A NEW APPROACH TO NINETEENTH-CENTURY RELIGIOUS EXEMPTION CASES

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Scholars frequently cite early nineteenth-century cases to ascertain the original meaning of the Free Exercise Clause. Previous studies, however, have ignored crucial trends in those decisions, thus leading to mistaken emphasis on the denial of religious accommodation claims. This Note argues that prevailing theological views, skepticism of courtroom declarations of religious belief, and contemporary notions of judicial deference better explain nineteenth-century cases than does a wholesale rejection of judicially enforceable religious exemptions. This novel approach clarifies previously unexplained tensions in early free exercise opinions. It also suggests that the Supreme Court's holding in Employment Division v. Smith *is inconsistent with many nineteenth-century decisions, notwithstanding Justice Scalia's claim to the contrary in his concurrence in* City of Boerne v. Flores*. Moreover, past studies have failed to appreciate the enormous midcentury shift in constitutional meaning in response to Mormon polygamy and widespread Catholic immigration. This transformation leaves originalism incapable of providing a consistent account of the Free Exercise Clause.*

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INTRODUCTION

In *Employment Division v. Smith*,[1] the U.S. Supreme Court held that the Free Exercise Clause of the First Amendment does not provide a right to religious exemptions from neutral and generally applicable laws.[2] That is, civil and criminal rules apply to everyone, irrespective of whether those rules conflict with an individual's religious views. In *Smith*, five Justices accepted Oregon's withholding of unemployment benefits from two Native Americans who had been fired because their sacramental use of peyote was criminal under the state's controlled substance laws.[3] The Court's unexpected overturning of precedent[4] ignited a firestorm of debate among legal scholars, most of whom objected to the majority's holding and methodology.[5] One prominent criticism was the Court's omission of any historical evidence.[6]

The Supreme Court revisited the Free Exercise Clause seven years later in *City of Boerne v. Flores*.[7] Congress had overridden *Smith* by passing the Reli-

1. 494 U.S. 872 (1990).

2. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted)).

3. For a brief discussion of *Smith*'s procedural history, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111-14 (1990) (noting that the issue before the Court was hypothetical and that neither party briefed the Court on the constitutional basis for granting exemptions). A more thorough account appears in GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL (2001).

4. Rather than expressly overturning precedents such as *Sherbert v. Verner*, 374 U.S. 398 (1963) (accommodating religiously motivated conduct within a state unemployment program), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents from compulsory school attendance laws), the Court in *Smith* stated that *Sherbert* was particular to unemployment cases in which the conduct at issue was noncriminal, 494 U.S. at 883-84, and that *Yoder* was limited to "hybrid" situations in which plaintiffs claimed additional rights such as parental discretion, *id.* at 881-82.

5. *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259; McConnell, *supra* note 3; Roald Mykkeltvedt, Employment Division v. Smith*: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603 (1991); Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519 (1994).

6. *See, e.g.*, Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1794-95 (2006) (noting that the Court in *Smith* "rewrote the law of free exercise without a glance at original understanding"); McConnell, *supra* note 3, at 1117 (stating that Justice Scalia's bypass of historical evidence "is particularly surprising because . . . Justice Scalia[] has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning").

7. 521 U.S. 507 (1997).

gious Freedom Restoration Act of 1993 (RFRA),[8] which provided religious exemptions from federal and state laws, even if the laws were neutral and generally applicable.[9] In *Boerne*, the Court declared RFRA unconstitutional as applied to the states. Most Justices agreed that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment; Justice O'Connor dissented, however, arguing on originalist grounds that the Court should overturn *Smith*.[10]

Justice Scalia's concurring opinion in *Boerne* responded to Justice O'Connor's originalist critique of the *Smith* holding. The concurring and dissenting opinions wrestled with early colonial, state, and federal accommodations, such as statutory and constitutional provisions exempting Quakers and other conscientious objectors from conscription laws. Most of the elements of this debate have been thoroughly canvassed elsewhere.[11] Justice Scalia's concluding remark, however, has received insufficient scholarly attention.[12] He wrote:

> It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommoda-

8. Pub. L. No. 103-141, 107 Stat. 1488, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

9. The law included limiting provisions, such as the opportunity for the government to prove a compelling interest in uniform enforcement of the law. *Id.* § 3, 107 Stat. at 1488-89.

10. *See Boerne*, 521 U.S. at 564-65 (O'Connor, J., dissenting).

11. For historical arguments against exemptions, see Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); and Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1993-1994).

For historical arguments in favor of exemptions, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) (arguing that "the modern [pre-*Smith*] 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"); and Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004) (supporting the position that state and federal free exercise clauses require religious exemptions). *See generally* Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 370 (2006) (arguing that "the research presented by each group of originalists is selective, and their conclusions are ultimately not convincing").

12. For a very brief response to Justice Scalia's argument, see Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 840 (1998).

> tion. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, none exists.[13]

Indeed, the dissent provided no account of early religious exemption cases and offered only silence in response to Justice Scalia's critique of this omission.

This Note disputes Justice Scalia's claim that the dearth of successfully litigated nineteenth-century exemption claims reveals a lack of historical support for religious accommodations. Rather than being "the most telling point," the absence of exemption decisions reflects historical differences that call into question overly simplistic originalist arguments. In particular, prevailing theological views, skepticism of courtroom declarations, and judicial deference better explain nineteenth-century cases than does a wholesale rejection of judicially enforceable religious exemptions. Understanding these factors also helps explain the apparent erosion of support for religious accommodations in the middle of the nineteenth century. This reinterpretation of the historical record suggests not only that *Smith* and *Boerne* may be inconsistent with original meaning but also that an originalist approach to the Free Exercise Clause does not account for shifts in ideas about religious freedom preceding the adoption of the Fourteenth Amendment.

This Note attempts to explain nineteenth-century federal and state exemption decisions on their own terms. Part I introduces the relevance of early nineteenth-century cases to an understanding of original meaning. Part II surveys the historical background of religious liberty cases, beginning with a description of how contemporary theological views constrained the scope of free exercise claims. It then turns to relatively unexplored evidence—testimonial-exclusion cases and statutory-exemption cases—in order to illustrate pervasive skepticism toward courtroom declarations of religious belief. Lastly, the Part discusses contemporary understandings of judicial review and identifies how notions of judicial deference permeated other religious liberty decisions. Part III then evaluates the few reported antebellum religious exemption cases, and contends that skepticism and deference have more explanatory power than other theories in expositing early nineteenth-century outcomes. The Conclusion analyzes the import of this evidence to modern free exercise debates. Responding to Justice Scalia's remark, this Note argues that the number of successfully litigated claims is an inappropriate historical tool for determining whether religious exemptions were constitutionally required.

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13. 521 U.S. at 542 (Scalia, J., concurring) (citation omitted). Gerard Bradley makes a similar argument:

> 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. It unequivocally rejected the conduct exemption.

Bradley, *supra* note 11, at 272 (footnotes omitted).

I. ORIGINAL MEANING

Originalist methodology has evolved substantially over the past twenty-five years. Initially focused on what the framers intended, scholars gradually shifted their attentions to the elected delegates who ratified the Constitution. Recent efforts have moved a step further, arguing that judges should evaluate constitutional text based on the contemporary public meaning of its words and phrases.[14]

To ascertain the original meaning of various constitutional provisions, legal scholars often look to early nineteenth-century cases.[15] The similarity of various state declarations of rights to the Federal Bill of Rights makes state decisions a useful source for interpreting the First Amendment.[16] Moreover, early nineteenth-century decisions are particularly important with respect to incorporated rights, which have two points of reference for original meaning. That is, nineteenth-century cases may elucidate the Bill of Rights as ratified in 1791, but they also can clarify what these rights meant when applied to the states in 1868.[17] Although originalists rarely consider original meaning in both periods, at times this dual approach may be critical. It is axiomatic in modern constitutional law that incorporated rights operate equally on the federal and state governments.[18] Therefore, identifying a single original meaning for provisions of

14. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). For critiques of recent originalist methodology, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150 (2007); and Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185.

15. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 198-203 (2003); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792-94 (1995); *see also* Robert Kry, *Confrontation Under the Marian Statutes*, 72 BROOK. L. REV. 493, 549 (2007) (collecting cases). *See generally* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) ("Originalism itself then seems to require attention to the subsequent interpretive tradition.").

16. *See, e.g.*, S.C. CONST. of 1790, art. VIII, § 1 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed.").

17. *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1068 n.64 (2009) ("Sources from the first half of the nineteenth century . . . are also relevant to understanding the original meaning of the First Amendment in 1868, when the Fourteenth Amendment was enacted, because it is the Fourteenth Amendment that has been read as applying the First Amendment to the states." (citations omitted)). For doubts concerning the originalist basis for incorporation, see Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009). The modern Court, however, has shown little willingness to question the merits or legitimacy of incorporation. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

18. *See McDonald*, 130 S. Ct. at 3035 ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same

the Bill of Rights relies on there having been consonant understandings in 1791 and 1868.

This Note offers a new interpretation of early free exercise decisions. It does not aim to prove a particular constitutional meaning of free exercise in 1791 or 1868. Indeed, this Note focuses on the difficulties in proving a particular constitutional meaning of free exercise. To the extent that nineteenth-century decisions illuminate founding-era public meaning, however, they suggest that *Smith* and *Boerne* may be inconsistent with the original understanding of religious freedom. Nevertheless, a significant shift in adjudication of exemption claims around the Civil War casts serious doubt on the viability of a coherent originalist approach to the Free Exercise Clause. Nineteenth-century accommodation cases therefore illustrate an especially problematic feature of attempts to discern the original meaning of incorporated rights.

II. NINETEENTH-CENTURY CONTEXT

A. *Theology*

In the late eighteenth century, robust protection for religious freedom presented little threat to the uniform application of American laws. First, the scope of federal and state laws was generally quite limited and therefore less likely to interfere with religious exercise.[19] Moreover, prevailing theological views also created very few conflicts between law and religion. As William Marshall observes, "the culture of the United States in the late eighteenth century was fairly homogeneous, being composed almost entirely of Christian sects whose practices were unlikely to violate non-religious societal norms."[20] To be sure, some sects, such as Quakers, had conscientious scruples to obeying militia laws and to swearing oaths. Jews and Seventh-Day Adventists sometimes refused to attend court on Saturdays. But these were about the only examples of direct conflicts between law and religion, and statutes or common practice usually accommodated these minority views.

Denominational control over religion during this period helps explain not only why there were so few conflicts between law and religion but also why the

standards that protect those personal rights against federal encroachment.'" (citations omitted)). Of course, some rights and particular remedies have not been incorporated.

19. *See* McConnell, *supra* note 11, at 1466 ("[G]overnments of that era were far less intrusive than the governments of today."). Judicial reporters also were far less prolific.

20. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 7 J.L. & RELIGION 363, 383 (1989). American religious experience and theological views were remarkably diverse, as was particularly apparent in Christological disputes, *see* Jon Butler, *Coercion, Miracle, Reason: Rethinking the American Religious Experience in the Revolutionary Age*, *in* RELIGION IN A REVOLUTIONARY AGE 1, 13-14 (Ronald Hoffman & Peter J. Albert eds., 1994), but these divisions rarely produced conflicts with the law.

idea of free exercise exemptions was itself nonthreatening. Even though the Reformation and eighteenth-century Great Awakening had emphasized individual relationships with God, doctrinal matters were still resolved communally—usually at the denominational level.[21] This background understanding of where religious scruples came from had a profound effect on the stability and acceptability of religious accommodations. In particular, communal control over religious doctrine constrained individuals from easily fabricating their own conscientious objections.[22]

Given this religious context, courts unsurprisingly looked to denominational teachings when considering the sincerity of an individual's religious claims. In an early nineteenth-century case, for example, Samuel McIntire was summoned as a juror but refused to swear to an oath, offering to affirm instead.[23] Affirmations, however, were meant to accommodate only those with religious scruples against swearing.[24] McIntire stated "that he preferred affirming to swearing; that he was not a quaker, nor attached to any particular religious sect."[25] Judge William Cranch ordered McIntire into custody, releasing him only after he consented to swear.[26] During the same term, Wilson Bryan refused to be sworn as a juror, "alleging that he was a Methodist."[27] Cranch asked him "whether it was contrary to the principles of that religious society to take an oath."[28] Bryan replied that "he did not know that it was; but that although he had heretofore been sworn on juries, yet he was determined not to take an oath

21. As early as the Reformation, Protestants had emphasized personal explorations of biblical meaning, thus usurping Papal authority to define church dogma. Nevertheless, Protestant leaders retained significant control over theology. *See* NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 179-80 (1989). The eighteenth-century Great Awakening reemphasized individual, spiritual relationships with God, but this movement hardly displaced religious authority. *See id.* at 186 ("Revivals of the 1740s drew upon millennial themes to challenge believers to a greater commitment to traditional values."); Butler, *supra* note 20, at 8.

22. For a discussion of the relative stability of religious views in the second half of the eighteenth century, see MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 114-57 (2002). Additionally, would-be dissenters also faced difficulty publishing their ideas absent the widespread access to printing presses that developed in the early nineteenth century. *See* HATCH, *supra* note 21, at 127. Therefore, although there were important theological differences between sects, *see* Butler, *supra* note 20, at 13, the resulting religious debates were unlikely to spur opposition to government laws.

23. McIntire's Case, 16 F. Cas. 151 (C.C.D.C. 1804) (No. 8824).

24. Quakers, for instance, relied on the biblical injunction, "[s]wear not at all." *Matthew* 5:34 (King James). For a brief discussion of affirmations, see Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 37-40 (2009).

25. *McIntire's Case*, 16 F. Cas. at 151.

26. *Id.* ("Upon his offering to be sworn without kissing the book, but holding up his hand, he was discharged.").

27. Bryan's Case, 1 D.C. (1 Cranch C.C.) 151, 151 (C.C.D.C. 1804).

28. *Id.*

again."[29] Again, the court ordered the prospective juror into custody until he agreed to swear.[30]

There is no indication that McIntire or Bryan claimed a religious exemption based on constitutional rather than statutory grounds.[31] Therefore, these short cases tell us little about how the court might have interpreted a direct claim of exemption under the Free Exercise Clause of the First Amendment. Nevertheless, they illustrate the importance of denominational membership in providing the court with evidence of individual beliefs. In *McIntire's Case*, Cranch held that a juror will not be permitted to affirm where it appears that he is "not a quaker, nor attached to any particular religious sect."[32] The report of *Bryan's Case* states: "A juror cannot be permitted to make solemn affirmation in lieu of oath, unless he be one of those people who hold it unlawful to take an oath on any occasion."[33] In fact, the court did not ask in either case whether the prospective juror had *individual* conscientious scruples. Instead, the pivotal question was whether the juror's religious sect endorsed such scruples.[34]

Religious individualism, however, spread quickly in the early republic. Just as revolutionary ideals eroded deference to political elites,[35] so too did church authorities lose their grasp on matters of religious doctrine.[36] Nathan Hatch describes the early republic era as "the most centrifugal epoch in American church history[,] . . . a time when the momentum of events pushed toward the periphery and subverted centralized authority and professional expertise."[37] In

29. *Id.*

30. *Id.* (noting that, on the following day, Bryan "submitted to be sworn, and was sworn by holding up his hand").

31. Indeed, it is unclear whether either McIntire or Bryan claimed a religious exemption at all. Some individuals worried that swearing raised the possibility of divine punishment if they erred as jurors. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 75-76 (2008). The statement by McIntire that he "preferred affirming to swearing" suggests that he did not assert a right to a religious exemption, while Bryan's claim that "he was determined not to take an oath again" may indicate religious opposition to taking oaths rather than mere distaste for the religious risk of taking an oath. Neither Bryan nor McIntire belonged to a sect which taught against swearing. Nevertheless, it is possible that Bryan's and McIntire's individual readings of the Bible led to personal beliefs in line with Quaker thinking on this question.

32. McIntire's Case, 16 F. Cas. 151 (C.C.D.C. 1804) (No. 8824).

33. Bryan's Case, 1 Cranch C.C. at 151. Cranch, who was both the judge and the reporter, wrote this quotation in the case heading.

34. While riding circuit in 1815, Supreme Court Justice Joseph Story considered a similar case in which a witness claimed conscientious scruples but was not a Quaker. Massachusetts had a law that permitted only Quakers to affirm. Story held the witness in contempt, stating "that the law was preemptory," and that it would be enforced "however unwilling the Court might be to adopt so harsh a measure." United States v. Coolidge, 25 F. Cas. 622, 622 (C.C.D. Mass. 1815) (No. 14,858).

35. *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

36. *See* HATCH, *supra* note 21, at 10, 182.

37. *Id.* at 15; *see also id.* at 40-43.

particular, individuals began to define their own religious beliefs, usually based on their own readings of scripture.[38]

Theological individualism presented a potentially unanswerable challenge to the concept of religious exemptions. Namely, if people could define their own beliefs, they could fraudulently claim conscientious scruples with impunity. Revivals of the early nineteenth century, however, emphasized the sole authority of scripture,[39] which effectively limited the scope of potential religious objections to those based on biblical text. Moreover, textual claims offered judges an opportunity to reject what they saw as misguided understandings of scripture.

B. *Skepticism*

Judges in the early nineteenth century were well aware of their inability to look within the consciences of others. Unlike modern jurists,[40] however, these judges were highly doubtful of individual declarations of faith and often applied their own views on matters of religious doctrine. This skepticism—broadly defined as an unwillingness to acknowledge the sincerity of religious claims—pervades early free exercise cases such that using outcomes to ascertain larger principles may mislead as much as it informs.

Early nineteenth-century evidence rules illustrate some of the background assumptions animating judicial skepticism. Common law dictated that interested parties—including the litigants and persons with a pecuniary stake in the outcome—were incompetent to testify.[41] In 1846, Michigan became the first

38. *See id.* at 182 ("[I]n the assertion that private judgment should be the ultimate tribunal in religious matters, common people started a revolution."); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 609 (2009) (describing theological individualism). In 1801, Reverend Andrew Fuller reiterated that civil magistrates have no power to interfere with religious sentiments. "But of late," he noted,

> men have pleaded, not only an exemption from civil penalties on account of their religious principles, in which the very essence of persecution consists, but also that they are not subject to the control of a religious society with which they may stand connected, for any tenets which they think proper to avow.

8 ANDREW FULLER, THE WORKS OF THE REV. ANDREW FULLER 265 (New Haven, S. Converse 1825).

39. *See* HATCH, *supra* note 21, at 179-83 (describing the importance of *sola scriptura* in the late eighteenth and early nineteenth centuries).

40. Modern sincerity analysis is discussed in Marjorie Heins, *"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 172-82 (1981); and Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325 (1990).

41. *See* Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 91 (1981). There were occasional exceptions. *See, e.g.*, Noble v. People, 1 Ill. (Breese) 54, 56 (1822) (permitting a victim of forgery to testify on the grounds of "necessity and public policy" even though he stood to benefit financially from a successful prosecution).

state to admit witnesses with a financial interest in the outcome.[42] Connecticut soon thereafter passed the first law allowing civil parties to testify.[43] Most states did not relax their competency rules until decades later.[44] Though there were other justifications for these strict rules,[45] they illustrate pervasive distrust in self-interested evidence.

Testimonial exclusions based on defect of religious principle reveal particular skepticism of courtroom declarations of faith. According to common law evidence rules, witnesses were required to believe in God and divine punishment,[46] both of which were thought necessary to feel bound by an oath.[47] New York Chief Justice Ambrose Spencer restated the rationale for oaths in the famous case of *Jackson v. Gridley*: "[N]o 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."[48]

Incompetency by defect of religious principle was a common law doctrine, but the manner in which American courts found witnesses incompetent diverged significantly from the English tradition. In England, witnesses testified directly about their religious views, and a witness's statement affirming the requisite beliefs was sufficient to establish competency.[49] American judges, however, charted a different course. As the Connecticut Supreme Court of Errors articulated in 1809: "It would seem to be incongruous to admit a man to his oath for the purpose of learning from him whether he had the necessary

42. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 659 (1997).

43. *Id.*

44. *Id.* at 668-69.

45. The nineteenth-century judicial system still adhered, at least nominally, to the notion that testimony under oath should not conflict. Thus, exclusions did not necessarily indicate that the probative value of testimony was less than its propensity to deceive. Rather, exclusions reduced the incidence of testimonial conflicts. *See id.* at 704-05.

46. The contemporary phrase was "a future state of rewards and punishments." JAMES HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 33 (2003).

47. For further discussion of historical oath rules, see Ronald P. Formisano & Stephen Pickering, *The Christian Nation Debate and Witness Competency*, 29 J. EARLY REPUBLIC 219 (2009); Frank Swancara, *Non-Religious Witnesses*, 8 WIS. L. REV. 49 (1932); Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 AM. L. REG. 373 (1903); and Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395 (2003).

48. Jackson v. Gridley, 18 Johns. 98, 106 (N.Y. Sup. Ct. 1820).

49. *See* ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES 50 (Hartford, Oliver D. Cooke 1810); White, *supra* note 47, at 407 ("The English cases all say interrogation of the witness is the only proper way to find out his belief. The English text-writers also take the same view . . . .").

qualifications to be sworn."[50] Instead, parties called on others to recount the contested witness's out-of-court religious declarations.

Nearly all states disallowed direct questioning of witnesses regarding their religious views. In some instances, parties litigated the issue after a trial court denied a witness's request to declare his or her own beliefs.[51] But even in states without specific case law, the usual practice was to prove religious views through hearsay evidence.[52] Occasionally, witnesses were allowed to testify

50. Curtiss v. Strong, 4 Day 51, 56 (Conn. 1809). In his widely circulated *Digest of the Law of Evidence*, Connecticut Supreme Court Justice Zephaniah Swift elaborated on the rationales for preventing prospective witnesses from declaring their religious views. Voluntary statements, Swift argued, were subject to doubt since the witness "must be under the strongest possible inducement to answer in such manner as will not disqualify him, whatever may be his opinions." SWIFT, *supra* note 49, at 49. Moreover, direct inquiries could not be compelled because "[a] man's opinions are matters between himself and his God, so long as he does not disclose them." *Id.* Lastly, prohibiting courtroom declarations of belief avoided the unappealing prospect of turning away persons who proved their trustworthiness by declaring their own disqualifying belief. *Id.* Therefore, prohibiting witnesses to testify as to their own beliefs had several justifications, including religious freedom, judicial legitimacy, and skepticism of courtroom declarations of belief.

51. *See, e.g.*, Wakefield v. Ross, 28 F. Cas. 1346, 1347 n.2 (C.C.D.R.I. 1827) (No. 17,050) (holding that the proposed witnesses could not testify as to their own beliefs); *Curtiss*, 4 Day at 56 ("It would seem to be incongruous to admit a man to his oath for the purpose of learning from him whether he had the necessary qualifications to be sworn."); Searcy v. Miller, 10 N.W. 912, 916 (Iowa 1881) ("The want of such religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinion upon that subject, in answer to questions put to him while under examination."); Smith v. Coffin, 18 Me. 157, 164 (1841) (stating that "according to decided cases, the person excepted against is not permitted to explain" his religious views); Thurston v. Whitney, 56 Mass. (2 Cush.) 104, 109 (1848) (stating that evidence of belief should be shown using out-of-court statements); Commonwealth v. Wyman, Thacher's Crim. Cas. 432, 435 (Bos. Mun. Ct. 1836) ("[I]t may be well doubted, whether it is proper to put a citizen on oath to declare his own turpitude."); Den v. Vancleve, 5 N.J.L. 589, 653 (1819) (stating that "infidelity" is proven "always by witnesses"); *Jackson*, 18 Johns. at 104 ("[I]t would be incongruous to admit a man to his oath, to ascertain whether an oath had any binding influence on his conscience."); Harrel v. State, 38 Tenn. (1 Head) 125, 127 (1858) ("[T]he party seeking to exclude a witness . . . may adopt either mode of proof; and we adhere to this determination, as the better practice. If the witness really disregards the obligation of an oath, it would seem to be neither safe, nor consistent, to resort to his examination."); Scott v. Hooper, 14 Vt. 535, 539 (1842) ("It would seem, that the witness should not be interrogated respecting his disbelief in a 'Supreme Being.'"); Perry v. Commonwealth, 44 Va. (3 Gratt.) 632, 658 (1846) (finding error in the lower court's "allowing the witness to be questioned on his *voir dire* touching his religious principles"); *Important Judicial Decision*, 1 AM. MONTHLY MAG. & CRITICAL REV. 64, 65 (1817) (noting that, in an 1817 North Carolina Supreme Court case between unnamed parties, Justice John Louis Taylor stated that "it would be incongruous to permit a man to be sworn, when the very question was, whether he was qualified to swear").

52. *See, e.g.*, Norton v. Ladd, 4 N.H. 444 (1828); Brock v. Milligan, 10 Ohio 121, 126 (1840). *But see* Cubbison v. M'Creary, 2 Watts & Serg. 262, 263 (Pa. 1841) (not reaching the question but nonetheless stating that "[t]here are . . . arguments of considerable weight in favour of allowing a witness . . . to state his present religious belief at the time of trial").

directly, but this happened only when neither party objected to the inquiry.[53] Many states also adopted statutory or constitutional proscriptions against direct examinations.[54]

Doubts about religious claims were not isolated to witness competency cases. Judges also were skeptical when a party asserted a specifically enumerated constitutional or statutory right to a religious exemption. In these cases, judges generally viewed individual declarations of belief as untrustworthy and prone to abuse. Denominational membership, by contrast, was a more reliable way of identifying the sincerity of personal beliefs. Religious norms in the nineteenth century no longer emphasized unified and communally developed theology, but denominational affiliation was less likely to be fabricated than individual assertions of conscientious scruples.

Statutory provisions in several states, for example, specified that conscientious exemptions from militia service would only be available when certified by the religious organization to which the objector belonged.[55] Massachusetts Supreme Court Justice George Thacher[56] summarized the rationale for these rules during a speech at the 1819 Maine Constitutional Convention.

53. *See, e.g.*, United States v. Kennedy, 26 F. Cas. 761, 761 (C.C.D. Ill. 1843) (No. 15,524) ("The witness having answered the question, without objection, it will be received. But, it may be proper to remark, that the modern practice is, not to interrogate the witness as to his religious belief."); Commonwealth v. Barnard, Thacher's Crim. Cas. 431 (Bos. Mun. Ct. 1835); Shaw v. Moore, 49 N.C. (4 Jones) 25 (1856); Jones v. Harris, 32 S.C.L. (1 Strob.) 160 (1846); Farnandis v. Henderson, 1 CAR. L.J. 202, 203 (1831) (S.C. Eq. Ct. 1827) (allowing the prospective witness the opportunity to state his own religious views, though not under oath).

Courtroom declarations were allowed in some states after witness competency rules were dissolved and religious belief went only to a witness's credibility. *See, e.g.*, Stanbro v. Hopkins, 28 Barb. 265, 269 (N.Y. Sup. Ct. 1858) ("[I]nasmuch as persons who do not believe in the existence of a Supreme Being who will punish false swearing, are now competent to testify on oath, touching all matters in issue, on a trial, I am unable to perceive any good reason why the party against whom they are called may not interrogate them . . . as to their opinions on matters of religious belief.").

54. *See, e.g.*, An Act in Relation to the Competency of Witnesses § 1, 1842 Mich. Pub. Acts 21, 21-22 ("[N]o person shall be deemed incompetent as a witness in any court, matter or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn."). These rules do not provide conclusive proof of courts' unwillingness to trust any courtroom declarations of belief. As stated previously, judicial legitimacy and notions of religious freedom also help account for these rules.

55. *See, e.g.*, An Act to Regulate and Discipline the Militia of This State, 1807 Md. Laws 339 (requiring "a certificate from a licensed preacher of the Gospel, or signed by the proper officer of the religious society to which such person may belong, stating that he has reason to believe, and verily does believe, from the religious and exemplary deportment and uniform declarations of such person, that he is conscientiously scrupulous of bearing arms").

56. A former Federalist congressman from Massachusetts, Thacher was appointed to the Massachusetts Supreme Judicial Court in 1800. Robert E. Moody, *George Thacher*, *in* 18 DICTIONARY OF AMERICAN BIOGRAPHY 386 (Dumas Malone ed., 1936).

> Judge Thacher enquired who was to determine what a man's *conscientious scruples were; and when they were sincere?* . . . [H]e said, he did not think it a safe or proper principle for government to adopt, always to leave it to *the consciences* of individuals, and simply for them to say whether they will obey a general law or not, and so, on that ground, claim an exemption from a general duty.[57]

Nevertheless, Thacher clarified that exemptions from militia service could safely be extended to Quakers: "When it is proved that a person is of that denomination, it follows of consequence that he is opposed to war; there is no need of his making a declaration of his *personal conscience* . . . ."[58] According to Thacher, individual assertions of conscientious objection were not to be trusted. But resting exemptions on denomination membership would provide, in some contexts, reasonable proof that a person's views conflicted with the law.[59]

Deciding that members of certain sects should be accommodated, however, still left open the question of how to prove religious membership. In Massachusetts, a statute required that Quakers seeking a religious exemption from militia service had to file a certificate signed by two elders and the clerk of their society stating that the claimant was a member of the society, and that he "frequently and usually attends with said society for public worship, and we believe is conscientiously scrupulous of bearing arms."[60] In 1815, the Supreme Judicial Court considered whether to recognize an exemption certificate that deviated from the prescribed statutory language. The form stated that several claimants "attend with [the Quaker] society for public worship, and, we believe, are conscientiously scrupulous of bearing arms."[61] The court declared the certificate

57. JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, OF THE CONVENTION OF DELEGATES 189-90 (Portland, A. Shirley 1820).

58. *Id*. at 197. He continued: "[W]henever any other sect of christians should become embodied and distinguished as the Quakers are, and afford the same evidence from their known principles and practice that war was their aversion and like them in consequence of their principles render an equivalent, he should be ready to vote their exemption . . . . But it must not be an *hypocritical conscience*." *Id.* at 198.

59. The Maine delegates eventually decided that "[p]ersons of the denomination of Quakers and Shakers, shall be exempt from military duty." PERLEY, *supra* note 57, at 186. After a vehement debate about whether conscientious objectors should have to pay an equivalent tax to support the military—a tax which many Quakers found equally objectionable—the convention voted down such a measure, deciding instead that the legislature should have authority to exempt militia members from paying their poll taxes "during the time they shall so do military duty." *Id*. at 204.

Some staunchly opposed what they perceived to be presumptions of insincerity. Enoch Lewis, for instance, wrote: "To presume that a plea of conscientious scruple is insincere, and upon that assumption to found a right to impose a penalty, is to reverse an established principle of law, which always presumes innocence where guilty is not proved." ENOCH LEWIS, SOME OBSERVATIONS ON THE MILITIA SYSTEM 12 (Philadelphia, A. Waldie 1831).

60. An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts § 6 (1800), *in* 3 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 88, 89 (Boston, I. Thomas & E.T. Andrews 1801).

61. Commonwealth v. Fletcher, 12 Mass. (11 Tyng) 441 (1815).

"substantially defective" and wrote that "one may occasionally attend the meetings, and yet not be acknowledged and received as a member of the society. So one not a Quaker or Shaker may be conscientiously scrupulous of bearing arms; yet he is not exempted by the statute."[62]

Read in modern terms, the Massachusetts Supreme Judicial Court's declaration would seem to disprove constitutionally guaranteed religious exemptions. The Massachusetts Constitution declared that "no subject shall be hurt, molested or restrained, in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience."[63] If conscientiously scrupulous persons were not afforded exemptions, then surely a constitutional right to those exemptions did not exist. This argument, however, makes several untenable assumptions. First, the case was not litigated as a constitutional claim, so it is unclear whether the justices considered the ramifications of the Massachusetts declaration of rights. More significantly, the legislature had created a statutory device for granting religious exemptions. A subsequent militia exemption case clarified the court's view that the legislative purpose in defining specific grounds for exemptions was to protect against fraudulent assertions of religious scruples. Writing for the court, Justice Samuel Wilde remarked:

> For to guard against fraud, [the legislators] have required additional and more satisfactory evidence of the existence of such scruples; and the evidence required by the statute cannot be dispensed with, even if other evidence of the fact, equally convincing, had been produced. . . . To prevent, as far as possible, the allowance of exemptions, under the pretence of religious scruples which do not exist, the legislature have interposed a check, in the form of the certificate; and this form must be strictly observed.[64]

A similar case arose in Maine several years later when a certificate did not match the precise statutory language. This time, the justices accepted the certificate, stating that it "substantially conforms to the law."[65] Nevertheless, they noted that their trust rested on the Quaker elders, not the applicant.[66]

The legislative schemes in Massachusetts and Maine illustrate skepticism of self-interested declarations of conscientious scruples. As shown in the Massachusetts cases, courts sometimes adhered rigorously to legislative standards when determining whether individuals qualified for religious exemptions. This strict statutory interpretation reveals distrust of individuals claiming conscien-

62. *Id.* at 442.

63. MASS. CONST. pt. I, art. II.

64. Lees v. Childs, 17 Mass. (16 Tyng) 351, 354-55 (1821) (holding that proof of Quaker membership was insufficient to comply with the statutory certification).

65. Dole v. Allen, 4 Me. 527, 531 (1827).

66. *See id.* ("It is not to be presumed that persons, raised to the office of elders in a religious society, even if we could suppose them capable of disregarding the ties of conscience, would so expose themselves in the eyes of their brethren and of the community, as to certify as true, what might be easily ascertained to be false.").

tious scruples, but it also exemplifies the importance of judicial deference in defining the parameters for granting exemptions.

C. *Judicial Deference*

In addition to skepticism of courtroom declarations of belief, early nineteenth-century exemption claims were heavily constrained by contemporary notions of judicial deference. Modern-day use of the term "judicial review" connotes both interpretive authority and finality. That is, today's Supreme Court assumes it has authority to make constitutional decisions even when the answer is ambiguous, and it asserts that the majority opinion, once delivered, is the supreme law of the land.[67] While some framers and ratifiers of the Constitution adhered to this expansive form of judicial review, the prevailing norm in the late eighteenth and early nineteenth centuries was considerably more modest.[68] Supreme Court Justice James Iredell summarized the restrained version of judicial power in *Calder v. Bull*: "[A]s the authority to declare [a statute] void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case."[69] Two years later, Justice William Paterson wrote that "to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."[70]

The combination of deference to legislative judgments and skepticism of courtroom religious declarations made judicial enforcement of free exercise exemptions highly unlikely, notwithstanding the possibility of such exemptions in theory.[71] Two reasons may account for this difficulty. First, if a court was un-

67. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

68. For prevailing founding-era views on judicial finality, see generally Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205 (2003). This Note largely ignores the finality question and instead focuses on the importance of constitutional clarity as a prerequisite for judicial review.

69. 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.).

70. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 102 (2004); WOOD, *supra* note 38, at 433-68; William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 458 (2005) (arguing that judges required clear proof of unconstitutionality in cases not involving breaches of judicial power or national power). Blasphemy decisions illustrate the extent of judicial deference afforded in religious freedom claims. *See* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 401-23 (1993).

71. *But see* Hamburger, *supra* note 11, at 931-32. Hamburger argues that founding-era views of judicial review make religious exemptions themselves unlikely to have been judicially enforced, given (he argues) the dubious constitutional merits of such exemptions. Applied to the nineteenth century, his argument is difficult to reconcile with the numerous cases in which exemptions were either granted or referenced favorably in dicta. As this Note ar-

certain whether an individual's religious views genuinely conflicted with the law, the court faced the risk of granting an exemption without either legislative or constitutional approval. That is, if a claimant's sincerity was not clearly established, then a fortiori the constitutional basis for an exemption was not clearly established.[72] Courts also worried that deciding *how* to evaluate sincerity was itself a discretionary judgment best left to legislatures. Judges had little legislative or common law guidance regarding the grounds upon which such conscientious objections should be recognized. Statutory standards for granting religious exemptions varied widely between states.[73] Therefore, although the constitutional principle of judicially enforceable religious exemptions might have existed, the procedure for determining when to afford such exemptions was highly uncertain.

In his speech before the 1819 Maine Constitutional Convention, Judge Thacher summarized the importance of having clear standards for granting religious objections. Addressing the topic of militia exemptions for conscientious objectors, Thacher began by comparing the rationale for religious exemptions to the principle of judicial review: "[W]hen the laws of Congress are contrary to the Constitution of the United States," he stated, "they are void—So any law of man, or requisition under a human law, contrary to, or forbidden by the laws of Christ's kingdom, are null and void."[74] Thacher then extended the analogy so as to clarify that exemptions, like judicial review, should apply only in "clear" cases.[75] "[T]he laws of Christ's kingdom, that are to be received by his disciples as paramount to all human laws," he stated, "ought to be clear and ex-

gues, the more persuasive argument is that judicial deference was a substantial barrier to granting exemptions in dubious cases.

72. There is a distinction between finding conscientious scruples and establishing the underlying legal conclusions that form the basis for other constitutional claims. The existence of a contract, for instance, is established when a court declares its existence. While underlying facts leading to the court's conclusion might be doubtful, the legitimacy of the court's decision is not. Religious scruples, however, are not a legal construct and therefore are subject to persistent doubt.

73. *See, e.g.*, An Act for the Relief of Persons Having Conscientious Scruples Against Bearing Arms § 2, 1827 Ill. Laws 296, 297 (requiring "an acknowledgement in writing before some judge or justice of the peace of the county in which such person resides, that he in sincerity and truth has conscientious scruples against bearing arms"); An Act to Regulate and Discipline the Militia of This State, 1807 Md. Laws 339, 339 (requiring "a certificate from a licensed preacher of the Gospel, or signed by the proper officer of the religious society to which such person may belong, stating that he has reason to believe, and verily does believe, from the religious and exemplary deportment and uniform declarations of such person, that he is conscientiously scrupulous of bearing arms"); An Act to Exempt the Persons Therein Mentioned from the Performance of Military Duty § 1, 1820 N.Y. Laws 252, 252 (requiring "oath or affirmation, before any justice of the peace or other magistrate, that they are religiously and conscienciously [sic] opposed to the bearing of arms"); Commonwealth v. Cornman, 4 Serg. & Rawle 83, 85 (Pa. 1818) (citing the 1816 state militia act exempting conscientious objectors without any showing of religious scruples).

74. PERLEY, *supra* note 57, at 192.

75. *Id.* at 193.

press."[76] Thacher then explained how to locate "clear" conscientious scruples. Those who "contend for the *exemption* on the ground of the demand being against conscience," he explained, should "point out the law in the christian code which clearly prohibits, or means counter" to the application of the law.[77] In other words, Christian claims for religious exemptions should be recognized only when the objections had explicit textual support in the Bible.

This Note has developed a theory to explain the scarcity of judicially enforced religious exemptions prior to the Civil War. This theoretical account incorporates other religious liberty decisions and broader perspectives on nineteenth-century constitutional adjudication so that we can try to read the few extant religious exemption cases on their own terms. Part III turns to the exemption cases and tests the theory, trying to identify the extent to which outcomes were influenced by theology, skepticism, deference, and constitutional meaning.

III. RELIGIOUS EXEMPTION CASES

There are few reported cases from the nineteenth century in which a state or federal court addressed the constitutional basis for religious exemptions. As explained in Part II, many factors—including the relatively limited scope of governmental power—contributed to the paucity of conflict between law and religious doctrine. And those few religious groups with views that did conflict with the law were often entitled to statutory or administrative exemptions. For instance, many Quakers refused to swear oaths and serve in the militia, but most states accommodated these beliefs by permitting affirmations instead of oaths and by exempting those with religious scruples from mandatory militia service. Similarly, Jewish jurors and witnesses were commonly recused from serving on Saturdays.[78] These accommodations further narrowed the opportunities to litigate whether constitutionally protected religious liberty included a right to individual exemptions from facially neutral laws.

Nevertheless, state courts did occasionally face exemption claims. The record of these cases supports the theory that courts acknowledged the principle

76. *Id.*

77. *Id.* at 193-94.

78. *See, e.g.*, Commonwealth v. Smith, 9 Mass. (8 Tyng) 107, 110 (1812) ("Before the recent statute, . . . Quakers, and persons scrupulous of taking judicial oaths, were either exempted or excused from serving on the grand jury."); Simon's Ex'rs v. Gratz, 2 Pen. & W. 412, 416 (Pa. 1831) ("The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath."); Guardians of the Poor v. Greene, 5 Binn. 554, 562 (Pa. 1813) (opinion of Yeates, J.) ("[P]ublic ministers of all denominations returned as jurors, have uniformly been excused by the Court on their application."); State v. Willson, 13 S.C.L. (2 McCord) 393, 396 (1823) (noting "certain instances of individuals being excused" from jury duty on account of conscientious objection).

of constitutionally mandated accommodations but were nonetheless heavily influenced by prevailing theological views, skepticism of courtroom declarations of belief, and contemporary notions of judicial deference. These factors clarify tensions and ambiguities in early opinions that are unexplained in the existing literature.

A. *Pre-1850 Cases*

In 1823, the Constitutional Court of Appeals of South Carolina considered a case in which an individual asked for an exemption from jury duty on account of his conscientious objection to passing judgment on others. Writing for the court, Justice John Richardson[79] rejected the juror's request, stating that "man has no window in his breast, through which we may look into his heart and discover his real sentiments."[80] Importantly, the juror seems not to have grounded his objection in biblical authority. Without means to test the sincerity of declared beliefs, the court worried about limiting the application of religious exceptions. "The precedent being once set," Richards wrote, "who could distinguish in this respect, between the pious asseveration of a holy man and that of an accomplished villain? I can foresee no limits to the impositions which might follow, under so elastic a principle."[81]

Although some scholars have read this decision to denounce the idea of constitutionally mandated religious accommodations,[82] the court's decision is not entirely clear. Justice Richardson ostensibly rejected a right of exemption by quoting renowned English jurist Matthew Hale, who said, "[W]e are the ministers of the law, [and] her decrees constitute our justice."[83] He did not mention the state constitution. Justice Richardson continued, however, by declaring that all religions believe "that man is bound to do his duty in whatever situation he may be placed by the God, whom he adores; a principle, which reconciles even the slave to his master."[84] He then emphatically rejected the religious basis for the juror's claim: "[A]midst the growing distinctions among ourselves, upon doctrinal tenets, . . . there is no christian sect which does not enforce . . . the plain moral . . . of a ready obedience to the laws of the country."[85] Justice

79. A former Republican speaker of the South Carolina assembly and state attorney general, Richardson became a judge in 1818. 5 APPLETONS' CYCLOPAEDIA OF AMERICAN BIOGRAPHY 243 (James Grant Wilson & John Fiske eds., New York, D. Appleton & Co. 1888).

80. *Willson*, 13 S.C.L. at 394.

81. *Id.* at 395.

82. *See, e.g.*, Bradley, *supra* note 11, at 285.

83. *Willson*, 13 S.C.L. at 396.

84. *Id.* (emphasis omitted).

85. *Id.* Judge Thacher took a similar approach to jurors' religious objections by declaring that the claimants were mistaken in their religious views:

> [Thacher] had lately known some to claim an exemption from acting as jurors in capital trials, on the ground of *conscientious scruples*; and another who did not see his way clear to

Richardson was upfront about the impracticality of determining the sincerity of religious objections, but rather than disposing of the issue on constitutional grounds he articulated the higher spiritual authority common to all Christians. Confronted with a constitutional question, he justified his decision with religious exegesis.

Justice Richardson's analysis conflicts with modern First Amendment doctrine, which proscribes "all questions concerning the truth or falsity of . . . religious beliefs."[86] Invoking religious authority to supersede claims of conscientious objection plainly offends this principle. In the early nineteenth century, however, courts were quite willing to correct individuals' misapprehensions of their own religious views. No other court invoked Justice Richardson's religious rationale for rejecting exemptions, but judge-made assessments of religious duties were common.

Twenty-three years later, Justice Richardson and his South Carolinian colleagues considered a free exercise challenge in which a Jewish merchant objected to being fined under Charleston's closing ordinance, which prohibited business transactions on Sundays.[87] The defendant claimed the law violated the South Carolina Constitution, which protected "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference."[88] A unanimous court upheld the fine because the defendant remained free to practice his own religion.[89] Nevertheless, the court acknowledged the possibility that the constitution required free exercise exemptions:

> If it were true that the commandment to keep the Sabbath day holy also required the Israelite to work six days, as closely and faithfully as he is to observe the 7th day as a day of rest, then indeed there might be a ground to say that the ordinance which requires him to desist, during Sunday, from a public business, the sale of goods, was unconstitutional.[90]

After reviewing several passages in the Old Testament, however, the court declared that Jewish merchants were not, in fact, religiously required to work six

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> take the oath or affirmation of a grand juror, *merely* because *it was impressed on his mind* that he could do more good than by spending his time that way. These kind of consciences, he said, stood in need of instruction.

PERLEY, *supra* note 57, at 198. Thacher claimed that being morally opposed to a practice was different than being religiously compelled to not obey a legal duty.

86. United States v. Ballard, 322 U.S. 78, 88 (1944).

87. *See* City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 508-09 (1846). Sunday law challenges were most frequently litigated on grounds other than conscientious objection. *See* Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675 (2000).

88. S.C. CONST. of 1790, art. VIII, § 1. The provision continued, "provided that the liberty of conscience hereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." *Id.* art. VIII, § 1.

89. *See Benjamin*, 33 S.C.L. at 527 (stating that the ordinance "does not require him to desecrate his own Sabbath").

90. *Id.* at 528.

days,[91] notwithstanding the biblical injunction "[s]ix days shalt thou labor."[92] Thus, rather than rejecting religious exemptions entirely,[93] the court explicitly acknowledged the possibility of such constitutional claims but refused a particular application because of the claimant's misunderstanding of scripture.[94] As the same court had done decades earlier, it expressed not only skepticism of the individual's religious scruples but also a willingness to assess matters of theology.

The significance of judicial skepticism is further illustrated by several cases addressing whether religious confessions were constitutionally privileged. The most famous of these decisions, *People v. Philips*,[95] arose when a Catholic priest, called as a prosecution witness in a theft case, refused to testify about a parishioner's confessional statements. The priest claimed constitutional immunity from testifying because disclosing confessional statements would violate his religious duties. Sitting as judge of the Court of General Sessions, New York City Mayor DeWitt Clinton[96] agreed that "[t]o decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated."[97] Clinton accepted the priest's sincerity and concluded: "Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens."[98] A few subsequent decisions cited *Philips* approvingly.[99]

91. *Id.* at 529.

92. *Exodus* 20:9 (King James).

93. *But see* Bradley, *supra* note 11, at 285 (stating that *Benjamin*, along with an appended lower court decision, "rejects conduct exemptions"). Bradley's statement is correct insofar as it relates to the specific claims at issue in these cases, but the court in *Benjamin* was careful *not* to reject the exemption principle in the abstract.

94. It is unclear what the court meant when it said "there *might* be a ground to say that the ordinance . . . was unconstitutional." *Benjamin*, 33 S.C.L. at 528 (emphasis added). Possibly the court was leaving the constitutional issue open for determination in a future case. Another explanation is that the court recognized the constitutional principle but realized that state interference with a sincerely held religious mandate may still be constitutional if aimed at "acts of licentiousness, or . . . practices inconsistent with the peace or safety of this State." S.C. CONST. of 1790, art. VIII, § 1.

95. People v. Philips, WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 5 (New York, Edward Gillespy 1813) (N.Y. Ct. Gen. Sess. 1813).

96. Clinton, a former U.S. Senator and nephew of Governor George Clinton, had recently angered the national Republican Party by running for president in 1812 against James Madison. He later became a Democratic governor. Donald M. Roper, *De Witt Clinton*, *in* 5 AMERICAN NATIONAL BIOGRAPHY 77, 77-79 (John A. Garraty & Mark C. Carnes eds., 1999).

97. *Philips*, SAMPSON, *supra* note 95, at 111.

98. *Id.* at 114.

99. *See* Commonwealth v. Cronin, 1 Q.L.J. 128, 136 (1856) (Va. Cir. Ct. 1855) (upholding the constitutional basis for the priest-penitent testimonial privilege); *see also* Farnandis v. Henderson, 1 CAROLINA L.J. 202, 213 (1830) (S.C. Ch. Ct. 1827) (citing the holding in *Philips* approvingly as being respectful of religious liberty, though not mentioning

Several courts, however, denied an equivalent privilege for non-Catholics. In 1817, a lower court in New York considered a defendant's claim that his confession to a Protestant pastor should be privileged under the state constitution. Rejecting the argument, the judge held that "there is a grave distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or advisor."[100] The next year, the Massachusetts Supreme Court heard a similar case in which a defendant asserted a privilege for his confession made to fellow church members. "It is held to be the duty of a member of a church to answer to all inquiries of his brethren respecting any evil reports touching his character or conduct," the defense counsels argued. "If he refuses, he is punishable, by the ecclesiastical tribunals, for contumacy. If the church has a right to make the inquiry, the party is bound to answer truly; and by complying with this obligation, which is binding on his conscience, he ought not to be exposed to temporal punishment."[101] Rather than refuting the notion of religious exemptions, the Massachusetts Solicitor General argued that "the confession, in this case, was not to the church, nor required by any known ecclesiastical rule. It was made to his friends and neighbors, without any requisition, or even solicitation, on their parts."[102] Without explanation, the court ruled in favor of the state.

These cases involving Protestants did not raise the precise religious exemption question addressed in *Philips*. In *Philips*, the witness refused to testify, stating that doing so would violate his own religious duties as a Catholic priest. In each Protestant case, by contrast, the witnesses had no conscientious scruples to testifying, and therefore the defendant's only argument was that *his* conscientious objections to revealing his own prior declarations should be sufficient to privilege the evidence. Nevertheless, the arguments made in the New York and Massachusetts cases suggest that exemptions were denied primarily because confessions were not mandated under Protestant doctrine. As Judge

religious exemptions). Justice Scalia's *Boerne* concurrence, however, belittled the importance of *Philips*:

> The closest one can come [to judicial enforcement of religious exemptions] in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777 required acknowledgment of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. Even this lone case is weak authority, not only because it comes from a minor court, but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege.

City of Boerne v. Flores, 521 U.S. 507, 543 (1997) (Scalia, J., concurring) (citations omitted). For a thorough reply, see Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004).

100. People v. Smith, 1 AMERICAN STATE TRIALS 779, 784 (John D. Lawson ed., 1914) (N.Y. Oyer & Terminer 1817).

101. Commonwealth v. Drake, 15 Mass. (14 Tyng) 161, 161-62 (1818).

102. *Id.* at 162.

Thacher noted, the legal basis for granting exemptions was quite narrow: "[O]pinions or *convictions of conscience*, as some may call them, are no legitimate grounds for personal exemptions. Conscience, . . . ought rather to be considered as an *impelling force*, than a *directing principle* in human actions."[103] Absent broad recognition of denominational rules that conflicted with the law, personal claims of conscientious scruples were insufficient. Thus, prevailing theological views about the primacy of denominational teachings framed how the judges assessed the sincerity of religious objections.

Other cases highlighted the connections between these factors and contemporary notions of judicial deference. The importance of deference was particularly apparent in Pennsylvania, which had the largest number of recorded exemption cases of any state.[104] The earliest Pennsylvania case, *Stansbury v. Marks*,[105] reads in its entirety:

> In this cause (which was tried on Saturday, the 5th of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The Court, therefore, fined him £10; but the defendant, afterwards, waving the benefit of his testimony, he was discharged from the fine.

This short report suggests that Phillips asked for a religious accommodation, but it is unclear why the court refused his request.[106] The next reported exemption case arose in 1817, when the Pennsylvania Supreme Court considered a claim by Abraham Wolf, a Jewish merchant, that the state's Sunday law interfered with his religious liberty.[107] As in *Benjamin*,[108] Wolf argued that, combined with his obligation to observe Sabbath on Saturday, God's commandment "[s]ix days shalt thou labor"[109] meant that he had a religious duty to work on Sunday. Rejecting Wolf's claim, Justice Jasper Yeates[110] wrote that "the Jewish Talmud . . . asserts no such doctrine."[111] As Michael McConnell ob-

103. PERLEY, *supra* note 57, at 191.

104. *Cf.* Bradley, *supra* note 11, at 277-82; McConnell, *supra* note 11, at 1506-10.

105. 2 U.S. (2 Dall.) 213 (Pa. 1793).

106. As argued in this Note, the lack of a judicially cognizable right to religious exemptions was not the only ground upon which these claims were denied.

107. Commonwealth v. Wolf, 3 Serg. & Rawle 48, 49 (Pa. 1817).

108. *See* City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 527 (1846); *see also infra* text accompanying notes 87-94.

109. *Exodus* 20:9 (King James).

110. A Federalist, Yeates was appointed as an associate justice in 1791 and survived impeachment proceedings brought by the Republican legislature in 1805. James H. Peeling, *Jasper Yeates*, *in* 20 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 56, at 606.

111. *Wolf*, 3 Serg. & Rawle at 50. Yeates then stated that rights of conscience were "never intended to shelter those persons, who, out of mere caprice, would directly oppose those laws, for the pleasure of shewing their contempt and abhorrence of the religious opinions of the great mass of the citizens." *Id.* at 51.

serves, "[t]he unstated assumption was that if the law had required Wolf to violate his conscience, he might have had a claim."[112]

The next two Pennsylvania Supreme Court decisions are among the most explicit authorities against judicially enforced religious exemptions. In *Commonwealth v. Lesher*,[113] the court upheld a lower court's exclusion of a prospective juror in a murder trial on the basis that "he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder."[114] The court had little trouble disposing of the appeal, stating that "scruples of a juror, whether real or not, (for into their genuineness no human tribunal can easily inquire,)" were sufficient to disqualify a biased juror.[115] But the court rested its decision only on the effect that a biased juror might have on the proceedings; its reasoning did not depend on any notion of religious freedom. In closing, the court clarified that "scruples of conscience in a juror, no matter how genuine they are, if there is no challenge on either side for that cause, cannot be taken notice of by the law."[116]

In *Simon's Executors v. Gratz*,[117] Chief Justice John Bannister Gibson wrote for the court in denying the religious liberty claim of Levi Philips, a Jewish plaintiff who moved for a continuance so that he would not have to attend court on Saturday. Chief Justice Gibson confronted the religious exemption issue directly, stating:

> The religious scruples of persons concerned with the administration of justice, will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake, is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect.[118]

According to Chief Justice Gibson, "considerations of policy address themselves with propriety to the legislature, and not to a magistrate whose course is

112. McConnell, *supra* note 11, at 1507.

113. 17 Serg. & Rawle 155 (Pa. 1828).

114. *Id.* at 155.

115. *Id.* at 160.

116. *Id.* In dissent, Chief Justice Gibson noted that "the truth is, this opinion [against serving on juries in capital cases] is not held by the Society of Friends as a body; as I have heard a gentleman of that denomination, who honourably discharges a high judicial trust, repeatedly declare." *Id.* at 162 (Gibson, C.J., dissenting).

117. 2 Pen. & W. 412 (Pa. 1831).

118. *Id.* at 416. Justice Duncan expressed similar sentiments in dicta in an 1818 case:

> [C]ourts will respect the religious scruples of all men, yet this respect must not carry them, in the administration of justice, to adopt principles unknown to the constitution and the laws, and subversive of the execution of laws which they have reason to observe; but courts, civil and military, and the officers who execute laws repugnant to the conscientious scruples of respectable societies, will always perform the duties with tenderness, and in a way least offensive to their sincere and honest prejudices; but still the laws must be obeyed.

Commonwealth v. Cornman, 4 Serg. & Rawle 83, 101 (Pa. 1818) (Duncan, J., concurring).

prescribed not by discretion, but rules already established."[119] Thus, Chief Justice Gibson did not reject the policy merits or even the constitutional basis of religious exemptions; rather, he rejected their *judicial* enforcement. Interestingly, though perhaps coincidentally, Chief Justice Gibson ruled in favor of Philips on an unrelated ground.[120]

The Pennsylvania cases play a prominent but overstated role in the historical critique of religious exemptions. Gerard Bradley argues that "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."[121] Pennsylvania, however, was also one of the states most hostile to judicial review. Historian Gordon Wood states that "[o]f all the struggles over the law and judiciary that took place in the states during the first two decades of the nineteenth century, probably the longest and most intense occurred in Pennsylvania."[122] In 1817, Chief Justice William Tilghman had articulated a limited role for judicial oversight, stating that "to declare a law void, when it violates the Constitution of this state or of the *United States* . . . is a power of high responsibility, and not to be exercised but in cases *free from doubt*."[123] His successor, Chief Justice Gibson, famously rejected judicial review almost entirely,[124] thus providing, in the words of McConnell, "reason to doubt that he represented the prevailing view on the interpretation of free exercise."[125] Given the Pennsylvania court's highly re-

119. *Simon's Ex'rs*, 2 Pen. & W. at 417.

120. The suit was restored because bystander jurors had been taken from outside of the courthouse. *See id.* at 413; *see also id.* at 417 ("I am for setting aside this non-suit, certainly not for any supposed interference with the rights of conscience."). The legal merits of this ruling are unknown.

121. Bradley, *supra* note 11, at 277.

122. WOOD, *supra* note 38, at 426; *see also* McConnell, *supra* note 3, at 1509 (pointing out that Chief Justice Gibson's views were idiosyncratic). The 1803 impeachment of Alexander Addison exemplifies the legislature's hostility towards Federalist judges who opposed the will of the people. *See* WOOD, *supra* note 38, at 427. *Lesher* and *Simon's Executors* followed shortly after a virulent fight in Kentucky over judicial review. *See* Theodore W. Ruger, *"A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 827, 829 (2004). For late eighteenth-century views of judicial review in Pennsylvania, see Treanor, *supra* note 70, at 498-99.

123. Farmers' & Mechs.' Bank v. Smith, 3 Serg. & Rawle 63, 73 (Pa. 1817). Chief Justice Tilghman also endorsed a case-by-case approach to deciding constitutionality rather than relying on strict distinguishing principles. *Id.* at 71 ("I confess, that to lay down a rule which would decide all cases, appears to me to be very difficult, perhaps impossible. One may be certain, that particular cases are not within the meaning of a law, without being able to enumerate all the cases that are within it. To attempt such enumerations, is unnecessary and dangerous, lest some should be omitted.").

124. *See* Eakin v. Raub, 12 Serg. & Rawle 330, 356 (Pa. 1825) (Gibson, C.J., dissenting). For a thorough appraisal of Chief Justice Gibson's views, see Craig C. Murray, *Chief Justice Gibson of the Pennsylvania Supreme Court and Judicial Review*, 32 U. PITT. L. REV. 127 (1970).

125. McConnell, *supra* note 3, at 1509.

strained approach to judicial review, its rejection of free exercise claims is unremarkable. Judicially enforceable exemptions presuppose judicial enforcement of constitutional rights.

Although the Pennsylvania Supreme Court was initially hostile to judicial review, the court eventually embraced the moderate form of judicial deference used in most other states. Even Chief Justice Gibson experienced a personal conversion,[126] declaring in 1845:

> There must be some independent organ to arrest unconstitutional legislation, or the citizen must hold his property at the will of an uncontrollable power. It would be useless for the people to impose restrictions on legislation if the acts of their agents were not subject to revision.[127]

The court's change of heart provided a potential opportunity to reassess the scope of constitutionally protected religious liberty.

That opportunity came in *Specht v. Commonwealth*,[128] when the Pennsylvania Supreme Court reexamined whether a law prohibiting Sunday labor unconstitutionally interfered with the religious exercise of those who observed the Sabbath on Saturday. Writing for the court and joined by Chief Justice Gibson, Justice Thomas Bell stated that under the Sunday law proscriptions "every one is left at full liberty to shape his own convictions, and practically to assert them to the extent of a free exercise of his religious views. . . . [The law] does not, in the slightest degree, infringe upon the Sabbath of any sect, or curtail their freedom of worship."[129] In response to the defendant's argument that as a Seventh Day Adventist he was conscientiously required to work six days per week, Justice Bell wrote:

> Were this so, the law which compels him to inaction upon one of the six, might well be regarded as an invasion of his conscientious convictions. . . . But without other evidence than the mere suggestion of counsel, we cannot believe that the religious sect to which the plaintiff in error belongs, have so construed this commandment as to make it imperative on its members, literally, to labour on every day of the week other than the seventh.[130]

Again, a court acknowledged the principle of exemptions but rejected them in the case at hand.

Religious exemptions were also addressed in the jury instructions in an 1847 fugitive slave case. The defendant, who was sued in federal court for harboring slaves,[131] alleged that he lacked the requisite fraudulent intent because he was merely fulfilling his religious obligations. He apparently cited Deuteronomy: "Thou shalt not deliver unto his master the servant which has escaped

126. *See* Murray, *supra* note 124, at 147-66.

127. Menges v. Wertmann, 1 Pa. 218, 222 (1845).

128. 8 Pa. 312 (1848).

129. *Id.* at 324-25.

130. *Id.* at 326.

131. Van Metre v. Mitchell, 28 F. Cas. 1036 (C.C.W.D. Pa. 1853) (No. 16,865); *see also* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

from his master unto thee."[132] Responding to this argument, U.S. Supreme Court Justice Robert Grier[133] explained that the biblical passage referred to returning slaves to another country—not harboring escaped slaves within the United States.[134] He instructed the jury:

> [F]raudulent intent required by the act to constitute illegal harbouring, is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men of disordered understanding or perverted conscience may conceive it a religious duty to break the law, but the law will not tolerate their excuse. . . . [L]et no morbid sympathy—no *false* respect for pretended "rights of conscience"—prevent either court or jury from judging him justly.[135]

Grier then cited the Right Reverend Jeremy Taylor: "Nothing is more usual . . . than to pretend conscience to all the actions of men. . . . The disobedient refuse to submit to the laws, and they also in many cases pretend conscience."[136]

It is unclear whether the defendant claimed a constitutional right to a religious exemption, though the record implies that he was merely arguing that he did not have the mens rea required by the statute. Nevertheless, Justice Grier's statements reveal a deep skepticism of the defendant's claims of religious scruples. Not only did Justice Grier explicitly refute the application of Deuteronomy to fugitive slaves within the United States, but he also indicated that the defendant's claims were insincere. Indeed, the defendant did not make any showing that his views were grounded in religious principles held by anyone else in his church. Nevertheless, it is hard to imagine that any claim to religious liberty would have overcome enforcement of the fugitive slave laws in the heightened political environment of the late 1840s.[137]

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132. *Van Metre*, 28 F. Cas. at 1039 (citing *Deuteronomy* 23:15).

133. A Democrat and native of Pennsylvania, Grier was nominated to the Supreme Court in 1846. He was quickly confirmed, partly because he fervently opposed abolition. *See* Stuart A. Streichler, *Robert Cooper Grier*, *in* 9 AMERICAN NATIONAL BIOGRAPHY, *supra* note 96, at 583.

134. *See Van Metre*, 28 F. Cas. at 1039.

135. *Id.* at 1041.

136. *Id.*

137. Justice Grier was a fervent opponent of abolitionism. Streichler, *supra* note 96, at 583. In another fugitive slave harboring case, Judge John McLean instructed the jury that "much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law." Jones v. Vanzandt, 13 F. Cas. 1040, 1045 (C.C.D. Ohio 1843) (No. 7501). On consideration of a motion to retry the case, Judge McLean stated:

> If convictions, honest convictions they may be, of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection. . . . If the law be wrong in principle, or oppressive in its exactions, it should be changed in a constitutional mode.

Jones v. Vanzandt, 13 F. Cas. 1047, 1048-49 (C.C.D. Ohio 1843) (No. 7502). There is no indication that the defendant asserted a First Amendment right to exemption, nor is it clear that the defendant's claim was religious rather than based solely on moral conviction.

B. *A New Context*

A final antebellum case in 1854 presaged a new era for religious exemption claims. In *Donahoe v. Richards*,[138] the Maine Supreme Court considered an appeal of a Catholic student's expulsion from public school for refusing to read from the King James Bible. The fifteen-year-old student and her father asserted that reading from a Protestant translation violated their conscientious beliefs as well as the explicit instructions of the local priest. Writing for the court, Justice John Appleton explicitly rejected the principle of religious exemptions:

> The conscientious belief of religious duty furnishes no legal defence to the doing or refusing to do what the State within its constitutional authority may require. If it were so, the obligations of a statute would depend not upon the will of the State, but upon its conformity with the religious convictions of its members.[139]

He noted that "the existence of conscientious scruples as to the reading of a book can only *be known from the assertion of the child, its mere assertion must suffice*."[140] Appleton's opinion, however, was premised on far more than skepticism of individual beliefs. The right of religious exemptions, he stated, "undermines the power of the State. It is, that the will of the majority shall bow to the conscience of the minority, or of one."[141]

Justice Appleton cited earlier nineteenth-century exemption cases, but his opinion was a clear departure from their logic and scope. Rather than deferring to legislative judgments or ensuring the veracity of individual claims, he firmly declared the authority of the state over matters of individual conscience: "A law is not unconstitutional, because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The State is governed by its own views of duty."[142] Continuing, Appleton hinted at the fears motivating his decision: "[T]he constitution . . . acknowledges no government external to itself—no ecclesiastical or other organization as having power over its citizens, or any right to dispense with the obligation of its laws."[143] Appleton's meaning was readily apparent to his contemporaries: allowing religious exemptions would give the Pope authority over American law. Moreover, he stated:

> The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mahomedan cannot claim an exemption from their operation, or

138. 38 Me. 379 (1854).

139. *Id.* at 412; *see also* THE BIBLE IN SCHOOLS: ARGUMENT OF RICHARD H. DANA, JR., ESQ., AND OPINION OF THE SUPREME COURT OF MAINE 24-32 (Boston, Sabbath Sch. Soc'y 1855) (argument of defense counsel Richard Henry Dana Jr. against the plaintiff's constitutional claim).

140. 38 Me. at 408.

141. *Id.* at 409.

142. *Id.* at 410.

143. *Id.* at 409-10.

> freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the soundest political wisdom, and resting on the sure foundation of inspired revelation.[144]

Appleton's reference to Mormon polygamy may have quieted even the most fervent advocates of broadly defined religious freedom.

Indeed, the conscientious objections of the mid-nineteenth century were a far cry from the relatively harmless claims raised decades earlier. In 1852, Brigham Young had famously announced a divine revelation extolling plural marriage.[145] The claim ignited a national furor. Freedom of religion had given way to freedom of religious invention, and Mormon teachings were challenging American society's deepest-held views on family organization.[146] Moreover, widespread immigration was bringing throngs of Catholics to American cities, escalating religious tensions and sparking anti-immigrant backlash. Anti-Catholicism in New England exploded in 1854 when the nativist Know-Nothing Party garnered a majority of the Massachusetts popular vote in statewide and local races.[147] The growing Catholic population was especially threatening to New England's public school system, where Horace Mann had ostensibly achieved a delicate religious balance by requiring nonsectarian Bible readings.[148] By 1854, many thought that unrestrained religious liberty threatened to unravel the social and religious fabric of the nation.

The new religious context brought both challenges and changes to American constitutional law and gave rise to the U.S. Supreme Court's first free exercise decisions, which denied a constitutional basis for religious exemptions.[149] *Donahoe v. Richards* was merely one court's approach to the exemption question, but Justice Appleton's opinion illustrates the overriding importance of

144. *Id.* at 410.

145. Joseph Smith was said to have received this revelation in 1843, though it remained a secret until Young's 1852 proclamation. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 730-31 (2007).

146. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 29-33, 45-49 (2002); *see also* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000). The Republican Party platform in 1856 attempted to tie Mormon polygamy with master-slave relations on Southern plantations. *See* GORDON, *supra*, at 55-58.

147. Dale Baum, *Know-Nothingism and the Republican Majority in Massachusetts: The Political Realignment of the 1850s*, 64 J. AM. HIST. 959, 960 n.4 (1978). Bradley hints at immigration's potential impact on free exercise jurisprudence. *See* Bradley, *supra* note 11, at 286 ("[I]t would be helpful to see how the great Irish and German Catholic immigrations of the late 1840s affected interpretation of Free Exercise.").

148. *See* R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 J. AM. HIST. 1581, 1588-90 (2000).

149. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (denying a religious exemption from a federal polygamy law). Interestingly, while others argued that the First Amendment protected Mormon polygamy, *see, e.g.*, GORDON, *supra* note 146, at 89, this was not the defendant's legal argument in *Reynolds*, *id.* at 131-32. The Court addressed the issue anyway.

contemporary political debates.[150] Banning polygamy was self-evidently constitutional, and judges reached for interpretive tools to arrive at that end.[151] These transformations hardly prove or disprove the constitutional basis for religious exemptions earlier in the century, but they remind us that the methods for defining constitutional rights in one period may vary drastically from those used in another. Adjudicating constitutional questions is a form of politics, and context matters.

CONCLUSION

By drawing on a broad array of other religious liberty cases as well as recent scholarship on judicial deference, this Note has expanded the lens through which scholars can view and contextualize exemption decisions. In particular, judges were highly skeptical of individual declarations of belief. When granted by statute, religious exemptions often required affidavits from religious leaders in order to prove conscientious scruples. And steeped in a culture of judicial deference, courts were loath to define their own process for determining religious sincerity. As Judge Thacher asked in 1819: "[W]ho was to determine what a man's *conscientious scruples were*; *and when they were sincere?*"[152] For him, religious dictates "ought to be clear and express,"[153] else they become mired in the misapprehensions or insincerity of individual claimants.

Though the record is sparse, early nineteenth-century religious exemption cases are consistent with this theoretical account. Lower court decisions in New York[154] and Virginia[155] accommodated priests, whose religious scruples against disclosing confessions were beyond dispute. And state supreme courts

150. Justice Appleton was also at the forefront of calls to liberalize witness competency rules. His jurisprudence therefore illustrates not only a turn away from religious exemptions but also a transition from the judicial skepticism that had formerly kept those exemptions in check. *See* Fisher, *supra* note 42, at 666-67, 678-79.

151. *Donahoe* was followed in *Ferriter v. Tyler*, 48 Vt. 444, 454, 470 (1876). Moreover, contemporary public opinion widely supported the *Reynolds* decision. *See* Sarah Barringer Gordon, *Law and Religion, 1790-1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 417, 433 (Michael Grossberg & Christopher Tomlins eds., 2008). *But see* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (arguing that the Fourteenth Amendment incorporated an expansive version of religious freedom unimagined at the founding). Lash's argument is opposite to mine, though our focuses are different. Instead of case law, he concentrates on the intent of those who passed the Fourteenth Amendment. However, his reliance on debates about former slaves skews his analysis, and he never explains how the framers of the Fourteenth Amendment squared their ostensible support for religious exemptions with simultaneous persecutions of Mormon polygamists.

152. PERLEY, *supra* note 57, at 189.

153. *Id.* at 193.

154. People v. Philips, SAMPSON, *supra* note 95, at 5 (N.Y. Ct. Gen. Sess. 1813).

155. Commonwealth v. Cronin, 1 Q.L.J. 128 (1856) (Va. Cir. Ct. 1855).

in Pennsylvania[156] and South Carolina[157] acknowledged in dicta that exemptions may be judicially enforceable. Still, protection of a substantive, individual right to religious liberty was highly constrained. Courts and legislatures generally used sectarian doctrine and membership as a proxy for individual belief. And whenever claimants' sincerity was in doubt, judges always denied their accommodation requests.

Beginning in the 1850s, however, skepticism was no longer a sufficient means of limiting religious exemptions. Earlier in the century, Protestant assumptions about the sole authority of scripture effectively confined accommodation claims to those based on a close reading of the biblical text,[158] thus preventing the anarchical potential of religious exemptions from seriously challenging the legal system's vitality. Mormon revelations and Catholic immigration eviscerated these unstated limits on free exercise. Constitutional principles widely accepted several decades earlier were now at odds with fundamental societal values and a virulently anti-Catholic and anti-Mormon political climate.

To the extent that nineteenth-century decisions are consistent with the meanings of the Free Exercise Clause as enacted in 1791 and incorporated in 1868,[159] the historical record poses a significant problem for originalist methodology. Accounting for skepticism and deference, early opinions suggest that freedom of religion clauses granted substantive, individual protection from both neutral and discriminatory laws. As articulated in *Donahoe v. Richards* and later affirmed in the Supreme Court's famous polygamy decisions, however, the prevailing understanding of religious liberty around the time of the Fourteenth Amendment did not ensure a general safe harbor for individual religious practices. Government could not explicitly prohibit religious exercise, but individuals did not have a right of exemption from neutral and generally applicable laws.

Essentially, the problem here is that the framers and ratifiers of the Fourteenth Amendment were not originalists.[160] Modern courts are unlikely to re-

156. Specht v. Commonwealth, 8 Pa. 312, 326 (1848).

157. City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508, 528 (1846).

158. Early nineteenth-century religious experience placed greater emphasis on individuals rather than trained ministers, but biblical text remained the ultimate authority. *See* HATCH, *supra* note 21, at 179-83.

159. As stated several times, this Note is largely confined to evaluating nineteenth-century case law—evidence widely acknowledged as relevant, but certainly not dispositive, to discerning the original meanings of religious liberty in 1791 and 1868.

160. The accepted meaning of several important provisions of the Bill of Rights had changed significantly by the time of the Fourteenth Amendment's ratification. *See, e.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006) (arguing that an individual rights view of the Second Amendment was largely absent at the founding but widespread by the time of the Fourteenth Amendment); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (arguing that the incorporated

ject incorporation or apply differing First Amendment constraints on the federal and state governments.[161] But fidelity to original meaning requires that originalists wrestle with these historical discrepancies.[162] This paradox is probably intractable. Originalism cannot, in combination with our current approach to incorporation, account for shifts in constitutional meaning between the ratification of the Bill of Rights and the adoption of the Fourteenth Amendment.[163]

Understanding the nineteenth-century context exposes a deep irony in Justice Scalia's opinion in *Boerne*. Justice Scalia cites the historical record—a body of evidence pervasively shaped by judicial deference to legislatures—to prove why Congress should not have a role in defining the scope of constitutionally protected religious liberty.[164] There are persuasive reasons why one might agree with Justice Scalia in opposing religious exemptions, but the lack of early precedent should not be one of them. Judges in the first half of the nineteenth century did occasionally recognize the constitutional basis for free exercise exemptions, but their decisions were guided by radically different under-

Establishment Clause included a nonestablishment principle, whereas the Establishment Clause originally aimed at federalism concerns); *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (arguing that the meaning of due process included substantive protections in 1868 but not in 1791).

161. *See supra* note 18 and accompanying text.

162. Eugene Volokh has noted that nineteenth-century evidence is especially important "when the sources buttress the evidence offered by late-1700s sources," but he provides no account of what an originalist should do if the nineteenth-century evidence conflicts. Volokh, *supra* note 17, at 1068 n.64. Volokh, however, does acknowledge that understanding the meaning of the incorporated First Amendment requires "understanding the original meaning of the First Amendment in 1868, when the Fourteenth Amendment was enacted." *Id.* Indeed, whether incorporation takes effect through the Fourteenth Amendment's protections of "liberty" and "due process," *McDonald*, 130 S. Ct. at 3031-32, or the "privileges or immunities of citizens of the United States," *id.* at 3060 (Thomas, J., concurring in part and concurring in the judgment), an original public meaning originalist understands those words according to their meaning in 1868—not in some prior period. *See, e.g.*, *id.* at 3042 (majority opinion) ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id.* at 3086 (Thomas, J., concurring in part and concurring in the judgment) ("[T]he inquiry [should] focus[] on what the ratifying era understood the Privileges or Immunities Clause to mean . . . ."); *id.* at 3088 ("[T]he Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty.").

163. The dilemma is especially thorny in the free exercise context, where the latter incorporated meaning, as suggested by nineteenth-century cases, was less protective of individual rights than the earlier meaning. For another example of such a shift, see John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825 (1999) (arguing that protections against self-incrimination had eroded significantly by the mid-nineteenth century).

164. In this respect, this Note supports McConnell's argument that Congress should have interpretive authority under the Fourteenth Amendment. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

lying assumptions. By looking beyond outcomes we can begin to appreciate the transformations that separate us from our constitutional past.