

The Sanctity of Religious Liberty of Minority Faiths Under State Constitutions: Three Hypotheses

Gary S. Gildin

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Religion Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Gary S. Gildin, *The Sanctity of Religious Liberty of Minority Faiths Under State Constitutions: Three Hypotheses*, 6 U. Md. L.J. Race Relig. Gender & Class 21 (2006).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol6/iss1/4>

This Conference is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE SANCTITY OF RELIGIOUS LIBERTY OF MINORITY FAITHS UNDER STATE CONSTITUTIONS: THREE HYPOTHESES

GARY S. GILDIN*

I. INTRODUCTION

Symposia have approached the challenging topic of religion and law from a variety of perspectives. Perhaps most often, the inquiry ponders the role religious tenets should play in informing or shaping positive secular law. When, if ever, is it appropriate for a representative in a liberal democracy to invoke the judgment of God in support of specific policy initiatives?¹ What weight, if any, should religious persuasion have in a secular court?² Do religious values lie at the heart of the foundation of law, meriting expression in legal norms?³ Have conventional Western understandings of the nature of law and human rights been misguided by viewing religion as a problem for, rather than a source of insight about or legitimization of, the law?⁴ Commentators also have probed reconciliation between the religious belief of actors in the legal system and their secular obligations.⁵ Still others have explored the converse question of the proper influence law may exert upon theology.⁶

* G. Thomas and Anne G. Miller Chair in Advocacy, The Dickinson School of Law, Pennsylvania State University. B.A., University of Wisconsin; J.D., Stanford Law School. Special thanks to panelists and participants in the Association for the Study of Law, Culture and Humanities October 2005 session on Religion, Ethics and Law as well as to the members of the Marquette University School of Law faculty whose comments and criticisms on earlier presentations of this topic vastly improved the analysis. The author is indebted to Danielle Richey and Jonathan Edmunds for their invaluable research assistance in the preparation of this article.

1. Symposium, *The Religious Voice in the Public Square*, 29 LOY. L.A. L. REV. 1401 (1996).

2. Symposium, *Religion and the Judicial Process: Legal, Ethical and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998).

3. Timothy P. Terrell, *The Foundations of Law: Confronting the Legal Meaning of Religious Faith: Wringing Universal Values Out of Pluralism Itself*, 54 EMORY L.J. 337, 339 (2005); Samuel J. Levine, *Religion's Role in the Administration of the Death Penalty*, 9 WM. & MARY BILL RTS. J. 179, 182-85 (2000).

4. Mark C. Modak-Truran, *Law, Religion and Human Rights in Global Perspective*, 22 MISS. C. L. REV. 165 (2003); Senator Orrin G. Hatch, *Religious Liberty at Home and Abroad: Reflections on Protecting the Fundamental Freedom*, 2001 BYU L. REV. 413 (2001).

5. Honorable Helen "Ginger" Berrigan, *Legal Ethics & Religion: An Oxymoron?*, 13 ST. THOMAS L. REV. 609, 610 (2001); Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics*, 66 FORDHAM L. REV. 1075 (1998); Bruce A.

This article will not tackle the overarching theoretical inquiry into the interrelationship between values gleaned from religious interpretation and mores promoted by secular law. Rather, it undertakes a more modest examination of the degree to which worshipers of minority faiths in twenty-first century America are protected against burdens on their religion imposed by secular laws reflective of majoritarian values.

Followers of non-mainstream religions in the United States whose faith is unintentionally burdened by state and local laws must resort to state, as opposed to federal, constitutions to secure exemption and accommodation. Recent developments have issued contradictory signals regarding the extent to which state constitutions may be relied upon to preserve minority sects. In response to diminution of federal constitutional protection, courts have construed state constitutions to exhibit heightened solicitude for religious pluralism, exempting congregants of non-mainstream faiths from general laws representative of majority values except in compelling circumstances. On the other hand, states have with equal vigor amended their constitutions to proscribe conduct that offends a fundamental majoritarian religious tenet—that marriage be reserved as a bond between a man and a woman. This article will offer three hypotheses as to what these facially inconsistent trends signify as to the trust worshipers of non-mainstream faiths should place in the shelter offered by state constitutions.

II. THE RELEVANCE OF LAW'S TREATMENT OF MINORITY FAITHS

Any theoretical or practical balance between law and religion must account for consequences to the liberty of believers in dogma not shared by the majority.⁷ As James Madison observed in Federalist No.

Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997); Thomas E. Baker & Timothy W. Floyd, *A Symposium Précis*, 27 TEX. TECH L. REV. 911 (1996).

6. Joseph Allegretti, *The Theology of the Practice of Law*, 53 MERCER L. REV. 1065, 1066 (2002).

7. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004); Stephen Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005); MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* (2d ed. 2002); ERIC MICHAEL MAZUR, *THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER* (1999); FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF*

51, “In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.”⁸

The means by which law reconciles majoritarian interests and minority faith traditions not only has consequences for the religious liberty of individuals, but may impact the stability of the body politic as a whole. Assimilating the rights of non-mainstream sects continues to challenge modern society. The struggle over the treatment and status of Sunni Muslims in a burgeoning Iraqi democracy numerically dominated by Shiite followers threatens a civil war. The furious reaction to publication of cartoons depicting the prophet Muhammad highlights the tension between Western European constitutional values and beliefs held precious by Islamic minorities in those countries. Thomas Friedman recently issued an ominous warning:

[T]he world is drifting dangerously toward a widespread religious and sectarian cleavage—the likes of which we have not seen for a long, long time. The only country with the power to stem this toxic trend is America. People across the world shall look to our example of pluralism, which is like no other.⁹

Accommodating members of non-mainstream faiths, however, is likely to become increasingly challenging in the United States due to a rise in religious diversity.¹⁰ The expanding number and changing origin of America’s immigrant population has contributed to a general broadening of religious pluralism.¹¹ In 2000, the Association of

RELIGIOUS MINORITIES AND DISSENTERS (1999); MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM (Jonathan D. Sarna ed., 1998); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998); Rosalie Berger Levinson, *The Dark Side of Federalism: Restricting the Rights of Religious Minorities*, 33 VAL. U. L. REV. 47 (1998); Samuel J. Levine, *Toward a Minority Voice: A Look at Free Exercise Rights Through a Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996).

8. THE FEDERALIST NO. 51 (James Madison).

9. Thomas L. Friedman, *War of the Worlds*, N.Y. TIMES, Feb. 24, 2006, at A23.

10. Cynthia Norman Williams, *America’s Opposition to New Religious Movements*, 27 LAW & PSYCHOL. REV. 171, 174 (2003).

11. Barry A. Kosmin, Egon Mayer and Ariela Keyser, *American Religious Identification Survey*, at 23 (2001) [hereinafter ARIS Survey]. Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 226 (2003) (“[S]tarting in the mid-nineteenth century, immigration helped produce an ever-expanding American Catholic community.”).

Statisticians of American Religious Bodies (ASARB) issued results of a study of membership in religious congregations in the United States. ASARB identified 265 distinct religious bodies claiming congregations, 149 of which agreed to participate in the study.¹² The 2001 American Religious Identification Survey (ARIS) of adults ages eighteen and older documented thirty-five independent Christian religious faiths as well as almost eight million members of twenty identifiable non-Christian religious sects.¹³

Even within mainstream faiths, there may be an uptick in individualized interpretation of religious dogma. The 2001 ARIS survey revealed that almost forty percent of persons who identified with a particular religion confessed that no member of their household belonged to a church or comparable institution, with formal affiliation varying significantly amongst religions.¹⁴ The authors of the ARIS survey interpreted these findings to represent “the difference between identification as a state of heart and mind and affiliation as a social condition,” “differences in the value and meaning attached to affiliation within various religious movements,” and “differences in meaning associated with religion itself.”¹⁵ The authors further opined that those who identify with a religion while at the same time abnegating institutional membership may represent what sociologist Thomas Luckmann characterized as “The Invisible Religion,” where “[t]he modern sacred cosmos legitimates the retreat of the individual into the ‘private sphere’ and sanctifies his (or her) subjective autonomy.”¹⁶ Consequently, potential for conflict in the United States between majoritarian spiritual values and an individual’s religious

12. The Association utilized the Yearbook of American and Canadian Churches to label the discrete sects. DALE E. JONES ET AL., RELIGIOUS CONGREGATIONS AND MEMBERSHIPS IN THE UNITED STATES: 2000, at xvii (2002).

13. ARIS Survey, *supra* note 11, at 12-13. As compared to the 1990 survey, the proportion of the population identifying with Christianity declined from 86% to 77%. The number of adults classifying themselves as non-Christian increased by almost 2,000,000, albeit representing a rise in percentage of the population only from 3.3% to 3.7%. The most significant increase was the doubling of adults bound to no religious identification, rising from 14.3 million (8% of total population) to 29.4 million (14% of total population). *Id.* at 10-11.

14. ARIS Survey, *supra* note 11, at 16.

15. *Id.*

16. *Id.* at 14, quoting THOMAS LUCKMANN, THE INVISIBLE RELIGION: THE PROBLEM OF RELIGION IN MODERN SOCIETY (1967). Additional evidence of increasing religious pluralism may be gleaned from the finding that 16% of the United States adult population reported having switched their religious preference or identification. *Id.* at 23. Furthermore, 22% of households that included either a married or domestic partner reported non-uniform religious identification amongst the couples. *Id.* at 29. See also Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1073 (1996).

tenet may exist not only between different faith traditions, but may lie within the mainstream religious group.¹⁷

III. POLITICAL STRUCTURE AND PROTECTION OF MINORITY FAITHS

The ability of non-mainstream believers to pursue their faith traditions turns largely upon the structure of the political community. In a theocracy where religion is the source of all law, non-adherents may be punished for apostasy.¹⁸ In an autocratically secular state where religion may be deemed a threat to state control, worship may be banned or regulated to such a degree that any exercise of faith is dampened.¹⁹

As made plain by recent elections in Iraq and Palestine, democracy is no guarantee of liberty for minority faiths.²⁰ The majority may transmute its religious tenets into positive law, barring individuals from acting upon beliefs that conflict with the will of the dominant tradition. While it is tempting to distinguish Iraq and Palestine because of the prevalence of a single sect, diversity of religions in the United States does not assure democracy will protect liberty of individual belief. While the ASARB study fielded responses from 149 distinct religious bodies, ninety-one percent of members of institutional religions were clustered in seventeen denominations. Adherents of eighty-seven other identified religious bodies composed but two percent of the population.²¹ Similarly, the ARIS study revealed 76.5% of the population self-identified with a Christian religious group, with well over half the population aligned with one of six faiths—Catholic, Baptist, Protestant, Methodist/Wesleyan, Lutheran or Presbyterian.²² Minority faiths lack the political clout necessary to defeat legislative initiatives intended to disadvantage their

17. See Berg, *infra* note 75, at 928; Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 217 (1991) (identifying how different means of categorizing religious groups yield varying results of which religions are minorities or outsiders).

18. Peter J. Riga, *Islamic Law and Modernity: Conflict and Evolution*, 36 AM. J. JURIS. 103, 108 (1991).

19. D.V. Cherniaeva, *The Legal Status of Religious Organizations in the Russian Federation*, 9 SUDEBINE 617, 624-33 (2004).

20. See Nathaniel Stinnett, *Defining Away Religious Freedom in Europe: How Four Democracies Get Away With Discriminating Against Minority Religions*, 28 B.C. INTL. & COMP. L. REV. 429 (2005).

21. Jones, *supra* note 12, at ix.

22. ARIS Survey, *supra* note 11, Exhibit 1 at 12.

faith.²³ Beyond intentional discrimination, legislatures may in good faith enact general laws ignorant of the burden imposed on the religion of those whose views are unrepresented in the assembly.²⁴

To secure the exercise of minority faith, the body politic must be constrained by constitutional measures that dilute the power of majoritarianism.²⁵ The American legal system relies upon two constitutional mechanisms to protect minority faiths: (1) the division of power between state and national government, and (2) prescribed limits on the power of any level of government to invade religious liberty.

In Federalist No. 10, James Madison articulated the danger of political faction as a primary rationale for creation of a national government. Madison specifically cited religious majorities as a potential source of peril in individual states:

A religious sect may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.²⁶

23. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); Robert Post, *Democracy and Equality*, 1 LAW, CULTURE AND THE HUMANITIES 142 (2005); David Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U.L. REV. 241, 253 (1995) (“Small, unfamiliar, and unpopular religions face far more uncertain treatment from the political branches of government.”).

24. The burden on minority faiths from neutral regulation is compounded when the administrative bureaucracy is asked to grant a religious exception. Not only is authority for an exemption absent from the face of the statute; it is premised upon a religious practice likely to be entirely foreign to the official. See *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3rd Cir. 2004); Sisk, *supra* note 7, at 1025 (“[T]he insensitivity of governmental bureaucracy will be a continual and disturbing source of imposition upon religious minorities. No system of legislative exemptions can fully address the unthinking enforcement of general rules by administrators or government functionaries despite religious objections and the absence of any genuine and concrete basis for an action beyond routine habits.”).

25. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1812 (2004) (“America’s extraordinary religious pluralism, scholars often argue, is the direct result of a system of religious freedom that at the very least prevents majorities from imposing norms of religious exercise on minorities.”); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

26. THE FEDERALIST NO. 10 (James Madison). See also JAMES MADISON, THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (June 12, 1788), in 3 ELLIOTT’S DEBATES ON THE FEDERAL CONSTITUTION, at 330 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1881) (“This freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.”).

While dispersal of power between national and state governments may be necessary to diminish the power of majorities to impinge non-mainstream faith, it is not a sufficient guarantor of religious liberty. Popular religions may gather sufficient political clout to influence law at the national level.²⁷ Hence our democracy relies upon an additional constitutional weapon—limits upon the power of legislative majorities to burden the liberty of individual conscience, enforceable through the federal judicial branch whose appointed judges have lifetime tenure.²⁸ Thus, it is to the courts that minority sects have turned, brandishing constitutions to procure exemption from laws that conflict with their faiths.²⁹

IV. THE WANING FEDERAL CONSTITUTIONAL PROTECTIONS OF FREE EXERCISE

The Free Exercise Clause of the First Amendment to the United States Constitution has proven a durable protectorate of non-mainstream faiths against *intentional* incursion by all levels of

27. While cautioning about the volatility in political party affiliations, the ARIS Survey documented the following preferences of certain faiths:

Jews, Muslims, Buddhists and those with no religion continue to have a greater preference for the Democratic Party over the Republicans, much as they did in 1990. Evangelical or Born Again Christians and Mormons are the most apt to identify as Republicans. Buddhists and those with no religion are most likely to be political independents. In keeping with their theology, Jehovah's Witnesses disavow political involvement.

ARIS Survey, *supra* note 11, at 36. Perhaps the most striking recent example of the power of the religious right to influence federal legislation was the passage of the Act for the Relief of the Parents of Theresa Marie Schiavo, which gave the United States District Court for the Middle District of Florida jurisdiction to override the state court's approval of the withdrawal of food, nutrition, fluids or medical care for Ms. Schiavo, who was in a persistent vegetative state. Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). See also Berg, *infra* note 75, at 925 ("When moral and cultural issues enter the political process, representative democracy will generally respond to majority religious faiths and values.").

28. Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring); see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

29. A recent study of religious freedom claims in the lower federal courts from 1986-1995 revealed that members of Catholic, Baptist and Mainline Protestant faiths comprised but 11% of claimants. On the other hand, 14.5% of claims were lodged by Muslim worshipers, 5.7% by Native Americans and 16.5% by followers of other Christian faiths. Gregory C. Sisk, Michael Heise & Andrew Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 562-67 (2004); Sisk, *infra* note 80, at 1036.

government.³⁰ While no individual right in our constitutional democracy is absolute, the United States Supreme Court applies the highest level of scrutiny to laws whose purpose is to burden a particular religious practice. The majority may intentionally regulate religious conduct only where it proves a compelling interest that may not be satisfied by alternatives less restrictive of the religious practice.³¹ Thus, while the governmental interest in monogamy has been found of sufficient order to override Mormon tenets permitting polygamy,³² the City of Hialeah's disapproval of Santeria religious exercise involving animal sacrifice was deemed insufficiently weighty to sustain its ban on such rituals.³³

If the clock were turned back to 1989, minority faiths were equally insulated from burdens effected by laws passed in ignorance of the conflict with their religious scruples.³⁴ The Supreme Court required government to prove a compelling interest to justify its refusal to exempt citizens from laws that impinge their sincerely held religious beliefs, even if the law was passed without any intent to tamp the exercise of that faith. The government was required to prove further that there were no available alternatives to attain its compelling interest that were less restrictive of the religious belief.³⁵

Under the pre-1990 federal constitutional regime, followers of non-mainstream faiths secured exemption from neutral laws that happened to clash with their beliefs.³⁶ The Supreme Court ruled the Amish must be excused from a Wisconsin law requiring children to attend formal school until the age of sixteen, which had trammled the

30. The Establishment Clause of the First Amendment likewise protects minority faiths against compulsion. This article, however, focuses more narrowly on the constitutional protection afforded by the Free Exercise Clause of the First Amendment and its state constitutional counterparts.

31. *Smith*, 494 U.S. at 872.

32. *See Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

33. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

34. An emerging thread of scholarship has questioned the traditional notion that before 1990 the United States Supreme Court fulfilled its institutional role as guardian of minority religious liberty. *See* articles cited in Feldmen, *supra* note 7, at 224.

35. *See Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 689 (1989); *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136, 141 (1987); *Bowen v. Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982). Minority faiths were protected not only by strict scrutiny of the government's regulation but by respect for the individualized nature of the belief. The citizen was not required to prove the religious belief burdened was a central tenet of his faith nor that it was shared as orthodoxy by other members of the sect. *See Hernandez*, 490 U.S. 680; *see also Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989).

36. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

sincere Old Order Amish belief that sending children to high school would endanger their salvation.³⁷ The Court held the State of South Carolina could not deny welfare benefits to a Seventh-day Adventist who declined to work on Saturday, her Sabbath.³⁸ The Court restored public benefits to a Jehovah's Witness who, in violation of statutory eligibility requirements, voluntarily relinquished his job after discovering he was fabricating tank turrets and other weaponry in violation of his faith.³⁹

A sea change in federal constitutional protection of minority sects occurred in 1990, when the Supreme Court held it would no longer apply strict scrutiny to across-the-board, uniform laws whose effect, but not intent, is to burden an individual's religion.⁴⁰ Instead, religious liberty would be sacrificed whenever the government had a rational basis for the regulation.⁴¹ The principal rationale for reduction of judicial scrutiny, and the concomitant shrinking of protection for non-mainstream sects, was the primacy of democratic choice in balancing the value of collective secular interests against the cost to individual spirituality. Contrary to Madison's admonition that religious pluralism was a necessary condition to liberty, Justice Scalia viewed increasing diversity of religious belief as "courting anarchy."⁴² The Court was cognizant that leaving accommodation of religious practices burdened by governmental regulation to majoritarian political processes would disproportionately disadvantage minority faiths; that cost, however, was deemed an "unavoidable consequence of democratic government."⁴³

Interestingly, democracy exercised its newfound power by reinstating strict scrutiny through the Federal Religious Freedom Restoration Act of 1993 (RFRA).⁴⁴ The Court, however, banished this exertion of democratic will as unconstitutional. In *City of Boerne v. Flores*,⁴⁵ the Court held RFRA violated both horizontal and vertical

37. *Id.*

38. *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

39. *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981).

40. *Smith*, 494 U.S. at 872.

41. Strict scrutiny would continue to be applied only in three circumstances: (1) where the intent of the law was to burden religion; (2) where the statutory scheme includes secular exemptions or a protocol for exemptions; and (3) "hybrid rights" cases where the claim is based not only on the Free Exercise Clause but also on an additional fundamental right. *Id.* at 877-84.

42. *Smith*, 494 U.S. at 888.

43. *Id.* at 890.

44. 42 U.S.C. §2000bb-1 *et seq.* (1994). The Act was approved unanimously by the House and by all but three Senators. 139 Cong. Rec. S14461-01 (daily ed. Oct. 27, 1993).

45. 521 U.S. 507 (1997).

separation of powers. Congress's attempt to restore the pre-*Smith* microscope of scrutiny to laws that burden individual faith was not an attempt to remedy constitutional violations consistent with Congress's power under section 5 of the Fourteenth Amendment; rather RFRA redefined the parameters of the Free Exercise Clause arrogating the Court's power to interpret the law.⁴⁶ Furthermore, by imposing upon the states its weighing of the interests of the body politic and individual religious faith, Congress invaded the states' reserved power to provide for the general welfare of its citizens.⁴⁷

Because the federalism underpinning of *City of Boerne* is absent when the burden on religion is imposed by federal regulation, many lower federal courts found RFRA constitutional when invoked to procure exemptions from federal, as opposed to state and local, laws.⁴⁸ In *Cutter v. Wilkinson*,⁴⁹ the Supreme Court noted it had yet to rule whether RFRA legitimately mandates strict scrutiny of burdens on religion erected by federal laws and regulations. However, in *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*,⁵⁰ the Court affirmed a preliminary injunction, issued under RFRA, exempting members of a Christian Spiritist religion from the Federal Controlled Substance Act ban on the use of a hallucinogen which the religion employed in sacramental tea for communion. While the Court did not explicitly address the constitutionality of RFRA as applied to religious exemptions from federal laws, in a footnote it stated that *Boerne* "held the application to States to be beyond Congress's legislative authority under [section] 5 of the 14th Amendment."⁵¹ Hence, it appears through RFRA, minority faiths will be safeguarded from *federal* regulation affecting their liberty.⁵² Federal constitutional and statutory law, however, provide worshipers of non-mainstream

46. *Id.* at 518-19.

47. *Id.* at 520-21.

48. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1220-22 (9th Cir. 2002).

49. 125 S. Ct. 2113, 2118 n.2 (2005).

50. 126 S. Ct. 1211 (2006).

51. *Id.* at 1217, n.1.

52. The *Gonzalez* Court also applied the compelling interest test in a manner protective of non-mainstream faiths. The Court rejected the government's argument that it could refuse a religious exemption based solely upon an interest in uniform enforcement or a generalized fear of a slippery slope. Rather, the Court held, RFRA requires judicially crafted exceptions on a case-by-case basis, with the government bearing the burden of proving a compelling interest in denying an exemption to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 1220.

sects no right to be excused from state or local laws of general applicability that invade their religious practices.⁵³

The Court's *Smith* and *Boerne* opinions unleashed a torrent of commentary bemoaning abandonment of federal constitutional protection for minority faiths. Yet even the most searing critics acknowledged that their argument was not likely to impel the Court to reverse course and restore strict scrutiny essential for the protection of minority religious traditions.⁵⁴ As a practical matter, absent an improbable amendment to the United States Constitution, congregants of smaller sects find no sanctuary in federal constitutional or statutory law from neutral state and local laws that happen to invade their religion. Instead, litigants of necessity have turned to an oft-maligned source of minority civil liberties—state constitutions.

V. STRICT SCRUTINY OF NEUTRAL BURDENS ON MINORITY RELIGIONS UNDER STATE CONSTITUTIONS

While the Supreme Court's decisions in *Smith* and *Boerne* sounded the death knell for federal shelter from inadvertent burdens on minority religious faith imposed by state and local legislatures, strict scrutiny has been resurrected under state constitutions.⁵⁵ One state—Alabama—amended its state constitution to require proof of a compelling interest to sustain burdens on religion.⁵⁶ Courts in eleven

53. Congress responded to the Court's overruling of RFRA by invoking its Spending and Commerce Clause powers to pass the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000a *et seq.* (2006). RLUIPA more narrowly prescribes strict scrutiny for land use regulations that burden religion and for constraints on religious exercise of institutionalized persons. In *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), the Court held RLUIPA does not violate the Establishment Clause. However, the Court expressly declined to consider whether RLUIPA exceeded Congress's power under the Spending and Commerce Clause. *Id.* at 2120, n.7.

54. See Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 271-72 (2003) "As a general matter, a yawning abyss stretches today between the Supreme Court and legal scholars. The Court shows little interest in legal scholarship and, in fact, has occasionally expressed disdain for legal academics." *Id.*

55. Twelve states have enacted state religious freedom acts, legislatively prescribing exemption from laws that burden sincere religious beliefs unless government proves both a compelling interest and no less restrictive alternative. R.I. GEN. LAWS § 42-80.1-3 (1998); CONN. GEN. STAT. § 52-571(b) (1997); 775 ILL. COMP. STAT. 35 (1998); FLA. STAT. ANN. § 761.01 (West 1998); S.C. CODE ANN. § 1-32-30 (1999); ARIZ. REV. STAT. ANN. § 41-1493 (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 110 (West 1999); IDAHO CODE ANN. §§ 73-402 (2000); N.M. STAT. ANN. § 28-22-5 (West 1978); 71 PA. CONS. STAT. ANN. § 2407 (West 2002); OKLA. STAT. ANN. tit. 51, § 251 (West 2001); MO. REV. STAT. § 1.302 (2003).

56. ALA. CONST. amend. No. 622.

states have interpreted their state constitutions to mandate application of the compelling interest/no less restrictive alternative test to laws that have the effect of limiting a sincere religious practice, even absent an untoward legislative purpose.⁵⁷ Only two state courts have interpreted their state constitution in lockstep with *Smith*.⁵⁸

The theoretical basis for invoking state constitutions to garner strict scrutiny of state and local laws that happen to infringe a non-mainstream religious practice is simple and non-controversial. While Supreme Court interpretations of the federal Constitution set a binding floor of rights that state courts must respect, they do not construct a ceiling upon individual rights founded in state constitutions.⁵⁹ State courts are free to find more expansive protection of analogous rights under their state constitution as long as such rulings do not then invade other rights secured by the United States Constitution.⁶⁰ Construing state constitutions to afford more generous liberty for minority faiths does no violence to the Supreme Court's abrogation of strict scrutiny under the Free Exercise Clause. Instead, it is faithful to the notion of state constitutions as independent sources of liberty that in many instances preceded codification of rights in the federal charter.⁶¹

57. See *Soc'y of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd* 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640 (Mont. 1993); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *State v. Bontranger*, 683 N.E.2d 126 (Ohio Ct. App. 1996); *Rupert v. City of Portland*, 603 A.2d 63 (Me. 1992); *In re Browning*, 476 S.E.2d 463 (N.C. Ct. App. 1996); *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990).

58. See *State v. Loudon*, 857 S.W.2d 878 (Tenn. Crim. App. 1993); *Wolf v. Sundquist*, 955 S.W.2d 626 (Tenn. Ct. App. 1997); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995).

59. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980).

60. As the United States Supreme Court recently affirmed in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), affording enhanced accommodation of non-mainstream faiths does not violate the First Amendment Establishment Clause. *Id.*

61. State religious freedom acts similarly do not suffer the constitutional infirmities that led to the demise of the federal RFRA. By determining that the welfare of its populace is promoted rather than imperiled by a regime that exempts minority adherents from neutral laws except where the legislature is furthering compelling interests, state legislatures are exerting the very latitude the Supreme Court sought to preserve when it struck down Congress's attempt to exercise its power under section 5 of the Fourteenth Amendment. Likewise, state legislatures do not arrogate the Supreme Court's power to declare what protection the Free Exercise Clause affords when they craft a different balance between collective interests and individual religious liberty. See Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J. L. & PUB. POL'Y 411, 429-37 (2000).

While the practical necessity and theoretical justification for resort to state constitutions are patent, an equally significant but more vexing inquiry is whether state constitutions will prove reputable protectors of minority faiths.

VI. REASONS TO BE CONFIDENT THAT STATE CONSTITUTIONS WILL SECURE MINORITY RELIGIOUS LIBERTY

There are at least seven reasons that portend state constitutions will more reliably safeguard minority religious liberty against state and local incursion than the federal Constitution. First, historically state law and state courts were the initial guardians of individual rights in general, and religious liberty in particular. State constitutions with textual guarantees of freedom of conscience predated adoption of the Bill of Rights to the United States Constitution.⁶² Until ratification of the Fourteenth Amendment in 1868, individual rights provisions of the federal Constitution constrained federal, but not state and local, government.⁶³ It was not until 1940 that the United States Supreme Court ruled the Free Exercise Clause of the First Amendment implicit in the concept of ordered liberty and thus applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁶⁴ Thus, for the first 150 years of the republic, state constitutions stood as the lone constitutional monitor of minority religious liberty.⁶⁵

On their face, the texts of state constitutions enact more expansive guarantees of freedom of religion. While the First Amendment to the United States Constitution provides merely that “Congress shall make no law prohibiting the free exercise of

62. See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); CHESTER JAMES ANTIEAU ET AL., *RELIGION UNDER THE STATE CONSTITUTIONS* (1965).

63. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

64. *Cantwell v. Connecticut*, 310 U.S. 293, 303 (1940).

65. See Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine and the Future*, 6 U. PA. J. CONST. L. 222, 224 (2003) (“Before the post-World War II era, the religion clauses were almost toothless in the United States Supreme Court”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 49-50 (1996) (noting state courts prohibited Bible reading on state constitutional grounds well before a United States Supreme Court Establishment Clause decision); see also Jason Mazzone, *Bodies of Constitutional Law*, (Brook. L. Sch., L. Stud. Paper, Jan. 4, 2006), available at <http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm> (before ratification of the Fourteenth Amendment, state courts applied principles of constitutional law derived from the federal Constitution to state governments).

religion,”⁶⁶ state constitutions codify a broader definition of the right protected as well as a longer list of governmental actions restrained. State constitutions may secure a “natural and indefeasible right to worship Almighty God according to the dictates of his own conscience” against “molestation,” “disturbance,” “infringement,” “control,” or “interference.”⁶⁷ While a judicial philosophy of original intent and textualism may result in a crabbed interpretation of the First Amendment ban on “prohibiting the free exercise of religion,”⁶⁸ the more sweeping language of many state constitutions have led courts to find enhanced liberty for minority believers.⁶⁹

The differential text of state constitutions may accurately and deliberately reflect an individual state’s historic commitment to religious diversity. Founding the Pennsylvania colony as a “Holy Experiment,” William Penn actively recruited outside the Quaker faith, believing the security of the body politic would be furthered rather than threatened by a pluralistic religious community.⁷⁰ The Wisconsin Supreme Court pointed to its state history in opting to apply strict scrutiny and exempt the Old Order Amish from the statutory mandate to display an orange triangle on their buggies, a requirement that offended their faith tradition. The court reasoned that the state’s

66. U.S. CONST. amend. I.

67. See OHIO CONST., art. 1, § 7 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . nor shall any interference with the rights of conscience be permitted”); MINN. CONST. art. I, § 16 (“The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control or interference with the rights of conscience be permitted.”); PA. CONST., art. I, § 3 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . no human authority can, in any case whatever, control or interfere with the rights of conscience.”); MASS. CONST. art. 2 (“[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience.”); WASH. CONST. art. I, § 11 (“Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion.”). See generally John Witte, Jr., *Religious Rights in the Founding Era*, (Emory U. Sch. L., Pub. L. & Legal Theory, Res. Paper No. 03-22, Nov. 2003), available at <http://ssrn.com/abstract=480164>.

68. See Witte, *supra* note 67 (arguing that the text of the Free Exercise Clause was not a deliberate decision to depart from broader terms of state constitutions).

69. *Humphrey v. Lane*, 728 N.E.2d 1039, 1044 (Ohio 2000); *State v. Miller*, 549 N.W.2d 235, 239 (Wis. 1996); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992); *Society of Jesus of New England v. Boston Landmarks Comm’n*, 564 N.E.2d 571, 572-73 (Mass. 1990); *State v. Hershberger*, 462 N.W. 2d 393, 395 (Minn. 1990).

70. See WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA: A DOCUMENTARY HISTORY 53 (Jean R. Soderlund ed., 1983); EDWARD CORBYN OBERT BEATTY, WILLIAM PENN AS SOCIAL PHILOSOPHER 123 (1939); Gary S. Gildin, *Coda to William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 1 U. PA. J. CONST. L. 81 (2001).

religiously heterogeneous population mirrored its traditional commitment to promote and protect religious diversity.⁷¹ The Minnesota Supreme Court required the government to prove a compelling interest to justify cutting the hair of a prisoner who believed his long locks were part of the essence of his Native American spirituality. The court noted that Minnesota had been settled by people of varied religious backgrounds seeking relief from religious intolerance in their home countries.⁷²

Beyond the distinct text and unique historic underpinnings, fundamental principles of federalism also support construing state constitutions more liberally to accommodate religious practices of non-mainstream faiths. Because any decision recognizing a federal constitutional right must be honored across the country, the United States Supreme Court is constrained by ignorance of the practical ability of fifty individual states to implement the right.⁷³ State courts, however, are far more familiar with the true costs and benefits of applying strict scrutiny to neutral laws that may negatively impact minority faiths in their jurisdiction. Consequently, they are freed from the institutional reluctance of the United States Supreme Court to expand individual constitutional rights. The rise of state constitutional protection of non-mainstream religious liberty is a testament to Justice Brandeis's characterization of states as "laboratories" for "novel and economic experiments without risk to the rest of the country."⁷⁴

State constitutions may be a more reliable guarantor of non-mainstream liberty because of the religious composition of the particular state. A faith with a decided minority status nationally may have clusters of congregants in an individual state that exert more significant power to inform or influence political outcomes in that state.⁷⁵ The ARIS survey found "[w]ith respect to religion in particular, states differ considerably in the religious make-up of their

71. *State v. Miller*, 549 N.W.2d at 239 (quoting *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d at 165, 115 N.W.2d 761 (Wis. 1962)).

72. *State v. Hershberger*, 462 N.W.2d 393, 398 (1990).

73. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

It must be remembered that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous constitutional scrutiny.

Id.

74. *New State Ice Co. v. Liebmann*, 258 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

75. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 948 (2005).

populace. That diversity is likely to contribute as much as any other source of social variation to differences in their cultural and political climate.”⁷⁶ For example, while Baptists comprise 55% of the population in Mississippi, they constitute but 4% of the population in Massachusetts.⁷⁷ Lutherans and Catholics, composing 65% of the population in North Dakota, may display substantial political sway in that state. By contrast, their combined 26% of the population in the State of Washington exceeds by a mere one percent those professing no religion.⁷⁸ Furthermore, as Professor Berg has noted, “geographical numbers do not tell the whole story of whether a group is vulnerable to political or legal pressure . . . [A] group may be small and still have power as a political or cultural elite.”⁷⁹

Apart from differential distribution of minority faith traditions among the general populace, a particular state appellate court may include a more religiously diverse set of decision-makers than the United States Supreme Court. One study has found significant correlation between the religion of the judge and his or her willingness to exempt members of non-mainstream congregations from laws that burden their faith.⁸⁰ “Jewish judges along with judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch that . . . refused to accommodate religious dissenters.”⁸¹ Of the Justices sitting on the Supreme Court in *Smith*

76. ARIS Survey, *supra* note 11, at 38.

77. *Id.* at 39-40.

78. *Id.*

79. Berg, *supra* note 75, at 946.

80. Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004). See also Donald Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999) (finding Evangelical judges on state supreme courts vote more conservatively than mainline Protestant, Catholic and Jewish judges on death penalty, gender discrimination and obscenity cases); Fred O. Smith, *Gendered Justice: Do Male and Female Justices Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087, 2123 (2005) (female judge more likely than male judge to rule in favor of gays and lesbians on due process and equal protection claims); James C. Brent, *An Agent and Two Principals, U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 251 (1999) (“Courts with a majority of Democrats were more likely to decide in favor of the free exercise claimant than were courts with a majority of Republicans (35.7% v. 22.8%).”).

81. Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence From Religious Liberty Cases*, 76 COL. L. REV. 1021, 1029 (2005) (citing Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491,

and *Boerne*, only Justices Breyer and Ginsberg were not Christian.⁸² Appeal to whatever conscious or subconscious impact faith status exerts on a judge's assessment of the importance of accommodating non-mainstream believers may find greater resonance in a state appellate court that is more religiously diverse than the Supreme Court.

Finally, the relative ease with which state constitutions may be amended—frequently cited as an inherent weakness of the charters' protection of minority liberty—may free a court to interpret state constitutional rights more generously than the federal analog. Only through the onerous and rarely successful process of constitutional amendment may the Supreme Court's construction of the Constitution be countermanded.⁸³ By contrast, the means of amending a state constitution tilt closer to majoritarianism. Several commentators have theorized that the comparative ease with which a state legislature—or citizens by referendum or initiative—may trigger an amendment emboldens judges to more liberally construe individual rights under state constitutions.⁸⁴ Indeed, Professor Neuborne ventured that the primary function of state constitutions is to shift the political burden of proof from those advocating creation of the right to those seeking to abrogate the right.⁸⁵

It is tempting to conclude that historically, institutionally, and practically, resort to state constitutions is a sound and enduring means of ensuring religious liberty of minority faiths. However, an opposing set of forces threatens the sanctity of non-mainstream religions under state law.

511-18 (2004). See also Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 734 (2005).

82. See also Feldman, *supra* note 7, at 272 ("So long as the Court remains predominantly Christian, its decisions and doctrines are likely to favor Christian (if not Protestant) interests and values."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293-94 (1957); but see Berg, *supra* note 75, at 965-967 (disagreeing that Supreme Court Free Exercise decisions are necessarily a product of pro-Christian biases of Justices).

83. U.S. CONST. art. V.

84. Lawrence Schlam, *State Constitutional Amending, Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269 (1994); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L. J. 985 (1993); David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051 (1985).

85. Burt Neuborne, *Foreward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

VII. REASONS TO BE SKEPTICAL OF STATES AS GUARDIANS OF NON-MAINSTREAM FAITHS

There is cause to be wary of the capacity of state constitutions to resist domination by mainstream religious values and serve as protectorates of minority faiths. As previously noted, Madison cited the amenability of smaller body politics to religious factions as a principal justification for a national government.⁸⁶ Indeed, many of the state constitutions in place before adoption of the federal charter promoted a single established religion.⁸⁷ Because state court judges are often elected (and subject to periodic retention by the voters), state judges may be more responsive to majority wishes and less willing to accommodate minority sects.⁸⁸ Even if a state court were to interpret its constitution contrary to a mainstream religious value, majoritarian political processes may override that decision with greater ease than if the right was founded in the federal constitution. In many states, the process of amending a state constitution more closely resembles legislation than the super-majoritarian federal and state consensus necessary to amend the United States Constitution.⁸⁹

86. See *supra* note 26.

87. THOMAS J. CURRY, *THE FIRST FREEDOMS* 134-92 (1986).

88. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977). Professor Neuborne identified the following additional reasons why state court judges were less likely than federal court judges to enforce *federal* constitutional rights: Since federal judges are chosen from a smaller, more qualified pool of applicants and are better compensated than state judges, the federal judiciary is more well versed in the law and more capable of tackling complex legal issues. Federal judges also tend to have more highly qualified law clerks and a lighter case load than their state counterparts. *Id.* at 1122-23. Federal judges tend to come from a higher socioeconomic class and enjoy a sense of "mission" and tradition of constitutional enforcement. Finally, federal judges are further removed from cynicism-breeding fact patterns in constitutional law. State judges, on the other hand, are often confronted with the worst fact patterns in all types of law, criminal and civil. *Id.* at 1125. But see Michael E. Solimine & James L. Walter, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis*, 10 HASTINGS CONST. L.Q. 213 (1983) (concluding there is no statistically significant disparity in willingness of state and federal courts to enforce federal constitutional rights); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Thomas H. Lee, *Countermajoritarian Federalism*, 74 FORDHAM L. REV. (forthcoming 2006).

89. See generally Janice C. May, *Amending State Constitutions 1996-97*, 30 RUTGERS L.J. 1025 (1999); Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995); James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); FLA. CONST., art. I, § 12; 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 1-2 (G. Alan Tarr & Robert F. Williams eds., 2006). From the start, most states made the amendment of their constitution, the replacement of their constitution, or both relatively easy, and the general trend has been to facilitate state constitutional amendment and replacement. State constitutions currently contain more than 5,000 amendments, and most state constitutions have been amended more than 100 times. *Id.*

The history of constitutional liberties of minorities in general has found states wanting. The “vast transformation from the concepts of federalism that had prevailed in the late 18th century”⁹⁰ culminating in ratification of the Fourteenth Amendment of the United States Constitution, was generated by the refusal of states to guarantee rights of newly enfranchised racial minorities.⁹¹ The 1871 Congress conferred jurisdiction over claimed violations of equal rights upon federal courts because it mistrusted the willingness or capacity of state courts to implement constitutional guarantees.⁹² The struggle over civil rights persisted into the 1950s and 1960s, when resort to federal law and federal courts again proved necessary to cure state courts’ unwillingness to override majority sentiment and ensure the fundamental liberty of persons of color.

The vulnerability of state constitutions to majoritarian religious sensibilities is manifest in the issue of same-sex marriage.⁹³ Four courts have ruled that their state constitutions preclude bans either on marriage or civil unions between persons of the same sex.⁹⁴ However, the constitutions of nineteen states have been amended specifically to prohibit recognition of marriage between persons of the same sex.⁹⁵ In

90. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

91. *Monroe v. Pape*, 365 U.S. 167 (1961); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3-20 (1985); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1150-52 (1977).

92. 28 U.S.C. § 1343(a)(3); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503-07 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961).

93. See Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1854-61 (2004).

94. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding right to civil benefits of marriage for same-sex couple under the constitution); *Deane v. Conaway*, Case No.: 24-C-04-005390 (Cir. Ct. of Balt. City) (finding there was no apparent compelling state interest in a statutory provision of same-sex marriage discriminating, on the basis of sex, against those individuals whose gender is identical to their spouses); *Woo v. California*, S135 208 (San Francisco Superior Ct., Mar. 14, 2005); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). On September 14, 2005, the Massachusetts legislature failed to pass a proposal to amend the state constitution to define marriage as the union of one man and one woman. H. 653, 184th Gen. Court (2005). While it had legalized marriage between persons of the same sex, the Massachusetts Supreme Court recently upheld the constitutionality of the state’s Marriage Evasion Act, ruling that gay couples who live in a state where same-sex marriages are prohibited may not legally marry in Massachusetts absent an intent to reside in Massachusetts. See *Cote-Whitacre v. Dep’t. of Public Health*, 844 N.E.2d 623 (Mass. 2006).

95. ALASKA CONST. art. I § 25 (“To be valid or recognized in this state, a marriage may exist only between one man and one woman.”); ARK. CONST. amend. 83, § 1 (“Marriage consists only of the union of one man and one woman.”); GA. CONST. art. I, § IV, para. I (“This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.”); HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”); KAN. CONST. art. XV, § 16 (“Marriage shall be constituted by one man and one woman only.”); KY. CONST.

ten of the states, the amendment banning same-sex marriage was placed on the ballot by voter initiative, and thus at no step in the process required greater than majority approval.⁹⁶ In nine other states, the amendment outlawing same sex marriage originated in the legislature. While most of these states required approval by a super majority of the legislature to submit the proposed amendment to the voters, the amendments became law upon the vote of a majority of the electorate.⁹⁷

§ 233a (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.”); LA. CONST. art. XII, § 15 (“Marriage in the state of Louisiana shall consist only of the union of one man and one woman.”); MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”); MISS. CONST. annot. art. XIV, § 263A (“Marriage defined as only between a man and a woman.”); MO. CONST. art. I, § 33 (“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”); MONT. CONST. art. XIII, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”); NEB. CONST. art. I, § 29 (“Only a marriage between a man and a woman shall be valid and recognized in Nebraska.”); NEV. CONST. art. I, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”); N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.”); OKLA. CONST. art. II, § 35 (“Marriage in this state shall consist only of the union of one man and one woman.”); OR. CONST. art. XV, § 5a (“It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”); TEX. CONST. art. I, § 32 (“Marriage in this state shall consist only of the union of one man and one woman.”); UTAH CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”).

By contrast, proposals to amend the United States Constitution to ban same-sex marriage have failed to emerge from the committees to which they were referred. *See* S.J. Res. 13, 109th Cong. (2005); S.J. Res. 1, 109th Cong. (2005); H.J. Res. 39, 109th Cong. (2005); S.J. Res. 40, 108th Cong. (2004); S.J. Res. 30, 108th Cong. (2004); H.J. Res. 56, 108th Cong. (2003); H.J. Res. 93, 107th Cong. (2002). Congress did adopt the Defense of Marriage Act which, for purposes of interpreting federal legislation or administrative regulations, defines marriage as “only a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7. The Act further provides that no state is required to give full faith and credit to any act of another state “respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.” 28 U.S.C. § 1738c.

96. The Nebraska ballot initiative was ruled an unconstitutional infringement of the First and Fourteenth Amendments to the United States Constitution because it “imposes significant burdens on both the expressive and intimate associational rights” of gays and lesbians. *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *appeal docketed*, No. 05-2604 (8th Cir. Feb. 13, 2006).

97. The amendments in Georgia, Kansas, Louisiana, Texas, Utah and Mississippi required approval by two-thirds of the members of both houses. GA. CONST. art. X, § I, para. II; KAN. CONST., art. 14, § 1; LA. CONST. art XIII, § 1; TEX. CONST., art. XVII, § 1; UTAH CONST., art. XXIII, § 1; MISS. CONST. ANN. art. XV, § 273. In Kentucky, three-fifths of all members of each elected house must approve an amendment. KY. CONST. § 256. In Missouri and Oklahoma, however, an amendment may be placed on the ballot at the next general

The specter of majoritarian abrogation of rights founded in state constitutions is evidenced by the three states which amended their constitutions in response to state court decisions that opened the door to constitutional protection of same-sex marriage, or in reaction to pending litigation threatening such an outcome. In *Brause v. Bureau of Vital Statistics*,⁹⁸ the Alaska Superior Court held that denying same-sex couples the right to marry constituted discrimination on the basis of sex in violation of Article I, section 3 of the state constitution.⁹⁹ The voters of the state of Alaska then successfully initiated a ballot measure amending the constitution to limit marriage to couples of the opposite sex.¹⁰⁰

The citizens of Hawaii similarly overrode judicial interpretation of the state constitution that permitted gay marriage. In *Baehr v. Lewin*,¹⁰¹ the Hawaii Supreme Court held that sex is a suspect category under the equal protection clause of the Hawaii Constitution. Consequently, the state could deny marriage licenses to persons of the same sex only if it could prove a compelling interest. On remand, the trial judge ruled the state had not met its burden.¹⁰² While the state's appeal was pending, the voters initiated a ballot measure amending the Hawaii constitution to provide "[t]he legislature shall have the power to reserve marriage to opposite sex couples."¹⁰³ Pursuant to its newfound constitutional power, the Hawaii legislature enacted a statute requiring persons be of the opposite sex to enter into a valid marriage.¹⁰⁴

election by majority vote of each house; a two-thirds vote of each house is required only if a special election is ordered. MO. CONST. art XII, § 2(a); OKLA. CONST., art. XXIV, § 1.

98. No. 3AN-95-6562 CI, 1988 WL 88743, at 6 (Alaska Super. Ct. Feb. 27, 1998), *aff'd sub nom* Brouse v. State, Dept. of H. & S.S., 21 P.3d 357 (Alaska 2001). A study by Professors Egan and Persily documents that public opinion, fueled by a spike in media coverage regarding bans on same-sex relations, intensifies following relevant United States Supreme Court decisions. Nathaniel Persily et. al., *Gay Marriage, Public Opinion and the Courts*, (U. of Penn Law School, Public Law Working Paper No. 06-17, May 2006) available at <http://ssrn.com/abstract=900208>.

99. "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." ALASKA CONST., art. I, §3.

100. ALASKA CONST., art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman").

101. 852 P.2d 44, 67 (Haw. 1993).

102. See *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

103. HAW. CONST., art. I, § 23.

104. HAW. REV. STAT. § 572-1.6 (2003). The Hawaii Supreme Court then ordered that the judgment of the trial court be reversed and the case be remanded for entry of judgment in favor of the state. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. December 9, 1999).

In the face of pending litigation, Oregon likewise adopted a constitutional amendment prohibiting same-sex marriage. Notwithstanding the Oregon statute providing “[m]arriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age,”¹⁰⁵ Multnomah County began issuing marriage licenses to same-sex couples. Although the Governor then directed the State Registrar to refuse to file or register any same-sex marriage records forwarded to that office, both the trial court and circuit court upheld the validity of the marriage licenses. While the case was pending before the state supreme court, Oregon voters adopted Ballot Measure 36, a voter initiated amendment to the Oregon constitution defining marriage as a relationship between one man and one woman. The Oregon Supreme Court then ruled the case moot.¹⁰⁶

There is substantial evidence linking state constitutional bans on same-sex marriage to majoritarian religious beliefs.¹⁰⁷ A 2003 national survey, conducted by the Pew Research Center for the People and the Press and the Pew Forum on Religion and Public Life, found that 55% of respondents believed engaging in homosexual behavior was a sin; 76% of persons with a high level of religious commitment shared that view.¹⁰⁸ While 59% of the adults surveyed rejected gay marriage, 80% of persons with a high level of religious commitment opposed such unions.¹⁰⁹ Conversely, almost half the adults with a relatively low religious commitment supported extending the right to marry to same sex couples.¹¹⁰ By far the most cited reason for opposing gay marriage was religious, with 28% squarely espousing homosexuality as immoral, a sin or contrary to the Bible and another 17% responding more generally that gay marriage is against their religious belief.¹¹¹ A study of twenty public opinion polls similarly confirmed attendance at religious services and “moral traditionalism”

105. OR. REV. STAT. 106.010 (2005).

106. *Li v. State*, 110 P.3d 91 (Or. 2005).

107. The Biblical and institutional religious injunctions against homosexuality and same sex marriage are compiled in Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221 (2002); and SAME-SEX MARRIAGE: PRO AND CON 46-53 (Andrew Sullivan ed., 2004).

108. Press Release, Pew Research Center, *Republicans Unified, Democrats Split on Gay Marriage: Religious Belief Underpin Opposition to Homosexuality 2* (Nov. 18, 2003), available at <http://pewforum.org/docs/index.php?DocID=37>.

109. *Id.* The survey further found that persons who hear their religious officials preach about homosexuality are more prone to markedly negative views of gays and lesbians.

110. *Id.* at 4.

111. *Id.*

as among the strongest predictors of a person's attitude towards gay marriage.¹¹²

The widespread incidence of state constitutional amendments banning same sex marriage—at times negating judicial decisions interpreting the state constitution to protect such unions—exemplifies the greater susceptibility of state constitutions to sway by majoritarian influence. These amendments further evidence, as Madison feared, that the rights of minority faiths under state constitutions remain vulnerable to factions of mainstream sects.

VIII. HYPOTHESIS AS TO THE SECURITY OF MINORITY FAITHS UNDER STATE CONSTITUTIONS

This article does not undertake the daunting, if not impossible, task of correlating the multiple variables that may account for a state's constitutional stance on accommodation of minority believers or its constitutional temperature on same-sex marriage. Indeed, no clear pattern exists among the states that have staked a constitutional position on the level of scrutiny to be applied to claims of religious exemption from general law or the issue of same-sex marriage. Of the twelve states endorsing the compelling interest test, four have also adopted constitutional amendments prohibiting recognition of marriages of persons of the same gender.¹¹³ One state, Massachusetts, has both endorsed strict scrutiny of burdens on religion and recognized a constitutional right to same-sex marriage.¹¹⁴ Conversely, one of the two states whose court refused to afford a more generous right of liberty of conscience under the state constitution also has amended its constitution to overturn threatened judicial protection of gay marriage.¹¹⁵ In eleven states that passed constitutional amendments prohibiting same-sex marriage, the courts have not had occasion to rule on the appropriate level of scrutiny governing accommodation of minority sects.¹¹⁶ At the same time, in three states whose courts have protected same-sex unions, the courts have not resolved the test

112. The other reliable predictors were education, age and feelings toward gays. Persily, *supra* note 98, at 29.

113. Alaska, Kansas, Montana, and Ohio. Alabama, the one state to impose the compelling interest test by constitutional amendment, has not acted to ban same-sex marriage.

114. The security of the Massachusetts Supreme Court's *Goodridge* decision remains under legislative attack. *See supra* note 94.

115. OR. CONST art. VX, § 5(a).

116. Arkansas, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, and Utah.

governing religious exemptions.¹¹⁷ Finally, among the twelve states that enacted strict scrutiny by legislation rather than constitutional interpretation or amendment, three have erected constitutional bans to gay marriage.¹¹⁸

A state's constitutional treatment of either issue turns on the complex intertwining of the serendipity of religious liberty or same-sex marriage cases appearing on the court's docket, the religious affiliation of its judges, the pluralism of its legislature, the religious composition of a state's populace, and the forces that galvanize its representatives and voters to act. In light of the complexity if not impossibility of measuring these variables, this preliminary inquiry offers three modest hypotheses that may account for the relatively contemporaneous state constitutional ascendancy of strict scrutiny of state regulations that burden religious faith and bans on same-sex marriage. The extent to which minority sects may feel secure in the shelter afforded by state constitutions may rest on which hypothesis proves true.

A. The "Bans on Gay Marriage Have Nothing to Do with Minority Religion" Hypothesis

First, it is arguable that state constitutional prohibition of same-sex marriage is not a product of hostility towards non-mainstream faiths that would be inconsistent with the state charters' more generous exemption of minority sects from secular laws. While barring same sex marriage may be motivated by majoritarian religious tenets, it does not follow that such bans in turn denigrate competing faith traditions. State constitutional amendments precluding gay marriage have not been erected to repel arguments that same-sex marriage is required by non-mainstream faith traditions. Rather, proponents of the right of persons of the same sex to marry to date have invoked secular attributes of privacy, equality or autonomy as the font of constitutional protection.¹¹⁹ Thus repudiation of same-sex marriage may have nothing to do with antipathy towards less popular religions.

117. Maryland, California, and Vermont.

118. Missouri, Oklahoma, and Texas.

119. See Backer, *supra* note 107. As the Pew Study revealed, almost 50% of respondents with a relatively low religious commitment support the right of same sex couples to marry. Press Release, Pew Research Center, Republicans Unified, Democrats Split on Gay Marriage: Religious Belief Underpin Opposition to Homosexuality 4 (Nov. 18, 2003), available at <http://pewforum.org/docs/index.php?DocID=37>.

Furthermore, the two rights in issue have attributes—not anchored in religion—that make accommodation of minority faith a more deserving candidate for state constitutional protection than same sex marriage. In construing state constitutions to impose the compelling interest/no less restrictive alternatives test on laws that burden sincere religious beliefs, state courts were not advancing new or unenumerated rights. As analyzed earlier, followers of non-mainstream faiths have obtained enhanced security under state constitutional rights that in many cases are textually distinct from the general language of the First Amendment, and which in most instances preceded either adoption of the original Bill of Rights or ratification of the Fourteenth Amendment.¹²⁰ Often the textual differences not only reflected independence of the federal charter, but codified the state’s unique commitment to religious pluralism.¹²¹ By departing from the Supreme Court’s decision in *Employment Division Department of Human Resources of Oregon v. Smith*¹²² to strictly scrutinize denials of exemption of minority believers from neutral regulations that burden their faith, state courts were not “legislating” unenumerated rights. At most, these courts tinkered with the balance to be struck between a textually protected right of conscience and the governmental interest in the geographically smaller “laboratory” of the individual state. Indeed, it is arguable that the state judges were doing even less; by endorsing strict scrutiny, they simply affirmed the presumption that state constitutions remained unaffected by the Supreme Court’s retraction of the guarantees of the Free Exercise Clause in *Smith*. As Professor Ledewitz has convincingly argued, when the Supreme Court repeals protection previously afforded by a federal constitutional right, it is presumed that prior interpretations of state constitutions remain in full force and effect and should not be interpreted in lockstep with the winnowing of the federal right.¹²³ Hence state courts could interpret their constitutions to demand strict scrutiny of burdens on religion in the post-*Smith* era without being accused of engaging in “judicial legislation.”

By contrast, under “traditional” measures of interpretation, it is more difficult to find same-sex marriage guaranteed by state constitutions. There is no textually explicit right to same sex marriage

120. See *supra* notes 62-65 and accompanying text.

121. See *supra* notes 70-72 and accompanying text.

122. 494 U.S. 872 (1990).

123. Bruce Ledewitz, *When Federal Law is Also State Law: The Implications for State Constitutional Law Methodology of Footnote Seven in Commonwealth v. Matos*, 72 TEMP. L. REV. 561 (1999).

in state constitutions, nor is there a documented tradition of gay marriage that can be deemed codified by broader constitutional language. Without benefit of specific history or text, proponents of same sex marriage have founded their claims in the more general contours of the equal protection or privacy clauses of the state charters. As the Supreme Court's forays into substantive due process and the penumbral right of a woman to choose whether to terminate a pregnancy have demonstrated, the counter-majoritarian role of courts is most vulnerable when employed to find unenumerated rights in constitutions. At least in theory, amendments to state constitutions banning gay marriage may reflect the desire to hamstring "activist" judges from authoring new rights that lack either textual or historic pedigree rather than evidence of animosity towards non-mainstream sects.

In sum, the spate of state constitutional amendments outlawing same-sex marriage may either: (1) codify majority religious principles that do not repudiate specific contrary beliefs founded in smaller faiths, or (2) reject "activist" judging in favor of the right of the people to weigh autonomy versus collective security for rights that are not textually enshrined in state constitutions. Under either explanation, bans on same-sex marriage are not by-products of an unwillingness to honor minority religion. Accordingly, worshipers of smaller sects may remain secure in the warmer embrace provided by the liberty of conscience clauses of state constitutions after being left out in the cold by the Supreme Court's diminution of the Free Exercise Clause in *Smith*.

B. The "Mistake" Hypothesis

A second hypothesis yields a more pessimistic view of state constitutional respect for minority faiths. It is true that unlike the reaction to actual or threatened judicial decisions sanctioning gay marriage, no state constitutional amendments emerged to preempt or override post-*Smith* interpretations of state constitutions adopting the compelling interest test for laws that happen to burden religion. To the contrary, by constitutional amendment in Alabama and by legislation in twelve other states, voters endorsed restoration of strict scrutiny. While members of minority religions are the leading beneficiaries of instating strict scrutiny under state constitutions, it is not axiomatic that guaranteeing non-mainstream liberty is the actual impetus for majoritarian faiths' acceptance of the increased protection. Under the

“mistake” hypothesis, majority religions support the more rigorous standard of review because of their perception that the Supreme Court’s repudiation of strict scrutiny in *Smith* was symptomatic of a larger diminution of the constitutional status of mainstream religion.

As a practical matter, the *Smith* Court’s institutional transfer of the guarantee of religious liberty from the courts to majoritarian legislative processes will not jeopardize mainstream Judeo-Christian congregants. The Court nonetheless relegated aspects of the federal constitutional right to Free Exercise of Religion to second-class status behind other “fundamental” rights not subject to invasion absent compelling justification. Demotion in rank of Free Exercise was a further symbolic blow to mainstream faiths already disenchanted by the Court’s interpretation of the second religious prong of the First Amendment—the Establishment Clause—to prevent any preference for religion over irreligion,¹²⁴ as well as to limit expression of their majoritarian beliefs.¹²⁵ Viewed in this light, state constitutional “restoration” of the compelling interest/no less restrictive alternatives test affirmed the preferred constitutional status of religion, with no particular solicitude for idiosyncratic faith traditions.¹²⁶ While as a practical matter it may have been a mistake to perceive that *Smith* imperiled their liberty, majoritarian faiths nonetheless were motivated to support construction of state constitutions that preserved religious freedom eroded by the Supreme Court.

Under the “mistake” hypothesis, there is consonance between initiation of state constitutional amendments repudiating same sex marriage and acquiescence to the wave of state constitutional endorsement of strict scrutiny for burdens on religion. Both enshrine in state constitutions majoritarian religious values not similarly captured by the federal constitution. Rather than take solace in state constitutions as a refuge, members of minority faiths should be concerned, just as James Madison warned, that dominant religious

124. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

125. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at high school football game violates Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer by member of clergy at graduation ceremony offends Establishment Clause).

126. RFRA was supported by the Coalition of the Free Exercise of Religion, which included not only smaller sects but also the American Jewish Committee, the Baptist Joint Committee, the Christian Legal Society, the General Council on Finance and Administration of the United Methodist Church, and the National Council of Churches of Christ in the USA. *See* Brief Amicus Curiae of the Coalition for Free Exercise of Religion at Appendix A, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), available at http://www.becketfund.org/pdfs/328_28.pdf. Among those testifying in favor of the bill were the Baptist Joint Committee on Public Affairs and the United States Catholic Conference. S. REP. NO. 103-111, at 2 (1993).

factions may more readily exert power at the state rather than the national level. The mainstream religions' capturing of state constitutions may stand as an omnipresent danger to, rather than safe harbor for, congregants of unpopular sects.

C. *The "Utilitarian" Hypothesis*

A third hypothesis repudiates the "all or none" vision of the earlier theses in favor of a "utilitarian" approach to the safety afforded minority faiths by state constitutions. The "bans on gay marriage have nothing to do with minority religion" hypothesis rests its optimism regarding the power of state constitutions to safeguard non-mainstream faith on: (1) begging the question whether majority faiths would respect state constitutional interpretations honoring minority religious beliefs that in turn contradicted mainstream tenets, and (2) adopting a theoretical explanation for repudiation of same-sex marriage that ignores evidence that opposition to gay marriage is founded in religious beliefs. The "mistake" theory presupposes that interests of minority faiths played no role in impelling acceptance of strict scrutiny as the state constitutional gauge for burdens on religion. Yet in those states where the compelling interest test was a product of court decision rather than constitutional amendment or legislation, litigants advocating broader liberty generally were followers of minority religious traditions.¹²⁷ The "utilitarian" thesis does not rest on any of the foregoing presumptions. Rather, it posits that state constitutions are a more reliable source of protection for non-mainstream faiths, but only with respect to tenets that do not contradict or impose a cost upon mainstream religious values.

The state constitutional cases adopting strict scrutiny of neutral laws whose effect was to impose burdens on religion did not protect conduct of non-mainstream religions that impugns tenets of Judeo-Christian faith. By permitting the Native American Longhouse police officer to wear his hair long as his faith required, the New York Supreme Court did not ratify actions that majoritarian religions would

127. *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd* 615 N.Y.S.2d 470 (N.Y. App. Div. 1994) (Native American Longhouse religion); *In re Miller*, 252 A.D.2d 156 (N.Y. App. Div. 1998) (Amish); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (Amish); *State v. Miller*, 549 N.W.2d 235 (Amish); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); (Native American Spirituality); *State v. Bontrager*, 683 N.E.2d 126 (Ohio App. Ct. 1996) (Amish); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (Native American Church of the United States).

deem sinful.¹²⁸ While exempting the Amish from displaying an orange and red slow-moving vehicle triangle on their buggies because the alternative use of grey reflective tape would satisfy the government's safety interest without compromising Amish faith, the Wisconsin Supreme Court did not expose non-Amish motorists to symbols banished by their own religion.¹²⁹ Endorsement of the compelling interest test, however, permits sacrificing the outsider's belief where it contradicts a mainstream religious tenet that found its expression in state law. From a utilitarian perspective, the compelling interest test leaves ample room for outlawing actions that contravene mainstream faith, and at the same time, strict scrutiny tolerates non-mainstream practices that impose no significant cost to the religion of the majority.

The success of the state constitutional march to outlaw same sex marriage fits the utilitarian thesis. Perhaps more than any other aspect of modern American life, marriage between persons of the same sex repudiates literal Judeo-Christian interpretations of their religious texts. Because of the unacceptable cost to majority faiths, state constitutions not only fail to protect same-sex marriage but—more overtly than federal constitutional law—ban the practice outright.

Under the "utilitarian" hypothesis, state constitutions have fulfilled, in part, their institutional mission of serving as successful "laboratories" for enhanced sanctity of minority religious faith. The United States Constitution safeguards liberty of conscience only from state and local laws that purposefully limit religious practices. State constitutions more generally exempt worshipers of smaller sects from laws which, while passed in ignorance of any religious conflicts, in effect burden their faith. While highly valuable to worshipers of non-mainstream faiths, state constitutional protection is likely to stop at the border at which exercise of their religion trammels majoritarian religious values.

IX. CONCLUSION

Comparing state constitutional treatment of religious exemption from general laws to the issue of same-sex marriage does not yield a definitive barometer of the sanctity of minority faiths under

128. *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd* 615 N.Y.S.2d 470 (N.Y. App. Div. 1994).

129. *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

state charters. Further evidence of whether followers of non-mainstream faith may obtain greater latitude under state constitutions than their federal counterpart may be gleaned in the near future by state constitutional challenges to tuition vouchers, faith-based initiatives and other ventures that disproportionately allocate public funds to coffers of majority faiths.¹³⁰ Regardless of which hypothesis proves valid, in Twenty-First Century America, state constitutions, rather than the United States Constitution, will define the true liberty of the increasing numbers of those professing non-mainstream beliefs.

130. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (tuition voucher program does not violate Establishment Clause of United States Constitution) *with* *Chittenden Town Sch. Dist. v. Dept. of Educ.*, 738 A.2d 539 (Vt. 1999) (tuition reimbursement to sectarian schools violates the compelled support clause of the Vermont Constitution). *See also* *Locke v. Davey*, 540 U.S. 712 (2004) (interpreting State of Washington Constitution to bar allocation of state scholarship funds for tuition to pursue a pastoral degree does not offend Free Exercise Clause of United States Constitution).