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Readdressing Nebraska's Misinterpreted Conscience Clause

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Comment*

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I thank God for His unearned grace; my husband, Nate, for being my teammate; my parents and in-laws for supporting me; Kalli Davis for mentoring me; Professors Richard Duncan and Anthony Schutz for aiding my research; and Executive Editor Jake Garbison and the entire *Nebraska Law Review* team for editing this piece.

I. INTRODUCTION

In 1990, the U.S. Supreme Court decided *Employment Division, Department of Human Resources v. Smith*,[1] a Free Exercise Clause case that radically shifted religious exercise jurisprudence in America. Prior to *Smith*, the Court applied the compelling interest test to all Free Exercise claims, requiring courts to apply strict scrutiny to any undue burden placed on free exercise.[2] But the Court deviated from this standard when it held that neutral and generally applicable laws do not trigger Free Exercise Clause protections.[3] As a result, plaintiffs began shifting their attention to states' religion provisions in an effort to seek greater protections under state constitutions.

Article 1 section 4 of the Nebraska constitution (the Conscience Clause)[4] secures the rights of conscience for Nebraska citizens.[5] However, while many states have chosen to apply a high level of constitutional scrutiny to their state constitutions' conscience clauses, the Nebraska Supreme Court chose to do the opposite—instead applying the federal Constitution's *Smith* standard to Nebraska's Conscience Clause.[6] In doing so, the court declined to examine the textual and historical differences between the state provision and its federal counterpart.[7]

More than a decade has passed since the Nebraska Supreme Court last addressed the purpose and meaning of its state constitution's Conscience Clause. This Comment examines the Nebraska Supreme Court's erroneous application of the *Smith* standard to Nebraska's Conscience Clause and the need for the court to readdress and appropriately analyze the provision's meaning and purpose. Part II examines the text of the Free Exercise Clause and its meaning, Nebraska's Conscience Clause, and the proper understanding of "conscience." Part II also tracks the history of federal and Nebraska religious exercise jurisprudence—including the Free Exercise Clause standards

1. 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); *infra* text accompanying note 58. As discussed *infra* text accompanying note 61, the statute which superseded *Smith* is not applicable to the states, including Nebraska or its state constitution.
2. *See infra* text accompanying note 54.
3. *See Smith*, 494 U.S. at 885–90.
4. *See In re* Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008).
5. *See* NEB. CONST. art. I, § 4 ("All persons have a natural and indefeasible right to worship Almighty God according to the *dictates of their own consciences*. . . . [N]or shall any interference with the *rights of conscience* be permitted." (emphasis added)).
6. *See Anaya*, 276 Neb. at 833, 758 N.W.2d at 18 (declining "to review their state constitutional challenge under a higher degree of scrutiny than challenges under the Free Exercise Clause of the federal Constitution"). Other states' interpretations of their state constitutions' conscience provisions will be discussed *infra* section II.D.
7. *Anaya*, 276 Neb. at 834, 758 N.W.2d at 18.

that have changed over time—while focusing on the *Smith* standard, Nebraska's application of this standard, and other states' responses to shifting standards in federal jurisprudence.

Part III argues that the Nebraska Supreme Court's decision to apply the *Smith* standard to its Conscience Clause was incorrect in two aspects. First, the court failed to properly interpret the Conscience Clause—ignoring its own rules of construction which call for an independent analysis of the provision's text to determine its original meaning. Second, the court engaged in judicial overreach when it applied the meaning of a federal provision to its textually distinct state provision. This overreach undermined the State's autonomous right to interpret its unique state constitution independently from the federal Constitution. Summarily, the Nebraska Supreme Court errantly stripped conscience rights protections from the Nebraska Conscience Clause over ten years ago. It is time for the court to readdress the clause's language, return the Conscience Clause to its original meaning, and restore religious liberty protections in Nebraska.

II. BACKGROUND

A. The Federal Free Exercise Clause: What It Means and What It Protects

The Free Exercise Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[8] The text of the Free Exercise Clause does not define religious exercise in detail,[9] but the federal provision is more clearly understood when viewed in light of its general intent and structure.

First, the language as a whole was intended to establish the framework for permissible government action affecting the enumerated right of free exercise at both the state and federal level.[10] Rather than defining free exercise in detail, the framers used broad, umbrella-like language. This was the U.S. Constitution's framers' intention.[11] By

8. U.S. CONST. amend. I.

9. JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 89 (2005).

10. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 18 (2009) ("[S]tate constitutions are constrained by, and constitute integral parts of, the federal Constitution."); *see also* Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1805 (1992) ("Federal and state constitutions thus are interdependent features of a greater *American* constitutional structure . . . ."); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 184 (2006) ("[T]he drafting of the federal Bill of Rights . . . was concerned with defining civil rights and liberties and ensuring their protection against governmental action.").

11. John Witte Jr., *Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1999) ("[T]he phrase [free

using the term "free exercise," these framers sought to encapsulate various forms of religious exercise in one phrase.[12]

Second, the Free Exercise Clause forbids Congress from *prohibiting* free exercise. Early drafts of the Free Exercise Clause included alternative words like "infringe," "compel," and "violate," yet these words were replaced with the single word, "prohibit."[13] This prohibition is a direct restraint on Congress. Congress, as part of the new federal government,[14] lacked constitutional authority to enact laws forbidding individuals from exercising their religion.[15] The framers of the Free Exercise Clause included this restraint on Congress because of their belief that a person's religious exercise should be outside the scope of the federal government's power.[16] Because religious convictions were believed to take "precedent[,] both in order of time and in degree of obligation, to the claims of Civil Society,"[17] the Constitution's framers wanted to ensure that individuals were not compelled to choose "between obedience to religious duties and obedience to civil laws."[18]

Third, and most notably, the Free Exercise Clause does not include a conscience provision.[19] States proposed various drafts for what became the Free Exercise Clause, many of which included reference to

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exercise] generally connoted various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, religious education, among others.").

12. *See* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 174–75 (1992) ("The Free Exercise Clause . . . does protect the freedom to act in accordance with the dictates of religion, as the believer understands them.").
13. *See* 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 434–35, 730 (Joseph Gales ed., 1834), *reprinted in* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1580, 1606 n.202 (1989) [hereinafter ANNALS OF CONG.]; *see also* WITTE JR., *supra* note 9, at 79–88 (reprinting the language of the twenty proposed drafts of the Free Exercise Clause prior to its ratification). Draft nine of the Free Exercise Clause read in part: "[N]o state shall infringe the equal rights of conscience." *Id.* Draft fourteen stated in part: "Congress shall make no law . . . prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*
14. WITTE JR., *supra* note 9, at 91.
15. *See* U.S. CONST. amend. I ("[N]or *prohibiting* the free exercise thereof . . . ." (emphasis added)).
16. McConnell, *supra* note 12, at 173. Professor McConnell also discusses the relationship between modern First Amendment jurisprudence and how the Free Exercise Clause and Establishment Clause interact in the midst of it, which is outside the scope of this Comment. *See generally id.*
17. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947).
18. Sara Lunsford Kohen, Note, *The Erosion of Nebraska's Free Exercise Protection*: In re Interest of Anaya (Anaya II), *276 Neb. 825, 758 N.W.2d 10 (2008)*, 89 NEB. L. REV. 159, 175 (2010).
19. *See* U.S. CONST. amend. I.

rights of conscience.[20] This conscience language was incorporated in a proposed draft of what became the Free Exercise Clause, stating in part, "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[21] This conscience language proposal, along with nineteen other drafts, was rejected from the ultimate language of the Free Exercise Clause.[22]

B. Nebraska's Conscience Clause Language

In contrast to the drafters of the federal Constitution, Nebraska's framers included a right of conscience provision in their state constitution.[23] Article 1 section 4 of the Nebraska constitution states in pertinent part, "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . [N]or shall any interference with the rights of conscience be permitted."[24]

The Conscience Clause's explicit protection of the natural rights of conscience is distinctly different from the First Amendment's Free Exercise Clause. The term "conscience" dates back over two millennia, originating in Roman and biblical times.[25] References to conscience can be found in canonical, common, and civil law.[26] Further, before the federal Constitution's framers referenced conscience in Free Exercise Clause drafts, early colonies recognized the rights of conscience in their state constitutions.[27] This conscience right, as understood by the

20. *See supra* text accompanying note 13.
21. *Id.*
22. WITTE JR., *supra* note 9, at 51. For a discussion on drafting proposals and language, see *id.* at 76–105; Adams & Emmerich, *supra* note 13, at 1559–1671 (considering the effect that the proposed drafts had on the First Congress).
23. *See* NEB. CONST. art. I, § 4.
24. *Id.* As discussed *infra* Part III, this freedom of conscience language was included in the 1866 constitutional proposal and has remained almost untouched since, withstanding major changes made to the State's constitution in the three constitutional conventions following the convention in 1866. KATE GAUL, LEGISLATIVE RESEARCH OFFICE, THE NEBRASKA CONSTITUTION: 1866–2016 (Feb. 2017), http://nebraskalegislature.gov/pdf/reports/research/constitution2017.pdf [https://perma.unl.edu/Z4BA-SEDZ].
25. WITTE JR., *supra* note 9, at 41. *See generally* 1 *Timothy* 1:5 (New American Standard Bible) ("But the goal of our instruction is love from a pure heart and a good conscience and a sincere faith."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).
26. WITTE JR., *supra* note 9, at 41.
27. *See, e.g.*, PA. CONST. of 1776, art. II (stating in part "[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . ."); VA. CONST. of 1776, § 16 ("[R]eligion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."); *see also* N.C. CONST. of 1776, art. XIX ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates

early states, is rooted in natural law.[28] Under Natural Law Theory, the "natural and indefeasible" right of conscience in the Conscience Clause is a right naturally possessed by every human being.[29] Natural rights are not granted by government; rather, they are inherently possessed by every human being, regardless of whether the government chooses to recognize them.[30]

Nearly a century after the earliest states declared conscience as a natural right, Nebraskans included this affirmation in their Conscience Clause.[31] Nebraska's constitution as a whole,[32] and specifically its Conscience Clause, reflects this principle that freedom of conscience is a natural and indefeasible right—a right that precedes enumeration in the Conscience Clause.[33] The drafters of the Conscience Clause thus recognized that the right of conscience is not subject to the control of any human government.[34] The Conscience Clause's use of the term "indefeasible" reinforces its derivation from natural law. The term is synonymous with how early political philosophers defined conscience as an "inalienable right"—an inherent right

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of their own consciences"); N.J. CONST. of 1776, art. XVIII ("[N]o person shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience . . . .").

28. Christopher Hammons, *State Constitutions, Religious Protection, and Federalism*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 226, 232 (2013).

29. *See* MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 99 (2015) (stating religious exercise is "an inalienable 'natural right' that preceded the Constitution and the social compact, a sphere that no mere human authority could properly invade").

30. *See* Hammons, *supra* note 28.

31. This belief continued through to the 1919–1920 Nebraska Constitutional Convention. A typical prayer that opened the convention on a daily basis stated that the people of Nebraska were thankful to God "for the Pilgrims and the Puritans who came . . . [and] for the principle that all men should be allowed to worship God according to the dictates of their own conscience . . . ." *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1919–1920 VOL. 1, at 892 (Clyde H. Barnard ed., 1920).

32. Nebraska's Preamble further reveals that the Nebraska constitution reflects principles of the natural law. NEB. CONST. pmbl. ("We, the people, grateful to Almighty God for our freedom . . . ."). This indicates the Conscience Clause was written under the assumption that God plays a role in Nebraskans' freedoms that are protected and recognized by their government because a preamble sheds light on the philosophy of its framers and the people of the state at the time. *See* Hammons, *supra* note 28, at 229.

33. *See supra* text accompanying note 29.

34. PAULSEN & PAULSEN, *supra* note 29, at 99–100; *see also* Hammons, *supra* note 28, at 232–33 (stating that government cannot prohibit individuals from exercising their religion, a right every person inherently possesses).

that cannot be taken away by the government.[35] This freedom is expressly protected by the language of the Conscience Clause.[36]

Additionally, the affirmative nature of the Conscience Clause's inalienable right of conscience is distinct from the federal Free Exercise Clause. The Conscience Clause's language is phrased like many state constitutions' religion clauses: as a declaration of an "affirmative" right held by the people with an accompanying limitation on the government's power to infringe that right—rather than a "negative" right expressed solely as a limitation on Congress.[37] In other words, the Conscience Clause *affirms* that all persons possess this right and prevents government interference,[38] instead of merely *prohibiting* a governmental action.[39]

C. Early States' References to Conscience

Early states' understandings of the liberty of conscience also provide insight into the meaning of the conscience rights in Nebraska's constitution. Nebraska's current Conscience Clause language was originally adopted in 1875,[40] but references to rights of conscience in America date back to the earliest settlers.[41] Every state constitution

35. *See, e.g.*, MADISON, *supra* note 17 (stating that freedom of religion is "in its nature an unalienable right" because it is "a duty towards the Creator," and every man has a duty to God defined by conscience that is "precedent[,] both in order of time and degree of obligation, to the claims of Civil Society").

36. Nebraska Constitutional Convention delegates believed that not only was freedom of religion a natural right, but that it is the role of government to protect these rights for the good of the people. One delegate in 1871, four years prior to the Nebraska constitution's ratification, stated:

> We all have natural inherent rights that the government can not deprive us of; that cannot be taken away from us, but exercise of these rights, for the good of the governed are regulated by law, and it is doing injustice to the government to say that it undertakes to destroy these rights. . . . I am not afraid sir, of the millions and billions in the east leaving their home across the ocean and coming here to enjoy those rights.

OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEBRASKA CONSTITUTIONAL CONVENTION ASSEMBLED IN LINCOLN, JUNE THIRTEENTH, 1871 212 (Addison Sheldon ed., 1905) [hereinafter OFFICIAL REPORT OF THE 1871 DEBATES AND PROCEEDINGS].

37. *See* Jeremy Patrick, *The Religion Provisions of the Nebraska Constitution: An Analysis and Litigation History*, 19 J.L. & RELIGION 331, 357 (2003).

38. *See* NEB. CONST. art. I, § 4 ("[N]or shall any *interference* with the rights of conscience be permitted." (emphasis added)).

39. *See* U.S. CONST. amend. I.

40. *Compare* NEB. CONST. of 1875, art. I, § 4, *with* NEB. CONST. art. I, § 4.

41. *See* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 830 (1998) (stating in regards to the states that existed prior to the Free Exercise Clause that "[a]lthough the precise language of these state provisions varied, almost all of them had a common structure: a broad guarantee of free exercise or liberty of conscience").

that preceded the federal Constitution included conscience language in the context of religious exercise.[42] The colony of Virginia was the first to adopt dictates of conscience language in a legally binding document.[43] The underlying purpose of Virginia's Declaration of Rights in 1776[44] was to proclaim that "rulers can have authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit."[45] The Vermont Constitution of 1793 is another example. Vermont's provision was similar to Nebraska's Conscience Clause, stating "[t]hat all men have a natural and inalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings."[46]

Further, states continued to enshrine rights of conscience in their constitutions following the ratification of the federal Constitution. These states chose to include more specific guarantees of religious liberty and freedom of conscience than the earlier-ratified Free Exercise Clause, as discussed next.[47]

D. Federal Free Exercise Jurisprudence

During Nebraska's early years as a state, the Conscience Clause was the only applicable provision that regulated the state's involvement in its citizens' religious exercise rights.[48] States were not bound by the federal Free Exercise Clause until 1940 when the Free Exercise Clause was incorporated against the states through the Fourteenth Amendment.[49] Prior to this incorporation, forty-two of the forty-eight state constitutions—most of which were enacted after the Free Exercise Clause was ratified—contained a clause protecting the right of conscience. That these states chose to explicitly protect the right of

42. WITTE JR., *supra* note 9, at 44 ("All the early state constitutions included a guarantee of liberty of conscience for all.").
43. Adams & Emmerich, *supra* note 13, at 1569 ("The Virginia Declaration of Rights, drafted principally by George Mason, guaranteed the free exercise of religion and served as a model for other state charters.").
44. *See* VA. DECLARATION OF RIGHTS of 1776. The pertinent language states in part that religion "can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ." *Id.*
45. LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 40 (2002) (emphasis added) (citing 3 THE WORKS OF THOMAS JEFFERSON 263 (Paul Leicester Ford ed., 1904)).
46. VT. CONST. of 1793, art. III.
47. *See supra* text accompanying note 27.
48. After its ratification, the Due Process Clause incorporated certain constitutional provisions to apply to the states through individual cases brought before the Court. One such case is *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which incorporated the Free Exercise Clause to apply against the states. For a critique of the incorporation of the Free Exercise Clause against the states, see Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006).
49. *See* Lupu & Tuttle, *supra* note 48.

conscience, rather than mere free exercise, is significant because it evidences the decision of later states not to bind their religious exercise provisions to the federal Free Exercise Clause.[50] Rather, these states expressed the meaning and purpose of religious freedom separately from the federal provision.[51]

In the 1960s, the U.S. Supreme Court began establishing strong protection for Free Exercise claims pursuant to the incorporation of the First Amendment against the states. Following *Sherbert v. Verner*,[52] any law that allegedly violated the Free Exercise Clause was required to meet strict scrutiny, or the "compelling interest test," to remain valid.[53] For the law to be upheld under this standard, the Government must prove it has a compelling interest to unduly burden free exercise, and the law imposing the burden must be the least restrictive means of achieving that compelling interest.[54] This standard applied to all Free Exercise Clause claims, even if the challenged law was neutral on its face, i.e., did not explicitly prohibit free exercise.[55]

Universal application of strict scrutiny to Free Exercise claims shifted dramatically in 1990 when the U.S. Supreme Court decided *Employment Division, Department of Human Resources v. Smith*.[56] Rather than applying strict scrutiny to all Free Exercise claims, the

50. *See* Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 773 (1993) ("Subsequent to *Smith*, however, differences between the religious protections under state constitutions and those afforded under the First Amendment are beginning to appear for the first time.").

51. WITTE JR., *supra* note 9, at 109.

52. 374 U.S. 398 (1963).

53. Wisconsin v. Yoder, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. at 403. The Court in *Yoder* also held that interference with the free exercise of a sincerely held religious belief must be justified by a compelling state interest. *Yoder*, 406 U.S. at 214.

54. *See Yoder*, 406 U.S. at 220; *Sherbert*, 374 U.S. at 403. The Government in *Sherbert* ultimately failed to meet strict scrutiny. The Court in *Sherbert* also rejected a belief/conduct distinction regarding religious exercise. The Court concluded that both belief and conduct are protected under the Free Exercise Clause, holding that disqualification from benefits for refusal to work on Saturdays due to religious convictions was unconstitutional. *Sherbert*, 374 U.S. at 410. The Court in *Smith* affirms this. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ."). A more in-depth discussion of the belief/conduct distinction is beyond the scope of this Comment. For further analysis, see generally Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993).

55. *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

56. 494 U.S. 872. In *Smith*, Native American claimants asserted their sincerely held religious beliefs and conduct were violated under the government's prohibition on the use of peyote, a hallucinogenic that the Native Americans ingested during religious ceremonies. *Id.* at 874.

Court held that a different standard applied to certain claims.[57] Under the new test in *Smith*, if a law is (1) neutral and (2) generally applicable, any alleged burden placed on religious exercise by the law has no remedy under the Free Exercise Clause as long as the Government provides a rational basis for the law.[58] Thus, if the Government is able to provide *any* rational basis for the law, the law will be upheld—regardless of the burden placed on religious exercise. In other words, under *Smith*, the "government may prohibit what religion requires or require what religion prohibits so long as it acts through neutral laws of general application."[59]

In response to *Smith* and its departure from the compelling interest test for all undue burdens placed on religious exercise, Congress unanimously passed the Religious Freedom Restoration Act (RFRA) to provide Americans with greater religious exercise protection than the First Amendment provides under *Smith*.[60] The Act, currently binding on the federal government,[61] intended to codify pre-*Smith* federal Free Exercise case law, re-establish strict scrutiny and abrogate *Smith*.[62] In other words, RFRA sought to re-establish the demanding

57. *Id.* at 878.

58. *Id.* The rational basis test requires the lowest level of scrutiny by courts. The government only needs to prove *any* conceivable basis for the law, thus requiring the challenger of the law to disprove "every conceivable basis" for the law's implementation. Heller v. Doe, 509 U.S. 312, 320–21 (1993). For a critique of the rational basis test, see generally Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339 (2014).

59. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 883 (2001) (citing *Smith*, 494 U.S. at 878–79). The Court ultimately held that the law at issue in *Smith* prohibiting use of peyote was neutral and generally applicable; thus, the claimants had no Free Exercise Clause claim. *Smith*, 494 U.S. at 874 ("[A]lthough it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required.").

60. *See* 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

61. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court held RFRA unconstitutional only as applied to the states. RFRA remains constitutional as applied to the federal government, and the Court has affirmed RFRA as applied to federal law. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). Thus, RFRA does not apply to Nebraska's Conscience Clause. Other states, in response to *Flores*, have enacted their own state versions of RFRA to restore and maintain stronger state protection of religious exercise. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 n.67 (2010) (listing sixteen states that have enacted heightened or strict scrutiny standards for their state religion provisions).

62. § 2000bb (stating its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

standard of strict scrutiny for all laws—including neutral ones—that placed an undue burden on religion.[63]

In addition, despite a historical lack of state religion clause jurisprudence,[64] states reacted to *Smith* by developing independent interpretations of their state constitutions' conscience provisions—the majority opting to reject the *Smith* standard, recognizing greater protection for their citizens than the *Smith* standard affords.[65] States predominantly achieved this by applying the compelling interest test to laws that impose an undue burden on the rights of conscience—i.e., by requiring strict scrutiny rather than the rational basis test required by *Smith*.[66] Other states, like Nebraska, did not develop independent state jurisprudence; instead, they adopted the *Smith* standard and applied a lower level of scrutiny to their state religion clauses.[67]

E. Current Conscience Rights Protection in Nebraska

Historically, claimants in Nebraska brought their claims under the federal Free Exercise Clause—not the Nebraska Conscience Clause—if their religious exercise was unduly burdened by the government.[68]

63. *Id.* ("[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

64. Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 298 (1993). For decades prior to *Smith*, there was almost no developing state religion clause jurisprudence. Authors noted that applications of state constitutions' religion provisions would have been "largely redundant" during this time in light of the strict scrutiny standard that applied to Free Exercise Clause claims under *Sherbert* and *Yoder*, when "a separate state constitutional jurisprudence in free exercise was unnecessary." *Id.* at 298–99.

65. *See* Michael D. Currie, Note, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject* Employment Division v. Smith *and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1377–78 nn.89–90 (2014) ("Twelve state supreme courts have rejected *Smith* and adopted a greater standard of scrutiny. . . . The remaining four states have adopted a heightened scrutiny standard.") (citations omitted); Russell M. Nigro, *The Importance of Interpretative Theory in State Constitutional Law*, 73 TEMP. L. REV. 905, 910 (2000) ("Particularly in the last twenty-five years, state constitutional attention has been focused on the more expansive rights that a state may provide through its interpretation of its constitution."). For an in-depth discussion on the functional aspects of this attention shift to state constitutional provisions, see generally James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1031 (2003).

66. *See* Currie, *supra* note 65 at 1378 n.90

67. *Id.* at 1377 n.89 (citations omitted) ("Six state supreme courts have adopted *Smith*'s rational-basis test.").

68. *See* LeDoux v. LeDoux, 234 Neb. 479, 452 N.W.2d 1 (1990). In *LeDoux*, the claim was based solely on the Free Exercise Clause. Additionally, neither the majority nor concurring opinions mention Nebraska's Conscience Clause.

The Nebraska Supreme Court interpreted Nebraska's Conscience Clause for the first time in 1996.[69] Following this interpretation, the U.S. Supreme Court held that RFRA is inapplicable to the states because such application exceeds Congress's authority under section 5 of the Fourteenth Amendment.[70]

In *In re Interest of Anaya*,[71] the Nebraska Supreme Court interpreted Nebraska's Conscience Clause as requiring what the Free Exercise Clause requires. In doing so, the court held that the *Smith* standard was appropriate to apply to interferences with religious exercise under Nebraska's Conscience Clause.[72] As a result, every neutral and generally applicable law that burdens the right of conscience is constitutional under the Nebraska constitution so long as the State presents any rational basis for the law that causes the undue burden.

In applying the U.S. Supreme Court's interpretation of the Free Exercise Clause to Nebraska's Conscience Clause, the Nebraska Supreme Court explicitly recognized that the Conscience Clause was textually distinct from the Free Exercise Clause.[73] Yet the court determined that it was "not prepared to accord these textual differences weight in terms of their constitutional significance."[74] Instead, the Nebraska Supreme Court determined that the two provisions were similar enough to permit the court to interpret them in congruence.[75]

Since 2008, the Nebraska Supreme Court has not readdressed the Conscience Clause's meaning and purpose. As a result, the rational basis test continues to apply under the Nebraska constitution to all conscience rights violations caused by neutral and generally applicable laws.

III. ANALYSIS

A. Rules of Constitutional Interpretation

The Nebraska Supreme Court has constructed a rule wherein conscientious objectors have no relief under the Nebraska Conscience Clause for any burden imposed upon them so long as the State presents a rational basis for the neutral and generally applicable law.[76] The court improperly established this rule by looking solely to the U.S. Supreme Court's decision in *Smith* to interpret the Nebraska

69. Palmer v. Palmer, 249 Neb. 814, 545 N.W.2d 751 (1996).
70. 521 U.S. 507, 511 (1997).
71. 276 Neb. 825, 758 N.W.2d 10 (2008).
72. *Id.* at 835, 758 N.W.2d at 19.
73. *Id.* at 834, 758 N.W.2d at 18 ("With respect to the textual argument, we recognize that the language of the state and federal provisions at issue differs.").
74. *Id.*
75. *Id.* at 834, 758 N.W.2d at 19.
76. *Id.* at 835, 758 N.W.2d at 19.

constitution's Conscience Clause.[77] In deferring to *Smith* in its interpretation of the Conscience Clause, the court focused only on the "similar rights" that the Free Exercise Clause and Conscience Clause are intended to protect, without analyzing or giving significance to the Conscience Clause on an independent textual basis.[78]

The Nebraska Supreme Court recognized "that the language of the [Conscience Clause] and [Free Exercise Clause] at issue differs."[79] However, the court followed this recognition by stating, "*we are not prepared* to accord these textual differences weight in terms of their constitutional significance."[80] In other words, the court recognized the textual distinctions of each provision while simultaneously declining to interpret the actual meaning and purpose of the Conscience Clause's textual differences.

The Nebraska Supreme Court ultimately disposed of the Conscience Clause's intended protections by declining to analyze the provision's unique language, history, and purpose. The court has yet to remedy this fault. The Nebraska Supreme Court has boldly overturned precedent when its past decisions clearly violated rules of statutory construction—including precedent reaffirmed by the court over a dozen times in less than one decade.[81] The court should be even more prepared to properly apply rules of *constitutional* construction to Nebraska's constitution and to overturn precedent accordingly because, unlike statutes, the legislature cannot overturn the constitutional decrees of the judiciary—even when the decisions violate basic rules of construction.

Nebraska Supreme Court precedent stresses that its state constitution's "terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation."[82] Overall, when each component of the

77. *Id.* at 834, 758 N.W.2d at 18.
78. *Id.* at 834, 758 N.W.2d at 19.
79. *Id.* at 834, 758 N.W.2d at 18.
80. *Id.* (emphasis added).
81. For example, the Nebraska Supreme Court, in a single decision, overturned *eighteen* cases that erroneously interpreted a Nebraska statute to include malice as a necessary element of second degree murder. State v. Burlison, 255 Neb. 190, 194–96, 583 N.W.2d 31, 35–36 (1998) (quoting State v. Irons, 254 Neb. 18, 574 N.W.2d 144 (1998)) ("When a case requires the interpretation of a statute, we have 'an obligation to reach an independent, *correct* conclusion irrespective of the determination made by the courts below.'").
82. First Tr. Co. of Lincoln v. Smith, 134 Neb. 84, 104, 277 N.W. 762, 773 (1938). The court further asserted, "Decisions of [the] [S]upreme [C]ourt of [the] United States construing provisions of [the] federal Constitution are not binding on state court in construing similar provisions of [Nebraska's] state Constitution." *Id.* at 772 (quoting Wilson Banking Co. Liquidating Corp. v. Colvard, 161 So. 123, 127 (Miss. 1935).

provision is properly interpreted, the Conscience Clause's purpose becomes evident: it is intended to prevent any interference of rights of conscience under all laws, including interference caused by neutral and generally applicable laws.

1. The Conscience Clause Rendered Meaningless and Surplusage

When the Nebraska Supreme Court ignored the textual differences between the Free Exercise Clause and Nebraska's Conscience Clause, the court failed to follow well-established rules of interpretation and, in effect, rendered the text of the Conscience Clause meaningless and mere surplusage.[83] The Conscience Clause contains entirely dissimilar language from the Free Exercise Clause,[84] yet the Nebraska judiciary continues to apply to its state provision the federal judiciary's interpretation of a federal constitutional provision.[85] The two clauses contain wholly different language, and the Conscience Clause should be interpreted on an independent basis.[86]

The Free Exercise Clause again states, "Congress shall make no law . . . prohibiting the *free exercise* [of religion]."[87] In looking at the language "free exercise," the *Smith* Court determined this right includes the freedom to believe in and profess one's religion, as well as the right to act out one's religion.[88] The *Smith* Court then interpreted the full phrase "prohibiting the free exercise" and determined the phrase meant a prohibition only on laws that specifically target and intend to restrict these freedoms.[89]

By applying the U.S. Supreme Court's *Smith* standard to its state Conscience Clause, the Nebraska Supreme Court effectively added

83. *See* State *ex rel.* Spire v. Beermann, 235 Neb. 384, 390, 455 N.W.2d 749, 752 (1990).

84. *Compare* U.S. CONST. amend. I *with* NEB. CONST. art. I, § 4.

85. *Anaya*, 276 Neb. at 835, 758 N.W.2d at 19 ("[P]rovisions of the Nebraska Constitution protect the same rights as the Free Exercise Clause of the federal Constitution, we will review . . . under the same standard . . . .").

86. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018) ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.").

87. U.S. CONST. amend. I (emphasis added).

88. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (listing examples of religious actions, such as "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation").

89. *Id.* at 878–79 (stating laws that are not aimed at religious exercise are free from the constraints of the Free Exercise Clause as long as the state has any rational basis for the law). For an in-depth discussion on the rational basis test and critiques against it, see Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897 (2005).

these words from the Free Exercise Clause to the Conscience Clause—omitting from its analysis the actual text of the Conscience Clause. This approach violated the court's rules of construction for numerous reasons. To start, the Free Exercise Clause was constructed separately from and with different language than the Nebraska Conscience Clause; treating these textual differences between the state and federal provision as asserting the same right fails to give each word a useful meaning in light of the provision as a whole.

The preeminent rule the Nebraska Supreme Court violated when it assigned the Free Exercise Clause's interpretation to the Conscience Clause is the rule that no part of Nebraska's state constitution shall be treated as superfluous.[90] Every word of the document must be given meaning because each and every clause of the Nebraska Constitution is included for a useful purpose.[91] The court cannot add nor omit words from a constitutional provision.[92] The Conscience Clause "must be construed as a whole, and no part will be rejected as meaningless or surplusage."[93]

Further, the U.S. Supreme Court was interpreting the text of a federal constitutional provision, not the Conscience Clause, when it applied the rational basis standard of review in *Smith* for all religious exercise claims. Unlike the Free Exercise Clause, the Nebraska Conscience Clause does not contain the language "free exercise," nor does it express that Congress is prevented from prohibiting these rights.[94] Rather, the Conscience Clause states that the *dictates of conscience* cannot be interfered with.[95] The court's interpretation thus added the words of the Free Exercise Clause to the Conscience Clause and omitted the words of the Conscience Clause when it assigned the *Smith* Court's interpretation of the Free Exercise Clause to its textually distinct state provision.

Finally, there are distinct structural differences between the text of the state and federal provision. The Conscience Clause expresses a positive right of the people—that "*all persons* have the natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."[96] The clause recognizes and affirms a right

90. Fisher v. PayFlex Sys. USA, Inc., 285 Neb. 808, 817–18, 829 N.W.2d 703, 712 (2013).

91. Anderson v. Tiemann, 182 Neb. 393, 397, 155 N.W.2d 322, 326 (1967).

92. State *ex rel.* Spire v. Beermann, 235 Neb. 384, 389–90, 455 N.W.2d 749, 752 (1990).

93. *Id.*

94. *See* NEB. CONST. art. I, § 4.

95. *Id.* (emphasis added).

96. *Id.* (emphasis added).

that all people inherently hold[97]—one "which the government itself may not deprive the individual."[98] In contrast, the Free Exercise Clause is phrased as a negative right—"*Congress* can make no law . . . ."[99] The Free Exercise Clause expresses a restraint on Congress from prohibiting the right of free exercise.[100] But while the text of the Free Exercise Clause restricts government's direct *prohibition* of free exercise, the Conscience Clause forbids *interference* with the rights of conscience. "[*A*]*ny* interference"[101] with the rights of conscience, regardless of whether the law facially prohibits these rights, is not permitted[102] when the text of the Conscience Clause is facially considered.

Neither the positive right of conscience nor the prohibition on any interference of this right is mentioned in the Free Exercise Clause. If the Nebraska Supreme Court had given every word meaning in light of its useful purpose, the court would have acknowledged the unique differences in the plain text and the recognized rights. Neither the affirmative right that all people naturally and indefeasibly hold the right of conscience nor the admonition that government shall never interfere with this right were even considered.[103] All the pertinent language in the provision was dismissed as "perfunctory language—merely stylistic window dressing."[104] The court failed to give the positive rights of conscience meaning in light of the provision as a whole and thus treated each word of the Conscience Clause as merely redundant of the Free Exercise Clause.[105]

97. *See id.* ("All persons have a *natural* and *indefeasible* right to worship Almighty God according to the dictates of their own consciences. . . . [N]or shall any interference with the rights of conscience be permitted.") (emphasis added).

98. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 (1999).

99. U.S. CONST. amend. I (emphasis added).

100. Terrance J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51, 67 (1984); Patrick, *supra* note 37, at 357 (citing Richard E. Shugrue, *Faithful to the Constitution: The Roadblock for Nebraska's Schools*, 79 NEB. L. REV. 884, 897–98 (2000)).

101. NEB. CONST. art. I, § 4 (emphasis added).

102. *See, e.g.*, McConnell, *supra* note 25, at 1418–19. McConnell offers examples of laws that are facially neutral that nevertheless interfere with religious exercise. *See id.* at 1419 ("[A] general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, [and] uniform regulation of meat preparation could put kosher slaughterhouses out of business.").

103. Anderson v. Tiemann, 182 Neb. 393, 397, 155 N.W.2d 322, 326 (1967).

104. Hammons, *supra* note 28, at 235.

105. Fisher v. PayFlex Sys. USA, Inc., 285 Neb. 808, 817–18, 829 N.W.2d 703, 712 (2013); State *ex rel.* Spire v. Beermann, 235 Neb. 384, 389–90, 455 N.W.2d 749, 752 (1990); *Anderson*, 182 Neb. at 397, 155 N.W.2d at 326.

2. Interpretation According to the Original Meaning and Purpose

In order to assign proper meaning to each word of the Conscience Clause,[106] the Nebraska Supreme Court must look to the original meaning of the provision. In determining the original meaning, Nebraska Supreme Court precedent requires the court to consider both the historical background and intended purpose of the constitutional provision.[107] The main inquiry in this determination is "[t]he intent and understanding of [the] framers and the people who adopted it as expressed in the instrument."[108] In conducting this inquiry, the court may "consider the facts of history in determining the meaning of the language of the Constitution."[109]

a. The History of Religion in Nebraska

First, the history of Nebraska clearly demonstrates that the intent of its constitution's framers was to prohibit interference with the rights of conscience. A historical aspect of critical significance in interpreting the meaning of the Conscience Clause is the wide variety of denominations present in the state prior to and during the time of the clause's ratification[110] and the fundamental role that religion played in the societal and constitutional structure in Nebraska's years as a territory and early state.[111] The variety of denominations led to Nebraska having "vastly more freedom of thought and independent action . . . than . . . any of the older States."[112] There were a variety of religious denominations amongst individuals who resided in the territory, and religion itself was central to the lives of these individuals. In fact, "[r]eligious belief was a sturdy strand in the social fabric of Nebraska in the late nineteenth century."[113] Because of this, the territory developed a culture that prioritized the freedom to believe and act according to one's beliefs.

This diversity of religious denominations and the influence it had on the Conscience Clause are evidence that the Conscience Clause's use of strong language, distinct from the Free Exercise Clause, re-

106. *Beermann*, 235 Neb. at 389–90, 455 N.W.2d at 752.
107. State *ex rel.* Lemon v. Gale, 272 Neb. 295, 304, 721 N.W.2d 347, 355–56 (2006); Jaksha v. State, 222 Neb. 690, 693, 385 N.W.2d 922, 924 (1986).
108. *Beermann*, 235 Neb. at 389–90, 455 N.W.2d at 752.
109. *Id.*
110. *See* Patrick, *supra* note 37, at 342–43 n.77 (referencing early documentation articulating the wide variety of religious groups and religious freedom in Nebraska prior to and at the time of its statehood).
111. *Id.* at 338; *supra* text accompanying note 32.
112. L.D. BURCH, NEBRASKA AS IT IS: A COMPREHENSIVE SUMMARY OF THE RESOURCES, ADVANTAGES AND DRAWBACKS OF THE GREAT PRAIRIE STATE 14, 108 (1878), *reprinted in* Patrick, *supra* note 37, at 342–43 n.78.
113. FREDERICK C. LUEBKE, NEBRASKA: AN ILLUSTRATED HISTORY 178 (1995).

flected Nebraska's territorial history[114] and was intentionally included to provide robust religious protections. Applying the lowest level of constitutional scrutiny to conscience rights claims disregards the Nebraska framers' intent to protect the right of conscience. As a result, rational basis review of neutral and generally applicable laws permits the law to take precedent over the precious right to worship "according to the dictates of . . . conscience . . . ."[115]

b. Perfect Toleration of Religion

In addition to the aforementioned history, Nebraska's journey to statehood provides further evidence of the original meaning of the Conscience Clause. When the territory of Nebraska sought to attain statehood, Congress imposed certain conditions on the territory.[116] One condition of particular significance was the requirement that the state's constitution provide for "perfect toleration of religious sentiment" and protect religious worship from being molested or interfered with.[117] In order to satisfy this requirement, the Territory of Nebraska drafted the version of what would later be adopted as the Conscience Clause.[118] Because Nebraska was admitted to the Union, the language of the Conscience Clause must have, at a minimum, provided for perfect toleration of religious sentiment and protected religious worship from being molested or interfered with.[119]

Toleration of religion means to "live and let live."[120] In other words, religious toleration ensures every individual is free to "live his [or her] own life *in accordance with religious conscience and convic-*

114. *See* State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); *infra* text accompanying notes 147–154.

115. NEB. CONST. art. I, § 4.

116. JOSEPH ELLIOTT COBBEY, COBBEY'S ANNOTATED STATUTES OF NEBRASKA 50 (1911). Two conditions that Congress required the Territory of Nebraska to secure in order to become a state were that "perfect toleration of religious sentiment shall be secured," and no one "shall ever be molested in person or property on account of his or her mode of religious worship." An additional condition was that slavery "be forever prohibited . . . ." *Id.*

117. *See id*.

118. The language of the 1866 Conscience Clause is nearly identical to Nebraska's current Conscience Clause:

> The Convention of 1875 returned to a formulation of the Religious Freedom Provision that was nearly exactly that of the 1866 Constitution. Besides changing the opening words "All men," to "All persons," the only substantive change was removing the phrase "or maintain any form of worship against his consent" in the second sentence.

Patrick, *supra* note 37; *see also* GAUL, *supra* note 24 (providing a side-by-side comparison of past and current Nebraska Constitution provision language).

119. *See* Patrick, *supra* note 37, at 342–43.

120. Michael W. McConnell, *Religion and Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1259 (2000).

tion."[121] For individuals to be able to live accordingly, the government cannot infringe on religious exercise rights either directly—through laws that expressly prohibit religious exercise—or *in*directly—through laws that require individuals to abandon their religious convictions in order to attain "an equal place in the civil community"[122]—and still maintain religious toleration. The earliest definitions make clear that perfect toleration demands that religious exercise must be "respected, accommodated, and protected"[123] as an inalienable natural right that government "may *never* infringe."[124] If the rights of conscience are not secured, perfect toleration—perfect protection—is relinquished because individuals are precluded from living according to their convictions.[125]

The *Smith* standard does not afford perfect toleration of conscience rights by the state. For example, in *In re Interest of Anaya*[126]—the case where the Nebraska Supreme Court misapplied the *Smith* standard to the Conscience Clause—the court concluded that the Anayas had no Conscience Clause claim.[127] The Anayas held a sincere religious belief that metabolic infant testing required removing life[128] from their son. However, the Anayas' belief was not respected or accommodated under the neutral and generally applicable standard applied by the court. By demanding the Anayas violate their sincerely held religious belief or face the consequences—loss of custody of their five-week old son[129]—the Anayas were unable to live according to their own con-

121. *Id.* (emphasis added). Professor McConnell emphasizes that religious tolerance dates back to the founding of the United States and the discussions surrounding its establishment. *Id.*

122. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring).

123. PAULSEN & PAULSEN, *supra* note 29, at 100.

124. *Id.* (emphasis added) ("In America, religion is . . . a fundamental, inalienable, (literally) God-given natural right."); *see also* Meyer v. Nebraska, 262 U.S. 390, 396 (1923) (holding a statute was unconstitutional because it forbade teaching in public school in any language other than English: "[W]e should not overlook the fact that the spirit of American [sic] is liberty and toleration—the disposition to allow each person to live his own life in his own way").

125. PAULSEN & PAULSEN, *supra* note 29, at 101 ("[G]overnment cannot *keep* someone from exercising religion, even if this may mean departing from its usual rules in order to permit individuals and groups freely to exercise their religious beliefs.").

126. 276 Neb. 825, 758 N.W.2d 10 (2008).

127. *Id.* at 836, 758 N.W.2d at 20.

128. It was not disputed that the Anayas sincerely believed "life is taken from the body if blood is removed from it and that a person's lifespan may be shortened if blood is drawn." Douglas Cty. v. Anaya, 269 Neb. 552, 554, 694 N.W.2d 601, 604 (2005).

129. The Nebraska Supreme Court ultimately held that the removal of custody by the lower court was an improper exercise of jurisdiction. *Anaya*, 276 Neb. at 838, 758 N.W.2d at 20. However, the Anayas' religious convictions had still been violated, as their son's blood was removed without their consent while he was in the State's custody.

sciences without facing legal consequence. If the Conscience Clause's original meaning of perfect toleration had been afforded, the Anayas would not have been forced to choose between living according to their consciences or violating their consciences—a decision they were required to make under the court's interpretation. Stated plainly, perfect toleration was not afforded under the court's interpretation of the Conscience Clause.

c. The Intent of Nebraska's Framers and Citizens

The Conscience Clause's "terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it."[130] Thus, building upon the determination that Nebraska's journey to statehood requires the language of the Conscience Clause to prohibit intolerance and coercion, the ratification history of the Conscience Clause solidifies that its unique language reflects the intent and understanding of the people who drafted and adopted it. Simply stated, the Conscience Clause's ratification history provides further insight into its original meaning.

Following admission to statehood in 1866, Nebraska held a constitutional convention in 1871 to create a binding state constitution.[131] In drafting this proposed constitution, the Nebraska framers looked to other state constitutions; specifically, the Nebraska framers relied heavily on the language of the 1870 Illinois Constitution.[132] The language of Nebraska's proposed religion provision was nearly identical

130. First Tr. Co. v. Smith, 134 Neb. 84, 277 N.W. 762, 773 (1938) (quoting State v. Bacon, 6 Neb. 286 (1877)).

131. OFFICIAL REPORT OF THE 1871 DEBATES AND PROCEEDINGS, *supra* note 36, at 10. To clarify, the proposed constitution of 1866 was not a legally binding constitution; it was proposed in order for Nebraska to meet conditions in its pursuit to attain statehood. The Constitutional Convention of 1871 and 1875 sought to create and ratify a binding Constitution.

132. *Id.* Nebraska's proposed language in 1871 stated in full:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, nor shall any preference be given by law to any religious denomination or mode of worship.

Id. The 1871 constitution was different than the 1866 constitution written to join the Union. Because the 1866 constitution's main purpose was to meet minimum qualifications for attaining statehood, the people realized its inadequacy. Thus, a movement for a new constitutional convention grew and was approved by voters in 1871. Patrick, *supra* note 37, at 344 (citing MIEWALD & LONGO, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE (1993)).

to the language of Illinois's provision, which guaranteed free exercise to the people with limitations.[133] However, when the 1871 proposed constitution was submitted to the people of Nebraska for approval, the language, along with the entire proposed constitution, was defeated at the polls.[134]

In 1875, Nebraska held a second constitutional convention to draft a binding state constitution.[135] The 1875 drafters chose to include most of the same language from the 1871 proposed constitution,[136] but one exception was of particular importance. The Conscience Clause drafters chose not to include any of the basic free exercise language from the 1871 provision, and instead chose to restore the conscience language from the 1866 proposed constitution.[137] The 1875 provision re-adopted the liberty of conscience language.[138]

This reverted language was entirely different from language in the rejected 1871 constitution. The proposed language in 1875 reaffirmed the conscience rights of Nebraskans,[139] and any interference with conscience rights would be prohibited.[140] Thus, the 1875 language shifted from a free exercise right that was guaranteed with limitations, to an

133. *See* ILL. CONST. of 1870, art. II, § 3; *supra* text accompanying note 132. The 1871 Nebraska religion clause proposal omitted the Illinois's phrase "against his consent." The language was otherwise an exact adoption of Illinois's provision. OFFICIAL REPORT OF THE 1871 DEBATES AND PROCEEDINGS, *supra* note 36, at 218–19. The meaning and purpose behind limitation provisions in state constitutions is outside the scope of this Comment. For a discussion on these provisions, see generally Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953 (2010).

134. One known reason for the constitution's failure to be ratified was the provision that required all religious property valued over five thousand dollars to be taxed. *See* Patrick, *supra* note 37, at 347; A. B. Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 NEB. L. REV. 580, 582 (1961).

135. *See* Winter, *supra* note 134, at 583.

136. *See id.* ("As a basis of departure, the convention used the rejected constitution of 1871, which had in turn been modeled upon the Illinois Constitution of 1870."); *supra* text accompanying note 118.

137. *See supra* text accompanying note 118.

138. *See id.*; *see also* NEBRASKA: THE LAND AND THE PEOPLE 519 (Addison E. Sheldon ed., 1931), *reprinted in* Patrick, *supra* note 37, at 350 n.129 ("In section four relating to religious freedom more emphasis is given to religion, thereby interpreting the more active religious sentiment of 1875."); Patrick, *supra* note 37, at 350 ("In terms of religion, probably the only important change rendered by the 1875 Convention was a modification of the Religious Freedom Provision to highlight the positive aspects of religion and reduce the number of occasions when it would not apply.").

139. *See* NEB. CONST. art. I, § 4.

140. *Id.* ("[N]or shall *any* interference with the rights of conscience be permitted.") (emphasis added).

absolute freedom from government interference of conscience rights.[141]

The change in language from the 1871 to the 1875 Conscience Clause is revealing. If the drafters believed that the language of the 1871 proposed provision accurately reflected their beliefs, they would have proposed the same language in 1875—just as they did for a majority of the 1871 constitution's language.[142] Instead, the drafters readopted the liberty of conscience language, demonstrating that this conscience language—not the rejected free exercise language—most clearly reflected the beliefs of the Nebraska framers at the time of the current Conscience Clause's drafting.

The ratification of the current Conscience Clause's language also reflects the intent of Nebraska's voters. Unlike the proposed 1871 constitution, Nebraska's current Conscience Clause language was ratified at the ballot box in 1875.[143] Nebraskans demonstrated their agreement with the language through their votes; the people of Nebraska overwhelmingly chose to ratify this language along with the remainder of the proposed constitution.[144] This ratification was not a mere formality; history shows Nebraskans did not passively approve language they did not agree with.[145] Thus, Nebraskans' rejection of the basic free exercise language and adoption of the Conscience Clause's unique language evinces the intent of Nebraskans at the time of enactment: to protect the natural and indefeasible rights of conscience.

d. Other States' Conscience Provisions

Another aspect of Nebraska's history that provides insight into the meaning and intent of the Conscience Clause is the Nebraska framers' ability to reflect on the experiences of other states regarding protection of conscience rights. At the time of the Conscience Clause's drafting, Nebraska's framers had before them three dozen states that had implemented, tested, and tried religion clauses in their state constitutions.[146] This allowed the Nebraska drafters to consider the failures

141. NEBRASKA CONSTITUTIONS OF 1866, 1871 & 1875 AND PROPOSED AMENDMENTS SUBMITTED TO THE PEOPLE SEPTEMBER 21, 1920 9 (Addison Sheldon ed., 1920) ("[The] positive recognition of religion justly interprets the more active religious sentiment of that time."). The shift from including "free exercise" to ensuring freedom of conscience is what Sheldon is referring to regarding the "more active religious sentiment," and the push for greater religious protection. *See* Patrick, *supra* note 37, at 357.

142. *See supra* text accompanying note 141.

143. *See supra* text accompanying note 134; *see also* Patrick, *supra* note 37, at 350 ("[T]he Constitution of 1875 was approved by the voters by a count of [30,332] to [5,474].") (citing JAMES C. OLSON, HISTORY OF NEBRASKA 183 (1966)).

144. *See supra* note 143.

145. *See supra* subsection III.A.2.c.

146. *Dates of Statehood: National (U.S.) Succession of States*, STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/national-us/statehood-date/date-

and successes of other states when drafting their own conscience provision.[147]

In choosing which state constitutions to borrow language from, drafters often looked to states that shared a common heritage and similar values.[148] This allowed the borrowed provisions to accurately reflect the adopting state's history and values.[149] The provisions the drafters borrowed thus reflected the adopting state's history and values.[150] Because the Conscience Clause was modeled after other states' constitutional provisions,[151] the historical meaning and judicial determinations of these early states' near-identical provisions are instructive in determining the meaning of Nebraska's Conscience Clause.

Three midwestern states—Wisconsin, Minnesota, and Ohio—had state constitutional conscience clauses at the time Nebraska was drafting its own.[152] All three states' provisions are very similar to Ne-

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statehood [https://perma.unl.edu/FN3B-WE2C] (stating thirty-six states had been admitted to the Union prior to Nebraska's statehood); *see also* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 975 (1994) ("[V]irtually all [nineteenth century] conventions were influenced by earlier constitutions, constitutional experience, practice, and interpretations.").

147. *See, e.g.*, Minn. Const. of 1857, art. I, § 16. Wisconsin voters ratified its 1848 state constitution by vote in March of 1848. *See The State Constitutions of 1846 and 1848*, WIS. HIST. SOC'Y, https://www.wisconsinhistory.org/turningpoints/tp-015/?action=more_essay [https://perma.unl.edu/9MML-46HF]. Minnesota's conscience provision was ratified in 1857. *Constitution of the State of Minnesota*, OFFICE REVISOR STATUTES, https://www.revisor.mn.gov/constitution/#article_1 [https://perma.unl.edu/RJT4-SVVP] (last visited Jan. 27, 2019).

148. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 205 (1998).

149. *Id.* at 205–09.

150. First Tr. Co. v. Smith, 134 Neb. 84, 112, 277 N.W. 762, 776 (1938). In *First Trust Company*, the Nebraska Supreme Court stated that when looking to constitutional provisions borrowed from other states,

> [I]n the absence of expressed contrary intention, the adoption of a statutory or constitutional provision from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part and, if it had been previously construed by the courts of such state, the judicial determination thus made.

Id.

151. Although Nebraska adopted most of the language in Illinois's Constitution of 1870 for its 1875 constitution, Nebraska's 1875 Conscience Clause was an exception. *See* Winter, *supra* note 134, at 583. Though it is unclear exactly which state(s) Nebraska adopted its Conscience Clause from, it can be assumed Nebraska reflected on other states'—particularly midwestern states'—conscience provisions because many of these states' conscience provisions were nearly identical to Nebraska's 1875 Conscience Clause. Minnesota's, Ohio's, and Wisconsin's conscience provisions are three examples, and their provisions are discussed next.

152. In addition to Nebraskans' Conscience Clause being very similar to their conscience provisions, individuals from Minnesota and Wisconsin had extensive influence in Nebraska at the time it attained statehood. For example, attorney

braska's.[153] In drafting their respective conscience clauses, these states intended to create stronger religious protection than the protection afforded under the Free Exercise Clause.[154]

For example, Wisconsin reflected on other states' failures to afford comprehensive protection for conscience rights when it drafted and ratified its 1848 conscience provision, which furnished "a more-complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union."[155] This bar is reflected in Nebraska's Conscience Clause language.[156] Similarly, Minnesota drafted and ratified language in 1857 to afford stronger protection to the diverse religious denominations residing within the state and to provide greater protection from religious persecution.[157] The decision of Nebraska's Conscience Clause drafters to adopt conscience language from states like Wisconsin and Minnesota signals the intent of these drafters to require more protec-

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Experience Eastabrook of Wisconsin was appointed to play a leading role in organizing the territory of Nebraska and was eventually a constitutional convention delegate in the 1870s. *See* D.C. DUNBAR, OMAHA ILLUSTRATED 74 (Alfred Rasmus Sorenson ed., 2012) (1888). Further, Minnesota played an integral part in Nebraska's then-establishing railroad system in the early 1860s, which connected to Illinois—a state with well-known influence on Nebraska's current Constitution—Wisconsin, and Minnesota. *See, e.g.*, ALBERT WATKINS, HISTORY OF NEBRASKA: FROM THE EARLIEST EXPLORATIONS TO THE PRESENT TIME WITH PORTRAITS, MAPS, AND TABLES VOL. III 447 (1913).

153. *Compare* NEB. CONST. art. I, § 4, *with* 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 . . . ."), *and* OHIO CONST. of 1851, art. I, § 7 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience."), *and* WIS. CONST. of 1848, art. I, § 18 ("The right of every man to worship Almighty God according to the dictates of his own conscience, shall never be infringed, . . . nor shall any control of or interference with the rights of conscience be permitted . . . ."). Twenty-nine states were admitted prior to Wisconsin's, and thirty-one states prior to Minnesota's admission. Thus, Nebraska had even more state provisions to glean from. *See supra* text accompanying note 146.

154. State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996) (holding *Employment Division v. Smith* is not binding on its state constitution's conscience clause when its state's precedent and unique history are considered separate from the Free Exercise Clause, and concluding strict scrutiny—not the neutral and generally applicable standard in *Smith*—is required by its conscience provision); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990) (concluding its conscience provision intended to afford stronger protection than *Smith* to diverse denominations to prevent intolerance and persecution in the state and holding strict scrutiny applies to its conscience provision).

155. *See Miller*, 549 N.W.2d at 239 (quoting State *ex rel.* Reynolds v. Nusbaum, 115 N.W.2d 761 (Wis. 1962)); *see supra* text accompanying note 147.

156. *See* NEB. CONST. art. I, § 4; discussion *supra* Part I.

157. *Hershberger*, 462 N.W.2d at 398 (citing State v. French, 460 N.W.2d 2 (Minn. 1990)).

tion of conscience rights than the Free Exercise Clause requires[158] and a more complete bar on any interference of these rights.[159]

Ohio's conscience clause is the most similar to Nebraska's; the two clauses are nearly identical.[160] Ohio became a state in 1803[161]—over 60 years before Nebraska joined the Union. It is one of the states that Nebraska framers could have looked towards when learning from "the experience of others."[162] In stark contrast to the Nebraska Supreme Court's approach, the Ohio Supreme Court determined that its state conscience clause provision not only provides more protection, but it also protects *entirely different rights* than the federal provision.[163] The Ohio Supreme Court in *Humphrey v. Lane* concluded that Ohio's conscience clause afforded much broader protection than the federal Free Exercise Clause.[164] More specifically, the *Humphrey* court asserted its conscience provision affords relief for undue burdens created by neutral and generally applicable laws.[165]

The court in *Humphrey* distinguished the phrase, "nor shall any interference with the rights of conscience be permitted" from the Free Exercise Clause's language.[166] Further, the court interpreted the word "interference" to mean preventing "even . . . tangential effects"[167] on freedom of conscience. In other words, the Ohio conscience clause was intended to prevent even *indirect* interference with the rights of conscience, including when the law is neutral and generally applicable.[168] The *Humphrey* court concluded that it is "not bound by federal court interpretations of the federal Constitution in interpreting [its] own Constitution,"[169] and under the clause's proper interpretation, Ohio's religious freedom provision provides broader protections than the federal Free Exercise Clause.

158. *See supra* text accompanying note 154.
159. *Miller*, 549 N.W.2d at 239 (quoting *Reynolds*, 115 N.W.2d 761).
160. OHIO CONST. art. I, § 7 reads in pertinent part, "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. . . . [N]or shall any interference with the rights of conscience be permitted." The clause also states in striking similarity to Nebraska's clause that "[r]eligion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship . . . ." NEB. CONST. art. I, § 4.
161. *Historical Highlights: The Admission of Ohio as a State*, HIST., ART & ARCHIVES, http://history.house.gov/Historical-Highlights/1951-2000/The-admission-of-Ohio-as-a-state/ [https://perma.unl.edu/N6SQ-XS7T].
162. *Reynolds*, 115 N.W.2d at 769–70.
163. Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000).
164. *Id.* at 1045.
165. *Id.*
166. *Id.* at 1044.
167. *Id.*
168. *Id.*
169. *Id.*

Although the Nebraska Supreme Court has expressed disinterest in looking to other courts' decisions concerning their respective state constitutions,[170] looking to other states' conscience clauses is instructive in light of Nebraska's lack of documentation from its 1875 constitutional convention,[171] and because Nebraska, along with other states, borrowed language from earlier state constitutions and incorporated this language into its own.[172]

Further, the Nebraska Supreme Court should be looking to other states' constitutions before relying on the U.S. Supreme Court's interpretation of the federal Constitution.[173] In other words, if the Nebraska Supreme Court is going to lockstep the Conscience Clause's meaning with another constitutional provision, the court should be looking to other state constitutional provisions, not a federal constitutional provision. As the Honorable Jeffrey S. Sutton emphasized,

> If the court decisions of another sovereign ought to bear on the inquiry, those of a sister state should have the most to say about the point. Two state constitutions are more likely to share historical and linguistic roots. They necessarily will cover smaller jurisdictions than the National High Court. . . . And they will be exercising a power—judicial review—that originated in state constitutional law, not in federal constitutional law.[174]

Ultimately, looking beyond Nebraska to other states that adopted nearly identical conscience clauses gives insight to the original meaning of the clause.

After applying basic rules of constitutional interpretation; considering the Conscience Clause's history and purpose; and looking to other states' interpretations of near-identical conscience provisions, the Nebraska Supreme Court cannot soundly conclude that the Conscience Clause allows the lowest level of constitutional review to apply to conscience rights claims. Simply, the original meaning of the Con-

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170. State *ex rel.* Spire v. Pub. Emp. Retirement Bd., 226 Neb. 176, 181, 410 N.W.2d 463, 466 (1987) ("[R]elying on other decisions by other courts which in turn relied upon provisions of other constitutions serves little purpose in determining the meaning of our own specific Constitution.").

171. While debates and proceedings of constitutional conventions are often essential to understanding the original meaning of state constitutional provisions, this is not a viable option for Nebraska's Conscience Clause: there is no record of the 1875 Constitutional Convention. Patrick, *supra* note 37, at 345. Evidently, Nebraska "refused to hire a shorthand reporter due to budget restraints and other extenuating circumstances." *Id.* Discussions at the 1871 convention do shed light on the importance of religion at the time. For instance, even in the midst of budgetary constraints, an official Chaplain was hired to open each day with prayer, most invoking "Almighty God" and Jesus. *See id.* at 346 n.96 and accompanying text. Further, the Convention discussed Sunday Sabbath laws and tax exemptions for religious purposes. *Id.* at 346.

172. *See supra* text accompanying notes 151–155.

173. *See* GEORGE ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 205 (1998).

174. SUTTON, *supra* note 86, at 175 (citing Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 n.80 (2011).

science Clause cannot permit the *Smith* standard to apply. Because *Smith*'s rational basis standard does not permit Nebraska citizens to live according to their conscientious convictions[175] under all laws that burden conscience rights, the current judicial standard does not reflect the originally understood meaning and purpose of Nebraska's state constitutional provision.[176]

B. Conscience Rights in a Constitutional Republic

Not only did the Nebraska Supreme Court fail to render a proper meaning to its state constitutional provision by equating the Conscience Clause with the Free Exercise Clause, but it also undermined state autonomy by deviating from fundamental principles of federalism embedded in the United States' structure as a constitutional republic. Federalism—rooted in the theory of dual sovereignty[177]—is wounded when Nebraska's state constitution is interpreted on a dependent basis with its federal counterpart. State constitutions are documents with independent force.[178] Independent analysis of these documents permits states to grant more protection to their citizens than the federal Constitution, and it preserves the voice of the people by safeguarding citizens' ability to engage in direct democracy through the ratification and amendment process in this constitutional republic.[179]

1. State Autonomy

The federal Constitution, in addition to dividing power between the three branches of government,[180] divides power horizontally between

175. McConnell, *supra* note 120; *see also* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring) (stating neutral laws "can coerce a person to violate his religious conscience or intrude upon his religious duties . . . .").

176. *See* Conroy v. Keith Cty. Bd. of Equalization, 288 Neb. 196, 198, 846 N.W.2d 634, 637 (2014) ("If the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey.") (citing City of North Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011)).

177. Hershkoff, *supra* note 98, at 1166.

178. *See* Humphrey v. Lane, 728 N.W.2d 1039, 1044 (Ohio 2000) (stating "the words of the Ohio framers do indicate their intent to make an independent statement [in Ohio's conscience provision] on the meaning and extent of the freedom" and holding the Ohio constitution is a document of independent force and grants more conscience rights to its citizens than the Free Exercise Clause requires).

179. Sanford Levinson, *"Reflection and Choice": A One-Time Experience?*, 92 NEB. L. REV. 239, 244 (2013) (stating the Nebraska constitutional amendment process allows "'we the people' [to] become effective policy-makers" and "engage in direct democracy"). Outside the scope of this Comment is the impact that incorporation of the Free Exercise Clause against the states has on federalism. For a discussion on this impact, see Lupu & Tuttle, *supra* note 48.

180. *See* PAULSEN & PAULSEN, *supra* note 29, at 30–37. Paulsen & Paulsen also provide a concise historical discussion regarding separation of powers. *Id.* at 31 ("[I]t

the federal and state governments to ensure state autonomy.[181] The people of each state are thus governed both nationally and locally.[182] Within this structure, state constitutions are permitted to grant their citizens more protection than what the federal Constitution affords.[183] This is because the federal Constitution acts as a floor, i.e., the "bare minimum,"[184] to the degree of protection state constitutions are required to provide.[185] Therefore, states have the ability to respond to limitations on rights in the federal Constitution by expanding these rights within their own state constitutions.[186] This enables the Nebraska Supreme Court to develop and apply independent jurisprudence under its state constitution which heightens individual rights above the federal Constitution's floor.[187]

The Nebraska Supreme Court undermined the distinct roles that state and federal provisions play within federalism by attaching the level of protection afforded by the Free Exercise Clause to the Conscience Clause and removing the horizontal divide between the federal and state governments' powers. When the Free Exercise Clause and Conscience Clause are interpreted congruently, the federal and state constitutional provisions are no longer treated as different documents

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was the framers' brilliant act of *combining* the separation of powers with America's unique federalism that has proven to be distinctive . . . .").

181. James Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1734 (2003) (citing U.S. CONST. arts. I–III and amends. X–XI). For additional discussion on the role of independent state constitutional jurisprudence, see generally James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993).

182. *See* WILLIAMS, *supra* note 10, at 15 ("[W]e have two kinds of constitutional law in the United States: federal and state.") (citations omitted).

183. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 202 (1998).

184. *Id.*

185. Gardner, *supra* note 65, at 1030.

186. *See* Humphrey v. Lane, 728 N.E.2d 1039, 1044–45 (Ohio 2000) (interpreting its state's conscience clause as requiring strict scrutiny and stating "[a]s long as state courts provide at least as much protection as the . . . federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups"); Gardner, *supra* note 65, at 1032; *see also* Thomas Morawetz, *Commentary: Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 638 (1994) ("[W]hen the question is one of conveying a right broader than that granted in the Federal Constitution, supremacy is irrelevant because federal law is assumed to be silent.").

187. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3–24 (2d ed. 1988) (discussing the doctrine of independent and adequate state grounds); *see also* Michigan v. Long, 463 U.S. 1032, 1040 (1983) (stating federal review of state law is avoided when the federal courts respect states' independence). This right is, of course, subject to the Supremacy Clause. If the state's interpretation is in conflict, it will be subject to United States Supreme Court review under the Federal Constitution. *See* U.S. CONST. art. VI.

with separate roles—the federal Constitution operating as a framework, and the Nebraska constitution operating within it and being permitted to expand its conscience protections further than required by the federal Constitution.[188]

As a result, the Conscience Clause is no longer capable of expanding rights beyond what is required under the federal Constitution. Instead, the Conscience Clause is limited to the "floor" that the federal Constitution provides. Thus, the Nebraska Supreme Court continues to disregard the division of power between the state and federal governments so long as it substitutes the U.S. Supreme Court's jurisprudence of a federal provision for independent jurisprudence under Nebraska's Conscience Clause.[189]

Further, state autonomy is harmed when the court refuses to interpret its state constitution independently from the federal Constitution. Within the horizontal divide of state and federal power, courts have the ability to develop and apply independent judicial jurisprudence apart from the federal government as long as the interpretation is consistent with the federal Constitution.[190] This ability serves a distinct purpose in the structure of the U.S. constitutional republic. Instead of being sub-governmental units, or "mere political subdivisions"[191] of the federal government, states have autonomy to interpret their state constitutions independently from the federal Constitution.[192] In other words, the Nebraska Supreme Court is not "bound by federal court interpretations of the federal Constitution in interpreting [its] own Constitution."[193]

188. *See* State v. Miller, 549 N.W.2d 235, 239 (Wis. 1996) ("[T]he language of the two [constitutions] is not the same. Some questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution.").

189. PAULSEN & PAULSEN, *supra* note 29, at 39 ("[T]he framers' plan was that the states could have whatever laws they wished for governing their own citizens on local matters, and the federal government could not interfere.").

190. *See supra* note 187 and accompanying text.

191. New York v. United States, 505 U.S. 144, 188 (1992) ("States are not mere political subdivisions of the United States.").

192. Morawetz, *supra* note 186, at 642 (discussing a historical approach to state constitutional interpretation that promotes state autonomy: "[O]ur separate history entitles us to read our constitutional provisions in a way that is independent of the federal reading of federal provisions.").

193. Humphrey v. Lane, 728 N.E.2d 1039, 1044–45 (Ohio 2000) (concluding its state conscience clause permissibly affords greater protection than the Free Exercise Clause); *see also* State v. Hershberger, 462 N.W.2d 393, 396–97 (Minn. 1990) ("[T]he Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide [this case]."); TRIBE, *supra* note 187 (stating the doctrine of independent and adequate state grounds protects states' right to independently develop state law from interference).

The court has abandoned the principle of independent constitutional interpretation by declining to interpret the Conscience Clause on an independent basis from the Free Exercise Clause. When the Nebraska Supreme Court does not "accord the . . . textual differences"[194] of the state and federal provision any constitutional significance,[195] the court is effectively developing *dependent* constitutional jurisprudence. No longer does the Nebraska constitution's Conscience Clause serve a distinct interpretive purpose in America's constitutional republic. Instead, the Conscience Clause becomes superfluous; it serves no separate function from the federal provision because its interpretation is bootstrapped to the U.S. Supreme Court's interpretation of the Free Exercise Clause.[196]

State autonomy requires a distinct divide between the federal and Nebraska Constitutions, and it necessitates independent constitutional jurisprudence. However, the Nebraska Supreme Court refused to interpret the conscience clause on an independent basis.[197] Doing so violated federalism's fundamental principles of division of power and independent interpretation, both of which are built into the framework of America's constitutional republic.[198]

2. Nebraska's Constitutional Amendment Process

In addition to undermining state autonomy, the court undermines state sovereignty when it interprets its state provision as the same as the federal provision. Nebraska's constitution, unlike the federal Constitution, is ratified and amended by the people of Nebraska.[199] Citizens of Nebraska play a critical role in amending the Nebraska constitution; votes of citizens are involved in every step of the process.[200] Indeed, the people of Nebraska have a voice in each of the three ways its constitution can be amended.[201]

194. *In re* Interest of Anaya, 276 Neb. 825, 834, 758 N.W.2d 10, 18 (2008).

195. Pope, *supra* note 181, at 985 (stating judges can look at state constitutional provisions and "build an independent state constitutional jurisprudence around them").

196. *See* SUTTON, *supra* note 86, at ix ("Why place such pressure on one Court and one Constitution to referee winner-take-all disputes when the country has fifty-one high courts and fifty-one constitutions?").

197. Van Cleave, *supra* note 183, at 201.

198. *Id.*

199. GAUL, *supra* note 24, at 2.

200. *See id.*

201. *Id.* ("The Nebraska Constitution can be amended in three ways: via legislative proposal, a convention, or directly by citizens."). Legislative proposals must be submitted to the Nebraska voters, and a majority is required to approve the amendment. Additionally, the legislature's recommendation of a constitutional convention must be approved by the voters. Finally, Nebraskans can petition for new constitutional amendments via a ballot initiative.

Nebraska is one of only eighteen states to allow its citizens to propose constitutional amendments without acquiescence from the legislature.[202] This allows Nebraskans to propose constitutional amendments by engaging in direct democracy via the ballot box.[203] Thus, Nebraska's constitution is the voice of its people. If the people do not like the language, they may reject it at its proposal or amend it.[204]

However, the Nebraska Supreme Court bypassed the crucial role of citizen involvement when it effectively allowed the Conscience Clause to be amended through federal judicial interpretation. It was not "We the People," but the U.S. Supreme Court, who amended the Conscience Clause. The Nebraska Supreme Court should not allow federal Justices to amend the state constitution without the people's consent. The people of Nebraska are well-suited to determine the extent of conscience protections under their state constitution.[205] It was with the people's voice, through popular vote at the ballot box, that ratified this language. Rather than taking this into account, the Nebraska Supreme Court's ongoing decision to piggy–back on the federal provision's interpretation was a "delegation of hard choices to others."[206] This interpretation supplanted the voice of "We the People" with five, unelected U.S. Supreme Court Justices.[207] The Nebraska Supreme Court should not delegate the duty of analyzing a constitution's independent history to the U.S. Supreme Court; rather, it should consider the voice of those who ratified the provision.

Though some argue that judges cannot be expected to develop independent judicial jurisprudence for state constitutions because state constitutions can and do change over time,[208] this concern is inapplicable to the Conscience Clause. Despite changes to Nebraska's constitution over time—and the ease of amending Nebraska's constitution—the Conscience Clause has remained unchanged since 1875.[209] The

202. NEB. CONST. art. III, § 2. Although the constitutional amendment process varies by state, the majority of state constitutions, unlike Nebraska's, do not permit citizens to amend their constitutions through a ballot initiative process. *See* Levinson, *supra* note 179.

203. *See* NEB. CONST. art. III, § 2.

204. *See supra* text accompanying note 201.

205. WITTE JR., *supra* note 9, at 76 ("It was commonly assumed at the [1787 Constitutional Convention] that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government.").

206. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 276 (1994).

207. *See* PAULSEN & PAULSEN, *supra* note 29, at 38–39 ("Neither the national government nor the state governments would be supreme. Rather, once again, the Constitution would be supreme. . . . Federalism thus furnishes the second half of James Madison's 'double security' to the liberty of 'the People.'").

208. *See* Pope, *supra* note 181.

209. *See supra* text accompanying note 118.

apprehension of this language changing in the future does not outweigh the importance of the Conscience Clause's language as a reflection of the voice of the people.

Nebraska has had the same language in its Conscience Clause since it was ratified. The Clause has retained its language through a twentieth century constitutional convention and over 230 constitutional amendments.[210] Nebraska's Conscience Clause deserves a proper interpretation. It should remain the voice of a people who have recognized the importance of the freedom to live according to the dictates of their conscience for over 140 years.

3. A Second Avenue for Recovery

As a final point, individuals seeking redress from a state law through the judicial system are better off when state courts interpret their respective state constitutions independently from the U.S. Supreme Court's interpretation of the federal Constitution.[211] This is because state constitutions provide an additional avenue for plaintiffs to challenge the validity of a state law.[212] This additional opportunity is not effective if state courts equate their state constitutional provisions to a federal constitutional provision. Accordingly, state supreme courts should pursue independent interpretations of their respective state constitutions for the benefit of their citizenry.

America's judiciary has developed into a system where federal and state sovereignties largely overlap.[213] Because of this overlap, individuals usually have two separate avenues for recovery.[214] Attorneys have begun to recognize the benefits that alleging distinct state and federal constitutional violations has on their clients.[215] For one, state constitutions are longer and therefore contain more detail than the federal Constitution.[216] A claimant's respective state constitution may

210. Levinson, *supra* note 179, at 244. Because the ability to amend Nebraska's constitution is easier than most states given the people's ability to propose amendments via ballot initiative, see *supra* text accompanying note 201, this statistic in light of the Conscience Clause's language remaining the same since 1875 is even more powerful. In other words, Nebraska's amendment process is easier than most states, yet the Conscience Clause has remained untouched.

211. *See* Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166, 170–71 (2009) (recognizing that "[w]ith the end of the Warren Court and the advent of the Burger and Rehnquist Courts, commentators (including Justice Brennan) promoted a rebirth of state constitutional law," but also noting that "state constitutional law remain[s] an underdeveloped area of the law") (citations omitted). *E.g.*, SUTTON, *supra* note 86, at 16–21.

212. *Id.* at 8.

213. *Id.* at 14.

214. *Id.*

215. *See* Sutton, *supra* note 211 at 166, 170–71.

216. *See* Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 839 (2011) ("While the federal Constitution comprises

address her grievance in more specificity than the federal Constitution. In other words, a state constitution may provide the only way for a claimant to win with an "on point" provision.[217] Second, the "hallmark of American constitutionalism"—the division of power between state and federal government—allows states to develop independent constitutional law.[218]

This is a crucial point. When state courts look to the contextual, cultural, and geographical influences on their respective state constitutions, differences will emerge from the federal Constitution's interpretation.[219] State constitutions thus provide independent avenues of recovery when they are interpreted according to these differences because they act as unique shields to individual rights.[220] Stated differently, state constitutions provide "double security" for injured claimants.[221]

The Nebraska Supreme Court's decision to lockstep the Conscience Clause with the Free Exercise Clause removed the structure of "dual constitutionalism" from religious liberty jurisprudence in Nebraska. Not only did the court's interpretation disregard the specificity that the Conscience Clause provides; the court's current application of the *Smith* standard to the Conscience Clause prevents plaintiffs in Nebraska from having a second avenue of recovery for burdens placed on their religious exercise and conscience rights. The Nebraska Supreme Court should seek to afford Nebraskans two, rather than one, opportunities to seek a remedy for conscience rights violations that state and local laws impose.

IV. CONCLUSION

Freedom of conscience is not only woven into the Nebraska constitution; it is threaded throughout the state's history since its early years as a territory. By declining to interpret the Conscience Clause according to its plain language and by assigning a federal provision's meaning to the Conscience Clause, the Nebraska Supreme Court rendered the text, history, and purpose of the clause meaningless. The court must remedy this violation of the principles of constitutional

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a mere 8,700 words, the average length of a state constitution is four times that . . . .").

217. *See* SUTTON, *supra* note 86, at 19.

218. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 342 (2011).

219. *See* SUTTON, *supra* note 86, at 17; Sutton, *supra* note 211 at 170–71.

220. *See* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 435 (1996) (citing Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 117 (1988).

221. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1493 (1987) (quoting THE FEDERALIST No. 51).

construction.[222] Simply put, denying all conscience claims under neutral and generally applicable laws runs contrary to the Conscience Clause in every aspect.

Further, bootstrapping the Conscience Clause to the U.S. Supreme Court's interpretation of the Free Exercise Clause results in a fluctuating meaning of a state provision—a provision that should be rooted in the principles of federalism and the people's voice. The Nebraska Supreme Court engages in judicial overreach when it goes beyond the unique text of the Conscience Clause—a clause that was crafted and ratified by the people of Nebraska—to assign this state provision an interpretation of a federal provision that has a separate and distinct history and meaning. This overreach has effectively ratified a new meaning to the Conscience Clause without the People's consent. It has resulted in a provision that no longer reflects the beliefs and voice of the people of Nebraska.

The Nebraska Supreme Court should not shy away from overruling its decision[223] to apply the *Smith* standard to Nebraska's Conscience Clause, just as the court has not shied away from overruling precedent contrary to basic rules of construction.[224] Simply because the court can assign a meaning to its state constitution does not mean the court *ought* to do so.[225] Overall, it is time Nebraska citizens be assured once again that they have the right to live according to the dictates of their own consciences, just as the Nebraska framers and early citizens of the State intended.

222. *Id.*
223. *In re* Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008).
224. *See supra* note 81 and accompanying text.
225. *See, e.g.*, SUTTON, *supra* note 86, at 19 ("Rational-basis review works for free exercise challenges to neutral, generally applicable laws as a matter of national constitutional law, . . . but the same may not be true for each state constitution.") (citations omitted).