FREE EXERCISE UNCERTAINTY: ORIGINAL MEANING? HISTORY AND TRADITION? PRAGMATIC NUANCE?

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Abstract

When a law not targeted at religion nonetheless has the incidental effect of substantially burdening a religious practice, does the Free Exercise Clause of the First Amendment provide a presumptive right to a religious exemption? Over the past six decades, the Supreme Court has shifted its answer to that question from "no" to "yes" to "no" to "maybe" without (1) overruling a single precedent, (2) engaging arguments about original meaning, (3) examining whether there is a deeply rooted history and tradition of recognizing constitutional exemption rights, or (4) considering analogies to its treatment of incidental burdens in other First Amendment contexts. The result is an unsettled free exercise jurisprudence that stands in considerable tension with recent developments elsewhere in constitutional law—developments that have seen the Court increasingly invoke original meaning and emphasize history and tradition—as well as with longstanding free speech doctrine.

After detailing the many complications raised by the Court's recent embrace of the "most favored nation" theory of religious exemptions—complications that make a wholesale reexamination of the exemption question seem inevitable—this article engages the broader issues of original meaning, history and tradition, and First Amendment consistency. Contrary to the conclusion reached by Justices Alito, Gorsuch, and Thomas in Fulton v. City of Philadelphia*, the original meaning of the Free Exercise Clause likely concerned only the making of laws regulating religion as such, not the application of generally applicable laws to religiously motivated conduct. And consistent with the original meaning, judicial interpretation of the Free Exercise Clause prior to 1963 reflected an overwhelming history and tradition of rejecting claims to constitutional exemption rights.*

But while neither original meaning nor a deeply rooted tradition supports free exercise exemption rights for individuals, normative arguments for such rights might lead the Court to take up Justice Barrett's separate invitation in Fulton*, joined by Justice Kavanaugh, to look for guidance in modern free speech doctrine concerning incidental burdens. This is the most promising prospect for exemption proponents, and it points toward an approach in which courts would apply modestly heightened scrutiny to denials of religious exemptions. Of course, any regime of judicially granted exemptions faces the challenge of how to keep judges out of the dangerous business of engaging in ad hoc balancing of religious interests against other interests. But the Court's recent and unanimous decision in* Groff v. DeJoy*, concerning the statutory right to reasonable accommodation of religion in the workplace, is a reminder that tests are available that would allow courts to deliver meaningful*

protection for religious claimants while avoiding judicial entanglement in religious questions.

I. INTRODUCTION

It got worse. The "doctrinal disaster area" that was the Supreme Court's free-exercise jurisprudence for 55 years[1]—from *Sherbert v. Verner*[2] to *Employment Division v. Smith*[3] to *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*[4]—grew even more convoluted during the COVID-19 pandemic. In a series of cases that reached the Court in accelerated fashion on the so-called "shadow docket,"[5] the justices considered several emergency applications for injunctive relief from religious entities and individuals seeking exemptions from government rules limiting group gatherings. After denying the first two applications while Justice Ginsburg was still serving,[6] the Court granted six similar applications with Justice Barrett participating.[7] And in the last of those decisions, *Tandon v. Newsom*,[8] the Court made jurisprudential news that far transcended the specific dispute before it.

To appreciate the import of that news, it is necessary to recall that (1) the Court's 1990 decision in *Smith* emphatically rejected the notion

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1. James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 744.

2. 374 U.S. 398 (1963). *See* Oleske, *supra* note 1, at 718 ("[T]he *Sherbert*-era exemption doctrine was grounded in a misrepresentation of past precedent, promised a high level of protection that it often failed to deliver, and gave courts an incentive to make value judgments about different religions.").

3. 494 U.S. 872 (1990). *See* Oleske, *supra* note 1, at 719 ("Justice Scalia's opinion for the *Smith* Court described the *Sherbert* era cases in a manner that flatly contradicts both the language of those cases and his own description of those cases just one year prior to *Smith*.").

4. 584 U.S. 617 (2018). *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L REV. 133, 135 (2018) (discussing how the decision in *Masterpiece* "introduced various distortions" into free exercise doctrine dealing with intentional discrimination and "provided insufficient guidance about the principles governing religious exemptions").

5. Stephen Vladeck, THE SHADOW DOCKET xii (2023) ("It was William Baude, a conservative constitutional law professor at University of Chicago (and former law clerk to Chief Justice John Roberts), who first used the term 'shadow docket' as an evocative shorthand . . . to describe everything *other* than the Court's 'merits docket.'").

6. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); South Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613 (2020).

7. *See* Tandon v. Newsom, 593 U.S. 61 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021); Gish v. Newsom, 141 S. Ct. 1290 (2021); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021); South Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021); Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020).

8. 593 U.S. 61 (2021).

that there is a constitutional right to religious exemptions from "neutral law[s] of general applicability,"[9] (2) Congress responded by passing the Religious Freedom Restoration Act (RFRA),[10] which aimed to restore the exemption rights that had existed under *Sherbert* before *Smith*,[11] and (3) the Court subsequently relied on *Smith*'s no-exemptions-required interpretation of the Free Exercise Clause to hold in *City of Boerne v. Flores*[12] that RFRA was not appropriate legislation enforcing that Clause against the states.[13] Yet, without so much as mentioning *Smith* or *City of Boerne*, the Court in *Tandon* announced a new free exercise rule that would require religious exemptions from many laws, thus sharply limiting (if not eviscerating) *Smith*.[14]

Within months of the *Tandon* decision, three justices called for overruling *Smith* in a lengthy concurring opinion penned by Justice Alito in *Fulton v. City of Philadelphia*.[15] Two other justices, in a separate concurring opinion written by Justice Barrett, indicated an openness to revisiting *Smith* in the future.[16] But while the former three expressed confidence that their position was consistent with the "original meaning"

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9. 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."); *see id*. at 885 ("To make an individual's obligation to obey . . . a law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense."); *id*. at 886 (stating that the recognition of "a private right to ignore generally applicable laws" would be "a constitutional anomaly").

10. 42 U.S.C. §§ 2000bb to 2000bb-4.

11. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) ("In [*Smith*], we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, and, in accord with earlier cases, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. Congress responded by enacting [RFRA], which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.").

12. 521 U.S. 507 (1997).

13. *See id*. at 531 (1997) (explaining that RFRA was not designed to confront unconstitutional laws because "Congress' concern was with the incidental burdens imposed [by state legislation], not the object or purpose of the legislation"); *id*. at 534–35 ("Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. . . . Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.").

14. *See* Alan E. Brownstein & Vikram David Amar, *Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context*, 54 LOY. U. CHI. L.J. 777, 794 (2022) ("Put simply, it is a repudiation of *Smith* rather than an extension of it.").

15. 593 U.S. 522, 617 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) (2021).

16. *Id*. at 543–44 (Barrett, J., concurring, joined in full by Kavanaugh, J.). Justice Breyer, who has since retired, joined Barrett's opinion in part.

of the Free Exercise Clause and grounded in history,[17] the latter two found "the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances."[18] Further confusing matters, although these same five justices previously made up the five-member majority in *Tandon*, none of them argued in *Fulton* that the rule adopted in *Tandon* could be grounded in either originalism or history and tradition, and three of them actually criticized that rule on workability grounds.[19]

Part II of this article details the many questions left unanswered in the wake of *Tandon* and *Fulton*, with the only certainty being that the justices will have to provide further guidance on the issue of free exercise exemptions.[20] Parts III, IV, and V of the article then provide an overview of three potential avenues for resolving the question of whether to retain or replace *Smith*.[21] First, the Court might endeavor to discern the original meaning of the Free Exercise Clause's text. Contrary to the conclusion reached by Justice Alito in *Fulton*, the original meaning of the clause likely contemplated laws regulating religion *as such*, not generally applicable laws that only incidentally affect religion. Second, the justices might ask whether a constitutional right to religious exemptions, even if not textually mandated, is nonetheless deeply rooted in our "history and tradition."[22] Such an inquiry, whatever its relationship to originalism,[23] would also seem to weigh against Justice Alito's position. Third, the Court might take up Justice Barrett's invitation to look for guidance in modern free speech cases concerning incidental burdens,[24] which have been decidedly devoid

17. *Id*. at 553–94, 612 (Alito, J., concurring).

18. *Id*. at 543 (Barrett, J., concurring).

19. *See infra* text accompanying notes 56–59 (discussing Justice Alito's analysis of this "special rule," as he characterized it).

20. *See infra* Part II.

21. *See infra* Part III–V.

22. *See generally* Randy Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. L. REV. 433 (2023) ("In three recent cases, the constitutional concepts of history and tradition have played important roles in the reasoning of the Supreme Court.").

23. *See id*. at 455 ("Justice Alito's opinion for the Court in *Dobbs* is a decided mix of originalist and nonoriginalist use of history and tradition."); *id*. at 462 (noting that "the history of regulating abortion" emphasized in *Dobbs* "is relevant to the nonoriginalist conservative doctrine limiting the scope of substantive due process"); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 25 (2024) ("What ought to have received greater discussion, from the Court and elsewhere, are the distinctions between traditionalism and originalism.").

24. *Id*. at 1883 (Barrett, J., concurring) ("[T]his Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.").

of original-meaning analysis.[25] This is the most promising prospect for exemption proponents, though it involves navigating a complicated landscape and drawing imperfect analogies. Ultimately, this final inquiry points toward an approach in which courts apply modestly heightened scrutiny to denials of religious exemptions. And while any regime of judicially granted exemptions faces the challenge of how to keep judges out of the "unacceptable business of evaluating the relative merits of differing religious claims,"[26] the Court's recent and unanimous decision in *Groff v. DeJoy*,[27] concerning the statutory right to reasonable accommodation of religion in the workplace, is a reminder that tests are available that would allow courts to deliver meaningful protection for religious claimants while avoiding judicial entanglement in religious questions.

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25. *See* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994) (reaffirming "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech" that was first announced in United States v. O'Brien, 391 U.S. 367 (1968)), a case that included no original-meaning analysis); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment) (arguing against heightened scrutiny of incidental burdens on speech, but relying on pragmatic arguments and an analogy to *Smith*, not originalism). *See also* 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023) (offering no analysis of the original *meaning* of the Free Speech Clause's *text*, and instead discussing only broad *principles* embraced by the framers) (citing Boy Scouts of America v. Dale, 530 U. S. 640, 660–61 (2000)), which did likewise); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 902 (2018) (expanding right to be free of compelled subsidies that was first recognized in 1977, and rejecting a party's originalist argument against the expansion, but offering no analysis of the original meaning of the constitutional text that would support either the initially recognized right or its expansion); Amy Barrett, *Introduction, The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1, 2 (2010) (agreeing with Professor Lawrence Solum that "most of the interesting work in free speech doctrine must be done by construction rather than interpretation") (citations omitted); Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 278 (2018) (asserting that "modern compelled-subsidy doctrine sits in an uneasy tension with original meaning"); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263–64 (2017) ("If an originalist wanted First Amendment doctrine to track Founding Era judicial reasoning, the Supreme Court's decisions in *Texas v. Johnson*, *Boy Scouts of America v. Dale*, *Citizens United v. FEC*, and *Snyder v. Phelps*, among many, many others, would likely have to go."); Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. REV. 1302, 1352 (2022) ("[T]o my knowledge, no prominent scholar has defended recent First Amendment deregulatory decisions—including for example, *Janus v. AF[S]CME*—on originalist grounds.").

26. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 887, n.4 (1990).

27. 600 U.S. 447 (2023).

II. *TANDON*, *FULTON*, AND THE CURRENT UNCERTAINTY IN THE COURT'S FREE EXERCISE EXEMPTION JURISPRUDENCE

In the spring of 2021, the Court issued two decisions—*Tandon v. Newsom*[28] and *Fulton v. City of Philadelphia*[29]—containing four key opinions—the majority and dissenting opinions in *Tandon* and the separate concurrences of Justice Alito and Justice Barrett in *Fulton*—that raise profound doubts about the conventional understanding of, and continued majority support for, the Court's landmark 1990 decision in *Employment Division v. Smith*.[30]

Here's how Justice Alito captured the conventional understanding of *Smith* in his *Fulton* concurrence: "Other than cases involving rules that target religious conduct, the *Sherbert* test [of strict scrutiny] was held [in *Smith*] to apply to only two narrow categories of cases: (1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) so-called 'hybrid rights' cases."[31] In other words, *Smith* held that the Free Exercise Clause does *not* provide a general right to religious exemptions,[32] but it did leave open two "narrow" paths to securing such exemptions.[33]

As I have detailed elsewhere, advocates for religious exemption rights made a great deal of effort in the years after *Smith* to expand the first path beyond situations involving *individualized* exemption schemes "into a broader 'selective-exemption rule' that would require the government to make religious exemptions if a law contains any *categorical* secular exemptions."[34] As a doctrinal matter, this move would involve "convert[ing] *Smith*'s requirement of general applicability into a requirement of uniform or near-uniform applicability," thus resulting in a right to "religious exemptions from even modestly underinclusive laws that bear no indicia of discriminatory intent."[35] According to proponents of this approach, even if a governmental regulation widely applies to both secular and religious conduct, it should not be considered generally

28. 593 U.S. 61 (2021).
29. 593 U.S. 522 (2021).
30. 494 U.S. 872 (1990).
31. 593 U.S. at 559 (Alito, J., concurring).
32. *Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (internal quotation marks omitted) (citations omitted)).
33. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1210 n.153 (1996) ("In an effort to reconcile its holding with prior precedent, the *Smith* Court recognized two exceptions to its blanket principle.").
34. Oleske, *supra* note 1, at 726.
35. *Id*. at 729.

applicable if it includes so much as a "single secular exemption" that "undermines the asserted reason for the law."[36] Instead, the failure to regulate any such "favored" conduct would trigger a presumptive right to a religious exemption that the government could only deny if it satisfies strict scrutiny.[37]

This "most favored nation" theory of religious exemptions,[38] which was engaged in depth by a relatively small number of lower courts and scholars prior to 2020,[39] became a focal point in the flood of litigation challenging COVID restrictions.[40] The issue soon reached the Supreme Court on its emergency docket, and the *Tandon* majority explicitly adopted the most-favored-nation rule, instructing that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[41] Applying the rule, the Court held that even though California's COVID regulations limited *both* secular *and* religious at-home gatherings to members of three households or less, religious at-home gatherings must be exempted from the limitation because various commercial businesses were not subject to the same limitation as private homes.[42]

Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissented, with Kagan writing an opinion for the latter three justices that treated comparability as critical but framed the inquiry differently than the majority. Kagan wrote that a State must "treat religious conduct as well as

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36. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 25 (2016); *id.* at 22 ("The question is whether a single secular analog is not regulated.").

37. *Id.* at 21 (maintaining that "a single secular exception also triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct"); *id.* at 22–23 ("The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct.").

38. The "most favored nation" moniker was first used by the academic originator of the idea that the Court ultimately adopted in *Tandon*. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–51.

39. *See* Oleske, *supra* note 1, at 728–29 nn.240–41 (collecting cases and commentary).

40. *See* Stephen I. Vladeck, *The Most-Favored Right: Covid, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 710 (2022) ("From the moment local and state officials began imposing restrictions tied to preventing the spread of COVID, those restrictions were challenged in court . . . [F]ederal constitutional challenges were brought by . . . religious groups challenging the impact of limits on in-person gatherings. Two groups, in particular—the Alliance Defending Freedom (ADF) and the Becket Fund for Religious Liberty—spearheaded challenges in states without their own RFRAs.").

41. 593 U.S. at 62.

42. *Id.* at 63–64.

the State treats comparable secular conduct,"[43] but she did not clarify whether she meant as well as the State *generally* treats comparable secular conduct or as well as the State treats *any* comparable secular conduct. Only the latter, which was the majority's formulation, would be an endorsement of the most-favored-nation theory.[44] In any event, Kagan didn't find the businesses invoked by the majority comparable to private homes, emphasizing the lower courts' findings that interactions at businesses generally "pose lower risks" than gatherings in homes due to the ability to enforce mask wearing, the shorter nature of interactions, and better ventilation.[45]

If the pandemic-era free exercise story had ended with *Tandon*, making sense of where the doctrine currently stands would be difficult enough. Does an emergency docket decision have full precedential effect?[46] Does the answer depend on the thoroughness of its analysis? If so, does a three-page opinion that makes no attempt to explain how its approach squares with key precedents like *Smith* and *City of Boerne* meet the mark?[47] If it does, and if the most-favored-nation approach to religious exemptions is here to stay, will the Court be so generous in finding the "comparability" trigger satisfied in future cases?[48] In cases where comparability is found, will the Court consistently apply the "not watered down" version of strict scrutiny the *Tandon* Court insisted upon?[49] And

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43. *Id*. at 65 (Kagan, J., dissenting).

44. *See* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2256 & n.126 (2023) (agreeing with this assessment).

45. *Tandon*, 593 U.S. at 65–66.

46. *See* VLADECK, *supra* note 5, at 241–42 (noting that Justice Alito "insisted, twice [in a 2021 speech], that these rulings [a]re not precedential," but arguing that "it's impossible to square" Alito's assertions with how the Court treated some of its decisions in the COVID "religious liberty cases").

47. *Cf.* Oleske, *supra* note 1, at 729–39 (discussing how the most-favored nation approach is inconsistent with the Court's central teachings in *Smith* and *City of Boerne* and explaining how its adoption "would largely eviscerate *Smith*'s no-exemptions-required rule").

48. *Cf.* Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2321 (2023) ("Under *Tandon*, . . . secular exceptions to abortion bans ought to trigger the requirement that comparable religious claims also receive accommodations."); Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 219 (2023) (arguing that "the any-secular-exemption approach of *Tandon* leads rather straightforwardly to religious exemption [from abortion bans] under the Constitution, because bans permit abortions for secular reasons like life, rape, incest, or IVF—but not religion").

49. 593 U.S. at 65. *See* Schragger & Schwartzman, *supra* note 48, at 2327–28 (noting that while Justices Alito, Gorsuch, and Thomas have embraced in vaccine-mandate cases

when strict scrutiny is not met, where will the Court draw the line between non-generally applicable policies that are void *in toto*, such as the ordinances considered in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[50] and non-generally applicable policies that can stand so long as religious exemptions are carved out, as in *Tandon*?

That might seem like enough unanswered questions for the Court to prompt in a single year on any given topic, but the 2021 free exercise story did not end with *Tandon*. Ten weeks later, the Court issued its decision in *Fulton*,[51] a merits case that had arisen before COVID. Although the *Tandon* Court completely ignored *Smith*, doing so in *Fulton* would have been more difficult given that one of the questions presented in the case was whether the Court should revisit *Smith*.[52] The majority in *Fulton* acknowledged Smith but neither decided whether to overrule it nor explained how it could be squared with the most-favored-nation approach to religious exemptions in *Tandon*. Instead, the Court decided *Fulton* on narrow grounds by invoking the precursor to the most-favored-nation approach mentioned above: the idea that if a rule "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for *individualized* exemptions,'" the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[53] As for the broader teaching of *Tandon*, that

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an understanding of how *Tandon*'s version of strict scrutiny should apply that would seem to require exemptions in abortion-ban cases, Justices Barrett and Kavanaugh "have so far not applied *Tandon* to cases involving vaccine exemptions," which "leaves them room to maneuver in forging a conservative majority to reject free exercise challenges to abortion bans"); *see also* Caroline Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475, 491–95 (concluding that abortions bans with secular exemptions cannot satisfy the "strictest of strict scrutiny" called for by *Tandon* in most-favored-nation cases).

50. 508 U.S. 520, 524 (1993) ("We invalidate the challenge enactments . . . ."); *id*. at 547 ("The laws here in question . . . are void.").

51. 593 U.S. 522 (2021).

52. *Id*. at 551 (Alito., J., concurring) ("One of the questions that we accepted for review is '[w]hether *Employment Division v. Smith* should be revisited.'").

53. *Id*. at 533–34 (majority opinion) (alteration in original) (emphasis added) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J., joined by Powell and Rehnquist, J.J.))). *See Roy*, 476 U.S. at 708 ("The 'good cause' standard [in *Sherbert*] created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); *see also* Oleske, *supra* note 1, at 727 ("[The individualized-exemption rule] mirrors a rule familiar from the free speech context, where content-neutral permit requirements are generally allowed, but will be invalidated if they 'delegate overly broad licensing discretion to a government official.' The reason for heightened skepticism of discretionary licensing is that it 'has the potential

a law's inclusion of any *categorical* exemption deemed comparable to a requested religious exemption triggers strict scrutiny, the *Fulton* Court provided no further guidance.[54]

In a lengthy opinion concurring in the judgment, but fiercely disagreeing with the majority's decision not to overrule *Smith*, Justice Alito offered an unexpected critique of the most-favored-nation rule. Although Justice Alito was probably the jurist most closely identified with the rule prior to *Tandon* due to two opinions he wrote as a Third Circuit judge,[55] his opinion in *Fulton* highlights the challenges of administering the rule.[56] His discussion of the issue in *Fulton* makes no mention of *Tandon* and instead begins by emphasizing how the lower courts have struggled to understand when the existence of secular exemptions will and will not trigger a right to religious exemptions:

> Some decisions apply this special rule if multiple secular exemptions are granted. Others conclude that even one secular exemption is enough. And still others have applied the rule where

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for becoming a means of suppressing a particular point of view.'" (quoting Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130–31 (1992))).

For an argument that *Fulton*'s endorsement and application of the individualized-exemption rule is far more consequential than generally perceived, see Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106 (2022).

54. On the broad reach of the most-favored-nation approach, see *Koppelman*, *supra* note 44, at 2242 ("It is hard to find any law that cannot be characterized as excusing comparable activity, especially if, as the Court says, the comparison is based on whether the state ever tolerates any setback to its pertinent interests. Few government purposes, not even the most critical ones, are pursued with monomaniacal intensity."); The Federalist Society, *Religious Liberty after* Fulton v. City of Philadelphia, https://www.youtube.com/watch?v=S-hN5c_ouzs (comments of Lori Windham at 12:20) ("What I want to leave you with is the idea that *Smith* no longer controls most cases.").

55. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 2110–11 (3d Cir. 2004) (holding that existing exemption from wildlife permit fee for zoos and circuses triggered presumptive right to exemption for individual who kept a wild bear on his property for religious reasons); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (holding that existing medical exemption from police department no-beard rule triggered presumptive right to religious exemption). *See also* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2439 (2016) (mem.) (Alito, J., dissenting from the denial of certiorari) (indicating that existing exemption from rule requiring pharmacies to dispense all FDA approved drugs, which "allows a pharmacy to refuse to fill a prescription because it does not accept the patient's insurance or because it does not accept Medicaid or Medicare," might trigger right to religious exemption). For an extended discussion of the Third Circuit's decisions in *Blackhawk* and *Fraternal Order*, and the Ninth Circuit's decision in *Stormans*. *See* James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 306–11, 325–33 (2013).

56. *See Fulton*, 593 U.S. at 609–11 (Alito, J., concurring).

> the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct.[57]

Justice Alito then proceeds to detail "hotly contested" splits in the lower courts and between the justices in pre-*Tandon* COVID cases on the issue of when existing exemptions should be deemed appropriate "comparators" to requested religious exemptions.[58] Against this background, Alito concludes that the most-favored-nation rule is not "easy to apply,"[59] something the rule's leading academic champions have also acknowledged.[60] Rather than continuing to wrestle with the difficulties of applying a rule that effectively serves as a malleable exception to *Smith*, Alito suggests a return to the *Sherbert* doctrine "that *Smith* replaced": if a generally applicable law "imposes a substantial burden on religious exercise," its application "can be sustained only if it is narrowly tailored to serve a compelling government interest."[61] In support of the *Sherbert* doctrine, Alito makes an extended argument about the "original meaning" and "original understanding" of the Free Exercise Clause,[62] something no jurist or commentator has attempted in support of the most-favored-nation approach.[63]

Justice Gorsuch penned a separate opinion concurring in the *Fulton* judgment, and he briefly alludes to the most-favored-nation approach by citing *Tandon* and two of the Court's other shadow-docket decisions

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57. *Id*. at 609–10 (Alito, J., concurring).

58. *Id*. at 610–11.

59. *Id*. at 611.

60. In a brief they co-wrote in *Fulton*, Professors Thomas Berg and Douglas Laycock observed that the questions involved in operationalizing the rule "vastly complicate[]" free exercise litigation: "Which secular exceptions are sufficiently analogous to count? What standard of review applies to that question? What if the secular exceptions arise from uncodified enforcement policy? And on and on." Brief of the Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 34, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123). Notably, although the Court found retail stores comparable to religious gatherings in the COVID cases it decided between October 2020 and April 2021, Laycock took the position that the "secular activities comparable to worship services are not retail stores, where few customers linger." Douglas Laycock, *Do Cuomo's New Covid Rules Discriminate Against Religion?*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html [https://perma.cc/J4HP-Z3DG].

61. *Fulton*, 593 U.S. at 614 (Alito, J., concurring).

62. *Id*. at 553–94 (Alito, J., concurring).

63. When Justice Kavanaugh became the first justice to explicitly discuss the most-favored-nation approach in the summer of 2020, he portrayed it as a product of modern precedent, with citations to a 1990 article by Professor Douglas Laycock interpreting *Smith* and a 1999 opinion by then-Judge Alito interpreting *Lukumi*. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612–13 (2020) (mem.) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

addressing COVID-19 regulations.[64] In Gorsuch's account, the Court took up those cases "to clarify how *Smith* works."[65] But he does not explain how that characterization can be squared with the fact that the Court in those cases does not so much as cite *Smith*, never mind offer an explanation of how the most-favored-nation approach could be squared with its central teaching.[66] Nor did Gorsuch confront the important point, made by Professor Eugene Volokh in his *Fulton* amicus brief, that the most-favored-nation approach reintroduces the same problems of judicial policymaking that led the *Smith* Court to reject exemption rights.[67] In any event, Justice Gorsuch ultimately reiterates Justice Alito's call for *Smith* to be immediately overruled.[68]

Justices Barrett and Kavanaugh, who were part of the five-justice majority in *Tandon* with Justices Alito, Gorsuch, and Thomas, broke from the latter three in *Fulton*. Although they indicated a willingness to revisit *Smith* in the future, they expressed "skeptic[ism] about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—

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64. *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring).

65. *Id.*

66. *See Smith*, 494 U.S. at 878 (distinguishing between laws that the "object" of burdening religion and those that have "the incidental effect" of doing so); *see also* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (finding RFRA inconsistent with *Smith* because "Congress' concern was with the incidental burdens imposed [by state legislation], not the object or purpose of the legislation"); Nathan Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2125 (2023) ("The current '*Smith* regime' is far more protective of religious exercise than a plain reading of *Smith* would have been—and . . . than the pre-*Smith* 'strict scrutiny' regime actually was."); Mark Strasser, *COVID-19, Free Exercise, and Most Favored Nation Status*, 27 LEWIS & CLARK L. REV. 1, 23 (2023) (maintaining that "the *Smith* decision is not plausibly interpreted to recommend the [most-favored-nation] approach").

67. Brief for Professor Eugene Volokh as Amicus Curiae Supporting Neither Party, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123) ("[J]ust like rejecting *Smith* would revive the main problems of the early 1900s substantive due process cases, so would an approach that requires comparing proposed religious exemptions with existing secular exceptions. . . . The problem . . . is that whether two kinds of conduct should be treated alike calls for the same sort of normative and practical judgment about government interests (and rival private interests) that is called for by the decision about whether certain conduct should be restricted. . . . [W]hen the law restricts a wide range of behavior, entirely apart from its religiosity, there is no principled way to administer a constitutional exemption system, even when the law also exempts some behavior (again, for reasons entirely apart from religion)."). *See also* Brownstein & Amar, *supra* note 14, at 782 (2022) (arguing that a most-favored-nation "approach creates—indeed exacerbates—the very problems that Scalia and the four other justices joining his opinion in *Smith* were trying to avoid").

68. *Fulton*, 593 U.S. at 626–27 (Gorsuch, J., concurring).

like speech and assembly—has been much more nuanced."[69] Then, in the latest chapter of the story, Barrett and Kavanaugh again broke with Alito, Gorsuch, and Thomas, declining to join opinions that would have applied *Tandon*'s most-favored-nation approach to require religious exemptions from vaccine mandates that include medical exemptions.[70]

To summarize, three members of the current Court claim *Smith* is inconsistent with the original meaning of the Free Exercise Clause, which they believe guarantees a strong presumptive right to religious exemptions. Two more Justices, who are often identified as originalists, are willing to revisit *Smith* but want to consider a more nuanced replacement if it is overruled. Together, those five Justices previously agreed to sidestep *Smith* in *Tandon* by applying the most-favored-nation framework, but the contours of that framework are unsettled, its strongest supporters have cast doubt on its workability, it has never been grounded in originalism, it empowers judges to second-guess legislative policy judgments, and two of the Justices who joined *Tandon* declined to apply it at the next available opportunity.[71] Meanwhile, the four remaining Justices have yet to indicate whether they are open to either reconsidering *Smith*[72] or bypassing it with some version of the most-favored-nation approach.[73]

In 2019, I urged the Court to reject the most-favored-nation theory of religious exemptions, writing: "If the Court believes the [Free Exercise] Clause is best interpreted as providing some measure of protection against

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69. *Id*. at 543 (Barrett, J., concurring).

70. *See* Dr. A. v. Hochul, 142 S. Ct. 2569, 2569 (2022) (Thomas, J., dissenting from the denial of certiorari) (mem.); Does v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (mem.); Dr. A. v. Hochul, 142 S. Ct. 552, 552 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (mem.).

71. There are at least three possible reasons Justices Barrett and Kavanaugh might have declined to join Justices Alito, Gorsuch, and Thomas in voting to take up the vaccine cases involving claims made under the most-favored-nation theory on the emergency docket: (1) they are having second thoughts about the merits of the theory, (2) they are inclined to think the claims are likely non-meritorious even under that theory, and (3) they are having second thoughts about the extent to which the Court has been using the emergency docket in recent years. For a brief discussion of the second and third possibilities, see Andrew Koppelman, *The Law-Breaking Supreme Court: On Stephen Vladeck's "The Shadow Docket"*, L.A. REV. OF BOOKS (Sept. 27, 2023), https://lareviewofbooks.org/article/the-law-breaking-supreme-court-on-stephen-vladecks-the-shadow-docket/[https://perma.cc/V5DN-9QEC].

72. *Fulton*, 593 U.S. at 533 (concluding that "we need not revisit that decision here"). Justice Jackson was not yet on the Court at the time of *Tandon* and *Fulton*, and she has not yet written or joined an opinion discussing either case.

73. As noted above, Justice Kagan's opinion in *Tandon* was ambiguous on this point. *See supra* text accompanying note 44.

burdens on religion flowing from indifference and unintentional neglect, it should develop a doctrine for addressing those burdens in all cases, not just cases that fit some Rube Goldberg exception to *Smith*."[74] Nothing in the past several years has altered my view that, in the words of Professor Alan Brownstein, there are "too many conceptual and practical problems with the analysis for it to be accepted" and that "the very foundation for the most favored nation framework is intellectually incoherent."[75] But the fact that a proposed end run of *Smith* is flawed does not answer the more foundational question of whether *Smith* should be revisited.

III. THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE: GOVERNMENT CANNOT REGULATE RELIGION AS SUCH

> We'll start with the First Amendment; we'll start with its first word: *Congress*. The addressee of the First Amendment is Congress, it's about Congress *making* a law, and I've already told you enough to explain that *Smith* from a textualist and originalist point of view—before we get to the Fourteenth Amendment, which may change things here, as it changes things in so many other areas—that *Smith* is rightly decided. You see, it's about the making of a law and telling Congress that it can't make law of a certain sort. . .
>
> [W]here is that phrase coming from: Congress shall make no law? Well, it's a riff on the Necessary and Proper Clause: Congress

74. Oleske, *supra* note 1, at 739.

75. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 193–203 (2002). *See also* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 664 (2003) ("[I]t is really an unprincipled and bizarre manner of distributing constitutional exemptions."). For additional critiques of the rule, *see* Brownstein & Amar, *supra* note 14; Koppelman, *supra* note 44; Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1539–42 (1999); Brief of Church-State Scholars as Amici Curiae Supporting Respondents at 7–12, Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (No. 20A138).

For the leading academic argument in favor of the most-favored-nation approach, *see* Laycock & Collis, *supra* note 36. For a more recent defense, *see* Chapman, *supra* note 66. For more qualified endorsements, which offer varying levels of praise for the values the approach might serve in theory, but express skepticism about judicial administration, see Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1 (2022); Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843 (2022); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1563 (2023); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397 (2021).

> shall have power to . . . make all laws necessary and proper for certain purposes. And once again, you see that [the Free Exercise Clause has] got to be about laws regulating religion *as such*, either formally or with the intent or the purpose of harming or benefitting . . . this religion or that religion. And that's not a *proper purpose* for Congress. . . . [T]he original First Amendment is about laws targeting religion as such.
>
> – Professor Akhil Amar, 2021[76]

Professor Amar's conclusion about the original meaning of the Free Exercise Clause—that its "shall make no law" language precludes Congress from making laws regulating religion as such, but does not require religious exemptions from laws Congress is empowered to make—is the leading view among scholars who have engaged in an originalist analysis of the provision. For example, Professor Gerard Bradley has written that the language "means that a class of legislation is forbidden," whereas a purported right to religious exemption would "not forbid a class of legislation."[77] Focusing on the same language, Professor Philip Hamburger has concluded that the "First Amendment is a singularly improbable foundation for claims of exemption."[78] As Hamburger explains: "Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise."[79] Professor Ellis West, in his book-length treatment of the original meaning of the Free Exercise Clause, likewise finds that its "make no law" construction means that it "prevents the passage of certain kinds of laws," but does not provide a right to exemptions from laws Congress "is authorized to pass."[80] And in his own

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76. *See* The Federalist Society, *supra* note 54, at 14:47; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 38, 42–43 (1998) (presenting the same argument).

77. Gerard V. Bradley, *Beguilded: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 306 (1991).

78. Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 892 (2004).

79. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 937–38 (1992).

80. ELLIS M. WEST, THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING 280 (2019). *See also* John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169, 170–71 (1992) ("If the Free Exercise Clause means what it says, it prohibits the enactment of certain kinds of laws. . . . The Clause forbids only laws about religion, because if it forbade all laws that might affect religion it would forbid almost everything."); *see generally* Chapman, *supra* note 66, at

book on the topic, Professor Vincent Phillip Muñoz maintains that the "absolute ban" embodied in the "make no law" language fits the founders' understanding that "[t]he inalienable natural right of religious liberty is a jurisdictional concept," with "authority over religious exercises as such" denied to government.[81] Even prominent originalist scholars who have written in support of exemption rights have acknowledged that the "make no law" language must be confronted.[82] And in its *Fulton* brief urging the Court to reaffirm *Smith*, the city of Philadelphia specifically relied on that language and Hamburger's analysis of it.[83]

Given that Justice Alito repeatedly emphasizes in his *Fulton* concurrence the importance of discerning the "original meaning" and "original understanding" of the Free Exercise Clause[84] and insists that the "project must begin with the constitutional text,"[85] one might expect him

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2130 n.93 ("Under the plain meaning of the text, the right the Clause protects is a right to not have the government enact certain laws.").

81. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING, 229–35 (2022). *See generally* Steven J. Heyman, *Transforming Natural Religion: An Essay on Religious Liberty and the Constitution*, 48 B.Y.U. L. REV. 1447, 1500 (2023) (contending that "eighteenth-century theory of natural rights and natural religion . . . sought to protect this liberty not by carving out exemptions from general laws but rather by separating the sphere of religion from that of civil society"); James M. Oleske, Jr., *The 'Mere Civility' of Equality Law and Compelled Speech Quandaries*, 9 OXFORD J. L. RELIG. 288, 295 (2020) ("Consistent with [Roger] Williams's distinction between the spiritual realm and the civil realm, he disclaimed any power of the state to regulate 'Opinions offensive' due to their 'Impiety,' but he made crystal clear that 'Opinions as well as practices' of 'Incivility' were 'the proper Object of the Civill Sword.' That was the case even if men's 'conscience incite them to civil offences,' in which case Williams explained that 'the conscience of the civil Magistrate must incite him to civil punishment.'"); Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 230 (1999) ("Williams said that religious objectors should not be excused from general laws adopted within the civil jurisdiction of government, and he repeatedly acted as if he meant just what he said.").

82. *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 120 (2020). The argument Barclay makes in *Historical Origins*, which concerns the potential relationship between the equitable "mischief rule" and free exercise exemption rights, is tentative. *Id*. at 122 ("Further research is warranted to assess whether constitutional Framers discussed the Free Exercise Clause in this equitable context."). For a critique of the analogy, see Andrew Koppelman, *Justice Alito, Originalism, and the Aztecs*, 54 LOY. U. CHI. L.J. 455, 466 n.69 (2022) ("[T]he originalist credentials of judicial exemptions cannot be rehabilitated by arguing . . . that early courts sometimes construed laws to exempt religious actions that were not part of the mischief that a statute aimed to prevent. The mischief rule does not excuse conduct that *is* part of the problem that the statute aims to remedy . . . ." (citations omitted)).

83. *See* Brief for City Respondents at *49, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123).

84. Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 553, 560, 571–72, 594, 612 (Alito, J., concurring) (2021).

85. *Id*. at 563.

to discuss thoroughly the import of the "shall make no law" language. Surprisingly, he does the opposite. Here is the entirety of Alito's analysis of those key words:

> We should begin by considering the "normal and ordinary" meaning of the text of the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]." Most of these terms and phrases—"Congress," "shall make," "no law," and "religion"—*do not require discussion for present purposes*, and we can therefore focus on what remains: the term 'prohibiting' and the phrase 'the free exercise of religion.'"[86]

What explains Alito's decision to dismiss summarily the "shall make no law" language in a single clause of a single sentence, notwithstanding the fact that elsewhere in his opinion, he cites the relevant scholarship of Bradley and Hamburger?[87] Perhaps it is because he puts overwhelming reliance on three articles written by Professor Michael McConnell,[88] who also neglects to engage the original meaning of that language. But whatever the reason for the omission, Alito's failure to include any discussion whatsoever of the "shall make no law" language significantly undermines his adamant assertion that *Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause."[89]

Justice Alito does explore at length a number of other issues that have arisen in originalist discourse about the Free Exercise Clause, including the proper interpretation of and import of words appearing in founding-era state constitutional provisions, but not in the First Amendment.[90] This is a subject that Justices Scalia and O'Connor debate in their separate opinions

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86. *Id*. at 564–66 (emphasis added).

87. *See id*. at 571 n.34 (citing Bradley, *supra* note 77; Hamburger, *supra* notes 78, 79).

88. *See id*. at 554, 569, 571 n.34, 598, 599, 612 n.81 (citing Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990)); *id*. at 571 n.34, 572–73, 582, 583, 588, 589, 612 n.81 (citing Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, Origins]); *id*. at 571–72 n.34, 581, 581 n.55, 585, 612 n.81 (citing Michael McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998)).

89. *Fulton*, 593 U.S. at 553. *See* Chapman, *supra* note 66, at 2130 (concluding that Alito's "translation goes well beyond the Clause's 'normal and ordinary meaning.'"). For an argument that Alito is also mistaken about the original meaning of the phrase "free exercise of religion," *see* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 235–44 (2021).

90. *Id*. at 1899–907.

in *City of Boerne*,[91] and it is a subject upon which Professors Hamburger, Muñoz, and West have all come to different conclusions than Professor McConnell.[92] Alito also considers the legislative history surrounding Congress's consideration of the Bill of Rights,[93] as well as the handful of state cases (there were no relevant federal cases) that addressed exemption claims between 1813 and 1856.[94]

In framing this broader discussion, Justice Alito repeatedly emphasizes that we have the benefit today of considerably more scholarship on the original meaning of the Free Exercise Clause than existed at the time the Court decided *Smith*.[95] And one is left with the distinct impression in reading Alito's opinion that the relevant scholarship must have moved decisively over the years against *Smith*'s no-exemptions-required interpretation and in favor of *Sherbert*'s pro-exemptions interpretation.[96] But a closer look reveals that is not the case. Of the twelve commentators Alito cites, four concluded that the original Free Exercise Clause did not protect a right to exemption,[97] one concluded

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91. 521 U.S. 507, 537 (1997) (Scalia, J., concurring); *id*. at 544 (O'Connor, J., dissenting).

92. *See* Hamburger, *supra* note 79, at 918–26; Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083, 1097–100 (2008); WEST, *supra* note 80, at 218–32.

93. *Fulton*, 593 U.S. at 592–95 (Alito, J., concurring).

94. *Id*. at 587–92. *See* Barclay, *supra* note 82, at 63 ("Through the early republic until 1813, there are no published cases in which the judiciary addressed a religious exemption question."); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) (citations omitted) ("[I]n early litigation under state constitutional equivalents of the Free Exercise Clause, two courts interpreted their provisions as protecting religious claimants from the operation of generally applicable law (in cases involving priest-penitent confidentiality), while two other courts rejected such an interpretation."). In addition to the cases referenced by McConnell, Alito relies on *Farnandis v. Henderson*, 1 CAROLINA L.J. 202 (1827), but that case did not involve an exemption from a generally applicable law. Rather, it involved religious targeting by a "rule that disqualified Universalists as witnesses because of their disbelief in divine retribution after death." Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037, 1054 (2005).

95. *Fulton*, 593 U.S. at 553–54, 571–74, 612 (Alito, J., concurring).

96. *See id*. at 553 (arguing that *Smith* "has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause").

97. *See* Bradley, *supra* note 77; Hamburger, *supra* notes 78–79; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1108 (1994) ("At most, the Free Exercise Clause [as originally adopted] prevented the federal government from passing laws targeting religion *qua* religion."); Muñoz, *supra* note 92, at 1086 (concluding that the evidence "strongly suggests that the members of the First Congress did not understand the Free Exercise Clause to grant religious individuals exemptions from generally applicable laws"). *See also* WEST, *supra* note 80, at 224 (concluding that "early Americans did not understand religious freedom to entail a right to religion-based exemptions from valid, civil laws.").

that any theoretical right to exemptions was exceedingly weak in practice,[98] four found the evidence unclear or did not offer a firm conclusion,[99] one concluded that *Sherbert* was wrong to recognize exemption rights in the public benefits context because such rights are only implicated by prohibitory laws[100] (this was also the Reagan Administration's position[101] and Chief Justice Burger's position in *Bowen v. Roy*[102]), and only two reached the conclusion Alito does in his *Fulton*

98. *See* Note, Wesley J. Campbell, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 987 (2011) ("The combination of deference to legislative judgments and skepticism of courtroom religious declarations made judicial enforcement of free exercise exemptions highly unlikely, notwithstanding the possibility of such exemptions in theory.") [hereinafter Campbell, A New Approach]; *see also* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 589 n.109 (2017) ("In my view, Founding Era evidence militates against robust judicial enforcement of religious exemptions but, at the same time, reinforces that incidental restrictions of religious practice or religious conscience implicated the natural right of religious freedom, just as every law restricting human actions implicated the natural right of liberty.").

99. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 125 (2008) (noting that "uncertainty remains on th[e] question"); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 343 (1996) (referencing but not engaging the "controversial claim that the original intention supports free exercise exemptions for religious objectors"); Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 386 (2006) ("If anything, nineteenth-century texts suggest nineteenth-century Americans inherited from the Founders either confusion or disagreement about the meaning of constitutional guarantees of free exercise and whether they implied an individual right to free exercise exemptions."); Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 65 (2004) ("In this Article, I do not offer any historical conclusion regarding original constitutional intent . . ."). *See generally* Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) ("I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances.").

100. *See* Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592 (1991). For a more recent analysis of this issue, *see* Will Foster, *A Puzzle About the Word "Prohibiting" in the Free Exercise Clause*, THE ORIGINALISM BLOG (June 18, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/06/a-puzzle-about-the-word-prohibiting-in-the-free-exercise-clausewill-foster.html [https://perma.cc/M82Y-THMS].

101. *See* Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General: Religious Liberty Under the Free Exercise Clause 73–74, 78–80, 108–15 (1986), https://www.ncjrs.gov/pdffiles1/Digitization/115053NCJRS.pdf [https://perma.cc/TXZ4-HQQE].

102. *See* Bowen v. Roy, 476 U.S. 693, 706–08 (1986) (plurality).

concurrence.[103] One of those two is McConnell, and as Justice Scalia pointed out in *City of Boerne*,[104] McConnell's conclusion is less than firm: "constitutionally compelled exemptions *were within the contemplation* of the framers and ratifiers as a *possible interpretation* of the free exercise clause."[105]

Not only does the weight of scholarship cited by Justice Alito fail to provide compelling support for his interpretation, many other scholars he does not cite—including the aforementioned Professors Amar and West—have reached conclusions that further tip the scales against his position. Notably, commentators across the ideological spectrum have found the originalist argument for exemption rights unpersuasive. On the conservative end, Professor Robert George has described *Smith* as "impeccably faithful to the original meaning of the Free Exercise Clause," and opined that "Justice Scalia and Professor Bradley win their debate with Justice O'Connor and Professor McConnell over" the issue.[106] The late Professor Lino Graglia likewise endorsed the Bradley position over what he described as the "fiction and pretense" of the exemptions-required interpretation.[107] And from the left, Professor Mark Tushnet has concluded that the historical evidence "strongly suggests that the free exercise principle does not require the government to exempt religious believers from generally applicable laws."[108]

In sum, Justice Alito's argument for exemption rights in *Fulton* (1) declines to engage the strongest original-meaning argument against such rights,[109] and (2) cites a boom in post-*Smith* originalist scholarship to justify revisiting *Smith* without acknowledging that "most commentators

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103. *McConnell, Origins*, *supra* note 88; Note, Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL'Y 971 (2019).

104. 521 U.S. 507, 537–38 (1997).

105. *McConnell, Origins*, *supra* note 88, at 1415.

106. Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 31–32 (1998). In more recent advocacy in the political and policy realms, George's rhetoric has often appeared to endorse constitutional exemption rights. But after I pointed out the seeming inconsistency with his earlier scholarship, George stated that he has not changed his view of *Smith* and the proper interpretation of the Free Exercise Clause. *See* James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1349–50 & n.180 (2017) (collecting George's various statements on the topic).

107. Lino A. Graglia, Church of the Lukumi Babalu Aye*: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 59–60 & n.354.

108. Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 124–25 (1993).

109. *See supra* notes 76–89 and accompanying text.

have concluded that there is no originalist justification for the [pre-*Smith*] exemption doctrine."[110]

Since *Fulton*, Professor Stephanie Barclay has offered what she has described as a new "historically grounded" interpretation of strict scrutiny that can provide "presumptive protections" for religion from generally applicable laws, "consistent with Founding Era historical evidence of judicial protections of religious exercise."[111] But on the key "least restrictive means" requirement of strict scrutiny that Barclay endorses, the evidence she marshals consists of a single state trial court decision in 1813 and a 1767 speech given by Lord Mansfield in England about a law *targeted* at religion, not a generally applicable law.[112] And more fundamentally, like Justice Alito, Professor Barclay declines to address the critical "make no law" language in the First Amendment.[113]

Notwithstanding the weakness of the case for exemption rights based on the original meaning of the Free Exercise Clause in 1791, Professor Kurt Lash has argued that its meaning might have changed with the

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110. Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 82–83 (2000); *see* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 506–07 (2009) (concluding that "the available evidence of the original understanding . . . does not provide strong support for the accommodationist position"); Koppelman, *supra* note 82, at 455 ("When the Free Exercise Clause of the First Amendment was written, not a single person in America had ever claimed that there should be, or that this provision would entail, a judicially enforceable right to exemption from laws that do not aim at interfering with religion. . . . [I]f such exemptions are to be defended, this case must be made on nonoriginalist grounds."); Brief of Professors Ira C. Lupu, Frederick Mark Gedicks, William P. Marshall, and Robert W. Tuttle as Amici Curiae Supporting Respondents at 4–5, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123) ("Free exercise of religion was not originally understood to include a right to violate generally applicable, religion-neutral laws . . . ."); *see also* Note, Austin T. Hetrick, *The Origins of Accommodation: Free Exercise, Disestablishment, and the Legend of Small Government*, 107 VA. L. REV. 393, 419 (2021) (offering a new historical argument and claiming it "erodes two of the central claims undergirding the historical case for religious exemptions"); *cf.* Volokh, *supra* note 75, at 1531 ("[I]n my view, the [original meaning] debate is either in equipoise or leans slightly against a constitutional exemption regime. . . . I think such a constitutional exemption regime is incompatible with the primarily democratic decision-making structure established by our Constitution.").

111. Stephanie H. Barclay, *Replacing* Smith, 133 YALE L.J. F. 436, 471–72 (2023).

112. *Id*. at 461–65. Barclay also cited a second state court decision from 1855, but given that her essay is aimed at discerning "the understanding of the Free Exercise Clause leading up to, and not long after, the time it was ratified," *id*. at 460 n.120, a case decided 64 years after ratification would not seem probative.

113. *Cf. id* at 441 ("[T]his Essay does not argue that the proposed doctrinal tests discussed here are required by original meaning; rather, it makes the more modest claim that the doctrines proposed here would offer a constitutional construction that is at least consistent with the constitutional limits and historical sources this Essay identifies.").

adoption of the Fourteenth Amendment in 1868.[114] Professor Amar has also contemplated this possibility.[115] And in a new paper, Professors Barclay and Lash build on the argument, using as their jumping-off point an important piece of evidence that Lash first brought to light in his earlier work.[116] That evidence, which is discussed below,[117] has not previously received the specific attention it deserves. But commentators have offered two broader critiques of Lash's initial case for rooting religious exemption rights in the Fourteenth Amendment.

First, his "argument focuses heavily on the reconstruction urge to protect religious freedom among emancipated African-Americans, and does not persuasively demonstrate any intention to protect religious exercise against neutral rules outside of that racial context."[118] For example, Lash relies on abolitionist criticism of laws that incidentally burdened religion by "prohibiting the assembly of blacks at night," which "had an unavoidable impact on black religious assemblies," and prohibiting "teaching slaves how to read and write," which "prevented slaves from reading the Bible."[119] But as more than one commentator has pointed out, the abolitionists'

> critique of such general prohibitions on slave speech and assembly does not indicate that the abolitionists believed in constitutionally compelled religious exemptions from valid neutral laws. They did not consider such prohibitions valid neutral laws. . . . The fact that they objected to such *illegitimate* broad restrictions on expression

114. *See* Lash, *supra* note 97, at 1109 ("This Article explores the proposition that the Free Exercise Clause was adopted a second time through its incorporation into the Privileges or Immunities Clause of the Fourteenth Amendment and that the scope of the new Free Exercise Clause was intended to include protections unanticipated at the Founding. . . . Religious exemptions from generally applicable laws, considered unnecessary and improbable at the Founding, now became necessary and proper.").

115. *See* The Federalist Society, *supra* note 54, at 22:44 ("[M]aybe it's actually a *privilege* of citizenship for there to be, in effect, substantive and not merely formal entitlements of a free exercise that actually have weight even against a general neutral secular law. It's possible to imagine that's a privilege."); *see also* AMAR, *supra* note 76, at 254–56 (summarizing Lash's argument and concluding that the Fourteenth Amendment's focus on minority rights "perhaps invites special judicial accommodation of minority sects that the legislature does not know or care about").

116. *See* Kurt T. Lash & Stephanie H. Barclay, *A Crust of Bread: Religious Resistance and the Fourteenth Amendment* (unpublished manuscript) (on file with author).

117. *See infra* text at notes 124–131.

118. Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 217 n.171 (1995).

119. *See* Lash, *supra* note 97, at 1135–37.

> in no way demonstrates that they advocated religious exemptions to *legitimate* general regulations of *conduct*.[120]

Second, some of the strongest evidence Lash produces about how the Free Exercise Clause was viewed in the years leading up to the adoption of the Fourteenth Amendment cuts against his position. That evidence concerns Congress's consideration in 1860 and eventual passage in 1862 of legislation prohibiting polygamy that included no exception for those engaging in the practice for religious reasons.[121] Quoting a congressman who "explicitly rejected the principle of religious exemptions under the First Amendment," Lash observes: "The idea that free exercise of religion might require immunity from laws passed for the public good was a 'pernicious philosophy.'"[122] This repudiation of exemption rights so close to the ratification of the Fourteenth Amendment is powerful evidence.[123] And it is reinforced by the subsequent history—detailed in Part IV below—of the polygamy debate continuing to play out after the adoption of the Fourteenth Amendment and producing judicial reasoning rejecting exemption rights that was consistently applied in many other contexts. But notwithstanding the daunting challenges this pre- and post-ratification history poses for Lash's claim, it is possible that it does not capture the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause. And as noted above, Lash identifies an important piece of contrary evidence—evidence indicating that the Clause was understood by at least one key figure to provide protection against generally applicable

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120. Boyce, *supra* note 110, at 519 (2009); *see also* Gedicks, *supra* note 110, at 82 n.17 ("Abolitionists opposed slavery because they believed it to be an evil practice, not because the laws which regulated it incidentally burdened religious practices. By contrast, the legitimacy of contemporary laws that incidentally burden religious practices is rarely in dispute.").

121. *See* Lash, *supra* note 97, at 1124–29.

122. *Id*. at 1128, 1128 n.100.

123. *See* Campbell, *A New Approach*, *supra* note 98, at 1001 n.151 (taking the "opposite" view of Lash on the question of whether exemption rights became more plausible at the time of the Fourteenth Amendment and noting that Lash "never explains how the framers of the Fourteenth Amendment squared their ostensible support for religious exemptions with simultaneous persecutions of Mormon polygamists"); *id*. at 1002 ("[T]he prevailing understanding of religious liberty around the time of the Fourteenth Amendment did not ensure a general safe harbor for individual religious practices. Government could not explicitly prohibit religious exercise, but individuals did not have a right of exemption from neutral and generally applicable laws."); Lombardi, *supra* note 99, at 420–21 ("[I]f there is a trend in the evolution of nineteenth-century treatises on the topic of free exercise, it seems to be away from a liberal position and toward an antiliberal position. Kurt Lash has hypothesized that with the rise of abolitionism, American free exercise thinking became increasingly liberal on the question of exemptions. At least among academic commentators, the opposite seems to have occurred.").

laws not targeted at religion. In 1871, Representative John Bingham, who had been the principal drafter of Section 1 of the Fourteenth Amendment in 1866, made the following statement in the course of arguing that the privileges and immunities of citizens of the United States consisted chiefly of the rights enumerated in the original Bill of Rights, including the Free Exercise Clause:

> Before [the Fourteenth Amendment,] a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread.[124]

Bingham went on to insist that "[u]nder the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example of Illinois."[125] Noting that the Illinois law referenced by Bingham was not targeted at religion, and prohibited harboring fugitive slaves for any reason, Barclay and Lash conclude that Bingham's comments embody "an understanding that the Fourteenth Amendment incorporated substantive limits on states' power to interfere with free exercise rights, irrespective of whether state interference was or was not even-handed" toward religion.[126] Given Bingham's pivotal role in drafting the Amendment, his understanding of its free exercise guarantee in 1871 is certainly worthy of the reexamination Barclay and Lash are urging. But it is far from clear that the inquiry will ultimately result in a convincing originalist case for religious exemption rights under the Fourteenth Amendment.

As an initial matter, there is the question of whether Bingham's legal understanding in 1871 was the same as it was either when he proposed the Privileges or Immunities Clause in 1866 or when the Fourteenth Amendment was ratified in 1868. As Professor Lash has noted elsewhere, "Bingham left a trail of conflicting statements regarding the meaning of Article IV['s Privileges and Immunities Clause], the nature of the Bill of Rights, and the relationship of both to the proposed Fourteenth

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124. Lash, *supra* note 97, at 1153 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of John Bingham)). Of course, Bingham's statement is incorrect to the extent it includes the period of time between the ratification of the Thirteenth Amendment and the Fourteenth Amendment. But in context, it is clear that Bingham is making an argument about the legal landscape before both amendments, as he is referencing a criminal conviction under Illinois' fugitive slave law that was affirmed by the Supreme Court in 1852. *See* Moore v. Illinois, 55 U.S. 13 (1852).

125. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871).

126. Lash & Barclay, *supra* note 116.

Amendment."[127] Professor Bret Boyce has likewise noted that Bingham was "often less than clear and consistent,"[128] and in particular, he highlighted the fact that Bingham's final speech in support of the Fourteenth Amendment in 1866 ends with an argument that appears to conflict with how both Lash and Boyce read Bingham's 1871 speech.[129] To be sure, the Bingham inconsistencies discussed by Lash and Boyce were not specifically about the free exercise issue, but they did concern foundational interpretive matters concerning the rights protected by the Fourteenth Amendment, and they should probably give originalists pause about treating any one Bingham statement interpreting such rights as authoritative.

More fundamentally, there is relatively little evidence of a broader understanding in 1866–68, either among members of Congress or the public, matching the understanding of free exercise rights that Bingham articulated in 1871. Perhaps Barclay and Lash will uncover additional evidence as they continue their research, which is ongoing and has already identified some statements similar to Bingham's. And given my own normative preference for accommodation rights backed by modestly heightened scrutiny,[130] I would welcome further historical evidence to bolster the doctrinal argument I make for such a regime in Part V below. But based on the record compiled to date,[131] I do not yet see a compelling originalist case for a judicially administered exemption regime under the Fourteenth Amendment.[132]

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127. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 335 (2011).

128. Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 48, 58–60 (2013). Boyce observes that future president James Garfield, then serving in the House, challenged Bingham's 1871 memory of the 1866 debate: "My colleague can make but he cannot unmake history." *Id*. at 54 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871)).

129. *Id*. at 58–59.

130. *See* Oleske, *supra* note 106, at 1360 ("I think we have a far better chance of sharing the benefits of accommodation broadly and equitably if we do not just rely on legislative grace for specific exemptions, but instead have a Supreme Court committed to developing, and lower courts committed to administering, principled standards that guarantee a common constitutional floor of protection.").

131. In addition to Barclay and Lash's work, *see* Clark B. Lombardi, Reynolds *Revisited: The Original Meaning of* Reynolds v. United States *and Free Exercise after* Fulton, 75 ALA. L. REV. 1009 (2024), and Christopher R. Green, *Citizenship and Solicitude: How to Overrule* Employment Division v. Smith *and* Washington v. Davis, HARV. J. L. & PUB. POL. (forthcoming 2024), https://ssrn.com/abstract=4622635.

132. As Nicholas Rosenkranz has noted, there is also a linguistic challenge to reading the text of the Privileges or Immunities Clause as securing a right to exemptions from

IV. NO DEEPLY ROOTED HISTORY AND TRADITION OF RECOGNIZING RELIGIOUS EXEMPTION RIGHTS

Even if the original meaning of the Free Exercise Clause—whether as first ratified in 1791 or as made applicable to the States by the Fourteenth Amendment in 1868—did not contemplate exemption rights, one might argue that such rights should be recognized if a deeply rooted history and tradition of vindicating such rights subsequently developed.[133] But a review of the evidence indicates that no tradition of vindicating such rights in court developed until the *Sherbert v. Verner* decision in 1963,[134] which came just ten years before the decision in *Roe v. Wade*[135]—a decision

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generally applicable laws. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1061 n.305 (2011) ("[E]ven under the 'enforce[ment]' prong of the Privileges or Immunities Clause, it is the 'law,' not the enforcement of the law, which must not abridge the freedom of religion: 'No State shall . . . enforce any law which shall abridge [the free exercise of religion] . . . .' It is difficult to see how a religion-neutral law could fit that description.").

133. *Cf.* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." (citing Meyer v. Nebraska, 262 U.S. 390 (1923), and subsequent cases)).

The issue of when reliance on post-ratification history and tradition is best viewed as relevant to the original-meaning inquiry as opposed to providing a separate basis for interpreting the Constitution is beyond the scope of this Article. *See generally* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023) ("In case after case, . . . originalists have relied on post-ratification practices that *do not shed special light on original meaning* and *do not reflect prior actors' deliberate efforts to interpret* the legal text (or answer the legal question) at issue."); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1169 (2023) ("*Dobbs* does not employ methods of original public meaning originalism that many academic originalists favor, but instead reasons from precedent, history, and tradition. For this reason, some originalists term *Dobbs* a living constitutionalist decision."); Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 96 (2023) ("While it is conceivable that the Court could look to history and tradition as a means of informing a determination of original public meaning, that simply is not what the Court is doing in [*Bruen*, *Dobbs*, and *Kennedy*].").

134. *See* Sherbert v. Verner, 374 U.S. 398 (1963). This article focuses on whether there was a tradition of vindicating free exercise exemption rights in court, not whether there was a tradition of legislative accommodation of religious practices, because the Court has recently taught that the former is the relevant inquiry in identifying deeply rooted rights. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 217 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.").

135. 410 U.S. 113 (1973).

deemed insufficiently early to establish a deeply rooted tradition in *Dobbs v. Jackson Women's Health Org.*[136]

In his 1871 State of the Union message to Congress, President Grant gave the following defense of strictly enforcing the prohibition on polygamy in the territories: "It is not with the religion of the self-styled Saints that we are now dealing, but with their practices. They will be protected in the worship of God according to the dictates of their consciences, but they will not be permitted to violate the laws under the cloak of religion."[137] This message from the federal executive branch, which mirrored the message sent by the legislative branch a decade earlier,[138] previewed a message the judicial branch would send less than a decade later:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . .
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[139]

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136. 597 U.S. 240 (2022) ("Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion."). If longevity plays a role in determining whether a right is deeply rooted, it might also be relevant that the right to religious exemptions lasted only 27 years at the Court before being repudiated in *Smith*, while the right to abortion lasted 49 years.

137. Ulysses S. Grant, *Third Annual Message*, THE AM. PRESIDENCY PROJECT (Dec. 4, 1871), https://www.presidency.ucsb.edu/documents/third-annual-message-11 [https://perma.cc/WC7E-9T9C].

138. *See supra*, notes 121–122 and accompanying text.

139. Reynolds v. United States, 98 U.S. 145, 166–67 (1878). Judge Charles Zane made the same point six years later: "While all men have a right to worship God according to the dictates of their own conscience, and to entertain any religious belief that their conscience and judgment might reasonably dictate, they have not the right to engage in a practice which the American people, through the laws of their country, declare to be unlawful and injurious to society." James B. Allen, *"Good Guys" vs. "Good Guys": Rudger Clawson, John Sharp, and Civil Disobedience in Nineteenth Century Utah*, 48 UTAH HIST. Q. 148, 160 (1980).

That 1878 teaching from the Supreme Court in *Reynolds v. United States*[140] was explicitly reaffirmed in the 1890 polygamy case of *Davis v. Beason*,[141] in which the Court emphasized that "[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country."[142] Although "[n]ot generally viewed as among the Court's finest moments, the Mormon Polygamy Cases are nevertheless consistent with . . . the historical understanding of the Free Exercise Clause," which did not include a right of "believers to be relieved of incidental burdens on their beliefs and practices."[143]

In the 95 years between ratification of the Fourteenth Amendment and the Supreme Court's first recognition of exemption rights in 1963, at least seventy decisions in state and federal courts rejected constitutional exemption claims, with a great many of those decisions relying on *Reynolds* and/or *Davis*.[144] In that same period, only one decision, from a federal district court in 1943, held that an exemption was constitutionally required.[145]

Setting the tone that would prevail for the next eight decades, the Vermont Supreme Court articulated in 1876 the following understanding of the free exercise right:

> [T]hat article in the [state] constitution was not designed to exempt any person or persons of any sect, on the score of conscience as to matters of religion, from the operation and obligatory force of the general laws of the state authorized by other portions of the same instrument, and designed to serve the

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140. 98 U.S. 145 (1878).

141. 133 U.S. 333, 344 (1890). Whereas *Reynolds* upheld a criminal conviction for *practicing* polygamy, *Davis* upheld statute denying voting rights to those who *advocated* polygamy. In 1996, the Court recognized that "[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." Romer v. Evans, 517 U.S. 620, 634 (1996).

142. *Davis*, 133 U.S. at 342–43. "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" *Id.* at 345.

143. Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1209 (2005).

144. *See, infra* Appendix (collecting cases).

145. United States v. Hillyard, 52 F. Supp. 612, 615 (E.D. Wash. 1943). *But see In re* Jenison, 120 N.W.2d 515, 519 (Minn. 1963) ("[W]e do not subscribe to the holding in United States v. Hillyard"), *vacated sub nom. In re* Jenison, 375 U.S. 14 (1963) (remanded for reconsideration in light of *Sherbert*). Professor Clark Lombardi has described one other decision in this period—Harrison v. Brophy, 51 P. 883 (Kan. 1898)—as granting a religious exemption. *See* Lombardi, *supra* note 131, at 1050. But *Harrison* involved the complete rejection of a common law rule, not the granting of an exemption to that rule. *See Harrison*, 51 P. at 884 (holding that an English common law rule targeting "superstitious uses" amounted to a "law of persecution" and was "without force" in Kansas).

> purposes contemplated by such other portions; it was not designed to exempt any persons from the same subjection that others are under to the laws and their administration, on the score that such subjection at times would interfere with the performance of religious rites, and the observance of religious ordinances, which they would deem it their duty to perform and observe but for such subjection. While all stand on equal footing under the laws, both as to benefits and privileges proffered, and as to exactions made, and liabilities and penalties imposed, no one's rights of conscience, as contemplated by said [constitutional provision], are violated in a *legal* sense.[146]

In 1886, the Arkansas Supreme Court offered a similar view, explaining that "a man's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land," and noting that "[i]f the law operates harshly, as laws sometimes do, the remedy is in the hands of the legislature."[147] In a similar vein, after noting the *Reynolds* Court's interpretation of the federal Free Exercise Clause, the Texas Supreme Court followed suit in 1918, explaining: "No more does section 6 of the Bill of Rights in our state Constitution relieve one from obedience to reasonable health regulations, enacted under the police power of the state, because such regulations happen not to conform to one's religious belief."[148] Twenty-seven years earlier, the Texas State Board of Education affirmed a decision of the Texas Superintendent of Schools that cited *Reynolds* and several state court decisions for the proposition that "in matters of conduct and outward acts no exemption from the operation of general laws or the due course of administration" is required as part of the "religious liberty guaranteed by the United States Constitution and the Constitutions of the several States."[149]

The United States Supreme Court was again confronted with the exemption issue in 1931. In response to the claim that the Constitution guarantees "a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so," the Supreme Court provided this emphatic response:

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146. Ferriter v. Tyler, 48 Vt. 444, 469 (Vt. 1876) (discussing school attendance rules).

147. Scoles v. State, 1 S.W. 769, 772 (Ark. 1886) (discussing Sunday labor law).

148. City of New Braunfels v. Waldschmidt, 207 S.W. 303, 305 (Tex. 1918) (discussing vaccination requirement).

149. Zirjacks v. Dupree (1895), *reported in* J.M. CARSLILE, ELEVENTH BIENNIAL REPORT: STATE SUPERINTENDENT OF INSTRUCTION 364, 372–75, 390 (1898).

> Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.[150]

The dissent, while disagreeing with the majority's judgment on statutory grounds, agreed with its interpretation of the constitution: "[G]overnment may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows."[151] The First Circuit, in a 1941 case involving a municipal permitting ordinance, struck the same chord:

> The civil authority can never concede the extreme claim that police regulations of general application not directed against any sect or creed—however widely the regulation may be accepted as being reasonable and proper—are constitutionally inapplicable to persons who sincerely believe the observance of them to be 'an insult to Almighty God.'[152]

In rejecting an exemption claim four years later, the 10th Circuit cited *Reynolds* for the proposition that the "right to engage in a practice which violates a forbidding Act of Congress valid in other respects cannot be asserted with success merely because the practice arises out of religious conviction."[153] And two years after that, the Virginia Supreme Court captured the essence of how the free exercise right was viewed for six decades when it wrote:

> The constitutional protection of religious freedom, while it insures religious equality, on the other hand does not provide immunity from compliance with reasonable civil requirements imposed by the State. The individual cannot be permitted, on religious grounds, to be the judge of his duty to obey the regulatory laws enacted by the State in the interests of the public welfare.[154]

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150. United States v. Macintosh, 283 U.S. 605, 623 (1931).

151. *Id*. at 633 (Hughes, J., dissenting).

152. City of Manchester v. Leiby, 117 F.2d 661, 666 (1st Cir. 1941) (citing Justice Cardozo's concurring opinion in Hamilton v. Regents, 293 U.S. 245, 268 (1934)).

153. Cleveland v. United States, 146 F.2d 730, 734 (10th Cir. 1945), *affirmed*, 329 U.S. 14 (1946).

154. Rice v. Commonwealth, 49 S.E.2d 342, 347 (Va. 1948).

Outside of cases in which free speech claims were made, the no-exemptions-required view of religious liberty prevailed in the courts right up to 1963.[155] Just three months before the *Sherbert* decision came down, the Minnesota Supreme Court rejected a claim for an exemption from jury service, favorably citing *Reynolds* for the proposition "that to excuse prohibited practices because of religious belief would in effect permit every citizen to become a law unto himself."[156]

Commentators in the late nineteenth and early twentieth centuries also read *Reynolds* as "defin[ing] the bounds of the religious liberty guaranteed by the Constitution."[157] The *American and English Encyclopedia of Law*,[158] an "influential reference work was considered to be an essential part of a basic reference library for lawyers,"[159] read *Reynolds* as standing for the proposition that the Free Exercise Clause "does not permit one to break the law, and plead in his defense that his actions were in the exercise of his religion and according to the dictates of his conscience."[160] Citing state cases that struck the same chord as *Reynolds*, Professor Carl Zollman wrote in the *Michigan Law Review* in 1919 that "conscientious belief furnishes no legal defense where a person has done or has refused to do what the government within its constitutional authority has required of him."[161] And writing in 1962, David Manwaring coined the term "secular regulation rule" to describe the longstanding view of the courts that "[t]here is no constitutional right to exemption on religious grounds from

155. *See* Oleske, *supra* note 1, at 703 & nn.93–94 ("[Justice] Jackson's arguments against requiring exemptions from generally applicable laws sometimes fell on deaf ears in cases involving free speech and free press claims that were joined with free exercise claims, but never in his time on the Court did the justices require an exemption on free exercise grounds alone.").

156. *In re* Jenison, 265 Minn. 96, 99 (1963), *vacated sub nom. In re* Jenison, 375 U.S. 14 (1963) (remanded for reconsideration in light of *Sherbert*).

157. PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES 36 (1889).

158. THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 20 (John Houston Merrill ed., Edward Thompson Co. 1892) [hereinafter A&C ENCYC. L.].

159. Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. DAVIS L. REV. ONLINE 65, 89 n.78 (2021).

160. A&C ENCYC. L, *supra* note 158, at 771 & n.4; *see also* THEODORE W. DWIGHT, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY 117 (Edward F. Dwight ed., 1894) ("It was not the object of th[is] provision in the United States Constitution to allow the plea of religious liberty to be used as a cloak for the violation of law and good order.").

161. Carl Zollman, Religious Liberty in American Law, 17 MICH. L. REV. 355, 365 (1919).

the compulsion of a general regulation dealing with non-religious matters."[162]

In short, for almost a century after 1868, it was firmly established that applying nondiscriminatory laws to restrict conduct regardless of its religious motivations was a permissible exercise of state regulatory authority.[163] This does not necessarily mean today's Court should decline to recognize a constitutional right to religious exemptions. There are strong normative arguments for protecting minority religious practices against incidental burdens,[164] and the Court's free speech jurisprudence provides protections against incidental burdens that are rooted in neither originalism nor a history and tradition predating the second half of the twentieth century. The next section explores arguments that proponents of exemptions might ground in such modern precedent.

V. PRAGMATIC NUANCE?

In her *Fulton* concurrence, Justice Barrett expressed skepticism about adopting a "categorical strict scrutiny regime" for reviewing non-targeted burdens on religion.[165] Instead, she suggested the Court draw guidance from its approach to resolving "conflicts between generally applicable laws and other First Amendment rights—like speech and assembly," which she described as "much more nuanced."[166] This is likely a reference to the fact that the Court has long applied what it has called "intermediate"

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162. David R. Manwaring, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 48–52 (1962). *See* State v. Soto, 537 P.2d 142, 145 (Or. Ct. App.1975) (Fort, J., dissenting) (describing *Reynolds* as establishing the "secular regulation rule"); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1627 (1989) (noting that "courts in the nineteenth and early twentieth centuries generally applied a concept known as the secular regulation rule").

163. *See Dobbs*, 597 U.S. 215, 261 (citations omitted) ("[F]or more than a century after 1868 . . . it was firmly established that laws prohibiting abortion like the Texas law at issue were permissible exercises of state regulatory authority.").

164. *See* David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556, 1556 n.36 (2023) ("[R]eligious minorities (in addition to being more likely targets of outright prejudice) may systematically face unreasonable impingements on their faith because the legislature was unaware of the threatened religious practice in the first place, or was ill-positioned to accurately conceptualize the burden a law places on an uncommon or unfamiliar religious practice and fairly weigh that against the interests the proposed law is meant to achieve." (internal quotation marks omitted) (quoting David Schraub, *When Separation Doesn't Work: The Religion Clause as an Anti-Subordination Principle*, 5 DART. L.J. 145, 153 (2007))).

165. Fulton v. City of Philadelphia, 593 U.S. 522, 543 (2021) (Barrett, J., dissenting).

166. *Id.*

scrutiny to most content-neutral regulations of speech,[167] including generally applicable conduct regulations that incidentally burden expression,[168] as well as time, place, and manner regulations that limit assembly and speech.[169] By contrast, the Court applies strict scrutiny to content-based regulations of speech.[170]

Although the Court's original articulations of intermediate scrutiny in the First Amendment context sounded quite strict in some respects,[171] the Court has clarified that the test imposes a more modest burden of justification on government:

> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Narrow tailoring in this context requires, in other words, that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests.[172]

Long before it formally adopted the strict-scrutiny/intermediate-scrutiny dichotomy for reviewing content-based and content-neutral regulations of speech, the Court distinguished in the landmark 1941 case of *Cox v. New Hampshire*[173] between "unfair discrimination"[174] and generally applicable laws "designed to promote the public convenience" that "cannot be disregarded by the attempted exercise of some civil right."[175] Notably, to illustrate that latter circumstance, the Court gave an example in which it invoked religion and speech side by side: "One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."[176] Despite this coupling of religion and speech when talking about incidental

167. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) ("Turner I").
168. United States v. O'Brien, 391 U.S. 367, 376 (1968).
169. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).
170. *Turner I*, 512 U.S. at 642.
171. *See O'Brien*, 391 U.S. at 376 (articulating a test that asks if the restriction on expression "is no greater than is essential to the furtherance of" state's "important or substantial governmental interest"); *Clark*, 468 U.S. at 293 (articulating a test that asks if restriction is "narrowly tailored to serve a significant governmental interest").
172. *Turner I*, 512 U.S. at 622.
173. Cox v. New Hampshire, 312 U.S. 569, 575 (1941).
174. *Id*. at 576.
175. *Id*. at 574.
176. *Id*.

burdens in *Cox*, the Court has treated the two differently ever since intermediate scrutiny was adopted in the speech context. For a time, the Court afforded religion greater protection against incidental burdens (strict scrutiny from 1963–1989), then lesser protection (no heightened scrutiny from 1990–2021), and most recently back to greater protection in some cases (strict scrutiny in *Tandon*).[177]

Although the full Court has never explicitly talked about bringing its free speech and free exercise doctrines into alignment on incidental burdens,[178] several commentators have suggested it do so by adopting intermediate scrutiny in religious exemption cases.[179] One challenge in doing so, however, is avoiding the danger Justice Scalia identified in *Smith* of judges "balanc[ing] against the importance of general laws the significance of religious practice."[180] Intermediate scrutiny is frequently viewed as a balancing test,[181] so applying it in free exercise cases could be

177. The latest discrepancy could be mitigated, but not eliminated, if the Court were to adopt a most-favored-nation approach in the speech context that would raise the level of scrutiny of content-neutral regulations from intermediate to strict whenever those regulations are underinclusive. The discrepancy would still exist in other cases, including those involving alleged overinclusion, where intermediate scrutiny would apply in the speech context and no heightened scrutiny would apply in the religion context. *Cf.* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 916 (1990) (Blackmun, J., dissenting) ("The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. . . Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.").

178. *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–79 (1991) (Scalia, J., concurring) (arguing that the Court should decline to apply heightened scrutiny in both contexts).

179. *See, e.g.*, Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1343–44, 1350–51, 1355–73 (1995); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 Wm. & Mary L. Rev. 925, 937–43 (1998) (drawing on free speech and dormant commerce clause doctrine). For a fascinating discussion of "intermediate solutions" to religion-equality conflicts that take place as a matter of self-regulation, and how the law might take those solutions into account, *see* Netta Barak Corren, *The War Within Religion: Towards a More Nuanced Resolution of Religion/Equality Conflicts* 71 AM. J. COMP. L. (forthcoming), https://ssrn.com/abstract=3183733 ("Currently, the conversation on religion-equality conflicts is dominated by either-or thinking: either religious objectors handle their operations free from any antidiscrimination obligations, or antidiscrimination obligations are strictly enforced without consideration for religious objection. Intermediate solutions rarely gain traction in the legal debate.").

180. *Smith*, 494 U.S. at 889 & n.5.

181. *See, e.g.*, Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) ("'Intermediate scrutiny,' unlike the poles of the two-tier system, is an overtly balancing mode.").

seen as a recipe for having courts determine the import of religious practices, something outside the judicial ken.[182] But as I have explained in prior work, intermediate scrutiny need not be operationalized as a balancing test in this context. Instead, it could operate as a two-part, yes/no inquiry in which courts determine (1) whether application of the government rule at issue imposes a substantial secular burden on an exemption claimant who engages in certain conduct or refrains from certain conduct for sincere, religiously motivated reasons, and (2) whether the state has an actual and substantial interest in denying an exemption to the claimant.[183] Instead of balancing religious and state interests *against* each other, this test *separately asks* whether the secular costs imposed on a religious activity meet a (relatively low) preset threshold and then whether the weight of the state interest meets a (relatively low) preset threshold. To be sure, this test promises less to religion than strict-scrutiny regimes promise. But those regimes notoriously underdeliver,[184] and as one commentator wrote four decades ago, "significant protection for religious conduct would be provided merely by requiring . . . that government show a non-speculative, identifiable, measurable, non-trivial injury to a legitimate interest."[185]

Providing such protection by requiring the government to show a "substantial interest" in denying religious exemptions from legal burdens would parallel the protection the Court recently clarified Title VII of the 1964 Civil Rights Act guarantees. As amended in 1972, Title VII requires employers to accommodate the religious practices of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business."[186] In *Groff v. DeJoy*,[187] the Court explained that "'undue hardship' is shown when a burden is *substantial* in the overall context of an employer's business."[188] Note that although the term "undue

182. *See Smith*, 494 U.S. at 887.

183. *See* Oleske, *supra* note 1, at 740–41. *See also* Barclay, *supra* note 111, at 450, 452, 455–56, 461 (arguing that strict scrutiny need not involve balancing).

184. *See* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 69 (2015) (noting that "judges have repeatedly found ways to limit regimes of religious exemptions" that purport to require strict scrutiny).

185. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 334–35 (1986). *See also* Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2041–42 (2011) ("[G]overnment should not lightly impose burdens on the exercise of anyone's religion, but if government is not merely being insensitive but instead has solid and legitimate reasons for declining to exempt religious objectors from complying with a general law, courts should defer to such democratic judgments.").

186. 42 U.S.C. §§ 2000e et seq. (2012).

187. Groff v. DeJoy, 600 U.S. 447 (2023).

188. *Id*. at 468.

hardship" could conceivably be interpreted to require balancing, with different employer burdens deemed due or undue depending on how they compare to the religious interests at stake,[189] that is *not* how the Court interpreted the term in *Groff*. Nor is it how the Court interpreted the term in the earlier *TWA v. Hardison*[190] decision that *Groff* clarified. Instead, the term was interpreted as establishing a threshold the employer burden must meet—"substantial increased costs" in *Groff*,[191] "more than a de minimis cost" in *Hardison*[192]—irrespective of the strength of the religious interest involved. Thus, courts are not put in the position of determining the relative importance of annual religious holiday observance, weekly Sabbath observance, daily prayer practices, the wearing of religious garb, religious forbearance from certain work duties, or religious refusals of vaccines, to name some of the more common issues that arise in Title VII accommodation cases. My proposed test above aims to bring the same virtue to adjudication of free exercise exemption claims while bringing free exercise doctrine closer into alignment with free speech doctrine.

Some have argued, however, that the correct free speech analogy for religious exemption cases lies elsewhere. Instead of looking to the general rule that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny,"[193] Professors Thomas Berg, Douglas Laycock, and Christopher Lund point to the Court's departure from such scrutiny in some freedom of association and compelled speech cases involving generally applicable laws.[194] Specifically, they highlight the Court's decisions in *Boy Scouts of America v. Dale*[195] and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[196] which found

189. *See generally* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 607 (2016) (interpreting the once-controlling "undue burden" standard in the abortion context as requiring courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer"); Planned Parenthood of Wisconsin, Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015) (describing an "undue burden" as "a burden excessive in relation to the aims of the statute and the benefits likely to be conferred by it").

190. TWA v. Hardison, 432 U.S. 63 (1977).

191. *Groff*, 600 U.S. at 470.

192. *Id*. at 84.

193. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994). *See also* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997) ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

194. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 CATO SUP. CT. REV. 33, 43; Christopher C. Lund, *Answers to Fulton's Questions*, 108 IOWA L. REV. 2075, 2082 (2023).

195. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

196. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995).

certain applications of antidiscrimination laws to be invalid because they compelled parties engaged in expressive activity to alter their own messages. The Court in *Dale* held that the Boy Scouts had a constitutional right to exclude an "avowed homosexual and gay rights activist" from adult membership in the group at a time when the group adhered to the view that "homosexual conduct is not morally straight" as that term was used in the Boy Scout oath.[197] The Court in *Hurley* held that the organizers of the St. Patrick's Day Parade in Boston had a constitutional right to exclude a gay-rights group that wanted to march in the parade behind a banner with their group name.[198]

Berg, Laycock, and Lund interpret *Dale* and *Hurley* as (a) applying strict scrutiny because (b) application of the laws in those cases did not leave open adequate alternative channels of communication.[199] Reasoning that laws burdening religious practices will also often leave religious adherents without adequate alternatives, they use the analogy to *Dale* and *Hurley* to call for widespread adoption of a strict-scrutiny regime in the free exercise context.[200] On a related note, Professor Sherif Girgis has proposed a free exercise exemption doctrine that would use the lack of adequate alternatives to determine whether a general law imposes a "substantial burden" on religion that might trigger a right to exemption,[201] but he does not weigh in on the question of the appropriate level of "heightened scrutiny" to apply once such a burden has been found.[202]

Regarding the Berg/Laycock/Lund reliance on *Dale* and *Hurley*, there are several complications.

First, although *Dale* referenced strict scrutiny as the governing test,[203] *Hurley* did not, and neither opinion actually applied that test by determining whether compelling state interests were present or least

197. *Dale*, 530 U.S. at 655–56.

198. *Hurley*, 515 U.S. at 574–75.

199. Laycock & Berg, *supra* note 194, at 47; Lund, *supra* note 194, at 2081–82 & n.38. *See also* Barclay, *supra* note 111, at 470 (citing the Laycock-Berg argument as a reason to apply strict scrutiny instead of intermediate scrutiny in exemption cases). Laycock and Berg also invoke the Court's time, place, and manner (TPM) doctrine to support their proposal of requiring adequate alternatives. *See* Laycock & Berg, *supra* note 194, at 47–48. But as Professor Frederick Gedicks has pointed out, "TPM regulations do not impose incidental burdens on speech, they target it, restricting speech as speech. TPM regulations are, therefore, not analogous to incidental burdens on religion which, by definition, do not regulate religion as religion." Frederick Mark Gedicks, *The Myth of Second-Class Free Exercise* (manuscript on file with author).

200. Laycock & Berg, *supra* note 194, at 43–48; Lund, *supra* note 194, at 2081, 2091–94.

201. Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759 (2022).

202. *Id*. at 1792.

203. *See* 530 U.S. at 640–41.

restrictive means were used. Instead, the Court in those cases effectively treated the burden involved—forced alteration of one's own expressive message—as *per se* unconstitutional.[204] Thus, no matter how compelling the government's interest may be in combatting race discrimination, the Ku Klux Klan will have the right to exclude Black individuals from membership and participation in KKK marches. Nobody, however, thinks such a *per se* approach is appropriate in all religious conduct cases, lest human sacrifice be found immune from prosecution.

Second, the Court did not explain *Dale* or *Hurley* in terms of no-adequate-alternatives, and the Court has applied intermediate scrutiny in other compelled expression cases where no adequate alternatives for expression existed. In *Turner Broadcasting System, Inc. v. FCC*,[205] for example, the challenged "must carry" provision gave cable operators no option but to carry local broadcasters they might not want to carry, and some cable programmers lost access to cable systems that had local monopolies.[206] But the lack of adequate alternatives for those burdened parties did not lead the Court to apply strict scrutiny.[207] And when *Hurley* distinguished *Turner*, it did not do so by discussing the respective opportunities for alternative speech in the two cases but, rather, by focusing on the completely different issue of whether third parties would misperceive the regulated party's compliance with the law to be an expression of its own message.[208]

Third, and related to the second point, there is another explanation for why the Court declined to apply intermediate scrutiny in *Dale* and *Hurley*, and unlike the no-adequate-alternatives explanation, this explanation does not conflict with decisions like *Turner*. The answer to the "mystery" of why the generally applicable laws in *Dale* and *Hurley* were treated

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204. The Court relied heavily upon both *Dale* and *Hurley* in its latest case on compelled expression, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) and it declined to invoke strict scrutiny, instead speaking in absolute terms about the scope of the right once triggered: "No government . . . may affect a 'speaker's message' by 'forc[ing]' her to 'accommodate' other views; no government may 'alter' the 'expressive content' of her message; and no government may 'interfer[e] with' her 'desired message.'" *Id*. at 596.

205. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).

206. *Id*. at 197 ("Only one percent of communities are served by more than one cable system."); *id*. at 214 (noting that 5.5% of cable operators had to drop a cable programmer as a result of the must-carry rules); *id*. at 226 (Breyer, J., concurring) ("I do not deny that the compulsory carriage . . . extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs.").

207. *See id*. at 185, 189–26 (applying "intermediate scrutiny").

208. *See Hurley*, 515 U.S. at 575–76.

differently than generally applicable laws in other speech cases may be that "anti-discrimination rules" raise unique issues.[209] To explain, it is helpful to think about the distinction the Court has made between laws targeted at discriminatory expression (unconstitutional, see *RAV v. City of Paul*[210]) and laws targeted at conduct motivated by discriminatory views (constitutional, see *Wisconsin v. Mitchell*[211]). In upholding the latter, a unanimous Court recognized that "bias-inspired conduct" can be subject to greater punishment because it is "thought to inflict greater individual and societal harm," including "distinct emotional harms on . . . victims."[212] In a similar vein, the Court has recognized that laws prohibiting discriminatory denials of service validly aim to prevent "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[213] But while it is valid for the government to protect against bias-related dignity harms flowing from *conduct* it is otherwise empowered to regulate, the government is not generally empowered to regulate the *membership criteria* of private expressive associations or the *content* of private parades. And when the government extends anti-discrimination laws in a "peculiar" way to interfere with such inherently expressive activities,[214] that application crosses the line separating *Mitchell* and *RAV* by regulating discriminatory expression that is untethered from conduct the state can validly regulate.

Of course, even if *Dale* and *Hurley* do not provide precedent for a strict-scrutiny-because-no-adequate-alternatives doctrine, such a doctrine might still be worth considering in the religious exemption context if it were workable. Alas, that does not seem likely.

As both Lund and Girgis recognize, if the lack of adequate alternatives only characterizes *some* cases involving restrictions of religious practices, a doctrine that turns on that lack will require the court to make distinctions between different types of religious burdens. That will not be easy. Indeed, although a great deal has been written in the past three decades on the issue of how to identify "substantial burdens" on religion,[215] nothing remotely resembling a consensus has emerged. The fundamental problem Justice Scalia identified in *Smith* remains: identifying "constitutionally significant burdens" seems to invite "the unacceptable 'business of evaluating the

209. Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650–51 (2001).

210. RAV v. City of Paul, 505 U.S. 377 (1992).

211. Wisconsin v. Mitchell, 508 U.S. 476 (1993).

212. *Id*. at 487–88.

213. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

214. *Hurley*, 515 U.S. at 558.

215. *See* Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 IOWA L. REV. 2189, 2190–91 nn. 5, 6, 8 (2023) (collecting prior scholarship on the topic).

relative merits of differing religious claims."[216] Girgis, however, believes that the problem is not insoluble, and he offers the following test:

> State action that prevents, prohibits, or raises the cost of religious exercise imposes a "substantial burden" unless it leaves you another way that you could realize your religion to *about the same degree* as you could by the now-burdened means of exercise, and at *not much greater cost* than you could by that means.[217]

As an initial matter, given the imprecision in the phrase "about the same degree," one wonders if this is a standard Justice Scalia might have been inclined to say only Justice Breyer could love. More fundamentally, as Girgis acknowledges, his proposed standard appears at first glance to bear more than a passing resemblance to the religious "centrality" test the Court has previously rejected.[218] But Girgis contends that his test is distinguishable for two reasons. First, his test "takes, as its key input, the *claimant*'s views about relative religious value," so long as they are sincere, rather than asking judges to evaluate the comparability of different options for exercising religion.[219] Second, while there might be reason to worry "'centrality' is so vague" that even if courts were to focus on a claimant's views, they could not "easily test the sincerity of a plaintiff's answer . . . without judging her answer by external standards," Girgis says his test "asks the more determinate question of whether the plaintiff thinks *one option is religiously as good as another*."[220] Girgis then makes the following thought-provoking claim:

> [T]here is no deep difference between asking my question and asking if a plaintiff is religiously *motivated* to engage in some conduct *C*. And courts ask the latter all the time, under all kinds of religious liberty regimes. There is no deep difference because (i) the "motivation" question asks if someone sees a religious reason to do *C* rather than nothing, and (ii) my test asks if she sees a religious reason to do *C* rather than some activity left open by the law. Both ask what the claimant believes. Both are sharp enough that courts can—and should—test for sincerity based on

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216. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 887 n.4 (1990).

217. Girgis, *supra* note 201, at 1795.

218. *Id*. at 1801. *See* Gedicks, *supra* note 199 ("[O]ne can hardly imagine a question more freighted with religion than whether an 'adequate theological substitute' exists for a religious practice made impossible or more costly by a general law.").

219. *Id.*

220. *Id*. at 1801–02.

> fit with the *claimant*'s statements or conduct, rather than fit with anyone *else*'s religious views.[221]

In short, Girgis is asserting that his proposed religious-alternatives question is more like the religious motivation question ("sharp") than the religious-centrality question ("vague"), even if one was to answer all three based on an examination of *claimant*'s views. But is that really true? Take the recent *Fulton* case and consider three questions a representative of Catholic Social Services might be asked:

(1) Is your current participation in the City's foster programs religiously motivated?

(2) Is your current participation in the program central to your religion?

(3) If you are not permitted to continue with some aspects of your current participation in the program, would other ways of helping children be about as religiously fulfilling from your perspective as continuing your current level of participation in the program?

Is question #3 really any "sharper" than question #2? Would having courts ask questions like #3 and then judge the sincerity of "no" answers not be more fraught with potential peril than asking questions like #1?[222] And would not the answers to questions like #1 be more obvious in most cases than the answers to questions like #3, thus reducing the occasions for having to evaluate religious sincerity? In the end, while Girgis' proposal is a valiant effort to solve the "religious questions" problem that led the *Smith* Court to reject constitutional exemption rights, it does not quite manage to square the circle.

At this point, it is worth stopping to consider *why* scholars are expending so much effort on defining "substantial burden" in a way that meaningfully limits the number of claims that can proceed to the next step of the analysis. The reason is that the next step—both under RFRA, as it currently exists, and under the Free Exercise Clause, as most opponents of *Smith* would have it—is strict scrutiny. And if strict scrutiny means what it says, "many laws will not meet the test," thus "open[ing] the prospect of constitutionally required religious exemptions from civic obligations of

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221. *Id*. at 1802.

222. The record in *Fulton* indicates that Catholic Social Services' answer to question #3 would have been "no." *See* Reply Brief of Appellants at 22, Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *reversed* 593 U.S. 522 (No. 18-2574) ("The City . . . claims there is no substantial burden because Catholic can simply engage in other religious exercise. But ministries, like children, are not interchangeable widgets. . . . It is no answer to say that Catholic can do other things to serve other children.").

almost every conceivable kind."[223] To "hold back the flood,"[224] courts either need to beef up the substantial burden requirement or water down strict scrutiny.[225] And given the understandable reluctance to do the former for fear of answering religious questions, the latter has been the norm.

Only Congress can fix that distortion in RFRA litigation, but the Court need not replicate it by bringing back strict scrutiny as a constitutional mandate in exemption cases. Instead of endeavoring to hold back the flood on the front-end of the analysis by strengthening the burden-on-religious-claimant requirement, the Court can do so on the back end by relaxing the government's burden of justification. And as discussed above, Title VII points the way.

VI. CONCLUSION

Five years ago, I detailed how the Supreme Court's free exercise exemption jurisprudence has long "been characterized by a less-than-forthright treatment of precedent."[226] Unfortunately, that pattern deepened during the COVID pandemic, as the Court endeavored to work around its landmark decision in *Employment Division v. Smith*[227] without acknowledging the obvious end run. There are signs, however, that the Court will soon confront *Smith* more forthrightly. If it does so, the Court might guide itself by (1) analyzing the original meaning of the Free Exercise Clause, (2) examining whether there is a deeply rooted history

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

224. Girgis, *supra* note 201, at 1801–02.

225. *But see* Barclay, *supra* note 111, at 450–52, 459–65 (arguing for an approach that would (1) allow religious claimants to move past the substantial burden threshold relatively easily, (2) "exclude all government justifications for interfering with religious exercise other than those [in] a select category," and (3) apply a rigorous least-restrictive-means test). The historical argument Barclay makes in support of her proposed approach is addressed above. *See supra* text accompanying notes 111–113. As for the workability of the approach, it would turn in large part on the shape of the "select category" of "permissible justifications" Barclay would allow for denying exemptions at the compelling-interest step of the inquiry, and that shape is not yet clear. *See* Barclay, *supra*, at 460 (rejecting only "mere government preference, convenience, or desire to avoid any marginal costs" as sufficient interests, but leaving open the possibility that the approach "may result in a smaller and more determinative set of interests than the list of governmental interests that lower courts have deemed compelling"). *See generally* McConnell, *Free Exercise Revisionism*, *supra* note 88, at 1127 ("[T]he Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test. Such a test would allow the government to override a religious objection only in the most extraordinary of circumstances. . . . Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.").

226. *See* Oleske, *supra* note 1, at 690.

227. Emp. Div. v. Smith, 494 U.S. 872 (1990).

and tradition of recognizing exemption rights, or (3) drawing analogies to the "nuanced" approaches the Court has taken to incidental burdens in other First Amendment contexts.[228] As this article has demonstrated, the arguments for overruling *Smith* based on #1 and #2 are weak. That leaves #3, which militates in favor of applying modestly heighted scrutiny to incidental burdens on religious practices, an option neglected by the Court for far too long.[229]

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APPENDIX: JUDICIAL DECISIONS DENYING RELIGIOUS EXEMPTION CLAIMS, 1868–1963

Ferriter v. Tyler, 48 Vt. 444, 468–70 (1876); Commonwealth v. Has, 122 Mass. 40, 41-42 (1877); Reynolds v. United States, 98 U.S. 145, 166-167 (1878); United States v. Clawson (1884) (unreported trial court proceedings); Scoles v. State, 1 S.W. 769, 772 (Ark. 1886) (citing *Reynolds*); State v. White, 5 A. 828, 829 (N.H. 1886) (citing *Reynolds*); Commonwealth v. Starr, 11 N.E. 533, 534 (Mass. 1887); State ex rel. Walker v. Judge of Section A, Crim. Dist. Ct., 1 So. 437, 444 (La. 1887); Innis v. Bolton, 17 P. 264, 267–68 (Idaho 1888) (citing *Reynolds*); Wooley v. Watkins, 22 P. 102, 105–06 (Idaho 1889) (citing *Reynolds*); Commonwealth v. Plaisted, 19 N.E. 224, 226 (1889) (citing *Reynolds*); City of Wilkes-Barre v. Garabed, 11 Pa. Super. 355, 366 (1899) (citing *Reynolds*); Davis v. Beason, 133 U.S. 333, 342 (1890); People v. Pierson, 68 N.E. 243, 246–47 (N.Y. 1903); State v. Marble, 73 N.E. 1063, 1065–66 (Ohio 1905) (citing *Reynolds*); Toncray v. Budge, 95 P. 26, 36–37 (1908) (citing *Reynolds*); Knowles v. United States, 170 F. 409, 411–12 (8th Cir. 1909) (citing *Davis*); Commonwealth v. Herr, 39 Pa. Super. 454, 463–65 (1909) (quoting *Reynolds* without citing it), *affirmed* 78 A. 68 (Pa. 1910); Owens v. State, 116 P. 345, 347–48 (Okla. 1911) (citing *Reynolds*); State v. Neitzel, 125 P. 939, 940 (Wash. 1912) (citing *Reynolds*); Haas v. State, 1917 WL 1470, at *2–3 (Ohio Ct. App. Feb. 1917) (citing *Reynolds*); City of New Braunfels v. Waldschmidt, 207 S.W. 303, 305 (Tex. 1918) (citing *Reynolds*); McMasters v. State, 207 P. 566, 568–69 (Okla. 1922) (citing *Reynolds* and *Davis*); City of St. Louis v. Hellscher, 242 S.W. 652, 653 (Mo. 1922) (citing *Reynolds*); Copeland v. Donovan, 208 N.Y.S. 765, 766–67 (Co. Ct. 1925) (citing *Reynolds* and *Davis*); Shapiro v. Lyle, 30 F.2d 971, 973 (W.D. Wash. 1929) (citing *Davis*);

228. Fulton v. City of Philadelphia, 593 U.S. 522, 543 (2021) (Barrett, J., concurring).

229. *See* Oleske, *supra* note 1, at 744 ("It is long past time for the Court to engage in a forthright reexamination of its sharply conflicting precedents and seriously consider the nuances and middle-ground arguments those precedents have steadfastly ignored.").

Commonwealth v. Green, 168 N.E. 101, 101 (Mass. 1929); United States v. Macintosh, 283 U.S. 605, 623–24 (1931); State v. Verbon, 8 P.2d 1083, 1086–87 (Wash. 1932) (citing *Davis*); Pearson v. Coale, 165 Md. 224, 167 A. 54, 58 (Md. 1933); Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245, 265–68 (1934) (Cardozo, J., concurring) (citing *Davis*); Coleman v. City of Griffin, 302 U.S. 636 (1937) (dismissing for lack of federal question on the authority of *Reynolds* and *Davis*); Nicholls v. Mayor & Sch. Comm. of Lynn, 7 N.E.2d 577, 579–81 (Mass. 1937) (citing *Reynolds* and *Davis*); State v. Drew, 192 A. 629, 631–32 (N.H. 1937); Gabrielli v. Knickerbocker, 82 P.2d 391, 393–94 (Cal. 1938) (citing *Davis* and *Reynolds*); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940), *overruled on other grounds*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Commonwealth v. Palms, 15 A.2d 481, 483–84 (Pa. Super. Ct. 1940); State v. Cox, 16 A.2d 508, 515-516 (N.H. 1940), *affirmed*, 312 U.S. 569 (1941); City of Manchester v. Leiby, 117 F.2d 661, 666 (1st Cir. 1941) (citing *Reynolds* and *Davis*); United States v. Newman, 44 F. Supp. 817, 819 (E.D. Ill. 1942) (citing *Reynolds* and *Davis*); Lawson v. Commonwealth, 164 S.W.2d 972, 973–76 (Ky. 1942) (citing *Reynolds* and *Davis*); Baxley v. United States, 134 F.2d 937, 938 (4th Cir. 1943) (citing *Reynolds*); Jones v. City of Moultrie, 27 S.E.2d 39, 42–43 (Ga. 1943); State v. Barlow, 153 P.2d 647, 652–53 (Utah 1944) (citing *Reynolds*); Cleveland v. United States, 146 F.2d 730, 734 (10th Cir. 1945) (citing *Reynolds*), *affirmed*, 329 U.S. 14 (1946); Gospel Army v. City of Los Angeles, 163 P.2d 704, 712 (Cal. 1945) (citing *Davis*); Kirk v. Commonwealth, 44 S.E.2d 409, 412 (Va. 1947) (citing *Reynolds*); Mosier v. Barren Cnty. Bd. of Health, 215 S.W.2d 967, 969 (Ky. 1948); Sadlock v. Bd. of Ed. of Borough of Carlstadt in Bergen Cnty., 58 A.2d 218, 222 (N.J. 1948) (citing *Reynolds*); Rice v. Commonwealth, 49 S.E.2d 342, 347 (Va. 1948); Gara v. United States, 178 F.2d 38, 40 (6th Cir. 1949) (citing *Reynolds* and *Davis*), *affirmed*, 340 U.S. 857 (1950); Hopkins v. State, 69 A.2d 456, 459 (Md. 1949) (citing *Reynolds*); Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950); Commonwealth v. Bey, 70 A.2d 693, 694 (Pa. Super. 1950); United States v. Kime, 188 F.2d 677, 678–79 (7th Cir. 1951) (citing *Reynolds* and *Davis*); People ex rel. Wallace v. Labrenz, 104 N.E.2d 769, 773–74 (Ill. 1952) (citing *Reynolds*); Commonwealth v. Beiler, 79 A.2d 134, 136-137 (Pa. 1951) (citing *Reynolds*); Anderson v. State, 65 S.E.2d 848, 851–52 (Ga. 1951); Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 884–85 (7th Cir. 1954) (citing *Reynolds*); Commonwealth v. Renfrew, 126 N.E.2d 109, 111 (Mass. 1955); Commonwealth v. Smoker, 110 A.2d 740, 741 (Pa. Super. 1955); Hill v. State, 88 So. 2d 880, 883-85 (Ala. Ct. App. 1956) (citing *Reynolds* and *Davis*); Appeal of

Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 130 A.2d 240, 243 (Pa. 1957); Craig v. State, 155 A.2d 684, 690 (Md. 1959) (citing *Reynolds*); Board of Educ. of Mountain Lakes v. Maas, 152 A.2d 394, 407 (N.J. Super. App. Div. 1959) (citing *Reynolds*), *affirmed*, 158 A.2d 330 (N.J. 1960); State ex rel. Shoreline Sch. Dist. No. 412 v. Superior Ct. for King Cnty. 346 P.2d 999, 1003 (Wash. 1959); Holdridge v. United States, 282 F.2d 302, 311 (8th Cir. 1960) (citing *Reynolds*); Hoener v. Bertinato, 171 A.2d 140, 143 (N.J. Juv. & Dom. Rel. Ct. 1961) (citing *Reynolds*); Mitchell v. McCall, 143 So. 2d 629, 631 (1962); State v. Congdon, 185 A.2d 21, 30–32 (N.J. Super. Ct. App. Div. 1962) (citing *Reynolds*); *In re* Jenison, 120 N.W.2d 515, 516–19, *vacated* 375 U.S. 14 (1963) (remanded for reconsideration in light of *Sherbert v. Verner*, 374 U.S. 398 (1963)).

Note: Even after *Sherbert* was issued on June 17, 1963, some courts continued to reject exemption claims on the authority of *Reynolds* and *Davis*. *See, e.g.*, Commonwealth v. King, 33 Pa. D. & C.2d 235, 239 (Quar. Sess. 1963) (citing *Davis*); Cude v. State, 377 S.W.2d 816, 818-19 (Ark. 1964) (citing *Reynolds*); *State v. Garber*, 419 P.2d 896, 901-02 (Kan. 1966) (citing *Reynolds* and *Davis*).