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Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism

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BEGUILED: FREE EXERCISE EXEMPTIONS AND THE SIREN SONG OF LIBERALISM

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From all the talk about our religious pluralism—how extensive, indelible, inarbitrable it is—one would expect that establishing *one* definition of religious liberty would be the mother of all civic disturbances.

Wrong. We *have* a common definition of religious liberty. I can demonstrate our agreement with one exhibit: the immensely broad-based denunciation of the 1990 Supreme Court decision, *Employment Division v. Smith.*[1] Two counsellors at a drug rehabilitation center (Alfred Smith and Galen Black) appealed Oregon's denial of unemployment benefits. Oregon cited the "misconduct" that led to their discharges. Their "misconduct" consisted of using the hallucinogenic drug peyote. Peyote was on Oregon's list of controlled substances; using it was criminal. By ingesting it, Smith and Black also violated the specific terms of their employment. Each was a recovering substance abuser. Each had previously agreed to remain absolutely drug free.[2]

Justice Scalia summarized these facts for the *Smith* majority:

* Professor of Law, University of Illinois College of Law. Many thanks to Steve Bainbridge, Robert George, John Garvey, Richard Myers, Steve Smith, Richard Neuhaus, Michael Ariens, and Mark Tushnet for helpful suggestions.

1. 110 S. Ct. 1595 (1990).

2. Smith v. Employment Div., 721 P.2d 445, 446 (Or. 1986); Black v. Employment Div., 707 P.2d 1274, 1276 (Or. Ct. App. 1985), *modified*, 721 P.2d 451 (Or. 1986), *rev'd*, 799 P.2d 148 (Or. 1990).

"[r]espondents . . . were fired from their jobs . . . because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members."[3] The Court detected no constitutional issue, and staked out no narrow grounds for so holding. "[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[4]

The public and scholarly reactions to *Smith* have given new meaning to the old prophecy "the lion shall lie down with the lamb." Denouncing the decision were the mainline, liberal National Council of Churches (NCC), the evangelical "new right," *and* the NCC's most trenchant critic, Richard John Neuhaus.[5] Both the neoconservative American Jewish Committee (the *Commentary* crowd) and the liberal American Jewish Congress condemned *Smith*,[6] along with the Solicitor General of the United States Catholic Conference.[7] The Baptist Joint Committee and the Evangelical Lutheran Church added their voices.[8] *Smith* stimulated a petition for rehearing by a "who's who" of constitutional lawyers.[9] Three of them—with extensive contacts in the churches—said there was "no dissent" in the religious community over the need to overrule *Smith*.[10] They called it "a sweeping disaster for religious liberty."[11] The American Civil Liberties Union (ACLU), Norman Lear's People for the American Way, and the American Humanist Association, among others, joined this ecumenical chorus of critics.[12]

Critic Michael McConnell says that *Smith* "is undoubtedly the most important development in the law of religious freedom in decades."[13] But why? Not because Smith and Black lost. McConnell, like most other critics, does not say that they should have won.

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3. *Smith*, 110 S. Ct. at 1597-98.

4. *Id.* at 1600.

5. Phillip H. Harris, *Leaping Headfirst into the Smith Trap*, FIRST THINGS, Feb., 1991, at 37.

6. *Id.*

7. *Id.*

8. *Id.*

9. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

10. Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, *An Open Letter to the Religious Community*, FIRST THINGS, Mar., 1991, at 44.

11. *Id.*

12. Harris, *supra* note 5, at 37.

13. McConnell, supra note 9, at 1111.

Plaintiffs almost always lose these cases.[14] A few critics may be rankled that Native American belief was so buffeted, supposing that "mainstream religions" (evidently meaning Christianity) would have fared differently. I doubt it. Nothing in the *Smith* opinion limits its reach to fringe religions, and there is considerable debate about the intrinsic tilt, if any, of accumulated judicial doctrine on the subject.[15]

Revealingly, many critics hoist as their banner Justice O'Connor's opinion[16] concurring in plaintiffs' defeat. For them, the majority's analysis, not the outcome, is "the most important development in the law of religious freedom in decades."[17] More exactly, it is the majority's "non-analysis": *Smith* abandoned a doctrine that comprised most of Free Exercise jurisprudence since 1963.[18] I submit the following definition of religious liberty for our generation: the government may not make or enforce any law that "substantially burdens" religiously motivated conduct unless it is a narrowly tailored means of achieving a compelling state interest.[19] Let us call this the "conduct exemption." It started with *Sherbert v. Verner*[20] twenty-nine years ago, and has apparently ended with *Smith*. Critics obviously consider it the linchpin of, if not synonymous with, "religious liberty."[21] Otherwise, *Smith* could be a "disaster" only for Free Exercise doctrine since 1963.

I propose to defend *Smith*'s abandonment of *Sherbert*, though not all of its reasons for so doing. I agree with critics, like Justice O'Connor, who argue that the majority opinion unreasonably under-

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14. In a random survey of 100 pre-*Smith* cases (1979-1989), the plaintiffs' ledger was approximately (due to difficulties in categorizing a few cases) 7 wins, 93 loses. One of the victories was reversed by the Supreme Court. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), *rev'g* 795 F.2d 688 (9th Cir. 1986).

15. *See, e.g.*, McConnell, *supra* note 9, at 1135-36. As Richard Myers pointed out to me in his comments on this Article, critics stress that mainstream religions do not ordinarily find themselves in need of conduct exemptions, because statutes do not often place their members in unfavorable predicaments like that of Smith and Black.

16. *Smith*, 110 S. Ct. at 1606-15.

17. McConnell, *supra* note 9, at 1111.

18. *Smith*, 110 S. Ct. at 1602-06.

19. *See id.* at 1608 (O'Connor, J., concurring).

20. 374 U.S. 398 (1963).

21. *See, e.g.*, Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1467 (1981) (commenting that "*Smith* overruled *Sherbert* and its progeny and endorsed legislative indifference to the religious liberty rights of unpopular religions.").

stated the solidity and scope of precedents since *Sherbert*.[22] But *Smith* rightly jettisoned the conduct exemption because it is manifestly contrary to the plain meaning of the Free Exercise Clause, historically recovered and with 150 years of precedent up to *Sherbert*. The conduct exemption, therefore, is bad constitutional law. It also is not, strictly speaking, a doctrine of religious liberty. It is one aspect of the post-World War II takeover of our civil liberties corpus by the political morality of liberal individualism. The conduct exemption is liberal political morality that, while hospitable to certain kinds of religious commitment (basically, any religion that is "privatized") and subversive of others,[23] contains no doctrine of religious liberty as such. The conduct exemption is, therefore, a very bad construction of the Free Exercise Clause. Only with a *lot* of additional argument—so far absent—can *Smith* be branded a disaster for "religious liberty."

Critics of *Smith* who are serious about constitutional law, or who are not liberals, and especially critics who are both, should rethink their position.

I

This part of the Article seeks the plain meaning of the Free Exercise Clause, historically recovered. By "plain meaning," I mean the standard or prevailing definition of terms, drawn from their customary usage in the relevant field of discourse; in this case, that of political and legal affairs. By "historically recovered," I mean the "plain meaning" as apprehended by those who made the Free Exercise Clause constitutionally operative—politically active Americans, *circa* 1789-91, especially the state legislators who ratified it.[24]

This quest presupposes (at least to be ultimately persuasive) a wider "originalistic" account of constitutional law in which "plain meaning, historically recovered" is usually decisive of contemporary meaning.[25] Although originalism has some very able defenders (Richard Kay,[26] Earl Maltz,[27] Christopher Wolfe),[28] its detractors

22. *See Smith*, 110 S. Ct. at 1603-06 nn.2-5, 1606-15.

23. For an extended argument in support of the proposition in the text, see Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275 (1986).

24. *But see* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 301.

25. I say "usually," because precedent—legislative, executive, and judicial—may warrant adherence to a doctrine that scholarly investigation reveals to be *not* the original meaning.

26. *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional*

are legion. And most of its detractors do not take it seriously. They consider it impossible (John Ely),[29] intellectually naïve (Mark Tushnet),[30] a cynical apology for a conservative political agenda (William Brennan),[31] or all of the above. And worse. A brief defense of originalism is here necessary, lest this Article not be taken seriously.

The initial stage of this defense distinguishes defensible from indefensible "originalisms." Criticisms of originalism tend to be directed at the latter, though it is sometimes hard to find anyone who actually holds the originalist view under attack. Strawman or not, it is important to emphasize that originalism presents no question of rule by the "dead hand of the past." The choice of rulers, so to speak, is between two sets of the living—legislators or judges. Like almost all other disputes between originalists and proponents of a "living Constitution," this one is about narrower versus considerably broader judicial power to overturn laws and policies enacted by contemporary lawmakers. Just so in *Smith*: do Oregon's legislators and administrators decide unemployment benefits for Smith and Black, or do judges?

Originalists should not care (though some do) what this or that Framer would say about peyote use, drug laws, and religious beliefs. Originalists should care very little about, for example, "Madison on church and state," or "Madison in the great Virginia struggle over general assessments for Christian teachers." What Madison understood the Free Exercise Clause to mean—a different question—*is* a bit pro-

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Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226 (1988); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987).

27. *See, e.g.*, Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Earl M. Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773; Earl M. Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983).

28. *See, e.g.*, CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986) [hereinafter WOLFE, MODERN JUDICIAL REVIEW]; Christopher Wolfe, *The Original Meaning of the Due Process Clause*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213 (Eugene W. Hickok, Jr. ed., 1991).

29. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 11-41 (1980).

30. *See* MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (Chapter 4 is particularly relevant to this discussion.). *But see* Christopher Wolfe, *Grand Theories and Ambiguous Republican Critique: Tushnet on Constitutional Law*, 1991 LAW & SOC. INQUIRY 831 (book review).

31. *See* William Brennan, The Constitution of the United States: Contemporary Ratification, Speech Delivered at Georgetown University (Oct. 12, 1985), *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 25-26 (Jack N. Rakove ed., 1990).

bative of its original meaning. Originalists should care about that. Originalists properly seek in the historical materials an intelligible principle capable of guiding contemporary decision. (By historical materials I mean chiefly the constitutional text, illumined by evidence of its plain meaning to the ratifiers.) The rest of judging is up to the living. The rest of judging includes the difficult tasks of identifying a principle determinate enough to guide decision, then impartially and adroitly applying the right, properly specified principle(s) to facts skillfully adduced by legal practitioners in the course of litigation.

A defensible "originalism" would place almost no stock in its most oft-cited defense: the "antidemocratic" or "countermajoritarian" quality of judicial review.[32] A defensible originalism would place little stock in the distinction between law and politics, which corresponds to the division of labor between courts and legislature.[33] "Majoritarian" is an ambiguous term[34] with no intrinsic moral authority. Moreover, it is hardly the animating feature of our Constitution that some originalists suppose it to be.[35] Without additional premises, it does not even lead to "originalism," but to the "judicial restraint" constitutionalism of John Ely,[36] Alexander Bickel,[37] and Robert Bork.[38]

The law/politics distinction is prone to a portion of the objection just noted. It envisages politics as the tumultuous process from which majoritarian preferences emerge out of an array of self-interested proposals. The law/politics distinction also corresponds, in some usages, to a dubious distinction between "reason" and "will." Legislators,

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32. Perhaps the classic statement is Alexander Bickel's: "The root difficulty is that judicial review is a counter-majoritarian force in our system." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139-41 (1990).

33. The law/politics distinction is pivotal to Bork's originalism. Consider the subtitle to Bork's *The Tempting of America, The Political Seduction of the Law.* For a lengthy, largely critical review of this book (and of the law/politics distinction), see Gerard V. Bradley, *Slaying the Dragon of Politics with the Sword of Law: Bork's Tempting of America*, 1990 U. ILL. L. REV. 243 (book review).

34. Gertrude E.M. Anscombe has shown how a majority can be in the minority on a majority of occasions. *See* Gertrude E.M. Anscombe, *On Frustration of the Majority by the Fulfillment of the Majority's Will, in* THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE 123-30 (1981).

35. *See* David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism*, 53 REV. POL. 251 (1991).

36. *See* ELY, *supra* note 29.

37. *See* BICKEL, *supra* note 32.

38. *See* BORK, *supra* note 32.

to secure their political fortunes, act at the behest of self-interested constituents. A majority of them get their way because, well, they are the majority. Their will is their warrant. Judges are distinguished precisely by the tool of their trade: not willfulness or interest, but reason.

Originalism is an account, basically a methodology, for constitutional construction by courts.[39] Its defense presupposes a wider account of practical reason, and of what constitutes genuine human flourishing.[40] Its defense distinguishes legal reasoning from unrestricted practical reasoning. (Here is a solid foundation upon which to build something *like* the law/politics distinction.) The former is a highly specialized, institutionalized version of the latter. This artificiality (or "artifactuality") is purposeful, and its main purpose is to generate *now* a set of concepts, definitions, and rules to resolve, in principle (but generally not in practice), all future social disputes. Legal reasoning should enjoy significant autonomy from unrestricted practical reasoning. Much of it will be arcane, completely technical. That is basically why we have lawyers—to mediate this specialized discourse to, and to make sure it serves, ordinary people.

Perhaps the greatest danger to a stable originalism is in keeping this relationship true. It is not easy. Legal reasoning, despite relative autonomy, is a kind of practical reasoning. Also, legal reasoning serves goods established by reflection in the order of practical reasoning. Law is a cultural product that is designed to secure the good of a just and harmonious social order. Law is, therefore, dependent for its value, so to speak, upon an ethics antecedent and largely exterior to itself.

The enduring temptation will be—and has been—judicial recourse to the judge's preferred account of those antecedent principles; his vote for the best political morality extant, or what he thinks historically was the antecedent. Liberalism is most often the former, natural rights most commonly the latter. Sometimes the roles are reversed. At other times, "civic republicanism" or the lineaments of a Christian commonwealth are added to the calculation. No matter. Originalism's corrective is to focus upon the enactment—the constitutional text. As one federal court aptly put it in the republic's early

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39. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 429 (1990).

40. *See generally*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) [hereinafter FINNIS, NATURAL LAW] (examining the relation among "natural law," "natural theology," and "revelation").

years:

> It is said [by counsel to warrant a judicial declaration of unconstitutionality], that such a law is in contravention of unalienable rights; and we have had quotations from elementary writers, and from the bills of rights of the state constitutions, in support of this position. The doctrines and declarations of those respectable writers, and in those venerable instruments, are not to be slighted; but we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an express compact, a government of convention.[41]

The various theoretical contentions of the Framers—whatever they were—were melded into or supplanted for operational purposes by the enactment. Here is refutation of criticisms that suppose that originalism rests upon a naïve assumption of homogeneity and unity of viewpoint in the early republic. That criticism may hurt some "original intent" theories that go beyond the text, and seek all purpose direction from an undifferentiated mass of wise men called "the Framers." But Forrest McDonald, who is no fan of judicial activism, warns that

> it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; others were not.[42]

The constitutional text supplies unity amidst this undeniable diversity.

Though "enactment" is central to originalism, originalists are *not* the positivists that many critics say they are.[43] Originalism presupposes no positivist theory of law. Originalists do not claim that law, including constitutional law, is beyond normative evaluation. Nothing in a sound originalism denies that there are natural or inalienable rights, some of them secured in the Bill of Rights. Originalism presupposes no moral obligation on the part of contemporary judges, legislators, or citizens to obey the "will" of the founders.

This misplaced criticism—that originalists must be

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41. United States v. The William, 28 F. Cas. 614, 622 (D. Mass 1808) (No. 16,700).

42. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 224 (1985).

43. Critics include: HADLEY ARKES, BEYOND THE CONSTITUTION (1990); ELY, *supra* note 29; Michael W. McConnell, *Trashing Natural Law*, N.Y. TIMES, Aug. 16, 1991, at A23.

positivists—presumes (in order to be a criticism rather than just an observation) that positivism is defective. Positivism *is* defective if by it is meant the command theory of law associated with Austin, and (or) the moral skepticism of a Holmes.[44] Only some contemporary positivists entertain such presuppositions. The presuppositions are not components of the sophisticated and not obviously defective positivism of, say, H.L.A. Hart[45] and Neil MacCormick.[46]

The central concern of "posoriginalists" (my term for those who identify originalism with positivism) seems to be that originalists set constitutional law on a course that veers sharply from, or is entirely indifferent to, some objectively correct or rationally cogent alternative path. But path to, or of, what? Not constitutional law, at least not without question-begging: *its* proper nature and direction is the matter under investigation. Besides, originalism hardly lacks rationality or objectivity of an important sort. Path for what, then? The best regime, or the just polity, or the perfectly constructed commonwealth. But originalists do not deny the cogency of such constructions. Originalists do insist (as the preceding pages suggest they that would) upon the proper autonomy of law, including constitutional law, from unrestricted practical reasoning. Put a bit more decisively, neither positivism nor its alternatives (such as natural law and natural rights) is an *interpretive* theory. Originalism is.[47] There may be some difference between the focal point of natural law theory and the focal point of positivism, but neither is or purports to be a technique for discerning the law of a particular political community (say, the United States) at a particular time (say, now).[48]

"Posoriginalists" may still suspect that originalists (like this author) lack confidence in enactment-independent claims of reason. Honestly, I do not. My rejoinder is that "posoriginalists" do not allow, as they should and I do, for the rationally underdetermined quality of most questions pertaining to the common good. Reason tells us that there are a few objectively wrong ways to assemble the infinitely complex ensemble of conditions conducive to human flourishing that constitutes the common good of society's members. There is no one

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44. Hadley Arkes does both. *See* ARKES, *supra* note 43.

45. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

46. *See* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

47. David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1402 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

48. *See* FINNIS, *supra* note 40, at 3-55.

correct way, and many more or less equally reasonable ones. It is by supposing otherwise, that is, that reason commonly provides objectively correct answers to questions of the common good, that "posoriginalists" acquire most of the moral charge to their critique.

Now we can see the gleam in their eye. Originalists, abundantly confident in reason, suppose that the Constitution is designed, fundamentally, to allocate jurisdiction. This is especially true of our federal Constitution, which rests upon state responsibility for most governmental tasks, and which divides national power among three branches. Jurisdiction is the power authoritatively to *choose* from among many competing reasonable proposals for directing the community's pursuit of the common good. The point of our Constitution is to provide for efficient, relatively clear resolution of jurisdictional questions precisely so that the contending proposals do not upset the basic harmony and stability of society. "Posoriginalists," because they tie constitutional law (and law generally) so closely to a right/wrong account of the common good, endanger that peace and harmony. They confuse the focal points of positivism and constitutional law.

Originalists nevertheless acknowledge, with "posoriginalists," that the Bill of Rights (and some other parts of the Constitution) recognize natural rights. They agree that a few sections of the Constitution recognize inalienable rights. These could not have been and were not created by men, even operators so astute as the Framers. They are not "true" by virtue of enactment. What men can do (and I think did do in 1787-91) is reflect upon the narrower (but still critical) question of how to *secure* natural rights within a stable, harmonious, *and* just legal order. *That* question can be resolved only by enactment by a constitutive power (in our political culture, "the people").

The important question—the one that *does* distinguish originalists (who may be natural law or natural rights theorists) from most of their critics—is to what extent judges ought to invalidate legislation on the basis of principles of natural justice not fairly discoverable in the text. Originalists insist that *this* is a prudential question *not* significantly dependent on natural justice. Reasonable persons—anticipating the kinds of individuals who would sit on the bench, the intrinsic limits of the adjudicatory setting, the need for impartially administered justice, and the inevitable diversity of views over the demands of practical reason, among other factors—might well constitute a government without judicial review at all.[49] Such

49. *See generally* John Finnis, *A Bill of Rights For Britain? The Moral of Contempo-*

an arrangement, I think, offends no tenet of natural justice. And, in light of *Dred Scott v. Sandford*,[50] *Plessy v. Ferguson*,[51] *Lochner v. New York*,[52] and *Roe v. Wade*,[53] we might well wish the Framers had done so. The main point is that no *deduction* from the existence of natural rights (or natural law or natural justice or any other account of political morality justified by critical reason) to judicial review is possible. Which is to affirm that the order of unrestricted practical reasoning is distinct from that of legal reasoning.

Were it otherwise, there would be no good reason to entrust authoritative exposition of the Constitution to persons who are legal specialists—judges. I say this fully recognizing that all legal systems are open, at some points, to the flow of unrestricted practical reasoning. It may be that construing a constitution, especially a bill of rights, presents more such openings than anywhere else in a legal system. From this, no judicial activism (of the type exemplified by *Roe v. Wade*) follows. I am quite sure that *Roe v. Wade*-type constitutionalism owes much more to the influence of contemporary liberal philosophers (like Ronald Dworkin[54] and John Rawls)[55] than to any inquiry into our constitutional tradition.[56] The constitutionalism of Justice Robert Jackson is prototypical:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[57]

Constitutional law is here understood as judicial vindication of individual rights over and against legislative pursuit of collective interests. Only the nonpolitical forum of principle—courts—can resist the allure of, and depredations of, our majoritarian politics, whose

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rary Jurisprudence, 71 PROC. BRIT. ACAD. 303 (1985).

50. 60 U.S. (19 How.) 393 (1856).

51. 163 U.S. 537 (1896).

52. 198 U.S. 45 (1905).

53. 410 U.S. 113 (1973).

54. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

55. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

56. *See infra* Part III.

57. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

wont is intolerance and conformity. But this construction is fundamentally at odds with the restricted nature of judicial review in antebellum America and the constitutional tradition up to around World War II. That is dispositive for originalists. But that does not finish the job. The liberal construction is usually offered as a philosophical critique of the constitutional tradition and as a reason to *reject* originalism. If so, the construction is warranted, if at all, by critical reason. From the standpoint of critical reason, it has been subjected to cogent, even fatal, criticism by, for example, John Finnis[58] and Robert George.[59]

Dissolution of this construction washes away most arguments against originalism. And what effect upon the conduct exemption? That doctrine has some specific meaning content (like exclusion of perfectionist state policies), but it is, on the whole, a gigantic balancing test whose practical effect is to transfer power in bulk to the judiciary. The purpose of the judicial calculations is not to arrive at a correct, or necessarily more libertarian (in the specific sense of more people getting more freedom from legal restraint), solution, but to avoid one kind of wrong answer: *any* answer given finally (i.e. without judicial review) by legislators. The conduct exemption thus exemplifies a common feature of the post-World War II corpus, as John Finnis explains: "[W]hat is presented as a dispute about the 'legal system' *qua* set of normative meaning-contents is in substance, typically, a dispute about the 'legal system' *qua* constitutional order of institutions."[60]

The conduct exemption is a "constitutional" question in the proper sense of jurisdiction: power authoritatively to settle a question concerning the common good. Jurisdiction marks the difference between an enforceable judicial decree and mere opining by a robed editorialist. But what is the source of jurisdiction? Not political morality. We have seen that jurisdictional questions cannot be answered by deduction from that starting point. Nor can it be up to judges to decide—apart from extrinsic, authoritative sources—that theirs is the power to decide. No one is obliged, legally or morally, to obey the notices of someone else just because that figure hearkens all to draw near and heed his commands.

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58. *Supra* note 49 *passim*.

59. Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 LAW & PHIL. 245 (1989).

60. FINNIS, *supra* note 40, at 356 (footnote omitted).

The conduct exemption implies authoritative judicial resolution of particular legal disputes. Its defenders are, therefore, obliged to identify the source of its authority, its jurisdictional pedigree. Congressional statutes? Yes, as any lawyer who has practiced in federal court knows. But why are the statutes authoritative? What is the source of Congress's power? The Constitution, of course, rather plainly construed.[61]

The point of this thought experiment is not to settle on a single, finely-tuned series of regressing steps. My challenge is this: conduct exemption defenders are courting self-refutation. They proclaim a judicially enforceable rule of law binding us all. Very well. They need justify that stance by a defensible methodology of constitutional construction. If the defender is not simply mindless, he or she will have to produce a chain of reasoning something like the above, one resting ultimately in the terms of the constitutional enactment. I am confident that that chain of reasoning will not, when deployed upon the Free Exercise clause, produce the conduct exemption.

All that said, originalists recognize that judges will occasionally encounter constitutional law that presents them with profound moral questions. The judge may conclude that the principle of constitutional law is unjust. What to do?

Two prominent escape options should be declined. One is suggested by Ronald Dworkin's attempt to incorporate into the art of judging *both* "fit" with traditional legal materials *and* precepts of critical morality.[62] Since these two features are incommensurable, Dworkin's solution is illusory.[63] The other escape supposes that this type of conflict gives rise to the difference between natural law and positivism. Natural lawyers, this largely misguided account holds, say that the unjust law is no law at all.[64] Judging thus proceeds by eliminating the legal horn of the dilemma. Positivists eliminate the other horn. Skeptical or flatly dismissive of the claims of critical reason (Holmes' "brooding omnipresence in the sky"),[65] they blithely rely upon the enactment.

Robert George explains how better to approach this question.

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61. *See* U.S. CONST. art. I.

62. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

63. *See* John Finnis, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357 (1987).

64. *But see* Gerard V. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L.J. 217, 245 (1990) (book review).

65. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

Treating Justice Scalia as an example of a non-positivist originalist, George explains:

> As I understand him, Scalia does not deny that there are objective moral truths; nor does he deny that these truths are accessible to reason; . . . nor does he deny that positive law (including constitutional law) can be evaluated by reference to these truths; nor does he deny that one must avoid complicity in the wrongdoing of others . . . . How can a judge who believes in natural law hold that he has a duty to render judgment in accord with positive law even when the positive law in question is unjust (or otherwise immoral)?
>
> According to natural law theorists, judges are under the same obligations of truth telling that the rest of us are under. If the law is in conflict with the natural law, the judge may not lie about it. If his duty is to give judgment according to the positive law, then he must either (i) do so or (ii) recuse himself. If he can give judgment according to immoral positive law without rendering himself formally or unfairly material[ly] complicit in its immorality, and without giving scandal, then he may licitly do so (though he may also licitly recuse himself). If not, then he must recuse himself. (A great deal of traditional casuistry has to do with problems of formal and material complicity in wrongdoing.)[66]

This brief precis is probably longer than necessary to justify our search for the original meaning of Free Exercise. True, from the controversy over Bork's nomination and Scalia's emerging originalist jurisprudence, you would think that lots of folks were flatly opposed to, and had no use for, originalism. Not really. No one—not judge, commentator, or academic—denies its relevance to constitutional law. Just about everyone is an originalist to some degree, including former Justices Brennan and Marshall.[67] In many cases, all the Justices agree that the original meaning is presently dispositive.[68] Enough said about whether the historical excursion awaiting the reader is justified.

We want to know if the conduct exemption is the plain meaning, historically recovered, of the Free Exercise Clause. And if not, what

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66. Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1075-76 n.85 (1990) (quoting letter from Robert George to Sanford Levison (Apr. 3, 1990)).

67. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 485-90 (1985) (Brennan, J., concurring).

68. For a recent example, see Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

is? But we are immediately confounded: what is the conduct exemption? What does it mean?

Is "religion," as the term is used in the Free Exercise Clause, all theistic belief systems? Theistic systems that contemplate a transcendent personal god who issues commands or otherwise possesses a will relevant to humans, just so that conflicting obligations may arise? What constitutes a "burden"? Is it burdensome to know that in the government's files is your social security number? What if you think that numbers are the mark of the Beast, as the Book of Revelation may tell us?[69] Or that numbers diminish your spirit, as the Native American plaintiff in *Bowen v. Roy*[70] alleged?

What are "legitimate governmental interests," and which ones are "compelling?" Can an exceptionless distribution of a burden, like eligibility for military conscription, ever be a compelling interest? Does "necessary" really require that *no* alternative exists? What of competing demands on government resources? Do they foreclose alternatives? If "necessary" means, rather, "appropriate, given all other constraints, demands, entitlements and plans," why not just eliminate the middlemen (all non-judicial government policymakers) and put judges in charge from the get-go?

Defenders of the conduct exemption do not deny that it is a bit fuzzy. Michael McConnell suggests this clarification: "maximum freedom for religious practice consistent with demands of public order."[71] But who disagrees with that? No one rationally can, because it is purely formal, like saying "there shall be no unjustified burdens upon religion." What is formal about it is that all of the substance is suppressed. Most significantly suppressed is: in what does public order consist? That no one has gotten a bloody nose? Does it include legal protection of the aesthetic, or moral, or religious sensibilities of all? Of a majority?

Even so appealing a formulation as Madison's (which McConnell endorses), "that free exercise should be protected in every case where it does not trespass on private rights or the public peace,"[72] is inconclusive. Do the people enjoy a collective right to a decent society? Does the government rightly constrain the religious practices of

69. *See* Leahy v. District of Columbia, 833 F.2d 1046, 1048 (D.C. Cir. 1987).

70. 476 U.S. 693 (1986).

71. McConnell, *supra* note 9, at 1111.

72. *Id.* at 1128 (quoting letter from James Madison to Edward Livingston (July 10, 1822)).

one or more persons when it makes impossible a cultural order supportive of the conscientious practices of the vast majority?

Does public order extend to a shared religious outlook? To common moral precepts? Does the right of conscience include an immunity from state interference with actions that, while self-regarding, are objectively immoral? Is there, in other words, a free exercise right to do a moral wrong, like ritual self-immolation, or to have adulterous sexual relations? Americans in the founding and antebellum eras thought not. *Both* "licentiousness" *and* "public peace and order" conditioned and limited the religious liberty that they enjoyed.[73] They thought that they enjoyed a nearly perfect freedom of conscience.[74] And they brought blasphemy prosecutions, and compelled ministerial support, as well as sabbath observance.[75] Quite likely, McConnell means "public order" to exclude all perfectionistic state action, in favor of liberal neutrality. Be that as it may, we need to know if that corresponds to the original understanding. Already, the answer appears to be no.

Stated as it was in *Sherbert*, the conduct exemption is a symbol of unexpressed commitments, an opaque herald of things to come, a trumpet blast promising that something (or someone) important follows.[76] We need to unpack its conceptual baggage, spread out its load of definitions, its concept of rights, its political maxims and empirical generalizations about human nature, and more. We especially need to know its account of justice, and whether the polity may aspire to more than justice among individuals, whether it may promote the genuine flourishing of individuals. Without such differentiation and clarification, the historical search cannot get going.

We cannot (so far) seek the historical pedigree of the "conduct exemption," because we do not know what we are looking for. It is one of those things that has to be discussed retail, not wholesale. Here is the insight of Justice Scalia's insistence in *Smith* (in other ways unconvincing) that we do not have a "conduct exemption" doctrine at all.[77] Scalia allowed that we have an unemployment benefits and religion doctrine,[78] and some "hybrids" resembling the conduct

73. *See infra* notes 148-265 and accompanying text.

74. *See id.*

75. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1503 (1990).

76. Sherbert v. Verner, 374 U.S. 398 (1963).

77. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1600-06 (1990).

78. *Id.* at 1602-03.

exemption.[79] In any event, the phenomenon known as *the* conduct exemption is a series of discreet propositions yet to be described.

I have broken the conduct exemption into four components: first, the class of actions eligible for protection (what is protected); second, the reasons that may justifiably burden that class of actions (the scope or nature of the protection); third, the institutional custodian of this calculation (who is the protector—courts or legislators?); and fourth, the basic objective of these protections (expressed without using terms to be defined). Thus, the "conduct exemption" comprises the "religiously motivated conduct" of individuals, *not* just intracommunal or ritual actions. It may justifiably be burdened for a limited number of extraordinary reasons, excluding perfectionist reasons, or what are called moral laws. Courts, and not legislatures, make this calculation. Finally, the objective is "religious liberty," defined as what happens when government provides no reason to practice or adopt any particular religious perspective. "Neutrality of effect" is a convenient expression for this objective.

Other differentiations are possible. One, emphasizing "burden," and another, the remarkable fact that the construct gets by without defining "religion," suggest themselves. Mine is nevertheless sufficient to permit historical investigation without preanalytical prejudice.

II

The controverted constitutional provision reads, "Congress shall make no law . . . prohibiting the free exercise" of religion.[80] The *Smith* Court spent most of its time arguing against one interpretation of it, the conduct exemption. But without identifying it as such, and without historical argument, the Court came close to expressing the meaning apprehended by the ratifiers:

> [A]ssembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation . . . . [A] state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts . . . *only* when they are engaged in for religious reasons, or only because of the religious belief that they display.[81]

The decisive feature is not the conduct exemption's "neutrality of

79. *Id.* at 1601-02.
80. U.S. CONST. amend. I.
81. *Smith*, 110 S. Ct. at 1599 (emphasis added).

effect," but, rather, what might be called "neutrality of reasons." John Locke provided a useful illustration, albeit long before the founding of the Constitution and a very long time before *Smith*:

> [I]f any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. Meliboeus, whose calf it is, may lawfully kill his calf at home, and burn any part of it that he thinks fit. For no injury is thereby done to any one, no prejudice to another man's goods. And for the same reason he may kill his calf also in a religious meeting. Whether the doing so be well-pleasing to God or no, it is their part to consider that do it . . . . But if peradventure such were the state of things that the interest of the commonwealth required all slaughter of beasts should be forborne for some while, in order to the increasing of the stock of cattle that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only 'tis to be observed, that in this case the law is not made about a religious, but a political matter; nor is the sacrifice, but the slaughter of calves, thereby prohibited.[82]

There are cases directly on point. A federal court recently entertained a Free Exercise challenge to a municipal ordinance that forbade the ritual slaughter of animals, but that did not proscribe slaughter for sport or food. The court, incorrectly in my view, upheld the ordinance.[83] Applying "neutrality of reasons" analysis to the facts of *Smith*, if Oregon generally allowed peyote use, but denied it only to Native Americans for ritual use, then Free Exercise was violated. As long as peyote use was generally prohibited, however, its use for religious reasons could be validly forbidden as well.

Nothing in this idea (and nothing in the Constitution) prohibits relief from neutral, generally applicable laws for conscientious objectors *by legislative accommodation*. This is precisely how almost half of the states and the federal government,[84] and recently Oregon,[85] have responded to ritual use of peyote. "Neutrality of reasons" is not

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82. Jeremy Waldron, *Autonomy and Perfectionism in Raz's "Morality of Freedom,"* 62 S. CAL. L. REV. 1098, 1134 (1989) (quoting JOHN LOCKE, *A Letter Concerning Toleration*, *in* LOCKE: THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 147-48 (J.W. Gough ed., 1976)).

83. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989).

84. *See* McConnell, *supra* note 9, at 1113.

85. *See Oregon Peyote Law Leaves 1983 Defendant Unvindicated*, N.Y. TIMES, July 9, 1991, at A14.

maintained because it is a "ratchet" protection against legislative supposition of *false* belief. Although that may typically be the case, "neutrality of reasons" is abided because accommodation supposes neither the falsity nor the truth of religious propositions. It supposes only that the person whose action is religiously motivated is behaving differently from the person who performs the same action (viewed behaviorally) for other reasons.[86]

This distinction possesses intrinsic force. Suppose that two individuals who are otherwise healthy, but who require blood transfusions, reside in a jurisdiction that prohibits suicide. Without the transfusion, each will die. With the transfusion, each will regain robust health. Each is twenty-five years old, and each refuses the transfusion. One does so because he is depressed and wants to die. His refusal thus encompasses a choice to die, and his plan will be accomplished by refusing to receive blood. He evinces the belief that life is not always a basic human good and that death is not always an evil. This person's death would be suicide. In our hypothetical jurisdiction, he violates the law, and probably should be transfused against his will.

The other person knows that he will die without the transfusion, and willingly accepts that eventuality. He refuses for a different reason: as a Jehovah's Witness, he cannot conscientiously take the blood of another into his system. This person *wants* to continue living, does not choose death, and would prefer to attain the object of his plan—religious duty—without dying. This person's death would not be a suicide. He is not intentionally taking an innocent human life; he is being faithful to God. In my view, he does not break the law and probably should not be transfused against his will.

Nothing in this example presupposes *Sherbert*,[87] the Free Exercise Clause, or any other enactment save the suicide prohibition. For reasons similar to those advanced in the suicide example, Christian Scientist parents who rely unavailingly upon spiritual healing for a diseased child do *not* commit any direct killing, even though parents making the same decision for other reasons probably would. Whether or not Christian Scientist parents are guilty of negligent homicide is a different, more difficult question, but it can and should be answered by the conduct exemption doctrine.

This neutrality of reasons is the defining feature of *Smith*'s Free

86. *See* Waldron, *supra* note 82, at 1135.

87. Sherbert v. Verner, 374 U.S. 398 (1963).

Exercise analysis, and it corresponds to the plain meaning, historically recovered. But it is not the only feature for *Smith*, and for the ratifiers. The *Smith* Court was less than precise about the class of actions eligible for this protection. Justice Scalia started out with worship and liturgy—both intracommunal collective actions—but trailed off into, seemingly, all divinely enjoined, or possibly all religiously motivated, conduct.[88] He seemed to adopt a believer-centered account of eligibility: the list is as long as our pluralism can make it.[89]

Scalia overshot the mark. For practical purposes, in the founding and antebellum eras, neutrality of reasons pertained to "worship," widely construed to include both doctrine and church discipline as well. All of these functions are intracommunal group actions—things that churches, not untethered individuals, do.

Why should we think that Scalia got the central feature—neutrality of reasons—right? Well, we know Locke was a profound influence upon the Framers of our Constitution, and there is no doubt that the Bill of Rights was proposed, adopted, and ratified with the objective of securing, against a *new* government, *old*, familiar rights.[90] True, Locke excluded from his scheme of toleration several classes of persons, including, most notably, Roman Catholics and atheists, but there are plenty of echoes of that in the founding, too.

That is hardly a persuasive case. Further discussion takes the form of an extended conversation with Michael McConnell's *The Origins and Historical Understanding of Free Exercise of Religion*.[91] Why? Because McConnell's is the best originalist case made as yet, and the best likely to be made in the near future, for the conduct exemption. If it is unpersuasive—as I contend that it is—then we may conclude that the conduct exemption cannot be supported historically. If the conduct exemption is not the original meaning, it does not follow that anything else, in particular, is. But McConnell's piece is, in significant part, a discussion of the only plausible historical alternative: neutrality of reasons.

McConnell demonstrates that two views, with a limited number of contemporary supporters, are contradicted by the historical evidence. McConnell is right that some action, and not just belief, *was*

88. *See supra* text accompanying note 81.

89. *See Smith*, 110 S. Ct. 1595.

90. *See, e.g.*, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 69-120 (1987); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988).

91. *See* McConnell, *supra* note 75.

protected.[92] He is also right that the Establishment Clause did *not* prohibit legislative exemptions.[93] But on the critical question of historical support for judicially crafted exemptions from general law—*Sherbert*—McConnell's conclusion is surprisingly guarded:

> Without overstating the force of the evidence, however, it is possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation.[94]

Elsewhere, "constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause . . . . While the historical evidence may not be unequivocal (it seldom is), it does, on balance, support *Sherbert*'s interpretation of the free exercise clause."[95]

McConnell dramatically overstates the strength of his evidence. Even so, one wonders *how much* evidence of original understanding is sufficient to authorize judicial invalidation of legislation (or, in this context, judicially crafted exemptions from legislation). McConnell seems to think that a preponderance of the evidence is enough. I think not, especially given the undeniable, long tradition of judicial interpretation to the contrary.

Momentarily, I will treat in detail the dispositive body of evidence: antebellum judicial interpretation, both state and federal, of constitutional guarantees of the free exercise of religion. *That* evidence is a significant but limited portion of McConnell's article. He spends much time recounting patterns of church/state thought and legal/constitutional behavior in the colonies, and in the early republic.[96] He emphasizes the religious underpinnings of the colonists' and early republicans' political thought.[97] He concludes that this evidence is "consonant" with conduct exemptions.[98]

McConnell seems to think that showing that a religious conception of duty to God propelled our tradition of liberty of conscience verifies the conduct exemption. A short but sufficient response to this

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92. *Id.* at 1459.

93. *See* Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 n.12 (1991).

94. McConnell, *supra* note 75, at 1512.

95. *Id.* at 1415.

96. *Id.* at 1421-73.

97. *See id. passim.*

98. *Id.* at 1415.

reasoning is that the evidence is "consonant" with Scalia's rendering of free exercise, and Locke's as well. A longer answer would build upon my earlier observation that unrestricted practical thought is refracted along its passage into law and legal reasoning. There is no straight path between the most obstreperous conscientious objection and the conduct exemption. Roger Williams is likely the great dissenter in our historical tradition; certainly no one in our history has placed religious duty closer to the center of his political thought. Yet, Williams was politically an authoritarian, and would have none of *Sherbert*, including that case's notion of solicitation of conscience.[99]

The point is not to debate Williams' significance for the Framers. McConnell suggests (correctly) that it was not much.[100] The point is to suggest, using Williams as an example, that the "interrelation between the claims of a limited government and a sovereign God"[101]—and Williams surely believed in both—is no premise for concluding anything about *Smith*'s historical antecedents. One might believe in both concepts, yet oppose a written constitution, judicial review, or both! Almost all of McConnell's remaining evidence (aside from the judicial corpus examined below) is either inapposite or contrary to his conclusion. McConnell relates accommodations of reli-

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99. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT (1985).

> There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any. I further add, that I never denied, that notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace of preservation; if any shall mutiny and rise up against their commanders and officers; . . . because all are equal in Christ, therefore no masters nor officers, no laws nor orders, nor corrections nor punishments;—I say, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel and punish such transgressors, according to their deserts and merits.

Id. at 441 n.73 (quoting Roger Williams, *in* ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 15 (1964)).

100. *See* McConnell, *supra* note 75, at 1426-27.

101. *Id.* at 1415.

gious conscience by colonial and state governments.[102] He notes a First Congress episode that "strongly suggests that the general idea of free exercise exemptions was part of the legal culture."[103] He concludes, reasonably enough, that "exemptions on account of religious scruple should have been familiar to the framers and ratifiers of the free exercise clause."[104] But "an obvious objection to all these examples would be that they were initiated by the legislature."[105] Thus, McConnell has adduced no instance of a judicially crafted conduct exemption.

How do we get *Sherbert* out of *legislative* accommodations? Certainly, one needs to argue for it. But McConnell simply chooses to make "accommodation" analytically active, and chooses to treat "legislative" as a mere variable modifier. Why not reverse priorities? Why assume that they are severable at all? McConnell does not say. "Legislative accommodation" may actually have been a single term designating an intrinsically political (non-legal) calculation. McConnell would agree that there was an abrupt change of events between 1790 and 1800. How abrupt? Assuming, contrary to historical fact, that "legislative accommodation" amounts roughly to the conduct exemption, this meaning would first have to be constitutionalized in the Free Exercise Clause, and then judicialized (they are two separate steps, because we cannot rule out, as a matter of interpretive principle, that some constitutional constraints are judicially unenforceable). This is all possible, and may have occurred. But, given that the background is entirely colored by "legislative accommodation," the abrupt turn would have left a measurable historical path.

McConnell has a difficult chore ahead of him. His strategy is bold. He *supposes* that legislative accommodations passed to the judiciary! "Once the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature."[106] "[T]he advent of judicial review had transformed a principle of free exercise previously enforced solely through legislative action into one enforceable through the courts."[107] McConnell cites no supporting evidence from the ratify-

102. *Id.* at 1466-73.
103. *Id.* at 1501.
104. *Id.* at 1511.
105. *Id.* at 1473.
106. *Id.* at 1445.
107. *Id.* at 1510.

ing debates, and allows that the Congressional debates said nothing about judicially crafted exemptions.[108] He allows that the First Congress debated and failed to pass an amendment that would have exempted any person "religiously scrupulous of bearing arms" from service in state militias.[109] If free exercise were thought to address that issue, why separate consideration? McConnell suggests imaginable alternatives.[110] But the least fanciful is that free exercise did *not* include exemption from militia service for conscientious objectors.[111]

There are deeper difficulties with McConnell's reliance upon "judicial review." I have placed his key justificatory paragraphs in the notes.[112] These paragraphs abound with simple assertions regarding

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108. *Id.* at 1500.
109. *Id.*
110. *Id.* at 1501.
111. *Id.* at 1501.
112. *Id.* at 1444-45.

Judicial Review.—One reason that Locke's doctrines may have seemed so limited from an American perspective is that he did not envision an authority within the law that was capable of limiting the sovereign power of the "magistrate" (by which he meant the government, the King, and Parliament). "[T]here is no judge upon earth between the supreme magistrate and the people." While Locke recognized the moral imperative to obey God instead of civil rulers, his conception of political institutions did not include a mediator who could transform this moral, prepolitical right into positive law. In the absence of such a mediator, individual conscience could be compelled to yield to government in the event of a conflict. For Locke, the field left to untrammeled conscience could only extend to that in which the civil magistrate had no particular interest—principally, to things pertaining to the world to come. Religious liberty could only be defined negatively; any broader definition would be pointless, since the magistrate would be judge of his own powers.

Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review. The revolutionary American contribution to political theory was that the people themselves are sovereign and therefore possess inherent power to limit the power of the magistrate, through a written constitution enforced by judges independent of the legislature and executive. As Madison would predict during deliberation over the Bill of Rights:

> If [the provisions of the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Once the courts are vested with the power to determine the proper boundary between individual conscience and the magistrate's authority, based on the words of a written charter derived from the people, fuller protection for conscience becomes conceivable. An independent judiciary could define religious liberty affirmatively, in terms of what religious liberty requires, and not merely what the leg-

matters most in need of proof. They are bereft of authority, save for the misconceived reliance on Madison.[113] Other difficulties include the fact that, whatever Locke's doctrine, it hardly follows that the modern judicial restraint position "is a relic of Lockean legislative supremacy."[114] That "relic" can be, and has been, defended upon many distinctly non-Lockean grounds. Are we to think that the "relic" survived until 1963? If not, and if the "conduct exemption" was not born until then, it is probably because less antiquated reasons undergirded free exercise law. In addition, McConnell marries popular sovereignty to judicial review with a written constitution as the marital bond. But the sovereign people can, and did, limit the power of all *three* branches of government provided in the Constitution. His assertion that judges practically were loyal *aides-de-camp* of the sovereign people is simply an anachronism. How can this triumph of judicial control of the legislature be squared with legislative control of access to the courts? Giving Congress control of jurisdiction would thus be similar to giving inmates the keys to the jail. The plausible opening question would therefore be: where in the document did the people authorize courts to enforce the bundle of notions known as the "conduct exemption" over against other branches?

Perhaps it appears in the Free Exercise Clause? If so, the question-begging is apparent. "Judicial review" is a doctrine about institutions, and the "conduct exemption" is the asserted meaning content of a constitutional provision. No change in the former, in and of itself, affects the latter. Thus, McConnell is left with the task at hand: getting the conduct exemption into the Free Exercise clause. Further, there is no necessary connection between a written constitution, "moral" and "prepolitical" rights, and judicial review. Part I of this Article says as much. And, notwithstanding *Marbury v. Madison*,[115] the fundamental issue in the early years of the Republic was not that the people had expressed limitations on the government in a written constitution, but *how* to enforce them. An obvious possibility was

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> islature concedes. The modern "judicial restraint" position, that legislatures are entitled to make free exercise exemptions but courts are not, is a relic of Lockean legislative supremacy. Once the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature.

Id. (footnotes omitted).

113. *See infra* note 123 and accompanying text.

114. McConnell, *supra* note 75, at 1445.

115. 5 U.S. (1 Cranch) 137 (1803).

through the actions of the people. Another means was state enforcement through nullification, and secession.[116] True, Madison understood the importance of judicial review to the constitutional scheme. But he seems to have regarded it as an umpire only for federal-versus-state disputes, and not for individual-versus-government disputes. Madison still subscribed, in 1798, to the compact theory of the union, a theory that implied state enforcement of constitutional constraints upon Congress.[117] He did, however, deny Jefferson's claim that nullification was an appropriate means of such state enforcement.[118]

McConnell neglects a delicious irony in Madison's evolving views on judicial review and the Bill of Rights. As is commonly recognized, Madison initially resisted the movement for such guarantees. After much prodding from Jefferson (a Lockean relic, by McConnell's reckoning), Madison finally admitted their usefulness. His political survival in a congressional race with James Monroe added to the appeal of Jefferson's arguments.[119] But, even then, Madison did not think of judicial review. Jefferson had to point that out to him too. The congressional speech excerpted by McConnell is,

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116. Consider this excerpt from one 1808 federal court opinion:

> But, should usurpation rear its head; should the unnatural case ever occur, when the representatives of the people should betray their constituents, we are referred, for consolation and remedy, to the power and vigilance of the state governments; to publick opinion; to the active agency of the people in their elections; to that perpetual dependence on the people, which is the primary control on the government; "to the vigilant and manly spirit, which actuates the people of America, a spirit which nourishes freedom, and, in return, is nourished by it;" and, in case of desperate extremities, for which no system of government can provide, "to that original right of self-defence, which is paramount to all positive forms of government." In one passage, indeed, where the writer is speaking of the resort, in case of a supposed usurpation, we are referred to the judiciary and to the executive, as well as to the people, without any discrimination of the circumstances to which the different sources of remedy would be applicable. "In the first instance," says the writer, "the success of the usurpation will depend on the executive and judiciary departments, which are to expound and to give effect to the legislative acts; and, in the last resort, a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."

United States v. The William, 28 F. Cas. 614, 619 (D. Mass. 1808) (No. 16,700) (citations omitted).

117. *See, e.g.*, JAMES MADISON, *The Virginia Resolutions of 1798*, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 506-07 (Congress ed. 1865).

118. *See* Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 157-62. (1948).

119. *See* BRADLEY, *supra* note 90, at 85-86.

therefore, the product of Jefferson's influence upon Madison.[120] Jefferson, the bad guy in McConnell's narrative, is the force behind McConnell's prime exhibit.

The central difficulty is McConnell's undifferentiated use of the term "judicial review." It plagues this passage and the entire article. The question is not the existence of judicial review or its basic legitimacy. Of that there is no doubt, at least as of 1789. The interesting historical issues are the nature, scope, and purpose of judicial review, and how answers to those questions affect the plausibility of the conduct exemption. Put bluntly, there is no such thing as "judicial review" *simpliciter*, though McConnell acts as if there is. He assumes that judicial review in the early Republic was, or included, the conduct exemption. It did neither.

What if "judicial review" simply meant that a law was "null" and "void," a failed attempt at lawmaking? What if the all but universally proclaimed scope of judicial review was "plain error": courts might void legislative action only when it was clearly, undeniably contrary to the obvious meaning of the constitutional text?[121] What if the purpose of judicial review was not to protect individuals against majorities, but to protect everyone against faithless legislators?[122] What if all three of the above correspond to the Framers' understanding of judicial review? What if that understanding persisted throughout the antebellum era? If the answers to *all* of the above questions are affirmative, we have a "judicial review" that does not resemble the conduct exemption. Given the intricate and multifaceted balancing act that it is, how *could* legislative action be "unambiguously" contrary to the "plain meaning" of the text?

The "judicial review" strategy is futile unless McConnell shows that what was debated as "judicial review" is very much like the conduct exemption. McConnell recognizes that "judicial review" is judicial authority "to declare void unconstitutional acts of the legislature."[123] That *is* pretty close to what contemporaries said it was, but it does *not* describe conduct exemptions. McConnell defines *that* as exemption from enforcement of a law that is not void, but is general-

120. O'Brien, *supra* note 35, at 269-72.

121. This was the situation as Justice Marshall presented it in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* United States v. The William, 28 F. Cas. 614, 617 (D. Mass. 1808) (No. 16,700) (citing examples of this standard for judicial review). *See generally* WOLFE, MODERN JUDICIAL REVIEW, *supra* note 28, at 17-117.

122. *See infra* notes 246-56 and accompanying text.

123. McConnell, *supra* note 75, at 1507.

ly valid and applicable.[124]

The point is worth pursuing because I think McConnell's use of "judicial review" is a rhetorically pivotal red herring. We had judicial review from the beginning, but conduct exemptions started in the late twentieth century. Historically, judicial review emerged as a corollary of restricted legal reasoning, along the lines originalists suppose it should have. The conduct exemption is no restricted legal-technical operation. It is, therefore, unlikely to have been embraced by early national use of the term "judicial review."

There is one sure way to find out who is right—go to the cases. If the drafters and ratifiers of 1789-91 entertained apprehensions of the Free Exercise Clause like the one apprehended by the *Sherbert* Court in 1963, there ought to be some early conduct exemption cases. But the Supreme Court's first square confrontation with Free Exercise was in 1878.[125] It unequivocally rejected the conduct exemption.[126]

Maybe the Court abandoned a more generous, if not original, understanding of Free Exercise resembling the conduct exemption. But the "conduct exemption" exists only to the extent that there are cases instantiating it. By that I mean, at least, judicial holdings clearly stating a willingness, as a matter of Free Exercise command, to exempt a believer from an otherwise valid and neutral law. For more than minimum evidentiary value, I mean a holding *in favor* of such a believer. That is because the conduct exemption is not a principle or prohibition capable of constraining legislatures without judicial enforcement. It does not prohibit a class or kind of legislation. By definition, it operates upon generally valid laws. The Article VI "no religious Test" clause[127] is a perfect example of a prohibition on a particular class or kind of legislation. It has played a central role in the development of religious liberty in this country, but there are no cases relying on the clause.[128]

McConnell allows that the state and federal religion clauses all

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124. *See id.* at 1428 (discussing exemptions for citizens from laws passed by parliament).

125. *Id.* at 1411-15.

126. Reynolds v. United States, 98 U.S. 145 (1878) (declining to find an exception to a prohibition against polygamy for Mormons). But perhaps this decision stemmed from the then undeniable prejudice against Mormons.

127. U.S. CONST. art. VI, cl. 3.

128. *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 714 (1987).

together "did not engender many lawsuits . . . and fewer still raised the question of free exercise exemptions."[129] He opines that "[t]he largest volume of litigation was over the competency to testify in court of those, like Universalists, who did not believe in a future state of rewards and punishments. There were also a number of blasphemy prosecutions that raised issues under the religion clauses."[130] He provides no citations, though he is probably right. I might question one judgment: sabbatarian complaints probably equalled incompetency cases. McConnell does not investigate what this combined number of cases might have to say, if not as authority directly on point, then as windows onto the constitutional treatment of conscientious objection. He lays them aside. "Since both of these categories of cases involved laws specifically directed at religion, they did not raise the exemption question."[131]

What's this? Precisely those cases in which the injury to conscience is most direct and most clearly due to "majoritarian oppression" (if you like) did not raise the question! McConnell puts them aside to explore a "suggestive" argument by counsel, in the *Permoli*[132] case, on a point that the Supreme Court held inapposite, because it "may" indicate that the "legal profession believed that interference with religious activities required compelling justification!"[133] He puts them aside even though, earlier, he counted as evidence for his position, legislative exemptions from religious assessments that, he seems to concede, were also "religious" laws.[134] *Then* they were probative of the peoples' sense of the "appropriate remedy when law and conscience conflict."[135] *Now*, apparently, they are not. He does not note the apparent inconsistency—if exemption from "religious" laws count, they count for both sides of the argument—or attempt to explain the flaw in the reasoning of those of us who do.

McConnell is most vulnerable for what he does *not* say. Why is the *absence* of federal cases not the analytical focus? Why is this not as suggestive as an argument by counsel? It is true that, in 1833,

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129. McConnell, *supra* note 75, at 1503.
130. *Id.*
131. *Id.*
132. Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845).
133. McConnell, *supra* note 75, at 1503 (emphasis added).
134. *Id.* at 1470.
135. *Id.*

Barron v. Baltimore[136] settled that the Religion Clauses bound only the federal government, so there should be relatively few federal decisions. But why *none* before *Reynolds* in 1878? Now, recall that the national government (that is, Congress) enjoyed plenary governmental power in the territories[137] and in the District of Colombia.[138] Yet, there were no reported challenges (much less successful ones) to Sabbatarian regulations there. The national government also operated courts. What of circuit decisions by Supreme Court justices McLean[139] and Story,[140] holding witnesses incompetent because they could not conscientiously swear? No conduct exemption was found there either. There *is* a body of evidence here demanding the analyst's attention.

Contrary to McConnell's assertion, the blasphemy and oath cases did not involve "laws specifically directed at religion."[141] If they had, courts enforcing even Locke's understanding of religious liberty would have voided them. One might well ask McConnell, on his interpretation of these laws, whether the religion clauses had *any* judicially enforceable content. If not, he has just disproved his case. Either way, one has to wonder about the coherence of his project: courts *would* enforce laws "specifically directed at religion" (and thus intentionally coerce belief), but *not* laws that pursued secular goals incidentally burdening belief.

McConnell certainly is mistaken, as a historical matter, on the point of blasphemy and oath cases. The oath requirement was "directed" at securing truthful testimony.[142] Since prosecution for perjury was rare, witness belief in a greater than human sanction for lying was thought essential to truthful testimony: the incompetent witness thus suffered no diminution of religious freedom. A New York court stated the common view:

> Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the

136. 32 U.S. (7 Pet.) 243 (1833).

137. U.S. CONST. art. IV, § 3, cl. 2.

138. U.S. CONST. art. I, § 8, cl. 17.

139. United States v. Kennedy, 26 F. Cas. 761 (C.C.D. Ill. 1843) (No. 15,524).

140. Wakefield v. Ross, 28 F. Cas. 1346 (C.C.D. R.I. 1827) (No. 17,050).

141. McConnell, *supra* note 75, at 1503.

142. *But see id.* at 1467 (asserting that the principle means of ensuring honest testimony was through the oath requirement).

> ascertainment of truth, human tribunals have a right to interfere. They are bound to see that no man's rights are impaired or taken away, but through the medium of testimony entitled to belief; and no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man.[143]

No doubt this account reflects a particular conception of God and His working in human affairs (and of human nature, the relative importance of justice between individuals, and of religion in the life of the nation, and much else). But the point of the oath requirement was *not* to subordinate unpopular religions or to promote majoritarian prejudices. The lesson for us is that Americans then considered the oath requirement a "general" or "neutral law"—at least *not* one "directed at religion"—and no conduct exemption for conscientious objectors was constitutionally required. Legislation permitted some believers to affirm rather than to swear, but that further suggests that "judicial review" did not transform preconstitutional practice. Besides, McConnell can hardly object that, when a particular conception of the Sovereign Almighty (for lack of a better term) influences legal doctrine, cases construing the doctrine are irrelevant to his inquiry. He justifies the conduct exemption with one himself![144]

Blasphemy prosecutions were not understood then to be "specifically directed at religion" either. I have found four lengthy antebellum appellate opinions upholding blasphemy convictions. They are *Commonwealth v. Kneeland*,[145] *State v. Chandler*,[146] *People v. Ruggles*,[147] and *Updegraph v. Commonwealth*.[148] Mr. Updegraph pronounced "that the Holy Scriptures were a mere fable," and so informed his fellow citizens.[149] Messrs. Ruggles[150] and Chandler expressed, in locker room language, the upshot of Unitarians' denial of

143. Jackson v. Gridley, 18 Johns. 98, 106 (N.Y. Sup. Ct. 1820).
144. *See* McConnell, *supra* note 9, at 1152.
145. 37 Mass. (20 Pick.) 206 (1838).
146. 2 Del. (2 Harr.) 553 (1837).
147. 8 Johns. 290 (N.Y. Sup. Ct. 1811).
148. 11 Serg. & Rawle 394 (Pa. 1824).
149. *Id.* at 398.
150. *Ruggles*, 8 Johns. at 292.

Jesus' divinity.[151] If Jesus was *not* the Son of God, what with biblical reports that Mary was with child at an embarrassingly early point in her betrothal to Joseph, then "Jesus Christ was a bastard and his mother [the Virgin Mary] was a whore."[152] Mr. Kneeland, an avowed pantheist, published some unfavorable evaluations of Universalist beliefs.[153] In so doing, he "willfully" denied God's existence and his government of the universe, in violation of a 1782 Massachusetts statute.[154]

All the blasphemers cited state constitutionally guaranteed rights of conscience.[155] In each case there was, we might say, a burden on conscience in their defense. Each court said that there was no constitutional issue at all. The court in *Chandler* expressly incorporated the reasoning of *Updegraph,*[156] and, in substance, the reasoning of *Ruggles. Kneeland,* the latest, relied upon *Ruggles,*[157] but the court was apparently unaware of *Chandler* and *Updegraph. Chandler* is representative of all four in the following relevant particulars.

The *Chandler* court emphasized that the prosecution was not directed at the spiritual reform of the speaker. Prosecution did not presume, recognize, or enforce the truth of any religious proposition. To suggest otherwise confused blasphemy with heresy. All the courts agreed that anyone might believe, profess, and argue for, orally or in writing, any religious position at all.

> [I]t is the open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace of the country, by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience; but licentiousness endangering the public peace . . . .[158]

As the *Chandler* court reported, "[i]n general, an offence which outrages the feelings of the community so far as to endanger the public peace, may be prohibited by the legislature . . . ."[159] Chris-

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151. *Chandler,* 2 Del. (2 Harr.) at 554.

152. *Id.*

153. *Kneeland,* 37 Mass. (20 Pick.) at 207.

154. *Id.* at 207-08.

155. *See, e.g., id.* at 219.

156. *Chandler,* 2 Del. (2 Harr.) at 577-78.

157. *Kneeland,* 37 Mass. (20 Pick.) at 218.

158. *Chandler,* 2 Del. (2 Harr.) at 577-78 (quoting *Updegraph,* 11 Serg. & Rawle at 407 (emphasis omitted)).

159. *Id.* at 553. Note that, in *Updegraph, Chandler,* and *Kneeland,* the defendants committed statutory offenses; in *Ruggles,* the defendant was indicted at common law.

tianity, for the time being, was the religion preferred by the vast bulk of the people and, therefore, reviling it was subject to indictment, though reviling Mohammed was not. So opined the *Chandler* court.[160]

It may be that McConnell thinks these cases *better* viewed as "directed at religion," but then he is not engaging in historical recovery. To the extent that the cases *are* "directed at religion," their significance cuts deeply into McConnell's case. Precisely in order to maintain a complete freedom of religion, "[a]ll men, of conscientious religious feeling, ought to concede outward respect to every mode of religious worship."[161] Freedom of religion thus entailed *duties* for individuals to refrain from actions that they otherwise possessed a natural right to perform.

Even after relegating *Updegraph*, McConnell is left with several unfavorable antebellum holdings of the Pennsylvania Supreme Court.[162] They are unfavorable because they (more or less explicitly) treat what we would call a conduct exemption claim as presenting no justiciable issue of religious liberty at all. Pennsylvania was, by all accounts, among the two or three most liberal colonies (and later, states) on the subject of religious liberty. If the conduct exemption did not fly there, we should not expect it to fly anywhere else.

McConnell tries to finesse these precedents by trotting out his workhorse "judicial review." He proceeds to compound the confusion surrounding its earlier labors by distorting Judge John Gibson's views on that subject and on conduct exemptions.[163] McConnell then courts terminal obscurity by critically contrasting this mass with the assertedly more typical and influential positions of Madison (on conduct exemptions) and John Marshall (on judicial review). The cash value of this confusing transaction is that McConnell can afford to relegate analytically the Pennsylvania corpus, even though it comprises a majority of all the cases he discusses! How? By identifying those cases with Gibson's "idiosyncratic" views that, besides their quirkiness, are squarely at odds with the authoritative opinions of Madison and Marshall. Lengthy excerpts from the key passages appear in the notes, lest this summary obscure or distort McConnell's strategy.[164]

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160. *See id.* at 571. I doubt that the *Kneeland* court would have followed *Chandler* here.

161. *Updegraph*, 11 Serg. & Rawle at 405.

162. For McConnell's treatment of the Pennsylvania corpus, see McConnell, *Religion*, *supra* note 75, at 1506-10.

163. *Id.* at 1507.

164. *Id.* at 1507-10.

How does McConnell execute this desperate plan? He starts with *Commonwealth v. Wolf*,[165] an 1817 challenge by a Jewish merchant to a Sabbatarian prohibition on Sunday commerce. Mr. Wolf lost, but McConnell sees hope in the defeat. Wolf lost "on grounds that would admit the principle of free exercise exemptions."[166] McConnell next

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> The next two Pennsylvania cases, [after Commonwealth v. Wolf, 3 Serg. & Rawle 48 (Pa. 1817)] *Commonwealth v. Lesher* and *Simon's Executors v. Gratz*, both contain opinions by Chief Justice John Bannister Gibson, a highly regarded jurist who is best known today for his dissenting opinion in *Eakin v. Raub*, in which he rebutted Chief Justice Marshall's position in *Marbury* that the judiciary has authority to declare void unconstitutional acts of the legislature. Gibson also was the foremost judicial opponent of free exercise exemptions in the nineteenth century. His decision in *Simon's Executors* was the leading precedent in the thirteen original states prior to the Civil War for the proposition that free exercise does not include the right of exemption from generally applicable law. An examination of Gibson's opinions in *Lesher* and *Simon's Executors* shows that his rejection of constitutional judicial review and his position on free exercise exemptions were closely related.
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> In *Simon's Executors*, Gibson explained the theoretical basis for his position. "Rightly considered," he said, "there are no duties half so sacred as those which the citizen owes to the laws." "That every other obligation shall yield to that of the laws, as to a superior moral force," he wrote, "is a tacit condition of membership in every society, whether lay or secular, temporal or spiritual, because no citizen can lawfully hold communion with those who have associated on any other terms." Gibson's statement may be contrasted with Madison's position in the *Memorial and Remonstrance*. Madison contended that religious duty "is precedent both in order of time and degree of obligation, to the claims of Civil Society." Gibson held that a person entering into civil society must assume the obligation of yielding to all the laws, because no other form of association is possible. Madison held that "every man" who becomes a member of a civil society "*must* always do it with a reservation . . . of his allegiance to the Universal Sovereign." What Gibson said is impossible, Madison said is necessary. Gibson's view of the nature of religious freedom thus conflicts directly with that of one of the leading framers of the federal free exercise clause.
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> Gibson's rejection of the principle of judicial review, as explained in *Eakin v. Raub*, provides further reason to doubt that he represented the prevailing view on the interpretation of free exercise. Like Locke, Gibson believed in legislative supremacy. In *Lesher*, he attributed his conclusion to his "horror of judicial legislation" and said that he "would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court." As discussed above, the advent of judicial review had transformed a principle of free exercise previously enforced solely through legislative action into one enforceable through the courts. Since virtually all of the framers and ratifiers of the first amendment expected and intended their work to be judicially enforceable, Gibson's contrary position was almost surely idiosyncratic.

Id. (citations omitted).

165. 3 Serg. & Rawle 48 (Pa. 1817).

166. McConnell, *supra* note 75, at 1506.

introduces Gibson's dissent in *Commonwealth v. Lesher*,[167] a case involving the challenge for cause of a prospective juror who could not conscientiously convict in a capital case. The *Lesher* court said that such scruples made the prospective juror prejudiced and unfit to judge the case.[168] The majority insisted that the matter was entirely one of common law.[169] It did not offer an account of the constitutional guarantees.

Gibson, dissenting, did.[170] Quite debatably, he said that the majority implicitly elevated conscience over the requirements of the orderly administration of justice.[171] Gibson asked rhetorically, what are the rights of conscience that the Pennsylvania courts placed beyond interference by human authority?[172]

> Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal.*[173]

Four years later, Gibson authored the opinion of a unanimous Pennsylvania Supreme Court in *Philips v. Gratz*.[174] A Jewish plaintiff was nonsuited for failing to appear for a Saturday trial.[175] Expressing regret that the trial, apparently for important reasons, was scheduled for the Jewish Sabbath, Gibson rejected a "continuance" for conscience's sake when claimed as a "right."[176] He referred readers to his *Lesher* dissent.[177] This reference connotes concurrence of the other judges in Gibson's earlier account of constitutionally guaranteed religious liberty. To avoid such unfavorable implications, McConnell introduces Gibson's 1825 "rejection of [the] principle of judicial review" in *Eakin v. Raub*.[178] He also asserts a sharp contrast between Gibson on religious liberty in *Gratz*, and Madison in his *Memorial*

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167. 17 Serg. & Rawle 155 (Pa. 1828).
168. *Id.* at 160.
169. *Id.* at 156.
170. *See id.* at 160-61 (Gibson, C.J., dissenting).
171. "Where liberty of conscience would impinge on the paramount right of the public, it ought to be restrained." *Id.* at 160.
172. *Id.*
173. *Id.*
174. 2 Pen. & W. 412 (Pa. 1831).
175. *Id.* at 412.
176. *Id.* at 416.
177. *Id.* at 417.
178. 12 Serg. & Rawle 330, 344-58 (Pa. 1825).

and Remonstrance.[179] Gibson's rejection of judicial review made him "idiosyncratic,"[180] and his view of religious freedom "conflicts directly"[181] with one of the leading sponsors of the federal free exercise clause. Thus *Wolf*, *Lesher*, and *Gratz*, do not count heavily against McConnell's defense of conduct exemptions.

McConnell leaves Pennsylvania with notice[182] of *Specht v. Commonwealth*,[183] another Sabbatarian case, from 1848. Mr. Specht lost, and the court cited[184] Gibson's opinions in *Lesher* and *Gratz*. (Gibson was Chief Justice at the time, and silently joined the opinion by Judge Bell.) A lengthy excerpt from *Specht* appears below.[185] The reader is invited to evaluate McConnell's optimistic account of the case: "Toward the end of the opinion, however, the court appeared to reject the claim on the facts, much as it had in *Wolf* . . . . Thus, having restated the no-exemptions precedent, the court narrowed its holding to the facts of the case, leaving open the possibility that an exemption might be granted when an actual conflict arose."[186]

I submit that McConnell's interpretation of *Specht* is fanciful, as is his interpretation of *Wolf*. In any event, here are a few of the major flaws in his strategy. First, the major premise is wrong; Gibson did not reject "judicial review" in *Eakin*. He rebutted persuasively most prevailing arguments for it, including Marshall's in *Marbury*. But Gibson embraced judicial review in various contexts and to varying extents: (a) of state laws against the Federal Constitution[187] (Gibson believed the Supremacy Clause required no less.[188] McConnell relegates this huge qualification to a footnote);[189] (b) to the extent necessary to assure that enactment was procedurally valid;[190] and (c) where the judiciary was the addressee of the constitutional command.[191] This last category includes, but is not limited to,

179. *See supra* note 164.
180. *Id.*
181. *Id.*
182. McConnell, *supra* note 75, at 1510.
183. 8 Pa. 312 (Pa. 1848).
184. *Id.* at 322-23.
185. *See infra* notes 263-67 and accompanying text.
186. McConnell, *supra* note 75, at 1510.
187. *See Eakin*, 12 Serg. & Rawle at 355-57 (Gibson, C.J., dissenting).
188. *Id.*
189. McConnell, *supra* note 75, at 1507 n.511.
190. *See Eakin*, 12 Serg. & Rawle at 347-48 (Gibson, C.J., dissenting).
191. *Id.* at 352.

the "defensive" judicial review of *Marbury* itself. Gibson's *Eakin* opinion is consistent with one reasonable interpretation of *Marbury*, one that sees judicial review as a barrier to legislative attempts to alter its—the judiciary's—constitutionally assigned power. This presumes a fairly crisp separation of powers that works against broader judicial review of other branches' actions.

The second flaw in McConnell's reasoning is that Gibson did not believe in "legislative supremacy," as McConnell alleges.[192] He is, therefore, not easily isolated from his contemporaries as some ante-Constitution dinosaur. Besides the judicially enforceable limits upon legislatures just noted, Gibson insisted throughout his *Eakin* opinion that the legislature and the judiciary are *both* subordinate to the people.[193] Popular sovereignty is the basis of Gibson's restrained account of judicial review. His commitment to it translated into substantial (though hardly complete or idiosyncratic) deference to legislation, *in the absence of contrary direction from the people via reasonably explicit constitutional direction.* In this, Gibson typified his generation.

Finally, even if we assume (with McConnell) that Gibson rejected "judicial review," it does not aid McConnell's argument for several reasons. First, Gibson *dissented* in *Eakin*; the Pennsylvania Supreme Court did *not* reject judicial review. Its rulings in the cases that McConnell discusses could not, therefore, depend upon Gibson's assertedly "idiosyncratic views." Second, Gibson *joined* the Court in *Wolf* and *Specht*. McConnell thus cannot be right about both of the following propositions: that Gibson was the foremost, but still "idiosyncratic," opponent of exemptions, *and* his (McConnell's) optimistic interpretations of *Wolf* and *Specht* (that they implicitly, if incompletely, endorse conduct exemptions). If the latter is sound, Gibson was not such a bad guy after all; if the former is sound, then the rosy glosses are false. Finally, *Specht* (which Gibson joined) occurred three years *after* Gibson disavowed his *Eakin* dissent and (as the story develops in McConnell's piece) adopted "judicial review." In 1845 (three years before *Wolf*), Gibson concluded that his opposition in *Eakin* to wide-ranging judicial review was no longer tenable.[194] Wider judicial review had been legitimized by "necessity," and indirectly ratified by the people, who seemed to Gibson uninterested in

192. McConnell, *supra* note 75, at 1509-10.
193. *See Eakin*, 12 Serg. & Rawle at 330.
194. Norris v. Clymer, 2 Pa. 277, 281 (1845).

their duty to enforce constitutional restraints.[195] *Specht* cannot be attributed to hostility toward judicial review on *anyone's* part, and *Specht* rejects conduct exemptions.

Unless we are to treat the entire antebellum Pennsylvania court and all its decisions as idiosyncratic, we must reject McConnell's ingenious efforts to escape them. Note that, to get this far, McConnell not only ignored *Updegraph*, but also blew past the 1792 case of *Stansbury v. Marks*.[196] In *Marks*, the Pennsylvania Supreme Court fined a Jewish witness who refused to testify on Saturday.[197] According to McConnell, *Marks* is the *only case* in the first twenty years after ratification, but it is "cryptic."[198] In my view, *Marks* may be briefly noted, but it is hardly "cryptic." Its import is clear enough.

McConnell asserts, without argument or citation to authority, that "Gibson also was the foremost judicial opponent of free exercise exemptions in the nineteenth century."[199] He also asserts, without argument or citation to authority, that *Gratz* was the leading antebellum precedent for that opposition.[200] Neither assertion, based upon my acquaintance with the materials, is warranted.

The contrast between Madison and Gibson is almost as misconceived. Certainly, McConnell adduces no genuine disagreement between them. Madison was speaking in *Memorial and Remonstrance* of first principles that should inform a decision about the constitutional order. That is practically what the General Assessments[201] and Jefferson's Bill for Religious Freedom[202] were about. Gibson spoke as an actor within one institution, operating under an established written Constitution. His opinion in *Eakin* relied heavily upon the precise terms of the constitutional enactment and upon the nature of legal reasoning and adjudication. It is true that comments in his *Lesher* dissent sound much like the Lockean social contract position McConnell criticizes, the position that McConnell deploys Madison to neutralize.

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195. *Id.*

196. 2 Dall. 213 (Pa. 1792).

197. *Id.*

198. McConnell, *supra* note 75, at 1504.

199. *Id.* at 1507.

200. *Id.*

201. *See, e.g.*, Petition for General Assessment (Nov. 4, 1784), *reprinted in* CHARLES FENTON JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 125 (1971).

202. 1 THE PAPERS OF THOMAS JEFFERSON 544-50 (J. Boyd ed., 1950).

In *Philips v. Gratz*, Gibson added that, "[r]ightly considered, there are no duties half so sacred as those which the citizen owes to the laws."[203] But "rightly considered," to put it mildly, is a pregnant modifier. Gibson expands briefly in *Gratz*, but says too little to permit comparison with the more developed views of James Madison.

Gibson's reliance in *Lesher* on *institutional* considerations is worth additional notice. In *Lesher*, Gibson wrote that "no one, is more thoroughly convinced of . . . the abstract propriety of the objection to the juror here."[204] But, as McConnell says, for Gibson, the remedy lay with the legislature. That is, as a matter of political morality, Gibson appears to have favored accommodation, but it was *not* for courts to translate that extralegal opinion into enforceable law. McConnell cites no evidence (and I am aware of none) that Madison, who survived until 1836, ever criticized Gibson or supported conduct exemptions. In fact, McConnell says only that Madison's *Memorial and Remonstrance* suggests an account of religious liberty "consonant" with exemptions.[205] Gibson's views are also consonant with exemptions, as long as (Gibson would say) the judge is authorized by enactment (or, perhaps, operating free of constraint when, for instance, scheduling trials) to act upon his own view of the situation.

McConnell's decision to equate the authoritative Madison with *Memorial and Remonstrance* is questionable. *Memorial and Remonstrance* was a compendious, incoherent public circular with a quite limited impact even upon the Virginia Assessment controversy.[206] Why not treat *The Federalist Nos. 10* and *51* as "Madison" for purposes of unfavorable comparison to Gibson? Probably because then the comparison would be less unfavorable. If we took President Madison's 1811 veto of a bill for incorporating an Episcopal church in Alexander,[207] the contrast with Gibson would disappear altogeth-

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203. Philips v. Gratz, 2 Pen. & W. 412, 416 (Pa. 1831).

204. 17 Serg. & Rawle at 163.

205. McConnell, *supra* note 75, at 1453.

206. *See* BRADLEY, *supra* note 90, at 38-40.

207. The opponents of the bill state that:

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated and comprehending even the election and removal of a minister of the same; so that no change could be made therein by the particular society, or by the general Church, of which it is a mem-

er. Moreover, Madison would be idiosyncratic. I know of no other antebellum figure who thought church incorporation, as such, unconstitutional.

There may have been some philosophical disagreement between Gibson and Madison. I do not know enough about Gibson to say. But McConnell has adduced none. Besides, the matter is not between Gibson and Madison, but between Gibson and the ratifiers' apprehensions of Free Exercise. As mentioned at the outset, that simply is not reducible to Madison's *Memorial and Remonstrance*, especially since Madison never suggested *it* as an interpretation of the Constitution's Free Exercise Clause.

Besides McConnell's extensive discussion of *People v. Phillips*,[208] he identifies just two other antebellum exemption decisions—*Commonwealth v. Drake*[209] and *State v. Wilson*.[210] Both cases reject conduct exemptions for religiously motivated conduct. In both, McConnell finds a silver lining where there is none. He says that "it is noteworthy [in *Drake*] that the prosecution confined its arguments to the facts and did not contest the defendant's interpretation of constitutional principles."[211] McConnell suggests acquiescence by the prosecution in the "constitutional principle" of "rights of conscience." But the prosecution argued the law, and the facts seem to have been undisputed. From the report relied upon by McConnell,

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> ber, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law: a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society; inasmuch as this identity must depend on other characteristics; as the regulations established are generally unessential and alterable, according to the principles and canons by which churches of that denomination govern themselves; and, as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences applicable to a violation of them according to the local law.
>
> Because the bill vests in the said incorporated church an authority to provide for the support of the poor, and the education of poor children of the same; an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies, as such, a legal agency in carrying into effect a public and civil duty.

11 ANNALS OF CONG. 351 (1811).

208. (N.Y. Ct. Gen. Sess. 1813), *text printed in Privileged Communications to Clergymen*, 1 CATH. LAW. 199-209 (1955) [hereinafter *Privileged Communications*]. *See* McConnell, *supra* note 75, at 1504-05.

209. 15 Mass. 161 (1818). *See* McConnell, *supra* note 75, at 1506.

210. 13 S.C.L. (2 McCord) 393 (1823). *See* McConnell, *supra* note 75, at 1510-11.

211. McConnell, *supra* note 75, at 1506.

it is reasonably clear that the prosecutor agreed that a provision of the declaration of rights *was* in play—the privilege against self incrimination, *not* the right of conscience.[212]

McConnell's handling of *Wilson* is both less and more troubling than his treatment of *Drake*. He faithfully relates language from *Wilson*[213] that makes Scalia's opinion in *Smith* sound libertarian. In other words, *Wilson* sounds like *Reynolds v. United States*. McConnell then effects damage control with some very troubling rejoinders. For example, he criticizes *Wilson*'s reasoning with the contemporary and familiar view, one that appeals to readers of his article, that *Wilson*, like *Smith*, is implicitly biased against minority religious practices.[214] But appeal to present sensibilities has no place in the enterprise in which McConnell is at least ostensibly engaged: scholarly recovery of historical authority as a way to arbitrate among present sensibilities.

McConnell leaves aside, in addition to the blasphemy and witness incompetency cases, one of the most formidable Sabbatarian discussions of the antebellum era, *City Council v. Benjamin*,[215] and the municipal court opinion from 1833 appended to it.[216] Neither supports McConnell's view. Each rejects conduct exemptions. Since their reasoning is substantially captured by *Specht* (of which a lengthy excerpt follows), further comment on them will be omitted.

McConnell omits opinions of various courts[217] (including the United States Supreme Court) exploring conscientious objection to laws requiring, in one way or another, financial support of religious institutions. Most likely McConnell regards these as further examples of "laws directed at religion." My earlier objection to his relegation of the blasphemy cases is renewable: when it suits his polemical purposes, he thinks "general assessment" laws quite appropriate. Madison's *Memorial and Remonstrance* against them is probably the most significant piece of evidence in his argument. If so, the opinion

212. *See Drake*, 15 Mass. at 161-62.

213. McConnell, *supra* note 75, at 1510-11.

214. *Id.* at 1511.

215. 32 S.C.L. (2 Strob.) 508 (1846).

216. Town Council v. Duke, (S.C. 1833), *reprinted in* 32 S.C.L. (2 Strob.) 508, 531 (1846).

217. *See, e.g.*, Holbrook v. Holbrook, 18 Mass. 248 (1822); Adams v. Howe, 14 Mass. 340 (1817); Barnes v. Inhabitants of the First Parish, 6 Mass. 401 (1810); Muzzy v. Wilkins, 1 Smith 1 (N.H. 1803).

of a unanimous United States Supreme Court in *Terrett v. Taylor*[218] is relevant. (McConnell does not mention it.) *Terrett* involved distribution of Episcopal glebe lands and construed the free exercise clause of the Virginia Declaration of Rights.[219] Besides that, John Marshall joined the opinion. His views, at least on judicial review, are centrally deployed in McConnell's argument.

Terrett, written by Justice Story, held that the legislature

> could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepultur of the dead.[220]

McConnell does not discuss other matters that a sound historical analysis would not neglect. Without explanation, he evidently[221] closes his investigation at 1848 with mention of *Specht*. Such decisions are always a bit arbitrary, but it seems to me that his reasons for *not* engaging the entire antebellum corpus ought be shared. We know that the Civil War is a turning point in our constitutional tradition, and it would be helpful to see how the great Irish and German Catholic immigrations of the late 1840s affected interpretation of Free Exercise. So, extending the inquiry would have uncovered the only antebellum invalidation of a Sabbatrian law, *Ex parte Newman*,[222] an 1858 California case that was reversed three years later in *Ex parte Andrews*.[223] Extending the inquiry would also have uncovered the typically unsympathetic judicial response to Roman Catholic pleas for relief from Bible reading in public schools.[224] For that matter, some explanation for *Reynolds* is reasonably expected after the conduct exemption allegedly enjoyed such support in the antebellum cor-

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218. 13 U.S. (9 Cranch) 43 (1815).

219. *Id.* at 45-49.

220. *Id.* at 49.

221. He states that "[t]he only other religious exemption decision located *from this period* is *State v. Wilson* . . . ." McConnell, *supra* note 75, at 1510 (emphasis addded). *Specht* is the latest case noted, and seems to function as a boundary marker.

222. 9 Cal. 502 (1858).

223. 18 Cal. 678 (1861).

224. *See, e.g.*, Donahoe v. Richards, 38 Me. 376 (1854).

pus.

Within his chronological borders, McConnell neglects powerful relevant evidence from a plentiful group of church property disputes,[225] especially those involving Roman Catholic parishes.[226] One of them is from Pennsylvania, and includes a long opinion by Gibson.[227] The more numerous group of Protestant cases reinforces the emerging conclusion of this analysis, that "religious liberty" then consisted of "neutrality of reasons," and that this constraint extended (at least practically) not to individuals' religiously motivated conduct, but to church doctrine, discipline, and worship. This freedom, was, as claimed, all but "perfect" in this sense: the government disability correlated exactly with the differentiating features of the Protestant churches that composed the vast mass of religious groupings.

This excerpt from an 1871 Illinois Supreme Court opinion exemplifies judicial resolution of Protestant church property disputes:

> Our constitution provides, that "the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed." In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all the external acts, and the observance of all ordinances and ceremonies, which are engaged in with the sole and avowed object of honoring God. The constitution intended to guarantee, from all interference by the State, not only each man's religious faith, but his membership in the church, and the rites and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State, shall not be justified. Freedom of religious profession and worship can not be maintained, if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and

225. *See, e.g.*, Gibson v. Armstrong, 46 Ky. (7 B. Mon.) 481 (1847); Den v. Bolton, 12 N.J.L. 206 (1831); Robertson v. Bullions, 11 N.Y. 243 (1834); Presbyterian Congregation v. Johnston, 1 Watt & Serg. 9 (Pa. 1841) (Gibson, J.); Harmon v. Dreher, 17 S.C. Eq. (Speers Eq.) 87 (1843).

226. *See, e.g.*, Wardens of the Church of St. Louis v. Blanc, 8 Rob. 51 (La. 1844); Saint Francis Church v. Martin, 4 Rob. 62 (La. 1843); Smith v. Bonhoof, 2 Mich. 116 (1851); *In re* St. Mary's Church, 7 Serg. & Rawle 516 (Pa. 1822) (Gibson, J.); *see also* PATRICK J. DIGNAN, A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES 1784-1932, 46-213 (1933).

227. *In re* St. Mary's Church, 7 Serg. & Rawle 516 (Pa. 1822). For background of this litigation, see FRANCIS E. TOURSCHER, THE HOGAN SCHISM AND TRUSTEE TROUBLES IN ST. MARY'S CHURCH; PHILADELPHIA, 1820-1829 (1930).

regulate its trials.[228]

Of course, 1871 is important for the church property pronouncement of a more authoritative bench, the United States Supreme Court. *Watson v. Jones*[229] expressly subordinated the freedom of churches to "the law of morality," even as it affirmed the centrality of that freedom to the, by then, eighty-year experience of religious liberty.[230]

The Roman Catholic property cases are more instructive. They present a compelling scenario for the conduct exemption; compelling enough to submit that, if none surfaces here, there is likely none at all. The legal disputes grew out of parish schisms—cleric/hierarchy versus lay/cleric splits, frequently abetted and sometimes produced by ethnic tensions among French, German, and Irish Catholics. The constitutional and legal issues centered around state laws governing church incorporation. They coincided with the needs of the overwhelming number of churches. These enabling statutes followed the universal practice of Reformed Protestant churches, and vested control of temporalities in lay-dominated boards of trustees.[231] This mix of ingredients was brought to a boil in 1829, when American bishops in provincial council decreed:

> Whereas, lay trustees have frequently abused the rights granted to them by civil authority, to the great detriment of religion and scandal of the faithful, we most earnestly desire that in future, no church be erected or consecrated unless it be assigned by a written instrument to the Bishop in whose diocese it is to be erected, for divine worship and use of the faithful, whenever it can be done.[232]

Approved by the Pope in 1830,[233] the result, without a statute authorizing formation of a corporation sole, was stated by the Michigan Supreme Court in 1851: "[I]t is clear that when the control of the church edifice is . . . placed in the hands of laymen, it ceases from that instant to be a Roman Catholic Church."[234] Could it be that "the Legislature of this State intended to vest in lay trustees, a power which would close the doors of every Catholic church in the

228. Chase v. Cheney, 58 Ill. 509, 537 (1871).
229. 80 U.S. (13 Wall.) 679 (1871).
230. *Id.* at 728.
231. *See generally* DIGNAN, *supra* note 226, at 66.
232. Smith v. Bonhoof, 2 Mich. 116, 122 (1851) (quoting the first Provincial Council).
233. *Id.*
234. *Id.* at 126.

State?"[235] The Court held that it was not.[236] The legislature, in a country that constitutionally protects religious liberty, could not have intended such a result. But the judicial solution was not to craft constitutionally compelled exemptions from the statute. It was to interpret the statute as accommodating Roman Catholic discipline. Throughout the entire antebellum era (during which Roman Catholic congregations struggled against the "Protestant" corporation laws), no single instance of judicial exemption is recorded.[237] Even the Michigan Supreme Court, which strove to accommodate Catholics, wrote in the same opinion that "[t]he allegiance which a Roman Catholic owes to the spiritual head of his church, rightly understood, in no way conflicts with that allegiance which he owes to the constitution and laws prescribed by the civil government of which he is a citizen. Should any conflict arise, the former must yield."[238] Sounds like Judge Gibson.

Instead of these episodes,[239] McConnell comments at length upon *People v. Phillips*.[240] *Phillips* at least involved a Catholic priest.[241] Father Anthony Kohlmann, a learned German Jesuit, was summoned to give evidence in Mayor DeWitt Clinton's court in a theft-related trial.[242] Father Kohlmann had evidently heard the incriminating confession of the accused. Under pain of ecclesiastical discipline and possible eternal damnation, the Jesuit pulled on the veil of sacramental secrecy.[243] Over the district attorney's objection, the court declined to sanction him for refusing to divulge.[244] Judge Clinton relied in part upon the New York Constitution's Free Exer-

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235. *Id.*

236. *Id.*

237. *See supra* note 226; *see also* Robert F. McNamara, *Trusteeism in the Atlantic States, 1785-1863*, 30 CATH. HIST. REV. 135 (1944); Alfred F. Stritch, *Trusteeism in the Old Northwest*, 30 CATH. HIST. REV. 155 (1944).

238. *Smith*, 2 Mich. at 128-29.

239. McConnell mentions Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845), for its suggestive argument by counsel. *Permoli* was one episode in the running law/cleric disputes, mostly over church property rented by the Louisiana Catholic church for decades. *See* DIGNAN, *supra* note 226, at 176. McConnell does not mention this background.

240. (N.Y. Ct. Gen. Sess. 1813), *text printed in Privileged Communications*, *supra* note 208, at 200-09. For additional background on *Phillips*, see JOHN GILMARY SHEA, A HISTORY OF THE CATHOLIC CHURCH 165-67 (1890).

241. *Privileged Communications*, *supra* note 208, at 200.

242. *Id.*

243. *Id.*

244. *Id.*

cise Clause.[245]

McConnell's handling of *Phillips* is as arbitrary as his treatment of the Pennsylvania cases. Perhaps most arbitrary is his decision to discuss *Phillips* at all, much more to feature it. Its precedential value was nil. Decided by a municipal trial court (even if presided over by a major political figure), distinguished and limited by the same court just four years later,[246] mooted and surpassed by legislation some one and one half decades after that,[247] it was singled out for repudiation by Gibson in *Philips v. Gratz*.[248] There is certainly no justification for devoting it several pages to it, particularly when *Stansbury v. Marks*[249] gets a couple of sentences. Besides that, and first, the constitutional observations in *Phillips* are at most one of two independent grounds for the holding. At least, they are observations in support of common law reasoning. The issue in *Phillips* was testimonial privilege, and privileges may be extended by common law courts without recourse to the Constitution. Here, the doctrines of the Catholic Church governing auricular confession supplied one horn of the dilemma to which privilege was an escape. In this aspect, *Phillips* is like our Jehovah's Witness right-to-die hypothetical—a rule of law that implicitly depends upon the particular religious convictions of persons subject to it.[250] Second, *Phillips* is not a conduct exemption case. No statute (neutral or otherwise) was present from which exemption could be sought. (Note that Fr. Kohlmann dutifully responded to subpoena, recognized the authority of the court, and was willing to testify about matters other than confessional conversation.) In light of the legislative guardianship of the common good exhibited in *Specht v. Commonwealth*,[251] for example, the absence of legislation is crucial. Third, Judge Clinton remained within the orbit of "worship" (widely construed) as the defining feature of free exercise eligibility, as his use of "ordinances," "ceremonies," and "sacraments" attests. Testifying was no sacrament. Clinton cited the eternal secrecy of the priest as an essential aspect of the sacrament; penetrating the wall of confidentiality would annihilate the sacrament itself. *Phillips*

245. *Id.* at 206.

246. *See* People v. Smith (N.Y. Ct. Oyer & Terminer 1817), *text printed in Privileged Communications*, *supra* note 208, at 209-13.

247. *See id.* at 213.

248. 2 Pen. & W. 412, 417 (Pa. 1831).

249. 2 Dall. 213 (Pa. 1792).

250. *See supra* p. 263.

251. 8 Pa. 312 (1848).

is, therefore, no precedent for the more expansive "religiously motivated conduct" of *Sherbert v. Verner*[252] *et al.*

Fourth, Clinton affirmed that a broadly defined public order—similar to that in blasphemy cases—may justify regulation of eligible conduct like worship. He predicted, in *Phillips*, that against a sect "violat[ing] the decencies of life" by, for example, "practicing their religious rites, in a state of nakedness," or by polygamy or human sacrifice, "the hand of the magistrate would be rightfully raised to chastise the guilty agents."[253] The New York Constitution that he expounded distinguished "licentiousness" from "religious liberty."[254] Clinton does not say that only the truth status of religious views is denied to legislators, but that is the practical effect of this part of the holding. Fifth, Clinton accomplished all this with the aid of a strategically placed ellipsis overlooked by McConnell. The constitutional provision, *as cited by Clinton* in *Phillips*, prefaced its operative portion with: "[a]nd whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked princes have scourged mankind."[255] Clinton left out the words "priests and" in the constitution. They appear immediately before "princes."[256]

Clinton lacked a sufficient sense of irony to include this text. He also neglected to mention (if he knew) that John Jay, later the nation's first Chief Justice, proposed in the 1777 Convention that no

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252. 374 U.S. 398 (1963).

253. *Privileged Communications*, *supra* note 208, at 208-09.

254. N.Y. CONST. of 1777, art. XXXVIII.

> And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all crimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Id.

255. *Privileged Communication*, *supra* note 208, at 206 (footnote omitted).

256. *Id.*; *see also supra* note 254. The reader will note the absence of the aforementioned ellipsis in the constitutional provision quoted in the text accompanying footnote 255. In the *Privileged Communications* reprint of the case, an editor's note informs the reader of the missing constitutional language.

Catholic be permitted to hold land or enjoy civil rights unless he swore that neither pope nor priest could forgive sins.[257] Finally, one might suspect, from its solicitude of Catholics, that *Phillips* was as much a political phenomenon as it was a legal analysis. In fact, Clinton for years had been deeply involved in a factional frolic for control of New York's Democratic Republican party.[258] Years earlier, he had forged an alliance with New York's few thousand (mostly Irish) Catholics.[259] St. Peter's Church had then been the focal point of Catholic activity in the city, and Clinton had personally quelled a lethal riot between nativists and Catholics outside St. Peter's Church.[260] St. Peter's was Fr. Kohlmann's parish. *Phillips* was decided during a very unpopular war with the arch-enemy of Irish Catholics. Clinton's explicit repudiation of British precedent on the subject helped distinguish the lot of Irish Catholics here from their lot in the British Empire.

This does not mean that, in *Phillips*, Clinton acted cynically or hypocritically. He was undoubtedly a warm friend of Catholic political interests. It does mean that an aberrant legal analysis—and *Phillips* was just that—was jump started by political considerations. It was not generated by the inner resources of legal doctrine. Given the more common hostility to Catholics, little wonder that *Phillips* was judicially stillborn. The legislature codified the priest-penitent privilege in 1828, and expanded it by prohibiting this kind of testimony even from clerics willing to give it.[261] Had the statutory response gone the other way, and reaffirmed the compulsion to testify, we might have had a genuine conduct exemption case. No doubt priests would have abided their ecclesiastical obligation and suffered the civil consequences. But such a statute would not be a "law directed at religion" in any constitutionally significant sense, whatever its disproportionate impact upon the Roman Catholic religion.

The function of McConnell's idiosyncratic account of "early judicial interpretation," is unmistakable: without it, the issue would be settled decisively against the conduct exemption. He writes in summary:

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257. BRADLEY, *supra* note 90, at 521.

258. *See* JOHN W. PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 122-29 (1967).

259. *See id.*; *see also* DIXON R. FOX, THE DECLINE OF ARISTOCRACY IN THE POLITICS OF NEW YORK 1801-1840, 76-78 (Robert V. Remini ed., 1965).

260. *See* PRATT, *supra* note 258, at 122-29.

261. *See also id.* at 124-29.

> The history subsequent to adoption of the first amendment is inconclusive but tends to point against exemptions. One lower court in New York squarely adopted the exemptions interpretation, and the supreme courts of Pennsylvania and South Carolina rejected it. None of these decisions was handed down within twenty years of the first amendment, and they are therefore weak indicators of the original understanding. The Pennsylvania holding is entitled to especially little weight since it was connected to a rejection of constitutional judicial review in general.[262]

Below is a summary statement of the antebellum corpus. It is an excerpt from *Specht*. I leave it to the reader to judge how powerful it weighs against the conduct exemption.

> The constitution of this state secures freedom of conscience and equality of religious right. No man, living under the protection of our institutions, can be coerced to profess any form of religious belief, or to practise any peculiar mode of worship, in preference to another. In this respect, the Christian, the Jew, the Mohammedan, and the Pagan, are alike entitled to protection. Nay, the Infidel, who madly rejects all belief in a Divine Essence, may safely do so, in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians. But beyond this, conscientious doctrines and practices can claim no immunity from the operation of general laws made for the government and to promote the welfare of the whole people.[263]

Thus, *Updegraph v. Commonwealth*.[264] Justice Bell then explained, in terms unmistakably Gibsonian, just what was constitutionally protected:

> [T]he right of conscience . . . "is simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever, or to support any religion; and to do, or forbear to do, any act for conscience' sake, the doing or forbearing of which is not prejudicial to the public weal."[265]

To the defendant's claim that the statute worked a prohibited

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262. McConnell, *supra* note 75, at 1513.
263. Specht v. Commonwealth, 8 Pa. 312, 322 (1848).
264. 11 Serg. & Rawle 394 (Pa. 1824).
265. *Specht*, 8 Pa. at 322 (footnote omitted).

state preference among sects, the court responded:

> Nor can it be objected against the statute that it gives a preference to any religious establishment or mode of worship. It leaves all free alike in the exercise of their distinctive religious tenets, saying to none, What does thou? As I have said, the selection of the day of rest is but a question of expediency, and if from the choice falling on the first day of the week, the Jew and the Seventh-day Christian suffer the inconvenience of two successive days of withdrawal from worldly affairs, it is an incidental worldly disadvantage, temporarily injurious, it may be, to them, but conferring no superior religious position upon those who worship upon the first day of the week. The law intends no preference. The command to abstain from labour is addressed to every citizen, irrespective of his religious belief, and if an inconvenience results to some, it is a consequence of the generality of the provision. But this affords no argument against the constitutionality of the law, however strong the argument might be felt when addressed to the legislature as a reason for a modification of the statute.[266]

Finally, neutrality of reasons and the category of affected actions is made clear:

> But it is argued, with apparent conviction of its truth, that to compel men to refrain from labour, *solely* from regard to the imputed holiness of a particular day, is, within the meaning of the constitution, to "control" the religious observance, and to "interfere" with and constrain the consciences of those who honestly disbelieve the asserted sanctity of the selected day. We cannot assent to this. *So long as no attempt is made to force upon others the adoption of the belief entertained by the governing power, or to compel a practice in accordance with it,* so long is conscience left in the enjoyment of its natural right of individual decision and independent religious action . . . . The error of the plaintiff's position is that it confounds the reason of the prohibition with its actual effect, and thus mistakes the mere restraint of physical exertion for the fetters that clog the freedom of mind and conscience . . . . In this aspect of the statute there is, therefore, nothing in derogation of the constitutional inhibition.
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> . . . It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his con-

266. *Id.* at 325-26.

> sent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the state; it enforces no unwilling attendance upon the celebration of Divine worship. It says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so. It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the conscience of any man any conclusion upon a subject which each must decide for himself . . . . It does not, in the slightest degree, infringe upon the Sabbath of any sect, or curtail their freedom of worship.[267]

It should be abundantly clear by now that the ratifiers, and succeeding generations of Americans, were hardly striving for "neutrality of effect." Case after case recognized incidental, disproportionate burdens upon believers, particularly upon non-Protestants. Case after case held that, so long as neutrality of reasons was abided—provisionally, where that pertained to a certain class of actions—constitutional guarantees were not implicated.

The "minority" view, so to speak, was not more "liberal." Quite the contrary. Sprinkled among "neutrality of reasons" were a few ardent defenses of Christian—meaning Protestant—orthodoxy. I use that descriptive in no recondite way. An example of what I mean is Judge Coulter's concurring notation in *Specht*. He would have upheld the law "because it guarded the Christian Sabbath from profanation, and, in the language of the act, prohibited work or worldly employment on the *Lord's Day*, commonly called *Sunday*; and not because of the mere usefulness of the day as a day of rest and cessation from worldly labour."[268]

This is no warrant for saying that Judge Coulter wanted or thought it consistent with the Pennsylvania Constitution to convert Saturday Sabbatarians, or to deny them civil rights. It is fair to say that he, along with many (probably most) other Americans, recognized an indissoluble bond between its political and civil institutions, and the Protestantism of its inhabitants. Some official sign of that bond, Coulter might, and others did, say, was appropriate.

Here we have evidence of the undeniable implicit establishment

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267. *Id.* at 322-25 (emphasis added). For a response to McConnell's optimistic interpretation of *Specht*'s suggestion that conscience might have been invaded if Specht were divinely enjoined to work six days a week, see *infra* text accompanying notes 285-95.

268. *Specht*, 8 Pa. at 327.

of Protestantism, which persisted until well into the twentieth century. Any number of quotations might make the point for the era analyzed in this Article. For example, in his commentaries, Joseph Story notes that, when the First Amendment was adopted, "the general, if not universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as it is not incompatible with the private rights of conscience, and the freedom of religious worship."[269]

George Thomas provides perhaps a more penetrating expression of the same phenomenon: "The separation of *church* and *state* was the basis for the unity of *Christianity* and *nation*, while moral persuasion was the identifying link."[270] Historian Bertram Wyatt-Brown observed that, "[c]ontrary to some historical opinions, the voluntary church system did not materially alter hopes for making America an officially Christian republic . . . . In fact, as [Lyman Beecher] saw it, the church was freer to press for measures of ethical and spiritual conformity than ever before."[271] The point of adducing these quotations is not to retreat from "neutrality of reasons." As Story hastens to say, the quest for a Christian America was subordinate to the constitutional guarantee of free conscience.[272] But we should recognize that this Protestant hegemony makes "neutrality of effect" thoroughly inapposite to the early and middle stages of our constitutional tradition.

So much for the objective of the conduct exemption. Are there additional, independent arguments against the central role of the judiciary that the conduct exemption presupposes? The issue is approachable through the penultimate paragraph of *Smith*:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious be-

269. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 988 (Carolina Academic Press ed. 1987).

270. GEORGE M. THOMAS, REVIVALISM AND CULTURAL CHANGE: CHRISTIANITY, NATION BUILDING AND THE MARKET IN THE NINETEENTH-CENTURY UNITED STATES 78 (1989).

271. Bertram Wyatt-Brown, *Prelude to Abolitionism: Sabbatarian Politics and the Rise of the Second Party System*, 58 J. AM. HIST. 316, 319-20 (1971).

272. *See supra* note 269 and accompanying text.

liefs.[273]

For quite a while now, the battle cry of "judicial review" has been "protect minorities against the will of the majority." We need look no further than the O'Connor concurrence (in this regard joined by Brennan, Marshall, and Blackmun) for an example:

> [T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority . . . . The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.[274]

And doubtlessly it carries along the conduct exemption. This sounds like Justice Jackson in *Barnette*.[275]

Earlier, I noted cogent philosophical criticism of this construction.[276] The point now is to see that the set of opposing triptyches—courts-rights-minorities versus legislatures-interests-(not rights)—is ahistorical. Something like it is perceptible only after about 1830, and widely accepted not before 1850. Historian William Nelson expressed the point well in an unjustly neglected 1972 article.[277]

> Judges of 1820, that is, unlike judges of today, did not see judicial review as a mechanism for protecting minority rights against majoritarian infringement . . . . Judges of the early nineteenth century viewed "the people" as a politically homogeneous and cohesive body possessing common political goals and aspirations, not as a congeries of factions and interest groups, each having its own set of goals and aspirations.[278]

> Judicial review, as it developed after the 1780's was thought, in sum, only to give the people—a single, cohesive and indivisible body politic—protection against faithless legislators who betrayed the trust placed in them, and not to give judges authority to make law by resolving disputes between interest groups into which the

273. Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

274. *Id.* at 1613.

275. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

276. *See supra* notes 58, 59 and accompanying text.

277. William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

278. *Id.* at 1177.

people and their legislative representatives were divided.[279]

As Don Fehrembacher explained, after noting the dearth of successful assertions of religious freedom claims in courts in antebellum southern courts (apparently there were none),

> [s]tate bills of rights, whatever may have been their restraining influence as guidelines for public officials, were not heavily litigated documents in the antebellum period. For the defense of liberty, Americans of that time relied less upon enforcing individual rights in court than upon preventing the abuse of public authority through separation of powers, frequent elections, and other such means of republican control.[280]

Simply put, the conception of law and politics infrastructural to the "conduct exemption" did not exist until at least a half-century after the founding. Only then did a necessary (but far from sufficient) condition emerge.

In the early national and antebellum eras, judicial review ended—and "legislative supremacy" began—once certain reasons were deemed to have been excluded from the lawmaking process. As late as 1861—two months before the firing on Fort Sumter—the New York Court of Appeals upheld a Sabbatarian prohibition upon Sunday Theatre.

> The act complained of here compels no religious observance, and offenses against it are punishable not as sins against God, but as injurious to and having a malignant influence on society . . . . All these [other laws against gambling lotteries, polygamy, etc., what we call "morals legislation"] and many others do to some extent restrain the citizen and deprive him of some of his natural rights . . . . It is exclusively for the legislature to determine what acts should be prohibited as dangerous to the community.
>
> [W]hatever the [legislators'] reasons may have been, it was a matter within the legislative discretion and power, and their will must stand as the reason of the law.
>
> We could not, if we would, review their discretion and sit in judgment upon the expediency of their acts. We cannot declare that innocent which they have adjudged baneful . . . .[281]

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279. *Id.* at 1172.

280. DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 22 (1989).

281. Lindenmuller v. People, 33 N.Y. 548, 573-75 (1861).

Lindenmuller, like *Specht*, captures the profound differences of opinion about institutions between the present conduct exemption enthusiasts and antebellum Americans. But as to these matters, at least, the differences persisted into the *Lochner* era, and beyond. In 1886, the Arkansas Supreme Court disposed of a constitutional challenge to Sunday closing laws.

> The appellant's argument, then, is reduced to this: that because he conscientiously believes that he is permitted by the law of God to labor on Sunday, he may violate with impunity a statute declaring it illegal to do so. But 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 . . . . If the law operates harshly, as laws sometimes do, the remedy is in the hands of the legislature. It is not the province of the judiciary to pass upon the wisdom and policy of legislation. That is for the members of the legislative department, and the only appeal from their determination is to the constituency.[282]

It is time to renew work on our provisional account of protected actions. We have spoken of "worship" widely construed to include doctrine, discipline, and ritual/liturgy/preaching. Two potential ambiguities remain. "Religious liberty," it seems, was a "neutrality of reasons" constraint upon legislative regulation of doctrine, discipline, and worship. But "religious liberty" is not a term in either the federal or state constitutions. Constitutionally considered, it comprises free exercise and nonestablishment guarantees, and sometimes other provisions, all also collectively known as "freedom of conscience." Is "worship" (or doctrine or discipline) protected *specifically* by free exercise, and not by nonestablishment? I do not think that the materials permit a conclusive answer to this question about division of labor, if there was one. Since every state had a medley of provisions, there was no practical need to distinguish the chores done by each. I *have* argued elsewhere that nonestablishment meant "no sect preference."[283] It stands (at least) for the central feature of religious liberty: government neutrality on what distinguished the various churches. Arguably, it supplies the more powerful thrust for neutrality. Religion and its "exercise" probably denote doctrine, discipline, and worship. But "free" means something, too, and it probably signaled "neutrality

282. Scales v. State, 1 S.W. 769, 772 (Ark. 1886) (citation ommitted).

283. *See* BRADLEY, *supra* note 90.

of reasons." Hence, my tentative verdict on this potential ambiguity: the ambiguity remains, but it is not particularly significant. More reasons follow.

The materials indicate that there is a definable class of actions protected by the religious liberty clauses, and that class is *not* (most emphatically) whatever believers made it. More than one opinion consulted a plaintiff's religion to refute precisely such suggestions.[284] But there is evidence in those opinions and elsewhere that Scalia might be right, that the list of eligible actions might be open-ended. To be sure, "religiously motivated conduct" is a term foreign to the historical sources. *Wolf*, *Benjamin*, and *Specht* all promised more serious judicial scrutiny *had* the plaintiff been under a divine command to work six days a week (and not just to refrain from work one specific day). *Specht* refers to a constitutional right "to do or forbear to do, *any* act for conscience sake."[285]

Now, none of this is persuasive evidence of *Sherbert*. There are no holdings establishing an open set of protected actions, and courts' willingness to inspect the creed and doctrines of believers makes clear that we are not talking about untethered individuals. We are talking about the freedom of churches and organized religion. And there is little doubt which way the pendulum would swing once "acts for conscience sake" broke out in antinomianism. That is *Reynolds v. United States*,[286] the first square confrontation with "an act for conscience sake," and it presented no constitutional claim at all!

But *Reynolds*, apart from its hostile tone and allowing for its unartful phrasing, did not contract antebellum holdings.[287] We are mistaken in distinguishing the class of eligible actions from neutrality of reasons. It is analytically possible, but now it is time to use *Specht* to improve upon our provisional definition. In the above paragraph, I excerpted *part* of a passage from *Specht* to suggest an expansive class of eligible actions. The full quotation reads "to do, or forbear to do, any act for conscience sake, *the doing or forbearing of which is not prejudicial to the public weal.*"[288] The portion previously omitted is *part* of the *definition* of eligible actions.

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284. *See* Commonwealth v. Wolf, 3 Serg. & Rawle 48, 49 (Pa. 1817); Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 528 (1846).

285. Specht v. Commonwealth, 8 Pa. 312, 322 (1848).

286. 98 U.S. 145 (1878).

287. *Id.* at 145.

288. *Specht*, 8 Pa. at 322 (emphasis added).

We are at the doorstep of the latent but profound "majoritarianism" of the original meaning of the Free Exercise Clause, and of religious liberty generally. *Specht* leads us to it, and here there is no doubt that it is representative of the antebellum corpus. "Neutrality of reasons" is the dominant factor, and it is a function of legislators' behavior. Do they, in fact, propose some theological belief or form of worship to citizens, and oblige assent (or at least outward conformity) to it? Judges did not consult legislative debates in answering that question. They "consulted" commonly accepted accounts of the purpose of, for instance, blasphemy laws. Blackstone or *People v. Ruggles*[289] or *Updegraph v. Commonwealth*,[290] not statehouse debates, were the sources. The occasional judicial voice, *Newman*[291] for instance, opining that Sabbath observance ran afoul of neutral reasons, suggests serious inquiry into the matter. But the *Newman* court produced no record of legislative debates either. The judicial conclusion: in a land devoted to religious liberty (i.e., neutrality of reasons), blasphemy laws *could have* no other purpose than preservation of public place and order.[292]

This reinforcement worked a *practical* limitation of eligible conduct to doctrine, discipline, and worship, as Protestants understood them. Apart from those differentiating features, and especially since nonsectarian religion was fit for state promotion, Christian legislators simply would not be proposing obedience to *religious* doctrines. Hence, Congress prohibited polygamy not because a religious doctrine or ritual called "monogamy" was the preferred theology. Polygamy was thought immoral, and a threat to the good order of society. The *Reynolds* court supposed so.[293]

The defining perspective was the Christian one of legislators. The norm remained universal. Jews, turks, and infidels were all protected by religious liberty from forced assent to religious proposals.[294] But the distinction between religious and non-religious reasons—neutrality—was not ecumenical. There was a single frame of reference, and it was not, nor did it aspire to be, equally Muslim and Protestant (if such a perspective is imaginable). Morality, to cite one

289. 8 Johns. 290 (N.Y. Sup. Ct. 1811).

290. 11 Serg. & Rawle 394 (Pa. 1824).

291. *Ex parte* Newman, 9 Cal. 502, 513-16 (1858).

292. *Id.* at 502.

293. *Reynolds*, 98 U.S. at 166-67.

294. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1604 n.28 (1990).

presently contentious area of state regulation, was securely distinguished from religion. Religious liberty had no impact upon what we call morals legislation.

With these caveats we may reapproach *Wolf*, *Benjamin*, and other examples of open-ended eligible actions like *Smith*'s. That the believer was under a divine injunction to work six days a week, I suggest, might have mattered *not* because (like *Sherbert*) Free Exercise analysis depended upon the idiosyncracies of individual commitments. That a law clashed directly with such a divine injunction was unfortunate, but legally remarkable for two other reasons. The clash suggested greater judicial inquiry into neutral reasons, to make sure legislators were *not* attacking the believer's religion. It also was occasion to suggest recourse to the legislature, with a judicial letter of recommendation.

McConnell explicitly questions this worship/neutrality of reasons account of free exercise.[295] He knows that it is the only likely historical alternative. His argument against it relies, oddly enough, upon constitutional developments in Pennsylvania. He says that, "[i]nterestingly, Pennsylvania (a state whose substantial Quaker population had an interest in exemptions) revised its constitutional protection for liberty of conscience in 1790, removing the language that had limited it to acts of worship."[296] Frankly, the change, from a purely grammatical viewpoint, suggests only that some additional, other "rights of conscience" have been added to "the right of conscience in the free exercise of religious worship."[297] That implies that no change in the latter is implied.

More distressing is the manner in which McConnell arbitrarily handles supporting evidence. A look at the *entire* religious freedom provision of each constitution (that is, the Pennsylvania Constitutions of 1776 and 1790)[298] shows that McConnell, by leaving out

295. McConnell, *supra* note 75, at 1461.

296. *Id.*

297. *See* PA. CONST. of 1776, art. II.

298. PA. CONST. of 1776, art. II; PA. CONST. of 1790, art. IX, § I.

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by Any power whatever, that

most[299] of them, has radically altered the nature of the shift. In any event, we know what the 1790 constitution empowered courts to do in the commonwealth—starting with *Stansbury* in 1792, and up to *Specht* in 1848.

McConnell says that, "[i]n none of the state free exercise cases in the early years of the Republic did the lawyers argue or the courts hold that religiously motivated conduct was unprotected because it was not 'worship.'"[300] McConnell's observation is true in this trivial sense: no case left action unprotected *only* because it was not worship. Otherwise, McConnell is mistaken. *Many* cases expressly used "worship" as a term of limitation. They did so along with other intracommunal activities like doctrine and discipline. Action that was *none* of them *was* unprotected. McConnell also says that it is unlikely that ritual conduct would be so subordinated to pious living. This is not only likely, but exactly what happened, partly because morality rested upon transectarian objective bases, and was legally enforceable. In support of neither objection does McConnell offer any authority or supporting observations.[301]

Pennsylvania is a good place to lay bare some of the deeper sources of McConnell's ahistoricism. He treats religious freedom as paradigmatically an individual right, asserted over and against collective interests. By doing so, McConnell overlooks a burgeoning load of scholarship showing that *the* fundamental natural right in the Revolutionary and early republican eras was the right of a community to

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shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.

PA. CONST. of 1776, art. II.

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.

PA. CONST. of 1790, art. IX, § I.

299. McConnell, *supra* note 75.

The 1776 Declaration of Rights of the Inhabitants of the State of Pennsylvania states that "no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." . . . The 1790 Pennsylvania Constitution states that "no human authority can, in any case whatever, control or interfere with the rights of conscience."

Id. at 1461 n.255 (citations omitted).

300. *Id.* at 1461.

301. *Id.*

be governed by laws of its own choosing.[302] Republican government was the paramount liberty.[303] Liberty was identity between the people and its representatives, as Nelson's account of judicial review suggests.[304] Religious liberty was not the trump card of individual autonomy.

We have good reason to see religious liberty primarily as freedom of churches and secondarily as that of individuals in relation to the churches. Palmer has brought these factors together with specific reference to Pennsylvania. "The Pennsylvania Constitution, even in its declaration of rights, was not oriented directly to individual fulfillment; it considered the communal right to qualify liberties as important as the individual's right to be free from governmental interference."[305]

At its deepest level, McConnell's historical argument seems to be an act of faith; not in God, but in what a people who believed in a sovereign God *must have* done when they came together for the drafting of the Constitution in 1789.

> To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like 'God' that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority.[306]

At its very core, Free Exercise reflected this "theological position."[307]

This impassioned sentence is partly rhetoric. It serves McConnell's polemic against historical figures like Jefferson, and contemporary scholars (like Walter Berns) who, according to McConnell, assert the priority of the political over the religious.[308] McConnell (claiming Madison as an ally) insists that religious liberty proceeded

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302. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, 61-62 (1969); Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 445-49 (1990); Robert C. Palmer, *Liberties as Constitutional Provisions: 1776-1791, reprinted in* WILLIAM E. NELSON & ROBERT C. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55 (1987) [hereinafter NELSON & PALMER].

303. NELSON & PALMER, *supra* note 302, at 64.

304. Nelson, *supra* note 277.

305. *Id.*

306. McConnell, *supra* note 9, at 1152.

307. *Id.*

308. McConnell, *supra* note 75, at 1442.

from religious, rather than political, premises.[309] (For what it is worth, I think McConnell is right.) But this debate, whatever its historical value, is no surrogate for a debate about the original meaning of the Free Exercise Clause.

This impassioned sentence is also partly substance. As far as I can tell, McConnell's allegiance to the conduct exemption is deeply indebted to this theological conviction. For McConnell, the sovereignty of God is at stake in the debate over *Smith*. To this conviction I offer two rejoinders. One is the founders' view of the matter. They affirmed the sovereignty of God and eschewed conduct exemptions. Why cannot McConnell? Two, I think it is imprudent to bet so much on so little. That is, no majestic, foundational claim like the "sovereignty of God" can ride on the precise contours of judicial construction of one clause in any positive enactment, including our Constitution.

My discussion has so far been about state practice. What of the federal Free Exercise Clause, which, after all, is the subject of the day? I agree with McConnell that the basic building blocks[310]—free exercise, establishment, religion—were apprehended by the state ratifiers as they generally understood identical terms in their state constitutions. Use of terms like "respecting," "prohibits," or "interfere" in the First Congress reflected no substantive disagreement among its members as to what they wanted to say. The consensus exhibited then reinforces the argument for similarity between state and federal provisions. And we know what the state provisions meant.

Might the federal proposers have used the basic building blocks and, by an eclectic use of modifiers, given birth to the conduct exemption? No. Why not? Most basically, because the federal proposers' designs are unimportant absent evidence of apprehension of them by the ratifiers. There is none. Also, federal use of the term "religion," rather than standard state use of "sect," could mean only (if it meant anything distinctive) a wider class of persons protected. The federal provisions thus protected the Roman Catholics and Jews, who were frequently discriminated against by the states. This venture beyond Protestantism (if that is what it was) is unlikely to have been joined to an expansion of the class of actions protected (say, from "worship" to all "religiously motivated conduct").

There is another portentous change in wording from state to

309. *Id.* at 1446.
310. *Id.* at 1456.

federal bills of rights. The latter is marked (not exclusively) by peremptory language: "shall," as opposed to the exhortatory "ought" of state constitutions.[311] This change probably signals an expectation of federal judicial enforcement. But that, too, cuts against expansion. With judicial enforcement would come efforts to render more specific, if not technical, the meaning of the norm.

"Congress shall make no law . . . . "[312] This means that a class of legislation is forbidden. A class is definable by foreclosing legislative adoption of truth claims of one or another church. But the conduct exemption does not forbid a class of legislation. It invites judges to compare the effect of believer autonomy upon public peace and order, the day-to-day tranquility of the community. But federal judges were not responsible for public peace and order. Nor was the federal government as a whole. The states were. Put differently, the conduct exemption is a balancing test of individual autonomy and public peace. But the latter is not within the ken of the federal judges doing the balancing.

The widespread suspicion of federal courts voiced during the federalist/antifederalist ratification controversy reinforces this conclusion. "Antifederalists spent a considerable amount of time criticizing the judicial article . . . . They saw in the provisions for the federal judiciary the potential for a consolidating aristocracy."[313] Are we to believe that a provision that mentions only "Congress," and that uses familiar terms, transferred a previously unimagined power to these feared judges? No.

But, the objector says, the congressional Framers did not use language clearly reflecting their intentions. Why did they not say "worship" or "neutrality of reasons?" Basically, they did, in the usage of their (if not our) day. There is no evidence that federal courts entertained some other interpretation. But this objection can be dispatched most efficiently by turning it around: if the Framers had intended to transfer from legislatures to courts the power over religion that the conduct exemption implies, they would not have used familiar language at all! They would have had to invent a new phrase!

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311. *See, e.g.*, U.S. CONST. amend. I.

312. *See, e.g., id.*

313. Boyd Clifton Rist, The Jeffersonian Crisis Revived: Virginia, the Court, and the Appellate Jurisdiction Controversy 27 (1971) (unpublished Ph.D. dissertation, University of Virginia).

III

In his magisterial 1985 survey, *The Constitution in the Supreme Court*, David Currie noted the scarcity of historical defenses of the conduct exemption.[314] He observed that defenses tended to be "policy" oriented.[315] McConnell, in 1990, noted the same scarcity,[316] and sought to remedy it. He has been unsuccessful. McConnell's historical methodology is perverse. Within its own terms, his analysis is frequently arbitrary and his conclusions are quite overdrawn. We have heard argument, and it is time to pronounce final judgment: conduct exemptions cannot be squared with an originalist account of constitutional law. Twenty-seven years of precedent (the period from *Sherbert* to *Smith*) are not enough to overcome plain meaning, historically recovered, *and* one hundred seventy years of faithful construction (the period from the founding to *Sherbert*). I submit (though I do not claim warrants to pronounce conclusively) that any serious account of constitutional construction holds no place for the conduct exemption.

Now, in 1991, McConnell expresses a preference for deciding *Smith* on the basis of "constitutional text and tradition," as opposed to "normative judgments."[317] "But," he concludes in carefully chosen words, "if it is necessary to confront the normative question directly" he would prefer the conduct exemption to constitutional law based upon the text and tradition.[318]

If the conduct exemption is to be supported by "policy" or sustained by "normative" nonconstitutional convictions, what are they? A good guess is suggested by *Sherbert*'s vintage: 1963. That was probably the high-water mark of Warren Court judicial activism, just two years before *Griswold v. Connecticut*,[319] and five years after Britain's Wolfenden Commission Report[320] proposed to decriminalize homosexual acts, a recommendation that touched off what remains the center of legal theoretical debate: enforcement of so-called private morality, opposition to which is the earmark of contemporary liberalism.[321]

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314. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 441 n.77 (1985).
315. *Id.*
316. *See* McConnell, *supra* note 75, at 1413-15.
317. *Id.* at 1153.
318. *Id.*
319. 381 U.S. 479 (1965).
320. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (1957).
321. *See* Robert P. George, *Social Cohesion and the Legal Enforcement of Morals*, 35

This liberalism is not what the Democratic party is and what the Republican Party is not. It is the philosophical tradition tracing back to Locke, arguably embraced by Kant, and transmitted by Mill.[322] Renowned contemporary defenders include John Rawls,[323] Ronald Dworkin,[324] David Richards,[325] and Bruce Ackerman.[326] Its distinguishing features are the "harm" and "neutrality" principles: government ought be "neutral" among conceptions of what is good or right for individuals to do, and possesses no right to coerce or to discourage conduct unless the conduct "harms" persons who have not consented to engage in it.

This liberalism has infiltrated and taken over our church-state corpus. (*Smith* rolls it back a significant bit.) Its influence is sometimes subtly introduced. It used to be commonly observed that sectarian disputes—disagreements about speculative theology, liturgy, and Church polity—led to political divisiveness and eventually to settlements like that wrought by the Framers. That is, to treat such disputes as matters of divergent opinion and unite people on other bases. Now, philosopher Jeffrey Stout opines that "what made the creation of liberal institutions necessary was the manifest failure of religious groups of various sorts to establish rational agreement on their competing detailed visions of the good life."[327] All questions of what constitutes genuine human flourishing, according to Stout, have been bracketed due to now divisive moral pluralism. But moral pluralism is unquestionably a recent development, dating to sometime after World War II.

Michael McConnell strenuously resists what he perceives to be the secularism of contemporary liberalism, but he embraces liberal political morality, and ties it to the conduct exemption. For McConnell, Free Exercise vanquishes state paternalism in all matters affecting the good life.

> Obvious connections exist between the scope of free exercise right defined by these provisions and the wider liberal political theory of

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AM. J. JURIS. 15 (1990).

322. *See* John Stuart Mill, *On Liberty*, *reprinted in* THE UTILITARIANS 475-600 (Anchor Books ed. 1973).

323. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

324. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

325. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

326. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

327. JEFFREY STOUT, ETHICS AFTER BABEL 212 (1988).

> which they are an expression. The central conception of liberalism, as summarized in the Declaration of Independence, is that government is instituted by the people in order to secure their rights to life, liberty, and the pursuit of happiness. Governmental powers are limited to those needed to secure these legitimate ends. In contrast to both ancient and modern non-liberal regimes, government is not charged with promotion of the good life for its citizens. Except as needed for mutual protection and a limited class of common interests, government must leave the definition of the good life to private institutions, of which family and church are the most conspicuous. Even in the absence of a free exercise clause, liberal theory would find the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others.[328]

The liberal conflagration of religious and moral autonomy is perfectly captured in a brief of 885 law professors in a recent Supreme Court case.

> The right of personal privacy stands against state domination over matters crucial to self-possession: self-definition in matters of value and conscience, and self-determination regarding ways and walks of life. By its force, government's hand is stayed from the diverse choices by which persons define their values, form, and maintain communities of belief and practice.[329]

That explains opposition to *Smith.* It is also indistinguishable from key arguments in *Bowers v. Hardwick*,[330] the consensual sodomy case, and *Cruzan v. Director, Missouri Dep't of Health*,[331] the "right-to-die" case. But the argument is not from any of those cases. It was filed in the 1989 case of *Webster v. Reproduction Health Servs.*,[332] the abortion counselling decision. It was the linchpin of the pro-choice view.

The worshiping community has been supplanted in our church-state doctrines by the religiously motivated individual, bearing a right to command neutrality between "religion and nonreligion." Out of this transformation emerges an undifferentiated private sphere, the scene of all meaningful (i.e., value laden) human action. "Private" action is

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328. McConnell, *supra* note 75, at 1465.

329. *See* Record Brief at 6, School Dist. v. Ball, 473 U.S. 373 (1985) (No. 83-990).

330. 478 U.S. 186 (1986). The arguments are most accessible in the dissent by Justice Blackmun. *See id.* at 211-13.

331. 110 S. Ct. 2841, 2884-89 (1990) (Stevens, J., dissenting).

332. 492 U.S. 490 (1989).

all that a person chooses—for whatever reason—to do that does no harm to others. Effaced is the distinction that allowed the founders to condemn even religiously propelled licentiousness. "Religious liberty" is the trump card of the emancipated self, overruling all state policies exceeding the harm and neutrality principles.

Any lingering mystery about the conduct exemption's lineage may be dispelled by the following samples from recent church-state opinions of the Supreme Court. They signal the pivotal transition from freedom of religion to individual freedom of choice for or against religious commitments: "*Cantwell*, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses of the First Amendment."[333]

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected . . . embraces the right to select any religious faith or not at all. This conclusion derives support . . . from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .[334]

> Such indoctrination [exemplified by Title I] . . . would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State . . . .[335]

> [A]n important concern . . . is whether the symbolic union of church and state effected by . . . governmental action is sufficiently likely to be perceived by adherents . . . as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices . . . [Symbolic union] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.[336]

> The solution to this problem [of religion and society] adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and

333. Wallace v. Jaffree, 472 U.S. 49, 50 (1985).
334. *Id.* at 53.
335. School Dist. v. Ball, 473 U.S. 371, 385 (1985).
336. *Id.* at 390.

> nonreligion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma."[337]

Michael Sandel summarizes this development:

> The respect this neutrality commands is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely. Religious beliefs are "worthy of respect," not in virtue of what they are beliefs in, but rather in virtue of being "the product of free and voluntary choice," in virtue of being beliefs of a self unencumbered by convictions antecedent to choice.[338]

The only way for the conduct exemption to avoid obsolescence—for it to escape collapse into a project rendering it superfluous—is to keep "religion" as a term of limitation, to keep freedom of conscience devoted to religion and not to the emancipated, autonomous self. This may be the intention of some believers who defend the doctrine, though certainly not the ACLU, People for the American Way, the American Humanist Associates, and Justices Brennan, Marshall, and Blackmun. *They* realize that the doctrine is an efficient engine for the maintenance of the neutral secular state, the playpen of the autonomous self. It is ticketed to rid the polity of any trace of the authority of religion, and of the moral tradition.

Can "religious liberty" be saved from a takeover by the autonomous self? We have already seen that some theorists (e.g., Rawls and Richards) attempt no rescue. Can those who try, succeed?

There is reason for optimism. Many cases say that only beliefs rooted in religion are protected by the Free Exercise Clause; that personal philosophical views or a traditional way of life are not protected.[339] But now consider some illustrations of this term of limita-

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337. *Id.* at 382 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)). In an impressive, recent article, Richard Myers argues that the Supreme Court's liberal privatization efforts (which he thinks I overstated in my earlier article) crested about 1986. *See* Richard Myers, *The Supreme Court and the Privatization of Religion* 41 CATH. U. L. REV. (forthcoming, May, 1992).

338. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?, reprinted in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 86 (James Davison Hunter & Os Guinness eds., 1990).

339. *See, e.g.*, Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1989) (holding that refusal to work on Sundays for religious reasons was protected by the Free Exercise

tion. A California couple managed to get to trial for Free Exercise violation of their religion.[340] Members of their Church of the Most High God worshipped the Egyptian God of fertility, Isis. This faith originated a few years back in a revelation to Mr. Wilber Tracy, in a beach bungalow in Santa Monica. In a brilliant flash of light, God appeared to Mr. Tracy. This God was in great physical shape. But "he didn't work out," Mr. Tracy testified at trial. "He didn't need to."[341]

So far so good, I guess. But Tracy attracted the authorities' attention for practicing what seemed to be the *only two* principles of church discipline: "absolution" through sex with a high priestess (Mrs. Tracy) and a "sacrifice" of money. "High priestess" status was no sinecure; a thousand confessions need be heard before "ordination."[342]

State v. Hodges[343] is the most colorful conduct exemption case that I have encountered. Robert Hodges was indicted for tampering with utility metering devices.[344] He appeared for trial in his "spiritual attire," proclaiming, "it is my religious belief and I have never worn anything else in court but this when I am on trial."[345] His outfit consisted of, in the words of the appellate court reviewing his citation for contempt,

> brown and white fur tied around his body at his ankles, loins and head, with a like vest made out of fur, and complete with eye goggles over his eyes. He had colored his face and chest with a very pale green paint or coloring. He had what appeared to be a human skull dangling from his waist and in his hand he carried a stuffed snake. His legs were also naked from mid-way between his knee and waist to his ankles. He appeared to be carrying a military gas mask and other unidentifiable ornaments.[346]

Mercifully, he admitted to being the sole adherent of this eclectic faith.

Clause of the First Amendment); Thomas v. Review Bd., 450 U.S. 707, 713 (1981) (holding that philosophical opposition to war is not the same as a religious belief).

340. *See Judge Weighing Claims of a Religion Based on Sex*, N.Y. TIMES, May 2, 1990, at A11 (hereinafter *Judge Weighing Claims*].

341. *Id.*

342. *Id.*

343. 695 S.W.2d 171 (Tenn. 1985).

344. *Id.* at 171.

345. *Id.* at 172.

346. *Id.* at 171.

The point is not that the Tracys and Mr. Hodges are typical of conduct exemption plaintiffs. I trust that they are not. The point is that conduct exemption doctrine is incapable of distinguishing them from persons who *are* typical. All conduct exemption plaintiffs are lumped together generically as "religiously motivated individuals." Plaintiffs like Mr. Hodges also evidence the all too common conception of religion as a non-cognitive enterprise.

Frazee v. Illinois,[347] a 1989 Supreme Court decision, underscores the impotence of religion as a term of limitation. The *Frazee* Court held tight to an admittedly challenging distinction between religious and secular beliefs.[348] That distinction might survive if religious liberty focused upon churches. We might, as was the case until well into the twentieth century, look to recognized or established religious groupings as an indicator of genuine religious conviction. Reference to a community served to verify sincerity and weed out the fraudulent opportunist or fair-weather believer. Religious communities maintained a robust prescription for walking in the way of the Lord. No one would adopt an entire way of life to avoid an unpleasant civic duty. It would also protect religion's respectability from slurs of non-cognitiveness. Surely, there will not be a whole church full of chickens.

Frazee forecloses these routes. Mr. Frazee claimed membership in no sect, adherence to no dogma.[349] He did not even assert an individuated, coherent set of beliefs. He asserted belief in "Bible religion" with one salient tenet: no labor on the Sabbath.[350] We cannot end run *Frazee* by explaining that his interpretation of Scripture is unfounded (or to Jehovah's Witnesses' that Scripture really does not prohibit transfusions). The *Benjamin* and *Wolf* courts did something like that. But what in Mr. Frazee's (or Mr. Hodges' or the Tracys') "religion" would we consult?

Courts cannot insist that believers reconcile contradictions in their own beliefs, or state them with clarity. As Michael McConnell says, the claimant's beliefs need not be "consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination."[351] The *Thomas* Court opined that religious claims need not

347. 489 U.S. 829 (1989).
348. *Id.* at 1517.
349. *Id.* at 1516.
350. *Id.*
351. McConnell, *supra* note 75, at 1417.

even be "comprehensible" to outsiders to merit First Amendment protection.[352] What further aid to the non-cognitivist charge is needed?

There can be no second-guessing or finessing through reinterpretation of the proffered religion. Believers who claim an identity with a tradition do not even have to get it right. For instance, a plaintiff might argue that, as a professing Roman Catholic, he cannot work in a bank alongside non-Catholics. One would look in vain for official verification of this, or another Catholic who so believes. No matter. It is "*a sincere conviction*" that one's religion (whatever it is) is burdened that starts the suit, not a sincere adherence to a definable religion. The religious tenet itself is subject to *no* critical analysis.

"Sincere conviction" need not pass a "straight face" test; one *cannot* read with a straight face some of the claims that courts have accepted. Mr. Hodges settles that. Besides, the point of the exercise is to overcome our prejudices, to avoid imposing our categories upon the assertions of others. It is defined negatively: sincere conviction is whatever a plaintiff claims, save what is a clear, undeniable, and patently attempted fraud. One of the very few religions to fail to pass this test was the Neo-American church. Members were called "Boo Hoos," its theme was "Puff The Magic Dragon," and its motto was "Victory over Horseshit." That its only function was the illegal use of narcotics finally persuaded a court to place it beyond the pale.[353] Other examples are pretty much limited to the tax evasion schemes of blue collar workers[354] who get together and ordain each other as ministers of Ralph and Joe's Temple of God and Storm Door Repair Company, or something similar.

"Burden" is no more formidable an obstacle. How could it be? Given the infinite latitude available to plaintiffs in defining the substance of their beliefs, no imagination is required to bring belief itself into open conflict with the legal provision being challenged.

Smith exemplifies how conduct exemption analysis is there for the asking, how religion is not only undefinable, but an empty shell inhabited by the autonomous self. The Supreme Court treated both Smith and Black as "members" of the Native American Church who "ingested peyote for sacramental purposes" at a church ceremony.[355]

352. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).
353. *See* United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).
354. *See Judge Weighing Claims*, *supra* note 340, at A11, A13.
355. Employment Div. v. Smith, 110 S. Ct. 1595, 1597 (1990).

As far as I can tell from the state court opinions, there was no factual basis for those conclusions. It is hard to say what *was* found as fact, because the Oregon Supreme Court did not seem to care. The lower appeals court remanded for answers to these questions,[356] but the higher court ruled without waiting for them.[357]

A recent New York Times article,[358] based upon interviews with Black, Smith, and one of their lawyers, reveals that Black (certainly) and Smith (possibly) were not church members. Each was evidently a guest at the ceremony, and neither ingested peyote "sacramentally," if, by that we mean (as we should), with belief in the surrounding web of beliefs and practices. Still, the United States Supreme Court held that religion was burdened.

Whose religion? Not Smith's and Black's—the courts have no definition of religion, no way to test sincerity, and no interest in determining plaintiffs' attachment to the religion talked about in the cases. The conduct exemption does not need to know if Black and Smith believe anything at all, much less if they believe in Native American spirituality. Someone without a scintilla of religious conviction could, right now, attend a Native American ritual and ingest peyote to see what it was like. If some legally cognizable harm visited him for so doing, he is a conduct exemption plaintiff. All he need allege is what Galen Black did: that he did it for "spiritual" reasons. What is "spiritual?" Whatever the "spiritualist" chooses to attach some spiritual significance to. (Pantheism, anyone?)

For all practical purposes, conduct exemption plaintiffs are self-designated. Courts (following the lead of government lawyers) do not contest assertions of a burdened conscience. How could they, in the regime of individuated religion that the doctrine inhabits and supports? The purpose of the doctrine—promotion of ideal conditions for unencumbered self-choice—does not require that live, religious commitments of this plaintiff actually be distressed; just that someone's might be. The doctrine secures a collective good, a judicial demarcation of the public/private realm with the government securely on the former side. Its sphere consists (more or less) of prevention of force and fraud, or commodious living, or facilitating the quest of private selves for meaningful identities. However articulated, this service is

356. *See* Black v. Employment Div., 707 P.2d 1274, 1279-80 (Or. 1985).

357. *See* Smith v. Employment Div., 721 P.2d 445, 451 (Or. 1986).

358. *For 2, an Answer to Years of Doubt on Ritual Use of Peyote*, N.Y. TIMES, July 9, 1991, at A9.

occasioned by action of what now must be viewed as a private attorney general with no necessary connection to the belief system impacted. No more is required by courts, nor dictated by the purpose driving the conduct exemption. Smith and Black prosecute a *qui tam* action.

A student survey of one hundred or so randomly selected conduct exemption cases from 1979 to 1989 demonstrates that "religion" has no analytical significance, and that "burden" has very little.[359] In the exceptional case, where courts detect no burden,[360] they say that the states' interests are compelling enough to defeat the plaintiff. That means that courts decide these cases (almost always against aggrieved "sincere believers") by immediate recourse to, and validation of, the government interests involved. If plaintiffs do not necessarily have their religious commitments at stake—and almost invariably lose—what is the point of conduct exemption analysis? The point is, most fundamentally, just what its proponents define as the central purpose of constitutional law, the judicial maintenance of the boundaries to legislative action thrown up by liberalism. The conduct exemption is the harm and neutrality principles.

I happen to believe that the harm and neutrality principles have no place in a sound political theory. I do not rely upon that belief, or my reasons for it, in the following criticisms. Even one who embraces liberalism should scorn its demagogic and false promotional campaign. But for liberalism judicially enforced, we would be engulfed in sectarian warfare. (Or is that the Establishment Clause advertisement?) The free exercise "ad" says, "Today, peyote; tomorrow, communion wine or kosher food. If judges don't do *Sherbert*, the majority's pogrom will soon visit *your* church or temple." The plausibility of this mindless, negative appeal (Willie Horton is high-brow by comparison) is self-generated. Like all good advertising, it is designed to convince you that you need something that you really do not need. If we are to buy liberalism, let us wittingly do so. Liberalism should not be a rider to our purchase of, for example, freedom to attend Catholic Mass.

I question whether the conduct exemption really serves religious liberty. Defenders say, "Why not give plaintiffs a second bite at the apple? If they lose politically, they might (occasionally) win judicial-

359. Anthony Cavallo, The Free Exercise of Religion: Is it Truly Free or Merely Convenient to the State? (Apr., 1990) (unpublished manuscript, on file with the author).

360. *See, e.g.*, United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989).

ly. Why not? What is the harm?" Well, "neutrality of effect"—government must not supply reasons for or against adopting a particular religion's viewpoint—is virtually the "no endorsement" Establishment Clause analysis.[361] It has invalidated many legislative victories for religious minorities.[362] If you doubt this identification, note the non-coincidental devotion of Justices Brennan and Marshall, as well as the ACLU, to both conduct exemptions and the "no endorsement" analysis. Justice Stevens is a contrary example with difficulties all his own. He is pro-endorsement,[363] anti-conduct exemption.[364] He seems to be a "super-liberal": the state should not notice religious reasons, even in the actions of citizens adversely impacted by neutral laws. His attempts to work this strategy out have shown him to be, at best, theologically and philosophically unsophisticated.[365]

What's the harm? Demand a full accounting of the net effect, so to speak, upon religious liberty of liberalism's takeover of our religion clause jurisprudence. Other than the ambivalent "neutrality" of relegating all religiously motivated conduct to the private realm,[366] the record shows that liberalism is no friend of believers.

I should like now to suggest another, more sinister, function of the conduct exemption cases. The question, given the predictable plaintiff's loss, is what difference does going to court make? As the surrounding rhetoric is designed to convince, an obligation that, *before* adjudication, was a product of majoritarian intolerance, indifference, or ignorance (or all three), is *now* the product of, well, a most searching scrutiny by a tolerant, caring judge who has held the state to the highest standard of justification. The marshal then enforces the

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361. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that a Christmas display that included a creche, along with other non-religious items in a park, did not violate the Establisment Clause).

362. *See, e.g.*, Grand Rapids v. Ball, 473 U.S. 371 (1985) (striking shared time programs for non-public school students); Aguilar v. Felton, 473 U.S. 402 (1985) (holding that using federal funds to pay salaries of public school employees who taught in parochial schools violated the establishment clause); Parents Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986) (granting a preliminary injunction to prevent a New York city school district from providing federally funded remedial education to female Hasidic Jews in public school).

363. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 627-33 (1989) (Stevens, J., concurring in Justice O'Connor's endorsement analysis).

364. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1597 (1990).

365. *See, e.g.*, Justice Stevens' unfortunate analysis in Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3079 (1989) (Stevens, J., concurring in part), and his remarks in Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2088, 2092 (1990).

366. *See* Bradley, *supra* note 23 (advancing this thesis).

decree. Whom does this exercise serve, the individual or the state?

It may be helpful again to view the conduct exemption as "no-endorsement-reinforcing." In the typical case, neutral legislation (say, the assignment of a unique number to each social security participant) has unwittingly "endorsed" some belief to the exclusion of others, and thereby created some "outsiders." This was the situation in *Bowen v. Roy*,[367] in which persons adhering to Native American beliefs objected to their daughter's being given a number, lest her spirit be diminished. The conduct exemption recaptures such distressed believers by the reassuring promise that the polity can, and will, accommodate such demands of conscience—except, of course, for cases of utmost political necessity. The *Bowen* plaintiffs lost,[368] as do the great majority of the similarly situated, but the conduct exemption's *rhetoric* is the important thing. It assures the plaintiff, but most of all it assures the rest of us, that the regime really is the protector of our religious freedom.

Again, what is the harm? The conduct exemption defeats one of the most humbling lessons for believers: religion's remarkable capacity to obscure true moral norms. We need look no further than the antebellum south for a profound example. Of course, the political objective (for liberal proponents of the conduct exemption) *is* to politically neuter the belief that there are true moral norms. Sometimes this results from a thoroughgoing moral skepticism; other times, it is thought a necessary strategy to save individuals from suffocation by a legally enforced moral code. Happily, the skepticism is unwarranted, and the latter, costly strategy presupposes a dilemma we need not face.

IV

The good news is that plain meaning, historically recovered, makes ample room for individual autonomy *without* liberalism. Put differently, we can have our cake (religious liberty) and a government that recognizes and promotes true moral norms. Religion is truly a good for everyone, and society rightly promotes it. "Religion" is a personal relationship with a more-than-human source of meaning and value. Religion, or the good of it for people, is intrinsically voluntary. As Oxford's John Finnis writes:

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367. 476 U.S. 693 (1986).
368. *Id.*

> Coercing people to adopt or profess a religion is—if attempted for religious motives . . . "self-contradictory." For the good of adherence to the propositions of religious faith intrinsically involves that the propositions be adhered to as *true*, i.e., as disclosing a transcendent *reality* which is a *fit* object of adoration, petitionary prayer, and so forth. To the extent that the propositions are professed because their profession is convenient, both they and the professing of them obscure rather than disclose that reality.[369]

"Conscience," which is harmony among a person's feelings, beliefs, judgments, and actions, is also a good for everyone, and society rightly promotes it. Autonomy is a condition for realizing this good, too. Together with Free Exercise's foreclosure of religious truth as a ground for government action, these two goods of all persons make for a powerful presumption in favor of freedom to act on the basis of religious belief. Only good reasons may justify intrusion upon conscientious action.

I insist, however, that judges are not well suited to make these calculations. The calculation here is not "public versus private," as it is for the conduct exemption. The calculation is, rather, that of determining the ensemble of social conditions most conducive to realization by everyone of the diverse, basic human goods. This complex, prudential judgment will not be properly done by politically isolated persons, employing the restricted reasoning of law to facts adduced in the course of litigation.

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369. John M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo Kantians*, 87 COLUM. L. REV. 433, 453 (1987).