruff*, the Second Department held that the State's interest outweighed the individual interest, namely that testifying about another's abuse of drugs violated her religious belief.[136] The use of this precedent, along with the balancing act itself, offered some insight that the Court would institute at least an intermediate standard of review.

The court did not address the issue of New York constitutional protections until 2006, in *Catholic Charities of Diocese of Albany v. Serio*.[137] In *Catholic Charities*, the appellants challenged the Women's Health and Wellness Act as containing an unconstitutionally narrow exception for religious employers.[138] Specifically, the petitioners were not asking for the repeal of the law in general but rather that they be entitled to the exemption already extended to other religious entities.[139] The statute at issue expanded women's access to health care and importantly required that employer health coverage for prescription drugs also provide

[128] *See id.* at 371.

[129] People *ex rel.* DeMauro v. Gavin, 706 N.E.2d 738 (N.Y. 1998).

[130] *Id.* at 739.

[131] *Id.* (quoting People v. Woodruff, 272 N.Y.S.2d 786, 789 (App. Div. 1966)) (internal quotation marks omitted).

[132] People v. Woodruff, 272 N.Y.S.2d 786 (App. Div. 1966).

[133] Sherbert v. Verner, 374 U.S. 398 (1963); *Woodruff*, 272 N.Y.S.2d at 789.

[134] People v. Woody, 394 P.2d 813 (Cal. 1964); *Woodruff*, 272 N.Y.S.2d at 789. This case reviewed the religious use of peyote. *Id.* at 814–15. It also advocated the compelling state interest doctrine and cited to *Sherbert*. *Woody*, 394 P.2d at 816.

[135] *Woodruff*, 272 N.Y.S.2d at 789.

[136] *Id.* at 789–90.

[137] Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 462 (N.Y. 2006).

[138] *Id.*; N.Y. Ins. Law § 3221(l)(16) (McKinney 2014).

[139] *Catholic Charities*, 859 N.E.2d at 462–63; Brief for Plaintiffs/Appellants at 2–3, Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006) (No. 2006-0110).

contraceptive coverage.[140] Petitioners were faith-based social service organizations that failed to qualify for the statute's relatively narrow exemption for religious employers[141] and were forced to fully participate in the program.[142]

The statute was deemed constitutional at the Appellate Division, Third Department by a 3–2 vote.[143] The majority opinion engaged in a dual approach, discussing at length the federal and state precedent and ultimately resting its conclusion on the balancing test from the *Woodruff* decision, as well as presumptions in favor of judicial restraint.[144] The dissent, authored by Presiding Justice Cardona and joined by Justice Spain, stated that the statute did not pass constitutional muster under the state and federal Constitutions.[145] Justice Cardona used the same balancing test as the majority and reached the opposite conclusion.[146] Cardona specifically rejected the argument that the employer could avoid giving contraceptive coverage by withholding all coverage, stating, "such a course of action would clearly undermine the articulated state interest involved herein. . . ."[147] The dissent also focused on how the statute implicated multiple rights of the religious organization, including among other things, religious freedom and free speech.[148] Therefore, the dissent concluded the statute failed the *Smith* "hybrid" right test.[149]

The Court of Appeals heard oral arguments on September 6,

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[140] *Catholic Charities*, 859 N.E.2d at 461; Ins. Law § 3221(l)(16).

[141] *Catholic Charities*, 859 N.E.2d at 462, 463. The statute defined a religious employer as,

> an entity for which each of the following is true:
> (a) The inculcation of religious values is the purpose of the entity.
> (b) The entity primarily employs persons who share the religious tenets of the entity.
> (c) The entity serves primarily persons who share the religious tenets of the entity.
> (d) The entity is a nonprofit organization . . . .

Id. at 462 (quoting Ins. Law § 3221(l)(16)(A)(1)) (internal quotation marks omitted). The court also mentioned that a larger exemption was heavily debated, and was initially proposed in the Senate, but it did not reach the final bill. *Id.*

[142] *Id.* at 463.

[143] Catholic Charities of Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 466, 477 (App. Div. 2006).

[144] *Id.* at 454–59 ("[a]ll things considered, and limiting our review to the appropriate judicial inquiry, we conclude that the balance tips away from plaintiffs' right to free exercise and in favor of the WHWA, and therefore find that the WHWA does not violate N.Y. Constitution, article I, § 3.").

[145] *Id.* at 466, 477 (Cardona, J. dissenting).

[146] *Id.* at 471–72 (Cardona, J. dissenting).

[147] *Id* at 471 (Cardona, J. dissenting).

[148] *Id.* at 471, 472, 473 (Cardona, J. dissenting).

[149] *Id.* at 474 (Cardona, J. dissenting).

2006, and decided the case on October 19, 2006.[150] Judge Robert S. Smith wrote the unanimous opinion.[151] Initially, the opinion rejected both the "inflexible rule of *Smith*"[152] as well as strict scrutiny.[153] The court then articulated the balancing rule from *Woodruff* and *La Rocca*.[154] Next, the court articulated (for the first time) the deference afforded to the legislature applying the balancing test:

> We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom. This test, while more protective of religious exercise than the rule of *Smith*, is less so than the rule stated (though not always applied) in a number of other federal and state cases.[155]

Judge Smith attempted to place limits on this opinion, stating that, hypothetically speaking, the court was not prepared to allow incidental burdens to create unreasonable interferences with free exercise.[156] Such hypotheticals included meat regulations shutting down kosher slaughterhouses or regulations that would abrogate the confidentiality of confessionals.[157] At this point it remains to be seen what, if any, protections are afforded beyond these hypotheticals.

With the rule articulated, the court held that the legislature had provided "extensive evidence" as to the impact of contraceptive care on its goal of health care equality.[158] With regard to the narrowly crafted religious exception, the court stated, "[o]f course, the Legislature might well have made another choice, but we cannot say the choice the Legislature made has been shown to be an unreasonable interference with plaintiffs' exercise of their religion.

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[150] Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 459 (N.Y. 2006).

[151] *Id.* at 461, 469. Judge Pigott took no part in the decision. *Id.* at 469. Pigott was appointed to the court in late August of 2006. *Hon. Eugene F. Pigott, Jr.*, COURT OF APPEALS, http://www.nycourts.gov/ctapps/jpigott.htm (last visited Oct. 17, 2014). It is interesting to note that then Justice Pigott joined the majority opinion in *Miller*. *In re* Miller, 684 N.Y.S.2d 368, 371 (App. Div. 1998).

[152] *Catholic Charities*, 859 N.E.2d at 466.

[153] *Id.* at 467.

[154] *Id.* at 466.

[155] *Id.*

[156] *See id.* at 467.

[157] *Id.*

[158] *Id.* at 468.

The Legislature's choice is therefore not unconstitutional."[159] This final provision might best indicate the court's standard of review, in that the legislature enjoys substantial deference in its determinations.

V. A Review of the Sister States

The focus of this paper now shifts to how other states have handled constitutions with language that mirrors New York's article I, section 3. The limitation on governmental interference to "acts of licentiousness, [] or practices inconsistent with the peace or safety of the state" has been articulated either completely or nearly completely in seventeen other states.[160] This paper will now focus on how these state high courts have interpreted their similar constitutions in the wake of *Smith*. Unless otherwise noted, each of the following state analyses involve a state constitution that contains language similar to New York's article I, section 3 (hereinafter "public safety and licentiousness clauses").

A. Washington

The Supreme Court of Washington has a long history of finding more expansive rights in its own constitution. In analyzing its state constitution, the court has used the dual reliance approach since 1984, when it was first articulated in *State v. Coe*.[161] Two years after *Coe*, the court refined this approach in the seminal case *State v. Gunwall*,[162] which articulated a non-exclusive list of criteria to be used when considering a deviation from the federal Constitution.[163] The court consistently adheres to the *Gunwall* factors and will not hesitate to scold a party in the opinion for failure to brief this aspect

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159 *Id.*

160 N.Y. Const. art. I, § 3; *see* Ariz. Const. art. II, § 12; Cal. Const. art. I, § 4; Colo. Const. art. II, § 4; Conn. Const. art. I, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 1, para. IV; Idaho Const. art. I, § 4; Ill. Const. art. I, § 3; Md. Const., Declaration of Rights, art. 36; Minn. Const. art. I, § 16; Miss. Const. art. III, § 18; Mo. Const. art. I, § 5; Nev. Const. art. I, § 4; N.D. Const. art. I, § 3; S.D. Const. art. VI, § 3; Wash. Const. art. I, § 11; Wyo. Const. art. I. § 18; *see also* Tozzi, *supra* note 51, at 279–80 & nn.47–48.

161 State v. Coe, 679 P.2d 353 (Wash. 1984); Laura L. Silva, *High Court Study: State Constitutional Criminal Adjudication in Washington since State v. Gunwall: "Articulable, Reasonable and Reasoned" Approach?*, 60 Alb. L. Rev. 1871, 1876 (1997).

162 State v. Gunwall, 720 P.2d 808 (Wash. 1986).

163 *Id.* at 811. The criteria included, but was not limited to: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Id.*

of a case[164] or outright refuse to reach the merits of a state constitutional claim,[165] particularly in the context of religious freedoms.

The court recently addressed state constitutional protection for religious liberties in *City of Woodinville v. Northshore United Church of Christ*.[166] In *Woodinville*, a church applied for a permit to run a temporary encampment of homeless people.[167] Several months before the application, the city passed a moratorium on the area in question, which it relied upon in denying the application.[168] The church then appealed a judgment enjoining them from hosting the temporary encampment, citing heavily to article I, section 11 of the Washington Constitution.[169]

In addressing the claim, the court noted the textual differences between the federal and state constitutions, including the strong language of article I, section 11, and specifically noted the state constitution's use of the phrase "justify practices inconsistent with the peace and safety of the state."[170] The court then unequivocally held that the Washington Constitution required the use of the compelling interest test, stating, "a party challenging government action must show two things: that the belief is sincere and that the government action burdens the exercise of religion. The government must then show it has a narrow means for achieving a compelling goal."[171] The court interpreted the peace and safety of the state phrase as limiting governmental interference except when doing so would be a reasonable exercise of police powers.[172] The court then held that the religious belief was indeed burdened by the total refusal to grant a permit.[173] In determining whether the belief was burdened, the court noted the lack of alternatives available in

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[164] *See* First Covenant Church v. City of Seattle, 840 P.2d 176, 186 (Wash. 1992) ("If a party does not provide constitutional analysis based upon the factors set out in *Gunwall*, the court will not analyze the state constitutional grounds in a case.").

[165] State v. Motherwell, 788 P.2d 1066, 1074 (Wash. 1990) ("The defendants, however, have cited to these [state constitution] provisions only in passing, without providing any authority or argument as to how the provisions should be applied to the present case. It is now well established that we will consider whether to apply our state constitutional provisions more strictly than parallel federal provisions only if we are asked to do so . . . .").

[166] City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009) (en banc).

[167] *Id.* at 407–08.

[168] *Id.* at 408.

[169] *Id.*

[170] *Id.* at 409–10 (quoting Wash. Const. art. 1, § 11).

[171] *Id.* at 410.

[172] *See id.* at 410 n.3 (citing Wash. Const. art. 1, § 11).

[173] *Id.* at 411.

the statute.[174] Having failed this prong of the test, the court held that the city did not meet the compelling interest test, and therefore, the church's constitutional rights were violated.[175]

Overall, Washington is interesting because of its similarities with New York. Both states use the dual approach, and both states have nearly identical provisions for religious liberty. However, the two states have reached results as far apart as their geography. Washington has implemented and adhered to the compelling interest doctrine. It has articulated both the rule and its limits (such as police powers). Washington indicates that the compelling interest doctrine is workable.

B. Minnesota

Minnesota is perhaps the most ardent defender of religious liberties in the United States. The Supreme Court of Minnesota comfortably disregards federal precedent and looks heavily to its own state constitution when deciding cases involving religious liberties.[176] This tradition of heightened protections is best shown when viewing cases in the immediate aftermath of *Smith*. While other states were plunged into confusion following *Smith*,[177] Minnesota simply affirmed its status quo in *State v. Hershberger*.[178]

Hershberger was decided less than six months after *Smith* and specifically asked whether *Smith* was controlling over Minnesota.[179] The case involved an Amish defendant who was charged with violating a state statute, which required the use of a slow moving vehicle emblem on all buggies.[180] In 1989, the Supreme Court of Minnesota held that the statute violated the federal free exercise rights of the defendant, but the United States Supreme Court vacated Minnesota's decision in light of *Smith*.[181] Upon remand, speaking through Chief Justice Popovich, the court unanimously and unwaveringly held that *Smith* was not controlling.[182] The court specifically declined to even distinguish the immediate case against *Smith*, stating:

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[174] *Id.* at 410 n.4.
[175] *Id.* at 411.
[176] *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) [hereinafter "Hershberger II"].
[177] For example, see *supra* notes 123–28 and accompanying text.
[178] State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).
[179] *Id.* at 395.
[180] *Id.* at 395–97.
[181] Minnesota v. Hershberger, 495 U.S. 901, 901 (1990).
[182] *Hershberger II*, 462 N.W.2d at 395, 396–97.

> While there might be merit in deciding the case and affirming *Hershberger I* based on associational freedoms also infringed by the statute, thereby distinguishing *Smith II,* we decline to do so. It is unnecessary to rest our decision on the uncertain meaning of *Smith II* when the Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide.[183]

Viewing *Smith* as unpersuasive, the court proceeded to apply a test similar to compelling interest and strict scrutiny.[184] It held that while the state interest of public safety was potentially fundamental, the statute was insufficiently narrowly tailored because the State failed to consider the alternative proposed by the Amish (a lighted red lantern instead of the state emblem).[185]

Two years later the court seemingly strengthened its protections of religious liberties. In *Hill-Murray Federation of Teachers v. Hill-Murray High School*,[186] the court clearly articulated a four-prong test that provides the greatest protection for religious liberties in the nation.[187] The court held that in determining whether a law infringes with a religious practice, the court must determine "whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means."[188]

Recently, the Minnesota Court of Appeals, the state's intermediate court, reaffirmed the four-prong "heightened 'compelling state interest balancing test.'"[189] In *Edina Community Lutheran Church v. State*, the court reviewed a statute that attempted to protect the right to bear arms.[190] The statute strictly regulated the process of asking individuals to not carry weapons and imposed specific language for signs and the process of making "reasonable requests."[191] The court held that public safety and the preservation of the individual right to bear arms were compelling

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[183] *Id.* 462 N.W.2d at 396–97 (citations omitted).

[184] *Id.* at 399.

[185] *Id.* at 399.

[186] Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992).

[187] *Id.* at 863.

[188] *Id.* at 865. The court held that, factually, the right to free exercise was actually not infringed upon in this case. *Id.*

[189] Edina Cmty. Lutheran Church v. State, 745 N.W.2d 194, 203 (Minn. Ct. App. 2008) (quoting *Hill-Murray Fed'n of Teachers*, 487 N.W.2d at 865).

[190] *Id.* at 201–02.

[191] *Id.*

interests but failed to meet its burden in showing that those interests would be drastically undercut by allowing a religious exemption.[192] Again, the application of the Minnesota four-prong test shows the absolute highest level of protection for the freedom of religion in the country. The rules and applications in states such as Washington and Minnesota undercut the rationale in *Serio* that other states make mere "lip service" to the concept of strict scrutiny.

C. California

California has had multiple occasions to reconsider the scope of its state constitutional protections for free exercise in the past decade.[193] In each case however, the Supreme Court of California has coyly hinted at adopting a heightened standard, only to frame the parties as requesting a standard of review that exceeds strict scrutiny.

In 2004, the Supreme Court of California heard the case of *Catholic Charities of Sacramento, Inc. v. Superior Court*.[194] This case involved the review of a statute very similar to the Women's Health and Wellness Act from *Catholic Charities v. Serio*.[195] The California court, unlike its New York counterpart, declined to adopt any standard because the case at hand did not necessitate a ruling on the scope of their constitutional protections.[196] The court stated:

> In a case that truly required us to do so, we should not hesitate to exercise our responsibility and final authority to declare the scope and proper interpretation of the California Constitution's free exercise clause. Here, however, we need not do so because Catholic Charities' challenge to the WCEA fails in any event. As we explain below, the statute passes strict scrutiny. A future case might lead us to choose the rule of *Sherbert*, the rule of *Smith* or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution and our own understanding of its import. But "[t]hese important questions should await a case in which their resolution affects the outcome."[197]

The court then plainly stated that the legislature had articulated

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[192] *Id.* at 208–09.
[193] Cal. Const. art I, § 4.
[194] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004) [hereinafter *Catholic Charities of Sacramento*].
[195] Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).
[196] *Catholic Charities of Sacramento*, 85 P.3d at 91.
[197] *Id.* (citations omitted).

a compelling state interest through its findings of economic disparity between the genders with regard to health care spending.[198] In its analysis, the court held that the legislature had the competence to identify gender discrimination and also that the legislature's identification was not "irrational."[199] Such a deferential analysis is more akin to rational basis review than to the searching inquiry associated with the strict scrutiny that the statute supposedly plainly satisfied. It is worth noting that it is exactly this analysis that Judge Smith pointed to when rejecting strict scrutiny in *Catholic Charities v. Serio*.[200] With regard to narrow tailoring, the court again quickly stated that a broader exemption would increase the number of individuals without access to contraceptive health care.[201] The court also made note that Catholic Charities failed to provide authority to support some of its arguments with regard to tailoring of the law.[202] That Catholic Charities would shoulder this burden in a strict scrutiny analysis is inconsistent at best.

The court's willingness to loosely apply "strict scrutiny" was not lost on Justice Janice Rogers Brown,[203] who authored a lone dissent.[204] Justice Brown lamented the cursory strict scrutiny analysis of the majority.[205] She also criticized the analysis as violating the rigorous balancing test California courts used in the 1960s, stating, "[u]nder California law—at least up to now—the compelling state interest test had bite and required the court to 'weigh[] the competing values represented . . . on the symbolic scale of constitutionality.'"[206]

The California court's confusion has not improved over time. In 2008, the court reiterated that it would not adopt a set standard, using logic similar to *Catholic Charities of Sacramento*.[207] The court

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[198] *Id.* at 92.
[199] *Id.* at 93.
[200] *Catholic Charities*, 859 N.E.2d at 467.
[201] *Catholic Charities of Sacramento*, 85 P.3d at 93–94.
[202] *Id.* at 94.
[203] Justice Brown was appointed to the U.S. Court of Appeals, D.C. Circuit just over a year after *Catholic Charities*. *Judges of the Court*, U.S. COURT OF APPEALS – D.C. CIRCUIT, http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+JRB (last visited Oct. 11, 2014).
[204] *Catholic Charities of Sacramento*, 85 P.3d at 98 (Brown, J., dissenting).
[205] *Id.* at 105 (Brown, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003)) ("Strict scrutiny . . . has mellowed in recent decades.").
[206] *Catholic Charaties of Sacramento*, 85 P.3d at 108 (quoting People v. Woody, 394 P.2d 813, 822 (Cal. 1964)).
[207] N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 968 (Cal. 2008).

plainly stated, "[a]s in *Catholic Charities* [of Sacramento], however, this case presents no need for us to determine the appropriate test. For even under a strict scrutiny standard, defendants' claim fails."[208] The court then engaged in a similar deferential analysis.[209]

Several states have looked to their constitutions to provide greater protections. It is not clear, and is rather doubtful, that California will provide any meaningful protections above the federal standard. California's cursory strict scrutiny analysis was the basis for New York's departure from this standard, and it seems likely that California is closer to fully abandoning strict scrutiny than it is to actually adopting that standard or applying it in any consequential manner.

D. Other States

As a general rule, it is rare that free exercise cases reach a state's high court. Even in New York, a state with perhaps the most developed legal profession in the country, nearly a decade passed before the Court of Appeals took its first post-*Smith* case.[210] Of the seventeen states with public safety and licentiousness clauses, eight have had no significant constitutional developments with regard to post-*Smith* state constitutional adjudication.[211] Even states that have opportunity to take free exercise cases will strive to avoid making a defined rule.[212] Additionally it appears that nationally, most religious issues before high courts take the form of establishment clause cases[213] or internal affairs of religious institution cases[214] and thus do not affect the analysis of post-*Smith* state constitutional adjudication.

The Colorado Court of Appeals, the state's intermediate court, had an opportunity to recently make a decision with regard to free

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[208] *Id.* at 968.

[209] *See id.* at 966–69.

[210] N.Y. State Emp't Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960 (N.Y. 1997).

[211] This includes Georgia, Mississippi, Nevada, North Dakota, South Dakota, and Wyoming. Of the states that have similar but not identical provisions, Maryland and Missouri have not had significant developments.

[212] *See supra* notes 194–210 and accompanying text.

[213] *See, e.g.*, Taetle v. Atlanta Indep. Sch. Sys., 625 S.E.2d 770, 770 (Ga. 2006) (holding that commercial agreement between public school and church to lease church space for kindergarten classes did not violate establishment clause); State v. Freedom From Religion Found., 898 P.2d 1013, 1014 (Colo. 1995).

[214] *See, e.g.*, Thibodeau v. Am. Baptist Churches of Conn., 994 A.2d 212, 216–17 (Conn. App. Ct. 2010).

exercise.[215] However, the case arose in the context of a divorce, and therefore, the court held it implicated other fundamental rights such as the right to raise children.[216] The court applied strict scrutiny, but in doing so implicitly adhered to the logic and ruling of the hybrid rights doctrine of *Smith*.[217]

States without safety and licentiousness clauses have also engaged in a noteworthy state constitutional analysis. In *State v. Miller*,[218] the Supreme Court of Wisconsin reviewed the case of Amish individuals who refused to use slow moving vehicle emblems.[219] Noting the similarities between *Miller* and *Hershberger*, the Wisconsin court concurred with and fully adopted the Minnesota court's four-prong test.[220]

Several other states recently reviewed Free Exercise claims and unfortunately looked solely to the federal Constitution and case law. Just recently, the Supreme Court of Kentucky fully adopted the *Smith* standard.[221] The court reviewed its constitution in the context of an Amish buggy case.[222] After considering federal and state precedent, the majority upheld the motor vehicle statute, stating, "statutes of general applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution . . . ."[223] The majority prevailed over a dissent by Justice Will T. Scott, joined by Justice Abramson.[224]

Justice Scott took issue with the majority's limited reading of the state constitution.[225] While the Kentucky constitution does not contain a licentiousness clause, it still contains stronger wording than the federal Constitution. Justice Scott noted, "[n]ot only is it linguistically *possible* to be more inclusive than the First Amendment, Section 5 of Kentucky's Constitution is linguistically *more inclusive*. Presumably, the framers of Kentucky's Constitution used more inclusive language with the intent it would offer *greater* protection than the Federal Constitution."[226] Justice Scott then

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[215] *See In re* Marriage of McSoud, 131 P.3d 1208, 1214 (Colo. App. 2006).
[216] *Id.* at 1215–17.
[217] *See id.*
[218] State v. Miller, 549 N.W.2d 235 (Wis. 1996).
[219] *Id.* at 237.
[220] *Id.* at 239–41.
[221] Gingerich v. Commonwealth, 382 S.W.3d 835, 841 (Ky. 2012).
[222] *Id.* at 837.
[223] *Id.* at 844.
[224] *Id.* at 845, 851 (Scott, J., dissenting).
[225] *Id.* at 845 (Scott, J., dissenting).
[226] *Id.* (Scott, J., dissenting). The Kentucky Constitution reads:

found the application of strict scrutiny appropriate because the language of the amendment "[made] clear the framers' intent that religious liberty should be zealously protected."[227] He then drew parallels with *Wisconsin v. Miller*[228] and, while conceding that the state had a compelling state interest in promoting highway safety,[229] he rejected the state's argument that a slow moving vehicle emblem was the least restrictive means of achieving its goal.[230] Practitioners and courts alike should note Justice Scott's analysis of whether the state action is the narrowly tailored/least restrictive alternative. Justice Scott noted the various methods used in sister states to achieve vehicle safety as a means of challenging the State's argument.[231] This underscores the importance of looking to other states when crafting arguments challenging statutes, as these may be a practical means of fleshing out a hypothetical argument.[232] It also allows the courts to analyze the practical outcome of holding for the religious liberty, instead of relying on government's determinations when crafting the legislation. Obviously, such an analysis is not limited to Amish buggy cases, and practitioners should make use of statutory exceptions and alternatives noted in the cases within this paper.

In *Mitchell County v. Zimmerman*,[233] the Supreme Court of Iowa reviewed the case of Mitchell Zimmerman, a Mennonite who received a traffic citation for operating a tractor on public roads

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

KY. CONST. § 5 (emphasis added).

[227] *Gingerich* 382 S.W.3d at 846.

[228] *Id.*

[229] *Id.* at 849.

[230] *Id.* at 849–50.

[231] *Id.* ("[T]wenty-three states and the District of Columbia do not require animal-drawn vehicles to display the SMV triangle mandated by [the Kentucky statute]. In these other jurisdictions, various uses of white and red lanterns on back and/or front of animal-drawn vehicles is required.").

[232] Importantly, it is possible that the party challenging the legislation may even shoulder the burden of showing alternative means, even if a state court is willing to apply what it deems to be strict scrutiny. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93–94 (Cal. 2004).

[233] Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1 (Iowa 2012).

with steel lugs on its wheels.[234] Zimmerman argued that the steel cleats were a Mennonite Church rule and cited the biblical passage from which the rule is derived.[235] The Iowa trial court upheld the ordinance and citation, while citing both the federal and state constitution.[236]

In its analysis, the court cited only federal precedent and applied *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[237] and specifically did not address state constitutional issues.[238] This is somewhat surprising, as the Supreme Court of Iowa has a deep history of applying its own constitution despite the existence of federal precedent.[239] The court found that the law was facially neutral but not generally applicable, and thus, strict scrutiny applied to the targeted legislation.[240]

The Supreme Court of Montana also engaged in a similar review of free exercise rights. In *Big Sky Colony v. Montana*,[241] a colony of Hutterites sued the State Department of Labor alleging that they were impermissibly defined as an employer within the State worker's compensation law.[242] Specifically, the challenged provision was a 2009 amendment to the worker's compensation law which expanded the definition to include religious groups that worked for profit on, among other things, construction projects.[243] Big Sky alleged that the amendment specifically targeted their communal system.[244]

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[234] *Id.* at 4. The ordinance was aimed at protecting the county roads and prohibited a wide variety of steel cleats. *Id.*

[235] *Id.*

[236] *Id.* at 6. The trial court addressed the state constitution by assuming hypothetically that the constitution required strict scrutiny, but that this standard was met because protecting roads was a compelling interest and the ordinance was narrowly tailored because it only targeted steel wheeled vehicles on concrete topped roads. *See id.*

[237] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In this case, the Supreme Court addressed the general applicability and neutrality provisions mentioned in *Smith*. *Id.* at 531–32.

[238] *Zimmerman*, 810 N.W.2d at 3 n.1.

[239] *See, e.g.*, State v. Baldon, 829 N.W.2d 785, 814 (Iowa 2013); State v. Pals, 805 N.W.2d 767, 771–72 (Iowa 2011). Specifically, readers are directed to Justice Appel's special concurrence in *Baldon*, in which he describes in detail the history and importance of state constitutional adjudication. *Baldon*, 829 N.W.2d at 814–34 (Appel, J., concurring specially).

[240] *Zimmerman*, 810 N.W.2d at 10, 15, 16. The law was not generally applicable because exceptions were provided for secular purposes, but not for the religious groups. *Id.* at 16.

[241] Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus., 291 P.3d 1231 (Mont. 2012), *cert. denied*, 134 S. Ct. 59 (2013).

[242] *See id.* at 1235.

[243] *See id* at 1234–35.

[244] *See* Brief of Appellee at 8–9, *Big Sky Colony, Inc.*, 291 P.3d 1231 (Mont. 2012) (No. DA 11–0572). HB 119 is the product of pressure from construction industry lobbying organizations. Representative Chuck Hunter of Helena introduced HB 119 to the House

The trial level court determined that the provisions targeted the Hutterite communal practices and, after applying strict scrutiny, awarded summary judgment to Big Sky.[245] On appeal, the Supreme Court of Montana adopted the *Smith* test and, after overwhelmingly drawing from federal precedent, rejected the free exercise challenge.[246]

State courts should attempt to avoid this kind of analysis. Relying on federal law invites Supreme Court review.[247] It also foregoes an opportunity to help develop a body of state case law, which, as noted above, is already scarce.[248] It also abdicates the responsibility that a state court holds in ensuring that the rights of its citizens are adequately protected.[249]

VI. STATUTORY APPROACH

Subsequent to *City of Boerne v. Flores*, many states adopted statutes identical to the federal RFRA. Of the seventeen states with public safety and licentiousness clauses, five have passed such provisions.[250] These provisions have proved effective in altering the state court's analysis and reinstituting the pre-*Smith* tests. However, as a general rule, the application of these statutes fail to rise to the level of protections offered by states such as Washington or Minnesota. This is typically due to statutory wording that requires a threshold determination that religious beliefs are "*substantially* burdened" before the compelling interest applies.

A. Florida

Of the five states that passed RFRA acts, Florida may be the most interesting development. The Florida legislature has a history of deferring to the federal judiciary and has passed constitutional amendments requiring its supreme court to interpret certain

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Labor and Industry Committee on January 8, 2009. When he introduced the bill he said, "So who really are we speaking of here? In particular, we are speaking of, in this section, about Hutterite colonies who frequently bid on and perform jobs often in the construction industry and often in direct competition with other bidders."
Id.

[245] *Big Sky Colony, Inc.*, 291 P.3d at 1235.

[246] *Id.* at 1237–41.

[247] *See supra* note 77 and accompanying text.

[248] *See supra* notes 211–12 and accompanying text.

[249] *See* State v. LaFrance, 471 A.2d 340, 343 (N.H. 1983) (describing the oath taken by the judiciary to ensure compliance with the state constitution).

[250] ARIZ. REV. STAT. ANN. § 41-1493.01 (2013); CONN. GEN. STAT. § 52-571b (2013); FLA. STAT. § 761.03 (2013); IDAHO CODE ANN. § 73-402 (2013); 775 ILL. COMP. STAT. 35/15 (2013).

provisions in lockstep with the federal Constitution.[251] With the passage of section 761.03, Florida's legislature required the state supreme court to apply the compelling interest test when the government substantially burdens free exercise.[252] However, this has led to results that are inconsistent with other states. While the compelling interest test is adhered to, the court has still applied it in a manner that reaches different results than other courts.

In 2009, Florida took up the issue of religious freedom in *Westgate Tabernacle v. Palm Beach* County.[253] The facts of this case were similar to Washington's *Northshore United* case, in that local permitting processes impacted a religious homeless shelter.[254] The homeless shelter was in violation for operating without a conditional use permit.[255] The county gave the church 180 days to either shut down or comply with the permitting process, which would have required "substantial renovations."[256] If Westgate did not comply with the permitting process, it faced a $100 per day fine.[257] Westgate then sued under the state constitution, and the court upheld the permitting process.[258] The court defined substantial burden as more than mere "inconvenience on religious exercise; [it] is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[259] The court held that factually, the substantial renovation requirement did not constitute a substantial burden and therefore upheld the permitting process.[260]

The Florida Supreme Court has also held that other permitting processes and city regulations did not violate section 761.03 because they fail to meet the threshold question that the religious belief was

[251] *See* FLA. CONST. art. I, § 12.

[252] "(1) The government shall not *substantially burden* a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest." FLA. STAT. § 761.03 (2013) (emphasis added).

[253] Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027 (Fla. Dist. Ct. App. 2009).

[254] *Id.* at 1029; *see* City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 407 (Wash. 2009).

[255] *Westgate Tabernacle, Inc.*, 14 So.3d at 1029.

[256] *Id.* at 1029–30, 33.

[257] *Id.* at 1029–30.

[258] *Id.* at 1030, 1033.

[259] *Id.* at 1031 (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)).

[260] *Id.* at 1033.

substantially burdened.[261] This is the typical application and outcome throughout the Florida intermediate courts as well.[262]

The other states using the statutory method showed similar results, however the full extent of this statutory review possibly remains to be seen, as the few cases before state high courts have not been ideal test cases.[263]

VI. Conclusion

The states have handled *Oregon v. Smith* in a number of ways. Several states created legislation to prevent their high court from applying rational basis. Many states left the issue to the courts and the issue has simply not presented itself in any sort of way that would allow meaningful review. However, in a select number of states the issue has been fully addressed and answered. The Court of Appeals of New York has interpreted a strongly worded constitution to provide a standard of review that is a small step above rational basis. California has consistently punted on this issue and refused to accept a hard rule, while muddying the waters of strict scrutiny along the way. Washington and Minnesota have offered the greatest levels of protection, applying strict scrutiny in its fullest meaning, as intended by the United States Supreme Court in *Yoder* and *Sherbert*. These decisions overturned statutes with narrow exceptions and maintained the wall between church and state. Overall, these courts and the attorneys that argued before them have best understood their role within the federalist system, and it is recommended that courts continue this practice for free exercise claims given the tenuous logic behind the federal standard. Only then will the states, judges, and attorneys have discharged their obligation to the citizens and clients in fully adjudicating the historic rights at play.

[261] Warner v. City of Boca Raton, 887 So. 2d 1023, 1035 (Fla. 2004).

[262] *See, e.g.*, Christian Romany Church Ministries, Inc. v. Broward Cnty., 980 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 2008).

[263] *See, e.g.*, State v. White, 271 P.3d 1217, 1227 (Idaho Ct. App. 2011) (finding defendant's use of marijuana was not motivated by religious belief); State v. Hardesty, 214 P.3d 1004, 1005 (Ariz. 2009) (en banc) (reviewing ban on possession of marijuana).