ESSAY

MORE IS LESS[*]

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IS the First Amendment's right of free exercise of religion conditional upon government interests? Many eighteenth-century Americans said it was utterly unconditional. For example, James Madison and numerous contemporaries declared in 1785 that "the right of every man to exercise ['Religion'] . . . is in its nature an unalienable right" and "therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society."[1] In contrast, during the past forty years, the United States Supreme Court has repeatedly conditioned the right of free exercise on compelling

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[1] James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *reprinted in* 8 The Papers of James Madison 295, 299 (Robert A. Rutland et al. eds., 1973).

government interests. The Court not merely qualifies the practice of the free exercise of religion, but places conditions on the First Amendment's right of free exercise. As explained by the Court, a compelling government interest "'can justify exacting a sacrifice of First Amendment freedoms'" and even can "be sufficient to warrant a substantial infringement of religious liberties."[2] Evidently, conceptions of the right of free exercise of religion have changed. How did this happen? How did the inalienable right of free exercise of religion come to be understood as a right contingent upon compelling government interests?

This inquiry matters, first, for religious liberty. In particular, it is revealing as to whether government interests are a measure of the right of free exercise of religion. The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]"—a right that here, for convenience, will often be called simply "the free exercise of religion."[3] Many modern lawyers and judges assume that this right includes a right of exemption. Whereas most eighteenth-century advocates of religious liberty sought a freedom from laws that imposed constraints on the basis of religion (or at least religious differences), numerous modern advocates and judges expect more.[4] Even if a law makes no mention of religion and thus does not discriminate on this basis, these observers propose a free exercise right against the law—a right of exemption for such individuals as have religious objections to it. They thereby adopt a very expansive definition of the First Amendment's right of free exercise. But at what cost? In particular, has the broad definition of this right required that the right become conditional on government interests? Of course, there are many reasons why judges (not least those on the Supreme Court) have

[2] Employment Div. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring) (quoting Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part)); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

[3] U.S. Const. amend. I. In contrast, on the rare occasion when this Essay refers merely to the practice or activity of free exercise of religion, this will be specified. Of course, the convenient label "free exercise of religion" is incomplete in ways that can easily become misleading, and it therefore is important to keep in mind that this abbreviation is only a label.

[4] Lest there be any doubt, when this Essay alludes to constraints on the basis of religion, it means constraints on persons on the basis of their religion or some aspect of it and not constraints on persons on account of their lack of religion, which ordinarily are more easily analyzed under provisions other than the Free Exercise Clause.

treated the free exercise right as contingent upon government interests. One salient possibility, however, is that the expanded definition of the right of free exercise necessitated that this right be circumscribed by the concerns of government.

Second, the contingency of the free exercise of religion raises a more general question as to whether the definition of any right can be expanded without risking access to the right. If a right is defined with greater breadth, will this necessarily stimulate demands for a diminution of its availability? Surely not. Nonetheless, the danger may be inherent in every attempt to expand a right, for at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access. In his study of the freedom of speech, press, and association, Professor Vincent Blasi observes that rights can become politically vulnerable when interpreted expansively.[5] Here, a legal aspect of this problem will be explored: the dynamic between an enlarged right and diminished access. It will be seen that when the right of free exercise of religion came to be defined broadly, it was rendered conditional on government interests. Obviously, any condition on a right can be considered simply a redefinition of the right—a point that will be considered in detail below.[6] Yet the introduction of a condition based on social or governmental interests not only limits an excessively expansive definition of the right but also suggests the vulnerability of the right as a whole and leaves those who need to exercise the right unnecessarily uncertain about its availability. Particularly if a right, such as the free exercise of religion, has traditionally been viewed as utterly unconditional, an insistence upon the need to balance it against the weight of government interests undermines the very character of the right. In this way, the conditions imposed during the last half of the twentieth century suggest how well-intentioned efforts to enlarge a right can inflate it so far as to weaken it. It is a strange le-

[5] Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 452–59 (1985); see also Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 654–55 n.140 (1980); William P. Marshall, Diluting Constitutional Rights: Rethinking "Rethinking State Action," 80 Nw. U. L. Rev. 558, 567 (1985).

[6] See infra Section II.B.

gal trope, through which overstatement can have a cost.[7] More really can be less.

These developments—both the reduction of free exercise to a conditional right and the broader tendency of expanded rights to prompt diminished access—are worrisome. As it happens, the contingency of the right of free exercise upon government interests has thus far been merely conceptual and has not yet had practical consequences. Even so, this is a fundamental change in the conception of religious liberty, and it therefore is reason for concern. No less disturbing is the wider problem—that an enlarged definition of any right may invite limitations on the circumstances in which it is available. In an individualistic society that celebrates its expansion of rights, this dynamic is likely to be commonplace, and its effects are apt to be felt with particular regret.

I. FREE EXERCISE INALIENABLE

The religious liberty guaranteed by the First Amendment, especially that protected by the Free Exercise Clause, was peculiarly inalienable. It was so inalienable that it was not conditioned or even defined in terms of government interests. Part II of this Essay will show that when Americans eventually expanded the definition of the free exercise of religion, they rendered this right contingent on government interests. Part II will thereby reveal how more can also be less. Here in Part I, however, it is necessary to begin by examining the traditional inalienability of the First Amendment's right of free exercise, for only on this basis will it be possible to observe the extent to which conceptions of the right have changed.

[7] Of course, more can be less in the opposite way: Expanded access to a right can prompt demands for the contraction of its definition or scope. Thus, the tendency of more to be less can go in two directions. Here, however, the focus will be on the expanded definition and diminished access. On account of circumstances that will be suggested later, this version of the tendency appears to be especially prominent in America—whether in religious liberty or other freedoms.

The phrase "less is more" may have derived from attempts to define the trope known as "meiosis." For example, one mid-seventeenth-century author wrote that meiosis "is when lesse is spoken, yet more is understood." John Smith, The Mysterie of Rhetorique Unvail'd 56 (London 1657). Robert Browning popularized the phrase as an artistic ideal, Robert Browning, Andrea del Sarto, *in* Men and Women, 184, 186 (Boston 1886), and Meis van de Rohe later adopted it as a slogan for modernism in architecture—reputedly provoking Frank Lloyd Wright to respond that "less is only more where more is no good."

A. The Inalienable Character of Religious Liberty

Americans once considered the free exercise of religion to be the most inalienable of rights. Today, after a century of legal realism, balancing tests, and the judicial weighing of government interests, old ideas about inalienable rights may seem improbable and even naive. Nonetheless, many Americans once considered religious liberty distinctively inalienable. In contrast to the English, who had subjected religious liberty to conditions that preserved the interests of government, numerous eighteenth-century Americans rejected a conditional understanding of religious liberty—most notably in the First Amendment to the United States Constitution. These Americans viewed the free exercise of religion as a right so personal and inalienable that it could not be conditioned or otherwise determined or measured by the concerns of society or government, and this makes it a good test of whether more is sometimes less.

Religious liberty was conditional in England and some of its colonies. In these English jurisdictions, individuals enjoyed a basic religious liberty that was the envy of religious minorities elsewhere. At the same time, however, religious liberty was subject to conditions protecting government from the disruptive worldly influence of religious beliefs. As will be seen, many dissenters claimed that religious belief really was purely internal to the mind and impervious to worldly threats and inducements. Yet religious belief seemed to affect external, physical matters—words or other conduct—and it therefore often appeared to threaten secular or "civil" interests. Most concretely, civil government had reason to worry that religious belief might provoke violations of law or other opposition to government. Certainly, in the seventeenth century, religious belief—whether Protestant or Catholic—had stimulated many of England's troubles. Accordingly, in the late seventeenth century, when the government recognized that religious diversity was unavoidable, it offered not an unqualified religious liberty, but a toleration that was subject to conditions—caveats by which the government could punish beliefs that tended to undermine civil society.

The most prominent expression of this conditional toleration was the Toleration Act of 1689. Since the sixteenth century, the government had enacted and enforced penalties on "dissenters"—

those who dissented from the established Church of England.[8] Already in the seventeenth century, however, the charters of almost half the American colonies guaranteed various degrees of religious liberty, including in some colonies a conditional toleration.[9] John Locke defended this sort of arrangement in his *Letter Concerning Toleration*, in which he argued for toleration but simultaneously cautioned that "no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate."[10] In 1689, the Toleration Act reduced this approach to practice by relieving Protestant dissenters of preexisting statutory penalties on them, as long as they conformed to the Act's conditions.[11] These conditions included that dissenters had to certify the place of their congregations to local authorities, that they had to leave the doors of their chapels unlocked during meetings, and that they had to take oaths of fidelity.[12] By conforming to these conditions, the dissenters would demonstrate that they and their beliefs posed no threat to society or the Crown. If, however, a dissenter failed to meet the conditions, he would be subject to the old statutory penalties. In sum, the charters of some American colonies, the leading defender of toleration, and the most significant statutory scheme of toleration in Europe all took for granted a conditional religious liberty, and they thus allowed government, under specified conditions, to penalize such beliefs as tended to be dangerous.

Many early American state constitutions similarly subjected religious liberty to conditions. Although these conditions varied in

[8] Although in England, Protestant nonconformists were known as "dissenters" and Catholics as "recusants," the former term will be casually used here to refer to all Christians who dissented from an established church—whether the Church of England or, later in this Essay, one of the established churches of American jurisdictions. Obviously, it cannot be assumed that all who dissented from their government's established church objected to an establishment of their own church.

[9] E.g., Rhode Island Charter of 1663, *in* 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1595, 1596–97 (Ben Perley Poore ed., Washington, Government Printing Office 2d ed. 1878); Carolina Charter of 1663, *in* The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, supra, at 1390, 1397.

[10] John Locke, A Letter Concerning Toleration 50 (The Liberal Arts Press 1950) (1689).

[11] Toleration Act, 1689, 1 W. & M., c. 18 (Eng.).

[12] Id. §§ 1, 3, 4, 6, 16.

their details, two broad types stand out.[13] One type mirrored the underlying ground for penalizing some belief—its tendency to undermine civil society or government—and made this tendency a disqualifying condition of religious liberty. In such a manner, the Constitution of Georgia guaranteed religious liberty, unless the religion was "repugnant to the peace and safety of the State."[14] In contrast, various other constitutions conditioned religious liberty not on the mere tendency of an individual's religious opinion, but on his or her conduct.[15] These more liberal constitutions assured individuals of religious liberty—assured them that they would not be punished for the disruptive or unsettling tendency of their opinions—provided they did not actually breach the peace or engage in some other specified bad act.[16] In these ways (whether by reference to beliefs or acts), many American constitutions conditioned religious liberty on the interests of government, and they thereby carefully preserved the possibility that government could penalize dangerous belief.

Religious dissenters resented that their liberty was merely conditional and thus potentially punishable for its supposed bad tendency, and they and their allies therefore argued that government should never impose constraints on the basis of religious opinions. For example, the Rev. Philip Furneaux argued that "human laws have nothing to do with mere principles, but only with those overt acts arising from them, which are contrary to the peace and good order of society."[17] In this spirit, he wrote:

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[13] For the variations, see Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915, 917–26 (1992) [hereinafter Hamburger, Exemption].

[14] Ga. Const. of 1777, art. LVI. This article stated: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession." Id.

[15] Hamburger, Exemption, supra note 13, at 922–23.

[16] Id.

[17] Letters from Philip Furneaux to the Honourable Mr. Justice Blackstone (Letter III) *in* An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England 31, 32 (Philadelphia 1773). For the context in which Furneaux made these arguments, see Richard Burgess Barlow, Citizenship and Conscience: A Study in the Theory and Practice of Religious Toleration in England During the Eighteenth Century 164–68 (1962). On account of its appearance in the "Interesting Appendix" to Blackstone's Commentaries, Furneaux's "Letters" circulated widely in America.

> [T]he tendency of principles, though it be *unfavourable*, is not *prejudicial* to society, till it issues in some *overt acts* against the public peace and order; and when it does, *then* the magistrate's authority to punish commences; that is, he may punish the *overt acts*, but not the *tendency*, which is not actually hurtful.[18]

In short, dissenters wanted government "to *protect* all *good subjects* in the profession of their religious principles" and therefore thought government should punish offenders "without any regard to their religious principles or professions."[19] Similarly, in America, Thomas Jefferson wrote "that our civil rights have no dependence on our religious opinions"; "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy"; "[t]hat it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."[20]

More generally, religious dissenters and their supporters argued that religious liberty was inalienable, and to establish this inalienability, they focused on belief.[21] Religious belief seemed so personal

[18] Letters from Philip Furneaux to the Honorable Mr. Justice Blackstone, supra note 17, at 34. He continued: "and, therefore, his penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, let them spring from what principles they will; and not against *principles*, or the *tendency* of principles." Id.

[19] Letters from Philip Furneaux to the Honorable Mr. Justice Blackstone (Letter VII) *in* An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England, supra note 17, at 110, 115. He also wrote about dissenters:

> They allow of the exemption of none from the authority of the civil magistrate; holding all to be equally under his jurisdiction; and that no plea of sacred character, or of religion and conscience, is to be admitted in bar to his procedure, in matters of a criminal, or merely civil nature.

Id. It was from Furneaux and other Englishmen that Jefferson borrowed much of his analysis of religious liberty, such as his ideas about overt acts. Of course, Furneaux and his English colleagues were themselves drawing upon earlier writers.

[20] An Act for Establishing Religious Freedom, 1785, in 12 Statutes at Large: Being a Collection of All the Laws of Virginia 84, 85 (photo. reprint 1969) (William Waller Hening ed., Richmond 1823).

[21] In contrast, a more cautious argument defined religious liberty by reference to the ends of civil government. For example, John Locke began a modest version of the argument by writing that "[t]he commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests." Locke, supra note 10, at 17. From this, he concluded that "the whole jurisdiction of

that government could never successfully force individuals to alter their faith. True, government could turn individuals into hypocrites, but it could not make them believers, and thus religious liberty seemed physically inalienable. In addition, individuals had a duty to adhere to their religious beliefs—a duty they owed to a power higher than civil government—and for this reason, religious liberty seemed inalienable not only physically, but also morally. It neither could nor ought to be submitted to government.[22] For example, in Virginia in 1774, the Rev. David Thomas, a Baptist min-

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the magistrate reaches only to these civil concernments . . . and that it neither can nor ought in any manner to be extended to the salvation of souls." Id. The limited extent of this argument is clear from Locke's acknowledgment that "the magistrate," like other men, "may make use of arguments, and thereby draw the heterodox into the way of truth and procure their salvation," cautioning only that it is "one thing to press with arguments, another with penalties"—a position that was open to interpretation as an acceptance of a tolerant establishment. Id. at 18–19. Even more seriously, in confining civil government to civil interests, Locke allowed that government could and should deny toleration to "opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society." Id. at 50. Thus, by focusing on the civil jurisdiction of civil government, Locke carefully conceded that government could promote and even in some instances punish religion for civil purposes.

[22] The distinction between the types of inalienability was derived from English arguments. It was explained with unusual clarity by an anonymous English pamphlet of 1702:

> Now there are two Characters of an unalienable Right; one is, That it is such as *may* not, The other is, That it is such as *can* not be dispos'd of by Human Authority. . . . For instance; the Homage of the Mind due unto God, as the supreme and universal Sovereign, is His by a Right above and before all other Obligations imaginable. Conscience is an Inclosure, never to be laid open to any Invader; it is in our keeping, but it is God's Property . . . . That then is an unalienable Right, which may not upon any Consideration whatsoever be either Resigned or Invaded.
>
> But again; That is certainly an unalienable Right, which however hard an Usurper may push to have it, or how willingly soever the Owner wou'd wish to throw it up, yet is neither in the Power of the one to make a Seizure of it, nor of the other to let it go; and among such Rights, we are to reckon the Persuasions of the Mind. . . . Mens Notions are not in their ['persecutors'] power, nor alterable by an act of Will . . . . They depend upon the view that the Understanding has of things, and therefore there is no possibility to change them by external Force. . . . These then are the two Characters of an unalienable Right; one is, That it *may* not; the other is, That it *can* not be dispos'd of at Discretion. It is therefore as evident, That Liberty of Conscience is to be allow'd to all Men, as it is that no Man may arrogate what is unalienably appropriated unto God, nor require of another what that other neither may nor can confer upon him.

The Case of Toleration Recogniz'd 2–4 (London 1702).

ister, argued: "The *Almighty* alone has reserved the government of conscience to himself, nor is it subject to any inferior jurisdiction. It ought not to be, nay it cannot be swayed by human authority: For it is absolutely impossible to force conviction on the mind."[23] Jefferson also recited the familiar themes about physical and moral inalienability: "The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."[24] In such ways, dissenters and their backers argued against any conditional religious liberty and demanded, instead, their inalienable liberty—in particular, an unqualified freedom from laws that imposed penalties on religion.

Already at the beginning of the American Revolution, such views had practical consequences, most prominently in the Virginia Bill of Rights. In 1776, when the legislature of Virginia framed this instrument, George Mason—a defender of the state's Anglican establishment—proposed that religious liberty should be protected only conditionally: "[T]hat all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society."[25] This proposal omitted any prohibition on an establishment, and even its guarantee of the more basic freedom of religion offered only a conditional toleration. James Madison therefore sought words that would have guaranteed a "free exercise" of religion and would have prohibited an establishment—although even he apparently assumed that to achieve this end, he

[23] David Thomas, The Virginian Baptist 17 (Baltimore 1774). He continued by quoting the Rev. John Abernathy: "In the words of a great writer I say, 'conscience has a supremacy in itself, I mean so far as not to be subject to any tribunal upon earth; it acknowledges no superior but God, and to him alone it is accountable . . . .'" Id.

[24] Thomas Jefferson, Notes on the State of Virginia 159 (Query 17) (William Peden ed., Univ. of N.C. Press 1982) (1784). The initial words about the rights of conscience—that "we never submitted" them—alluded not to physical or moral inalienability, but to Lockean arguments about the surrender of natural rights to government: that civil government was established for material, secular, civil ends, and that spiritual matters therefore were not surrendered to this government. Incidentally, the phrase used by Jefferson—"rights of conscience"—was the conventional label for religious liberty in general.

[25] 7 Revolutionary Virginia: The Road to Independence 270, 272 (Brent Tarter & Robert L. Scribner eds., 1983) [hereinafter Revolutionary Virginia]. This is the Mason version as adopted by the committee of the convention, to which Madison responded.

would have to accept a condition on the right of free exercise.[26] The legislature rejected his attempt to forbid an establishment. It eventually, however, adopted an unconditional guarantee of the free exercise of religion, which in the final version stated that "all men are equally entitled to the free exercise of religion according to the dictates of conscience."[27]

After 1776, Virginians often relied upon the entirely unqualified character of free exercise to advance their arguments against establishments. The dissenters and their friends in Virginia had already secured "the free exercise of religion," but they still struggled against attempts to resurrect an establishment in that state, and because they had failed to obtain a constitutional provision against an establishment, they needed to rely upon the meager basis of the Virginia free exercise clause to show that an establishment was unconstitutional.[28] In particular, they suggested that their constitu-

[26] This proposal was that "'all men are equally entitled to the full and free exercise of [religion] accordg. to the dictates of Conscience; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges; nor subjected to any penalties or disabilities under &c.'" 7 Revolutionary Virginia, supra note 25, at 457 n.33.

[27] Va. Const. of 1776, Bill of Rights, § 16. After his anti-establishment proposal was rejected, Madison's initial fallback position was "that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate. . . . Unless the preservation of equal liberty and the existence of the State are manifestly indangered." 7 Revolutionary Virginia, supra note 25, at 457 n.33 (reconstructing Madison's proposal). In this proposal, he suggested a moderated condition, and in referring to "equal liberty," he probably hoped to create a condition that could later be used against any Anglicans who sought an establishment. Notwithstanding his willingness to compromise on conditions and even to manipulate them to his ends, it is probable on the basis of his slightly later writings that he ideally wanted no conditions.

Madison seems to have commended governmental limits on religious liberty only in the nineteenth century, when he became increasingly suspicious of religious organizations, their power, and their hierarchies. In 1822, Madison wrote to Edward Livingston: "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace. This has always been a favorite principle with me . . . ." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 The Writings of James Madison 98, 100 (Gaillard Hunt ed., 1910). For Madison's suspicions of religious organizations, see Philip Hamburger, Separation of Church and State 181–83 (2002) [hereinafter Hamburger, Separation].

[28] Philip A. Hamburger, Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights, 1992 Sup. Ct. Rev. 295, 347–53 [hereinafter Hamburger, Equality].

tion's free exercise of religion implied a freedom from an establishment, and that if free exercise was unconditional and entirely free from government regulation, so was the freedom from an establishment. For example, in 1785, when writing his *Memorial and Remonstrance* against a proposal to renew an establishment, Madison restated the conventional arguments—based on physical freedom and a moral duty—for the peculiarly inalienable character of "the right of every man to exercise ['Religion']":

> This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.[29]

On such foundations, Madison held that "[t]his duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society."[30] Extending such arguments to an establishment, he added "and that Religion is wholly exempt from its cognizance."[31] John Leland—the Baptist preacher who wandered for years through Virginia—similarly asserted: "The question is, '*Are the rights of conscience alienable, or inalienable?*'"[32] Virginians in these ways argued against an establishment by emphasizing the inalienability of free exercise.

Some Americans explained the distinctively inalienable character of religious liberty by noting that it was the one natural liberty not constrained at all by the formation of civil society or government, and their observations confirm that religious liberty was not only unconditioned but also undefined by social or governmental interests. Most natural liberty was understood to be protected and thus defined in society by a constitution or more typically by legis-

[29] Madison, supra note 1, at 295, 299.
[30] Id.
[31] Id.
[32] John Leland, The Rights of Conscience Inalienable, &c. (1791), *reprinted in* The Writings of the Late Elder John Leland 179, 180 (L.F. Greene ed., New York 1845). He wrote this against the New England establishments, but did so upon his return to the North immediately after his itinerancy in Virginia.

lation, and in this sense natural rights—the various portions of natural liberty—were partly restricted by government. For example, speech, bearing arms, and holding property were subject to numerous constraining laws, which were said to preserve natural rights by prohibiting their abuse.[33] In the words repeated by countless Americans, the people sacrificed some of their liberty to government in order to ensure protection for the remainder.[34] This was even true of the natural rights that were inalienable. For example, although life, liberty, and the pursuit of happiness were inalienable as ends, they could be enjoyed in security only as regulated by government and its laws.

The one clear exception was religious liberty, which was more rigidly inalienable, for it could not in any degree be sacrificed to government. As Presbyterian dissenters in Virginia declared: "Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be, resigned to the will of the society at large; and much less to the legislature, which derives its authority wholly from the consent of the people . . . ."[35] Even many adamantly pro-establishment writers, such as Theophilus Parsons, agreed that "in entering into political society," every man "surrendered th[e] right of controul over his person and property, (with an exception to the rights of conscience) to the supreme legislative power."[36] Accordingly, it could be said that—unlike

[33] For details, see Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 908 (1993) [hereinafter Hamburger, Natural Rights]. For the way in which this point was reflected in the First Amendment's use of the words "prohibiting" and "abridging," see infra note 64.

[34] After noting that some natural rights "are alienable, and may be parted with for an equivalent," Theophilus Parsons explained: "Sometimes we shall mention the surrendering of a power to controul our natural rights, which perhaps is speaking with more precision, than when we use the expression of parting with natural rights—but the same thing is intended." [Theophilus Parsons], The Essex Result (1778), *reprinted in* 1 American Political Writing During the Founding Era 480, 487 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

[35] Memorial of the Presbyterians of Virginia to the General Assembly (Aug. 13, 1785), *reprinted in* American State Papers Bearing on Sunday Legislation 112, 113–14 (William Addison Blakely ed., 1911).

[36] Parsons, supra note 34, at 492. Of course, in writing of the generic rights of conscience, Parsons meant only the basic religious liberty rather than a freedom from an establishment. In contrast, Stillman sought to suggest more than this. For other establishment writers who held the basic religious liberty to be inalienable, see Hamburger, Exemption, supra note 13, at 934 n.83.

speech, property, and bearing arms—religious liberty remained the same in civil society as in the state of nature. A leading Baptist dissenter, the Rev. Samuel Stillman, explained of the "Rights of Conscience" that "in a state of nature, and of civil society [they] are exactly the same. They can neither be parted with nor controlled, by any human authority whatever."[37]

Clearly, many dissenters and their supporters rejected governmental conditions on religious liberty. Indeed, they repudiated any social or civil calculation of the scope of the freedom. From their viewpoint, the interests of society and government could not be a measure of religious liberty.

B. The Definition of Religious Liberty

Early Americans were able to adopt constitutions that guaranteed religious liberty without conditions or even other qualifications because they defined this freedom in ways compatible with government interests.[38] Americans would later expand the definition of their religious liberty and would thereby render this freedom conditional. In the late eighteenth century, however, Americans had some definitions of religious liberty that did not threaten government interests, and on these foundations, in several of their constitutions, including the U.S. Constitution, they protected religious liberty without any qualification.

The practical achievement of an inalienable religious liberty required early Americans to pay attention to the definition of religious liberty. Americans had once tended to understand religious liberty as conditional upon government interests, and they therefore had not felt obliged to worry much about its definition, for they could use the conditions to protect government interests even when the definition of the liberty was too broad. In the late eight-

[37] Samuel Stillman, A Sermon 11 (1779). This character of religious liberty was sufficiently conventional that Alexander Addison later could take advantage of it to argue for the constitutionality of the alien and sedition acts: "The right of conscience is a natural right of a superior order for the exercise of which we are answerable to God. The right of publication is more within the control of civil authority, and was thought a more proper subject of general law." Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly (1800), *in* 2 American Political Writing During the Founding Era, supra note 34, at 1055, 1090.

[38] See Hamburger, Separation, supra note 27, at 76–78; Hamburger, Exemption, supra note 13, at 942; Hamburger, Equality, supra note 28, at 357–60.

eenth century, however, as Americans increasingly thought of religious liberty as inalienable, they began to draft or at least to conceptualize their guarantees of religious liberty more tightly, and in some of the constitutions in which Americans took this care, they guaranteed religious liberty without reference to government interests. With a guarantee of religious liberty that did not suggest too narrow or too broad a definition—that protected both the freedom of individuals and the interests of government—Americans could discard governmental conditions. This is what Americans did in the First Amendment, and their solution provides a benchmark for observing how more became less.

In effect, Americans had to translate the philosophical theory of religious liberty into a legal reality. In their arguments for religious liberty, dissenters and others had argued that religious liberty was not defined or conditioned in terms of government interests and yet also that it posed no threat to these interests.[39] Jefferson, for example, denied that religion had civil consequences: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[40] It was an optimistic thought. The difficulty was that Americans could pursue this perspective and abandon the conditions on religious liberty only to the extent that they could extract a practical legal right from this idealized religious freedom, which supposedly held no dangers for civil society or government.

In particular, the awkwardness was to move from belief to behavior, for Americans had to determine what conduct—what external, physical action—was part of the basic religious liberty. This most essential religious liberty was not the freedom from an establishment of religion—the freedom from government support for another person's religion—but rather was a freedom of one's own religion.[41] Throughout the seventeenth and eighteenth centuries, religious dissenters focused their arguments for this freedom on the element of belief, for by this means (as already observed) they could prove the inalienability of religious liberty. Yet this is hardly

[39] Hamburger, Separation, supra note 27, at 76–78.
[40] Jefferson, supra note 24, at 159 (Query 17).
[41] Needless to say, each type of religious liberty could be viewed as part of the other. The distinction, however, remains useful.

to say that they confined their conception of religious liberty to belief. Accordingly, if English and American dissenters were to be persuasive, they had to resolve the complex question of which acts were part of religious liberty. As it happens, it was a problem to which religious dissenters and growing numbers of other Americans soon developed a remarkably elegant solution.

One approach (not the most elegant) that appeared in American constitutions was to guarantee a specified action—notably, worship. For example, in 1776 the North Carolina Constitution stated "[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences,"[42] and in its anti-establishment clause, the Constitution emphasized that "all persons shall be at liberty to exercise their own mode of worship."[43] Similarly, the New Hampshire Constitution in 1784 declared: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . ."[44]

This sort of constitutional assurance of a specified religious action was not entirely satisfactory, for it might be simultaneously too narrow and too broad. A guarantee of "worship" narrowly limited religious liberty to worship and consequently did not protect other religious actions that might be considered inalienable, let alone belief. At the same time, it broadly protected worship, even though some worship might be violent, immoral, and dangerous and thus well within the cognizance of civil government. Accordingly, the drafters of the North Carolina and New Hampshire constitutions felt obliged to retain clauses that protected government interests.[45]

A second approach similarly protected worship, but it tamed its guarantees of worship without alluding to government interests. In particular, it clarified the limited breadth of such guarantees by adding prohibitions on laws interfering with worship. For example, in 1776 the Pennsylvania Constitution declared "[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding," but shortly afterward it added that "no authority can or ought

[42] N.C. Const. of 1776, Decl. of Rights, art. XIX.
[43] Id. art. XXXIV.
[44] N.H. Const. of 1784, Bill of Rights, pt. 1, art. V.
[45] See infra note 50 and text accompanying notes 51–52.

to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience, in the free exercise of religious worship."[46] The Vermont Constitution of 1777 also adopted this kind of anti-interference clause.[47] Consequently, neither constitution needed a clause reserving the interests of government. These constitutions offered a religious liberty that was entirely uncontingent. Yet their patchwork solution—a combination of guarantees of worship and provisions against interference with worship—was awkward and potentially confusing.

As intimated by these constitutions, a third approach was to adopt a provision against laws that discriminated or imposed penalties. Such a provision forbade laws that discriminated or imposed penalties on grounds of religious differences (whether in worship or in religious profession, persuasion, or sentiment). In its various formulations, this sort of guarantee assured an equality under law. For example, the New York Constitution of 1777 forbade "discrimination."[48] Put another way, this was a freedom from penalties on religion. In the words of the Massachusetts Constitution, "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; or for his religious profession or sentiments."[49]

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[46] Pa. Const. of 1776, Decl. of Rights, art. II. The 1790 Pennsylvania Constitution broadened the anti-interference clause so that it concerned not merely worship but all religious liberty: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; . . . that no human authority can, in any case whatever, control or interfere with the rights of conscience . . . ." Pa. Const. of 1790, art. IX, § 3.

[47] Vt. Const. of 1777, Decl. of Rights, ch. I, art. III. See also an anti-interference clause without a guarantee of worship in Del. Const. of 1792, art. I, § 1.

[48] N.Y. Const. of 1777, art. XXXVIII. Whether worrying about penalties on the basic religious liberty or privileges for establishments, Americans often thought in terms of nondiscrimination, and the New York Constitution guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference"—a formulation in which the word "discrimination" protected the basic religious liberty and the word "preference" prevented an establishment. Id.

[49] Mass. Const. of 1780, Decl. of Rights, pt. 1, art. II. For other provisions against discrimination in worship or religious profession, persuasion, or sentiment, see Md. Const. of 1776, Decl. of Rights, art. XXXIII; N.H. Const. of 1784, Bill of Rights, pt. 1, art. V; Pa. Const. of 1790, art. IX, § 3; Pa. Const. of 1776, Decl. of Rights, art. II; S.C.

The drafters who adopted this third approach could have abandoned the governmental qualifications but did not do so—apparently because they had lingering suspicions of religious minorities. The second and third approaches allowed drafters to discard the conditions on religious liberty. As has been seen, when drafters adopted the second approach—guarantees of worship modified by anti-interference clauses—they took advantage of the opportunity to cast aside all conditions preserving government interests. Those, however, who pursued the third approach—that of antidiscrimination or antipenalty provisions—were not so bold, and it may be suspected that both their more careful definition of religious liberty and their retention of governmental qualifications stemmed from their residual fears of dissenters. Accordingly, conditions appeared not only in the states with simple guarantees of worship but also in some of the states in which the guarantees of religious liberty were drafted more carefully and conditions were unnecessary.[50]

Incidentally, in some constitutions, drafters feared the danger from religious minorities but were reluctant to impose the tradi-

Const. of 1790, art. VIII, § 1; Vt. Const. of 1786, Decl. of Rights, art. III; Vt. Const. of 1777, Decl. of Rights, ch. 1, art. III.

Another example may be the New Jersey Constitution, which stated: "That no person shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." N.J. Const. of 1776, art. XVIII. Although very similar to a guarantee of worship of the sort adopted in North Carolina and New Hampshire, the New Jersey provision subtly varies from them to emphasize that government could not deprive persons of their privilege of worship. This guarantee thereby may been designed to clarify that the right was a sort of freedom from penalties on worship. Certainly, this is how the government of the state interpreted the clause.

For a "no preference" clause that was aimed at establishment privileges but that perhaps could have been understood to prohibit discriminatory penalties, see Ky. Const. of 1792, art. XII, § 3.

[50] As might be expected, the constitutions that imposed traditional conditions on religious liberty tended to be in states in which establishment forces influenced the drafting—indeed, where they obtained constitutions that permitted establishments. One such constitution was that of Massachusetts. After providing against penalties on an individual's worship or religious sentiments, it added the condition: "provided he doth not disturb the public peace or obstruct others in their religious worship." Mass. Const. of 1780, Decl. of Rights, pt. 1, art. II. Similarly, Georgia, Maryland, and New Hampshire adopted conditions. Ga. Const. of 1777, art. LVI; Md. Const. of 1776, Decl. of Rights, art. XXXIII; N.H. Const. of 1784, Decl. of Rights, pt. 1, art. V. Like Massachusetts, these were among the states with constitutions that allowed establishments.

tional governmental conditions, and they therefore, instead, added interpretive provisos. For example, as already seen, the North Carolina Constitution of 1776 guaranteed the "unalienable right to worship" and accordingly had to protect government interests, but it did so by regulating interpretation.[51] In particular, in its section that forbade an establishment, the Constitution restated that "all persons shall be at liberty to exercise their own mode of worship:—*Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment."[52] This sort of interpretive proviso was in the form of a condition, but rather than limit access to religious liberty, it assured a safe definition of it by precluding a dangerous interpretation. Even the constitutions with interpretive caveats, however, still measured religious liberty in terms of government interests and thus fell short of the inalienability insisted upon in arguments for religious liberty.

The fourth and the most elegant approach to guaranteeing the basic religious liberty was to assure the "free exercise of religion." This solution was adopted in 1791 by the First Amendment to the U.S. Constitution, and it will be the foundation for observing how more became less.[53] Earlier research has pointed to the abundant evidence that the First Amendment's free exercise clause did not guarantee a constitutional right of exemption.[54] In addition, there is reason to think that clause was unconditional and that it alluded to a type of freedom from discrimination or penalty.

The words themselves are a good starting point, particularly their reference to Congress and its laws. In contrast to the First Amendment, which specified limitations on the power of Congress,

[51] N.C. Const. of 1776, Decl. of Rights, art. XIX.

[52] Id. art. XXXIV. Of course, like traditional conditions, this sort of interpretive clause was merely optional in constitutions with antidiscrimination or antipenalty provisions. For example, in New York, anti-Catholic framers sought a traditional condition on religious liberty, and more liberal framers sought an unconditional freedom. The convention compromised on a guarantee of "the free exercise and enjoyment of religious profession and worship, without discrimination or preference . . . *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. of 1777, art. XXXVIII; see Hamburger, Exemptions, supra note 13, at 924–26. For a similar proviso, see S.C. Const. of 1790, art. VIII, § 1.

[53] U.S. Const. amend. I.

[54] Hamburger, Exemption, supra note 13, passim.

the state guarantees of the free exercise of religion focused on the right of individuals. In 1776, the Virginia Bill of Rights stated that "all men are equally entitled to the free exercise of religion according to the dictates of conscience."[55] The 1777 and 1789 Georgia constitutions adopted a similar guarantee, which (in the 1789 wording) declared that "[a]ll persons shall have the free exercise of religion."[56] The First Amendment, however, provided that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[57] This amendment spelled out some assumptions that the Virginia and Georgia provisions merely took for granted: It specified that it forbade a type of law—and not merely a law that affected the free exercise of religion, but rather a law that prohibited such exercise.[58]

Although this is not the place for a detailed history of the First Amendment's free exercise clause, the antiprohibition understanding of the clause certainly fits with the well-known tendency of dissenters to argue for equal rights. Whether in arguments for the basic religious liberty from penalties or in arguments against establishments and their special privileges, dissenters emphasized that what they opposed was discrimination.[59] Summarizing the arguments of dissenters, the prominent Baptist minister Isaac Backus

[55] Va. Const. of 1776, Bill of Rights, § 16.

[56] Ga. Const. of 1789, art. IV, § 5; Ga. Const. of 1777, art. LVI.

[57] U.S. Const. amend. I.

[58] Of course, it probably was only by happenstance that the amendment revealed this assumption, for in using the word "prohibiting" here rather than "abridging," the drafters of the First Amendment were in all likelihood focusing on another concern, the distinction between what could be called moral and physical liberty. See infra note 64.

The First Amendment was written in a way that does not lend itself to arguments for a constitutional right of exemption from general laws. A claim of exemption is a demand that a court hold a law unconstitutional as applied to an individual with religious objections. Yet the words "Congress shall make no law" frames First Amendment questions in an unusual all or nothing manner. Rather than forbid the application of a law that prohibits the free exercise of religion, these words suggest that Congress can make no such law. Accordingly, a court apparently cannot, on the basis of the First Amendment, simply exempt an individual from the application of a law. If Congress makes a law that in any way prohibits the free exercise of religion—even if only through the law's application to one individual—the entire law would seem to be vulnerable. Thus, the First Amendment is a singularly improbable foundation for claims of exemption. See Hamburger, Exemption, supra note 13, at 936–38.

[59] Thomas E. Buckley, Church and State in Revolutionary Virginia, 1776–1787, at 6 (1977); H. J. Eckenrode, Separation of Church and State in Virginia 41 (1971); Hamburger, Equality, supra note 28, at 297, 336–67.

declared: "I challenge all our opponents to prove, if they can, that we have ever desired any other religious liberty, than to have this partiality entirely removed."[60] Against the background of such demands, it is not surprising that free exercise provisions seem to have been prohibitions on laws that imposed penalties or discriminatory constraints on religion.[61]

This understanding of the free exercise guarantees suggests much about their capacity to be unconditional. If, as proposed here, the Virginia, Georgia, and federal free exercise clauses referred to a freedom from penalties on religion, then these provisions could generally protect religious conduct as well as belief, without in any way preventing civil government from legislating to protect its civil or secular interests. As a result, the free exercise of religion—preeminently that guaranteed by the First Amendment—did not need to be contingent on the concerns of government.

What is essential here is not the precise definition of the right of free exercise protected by the First Amendment, but rather that the practicability of this right allowed Americans to secure it without qualification. Georgia's first constitution, in 1777, promised a free exercise of religion but still added a condition: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[62] In contrast, in 1776 the Virginia Bill of Rights had rested on the assumption that there was no need to preserve government interests with conditions or interpretive provisos, and it therefore stated simply that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[63] Similarly, in 1789, Geor-

[60] Isaac Backus, An Appeal to the People (1780), *in* Isaac Backus on Church, State, and Calvinism 385, 396 (William G. McLoughlin ed., 1968).

[61] A brief comparison reveals the generality of the guarantees of free exercise of religion. Whereas some antipenalty and antidiscrimination provisions focused on worship, on profession, persuasion, or sentiment, or on some combination of these, the provisions for the free exercise of religion did not stipulate either an act or a belief, but, instead, generally concerned religion. Moreover, whereas some antipenalty and antidiscrimination provisions concerned an individual's worship or religious sentiment and thus apparently forbade constraints imposed on the basis of religious differences, the free exercise provisions seem more broadly to have forbidden laws imposing constraints on the basis of religion.

[62] Ga. Const. of 1777, art. LVI. It continued: "and shall not, unless by consent, support any teacher or teachers except those of their own profession." Id.

[63] Va. Const. of 1776, Bill of Rights, § 16.

gia's second constitution and, shortly afterward, the First Amendment to the U.S. Constitution adopted this sort of unqualified guarantee of free exercise. The meaning of the First Amendment's free exercise clause has been much disputed, but one conclusion is very clear. The First Amendment adopted neither the traditional governmental conditions nor even the interpretive provisos. Like the Virginia Bill of Rights and the second Georgia Constitution, it apparently rejected government interests as a condition or other measure of the free exercise of religion.[64]

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[64] Another point of view has been taken by Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1461–66 (1990). See, however, Hamburger, Exemption, supra note 13, at 932–47.

Incidentally, in distinguishing between what Congress could not *prohibit* and what it could not *abridge*, the First Amendment seems to have recognized the unique inalienability of the free exercise of religion. Eighteenth-century Americans often distinguished between physical freedom and moral or non-injurious freedom. If a physical natural power (such as speech, press, or assembly) was subject already in the state of nature to natural law and its moral constraints on the injurious use of the freedom, then this physical freedom was not *abridged* by the subsequent institution of civil laws that followed natural law in prohibiting the injurious use of the freedom. In addition, of course, the moral or non-injurious liberty was not *abridged* by such laws. Hamburger, Natural Rights, supra note 33, at 945–48. Accordingly, in stating that Congress shall make no law *abridging* the freedom of speech, press, and assembly, the First Amendment did not reveal whether it was referring to the physical or the moral liberty. There was no reason for the Amendment to focus on only one type or the other, and it therefore did not do so. In contrast, however, when the Amendment stated that Congress shall make no law *prohibiting* the free exercise of religion, it clearly, at first glance, referred to the moral liberty. If a physical natural freedom or power usually included a power to injure, then this injurious or immoral part of the physical freedom needed to be prohibited by civil laws, and therefore it did not ordinarily make sense to say that no law shall *prohibit* a physical freedom. The one exception, however, was the free exercise of religion, which was the only natural right that allegedly was entirely the same in civil society as in the state of nature. In this sense, the physical natural liberty of free exercise was no greater than the moral liberty, and therefore in forbidding laws *prohibiting* the free exercise of religion, the First Amendment used a word that conventionally referred only to the moral freedom but that in this instance could also have referred to a coterminous physical freedom. Thus, in singling out the free exercise of religion and stating that Congress shall make no law *prohibiting* it, the First Amendment apparently took note of the distinctive character of this right.

This distinction between abridging and prohibiting suggests that the First Amendment took two slightly different approaches to legislation that limited natural freedom. Apparently, Congress could make laws punishing at least some types of injury done through speech, press, and assembly and to this degree could directly constrain speech, press, and assembly, but Congress could not make laws punishing even an apparently injurious exercise of religion. For example, in modern terms, a law could forbid the use of telephone wires for conspiring to commit fraud, but it could not forbid the use of prayer meetings for conspiring to commit fraud.

The First Amendment thus guaranteed a sort of religious liberty that did not seem to threaten government interests and that therefore could be unconditional—indeed, utterly unqualified. Americans were well aware of the English, colonial, and state guarantees of religious liberty that conditioned religious liberty upon governmental concerns. They were also increasingly familiar with the state guarantees of religious liberty that more moderately required interpretation compatible with the interests of government. Americans, however, took another approach in the constitutions of Pennsylvania, Vermont, Virginia, and eventually Georgia and the United States.[65] These documents—most notably, the U.S. Constitution—recognized the peculiarly inalienable character of religious liberty. They guaranteed religious liberty in slightly different ways, but they all took for granted definitions of religious liberty that were compatible with government interests. Accordingly, they were able to protect religious liberty without qualification—without any condition, interpretation, or other measure in terms of government interests.

Some commentators, including eventually Jefferson, wrote that "the idea is quite unfounded, that on entering into society we give up any natural right." Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), *in* 11 The Works of Thomas Jefferson 533, 534 (Paul Leicester Ford ed., 1905). This, however, was a deliberate attempt to play upon more conventional assumptions, and in substance, it differed little from them. In conventional terms, a portion of natural liberty (especially the injurious portion of the physical liberty) was sacrificed, and the remainder (constituting at least most of the moral portion) was thereby protected. In Jefferson's attractive formulation, the moral natural liberty was not sacrificed. See Hamburger, Natural Rights, supra note 33, at 946 n.104. Jefferson's formulation sounded as if it were a radical rejection of conventional thought only because he omitted to specify that he was referring to the moral or non-injurious liberty.

[65] See Pa. Const. of 1776, Decl. of Rights, art. II; Vt. Const. of 1777, Decl. of Rights, ch. I, art. III; Va. Const. of 1776, Bill of Rights, § 16, at 1908, 1909; Ga. Const. of 1789, art. IV, § 5; U.S. Const. amend. I. Arguably, one could add to the list the 1778 South Carolina Constitution, which included in its guarantee of religious liberty a stipulation that "No person whatsoever shall speak anything in their religious assembly irreverently or seditiously of the government of this State." S.C. Const. of 1778, art. XXXVIII. This was not, however, stated as a condition.

For the period immediately after 1791, see also Del. Const. of 1792, art. I, § 1; Ky. Const. of 1792, art. XII, para. 3.

II. BOTH MORE AND LESS

The liberty that once was peculiarly inalienable—that once was not conditioned or measured by government interests—has become contingent on these interests. Like many other rights, it is assumed to be the subject of a "balancing test," in which the right is weighed against the needs of government. How the most unconditional of rights came to be understood in this conditional manner reveals much about the precariousness of religious liberty and about the possibility that more can be less.

A. The Contingency of Free Exercise in the Courts

Notwithstanding that the First Amendment's free exercise of religion was once the most inalienable and unqualified of rights, it has come to seem contingent on the concerns of government. According to American courts, government can "burden" the free exercise of religion, if it does so on the basis of a compelling interest.

The contingency of the free exercise of religion has become apparent primarily in exemption cases. In this sort of case, an individual with a religious objection to a general, secular law claims a constitutional right under the Free Exercise Clause to be exempt from the law.

The Supreme Court first clearly accepted an exemption argument in 1963 in *Sherbert v. Verner*.[66] Sherbert was a Seventh Day Adventist who, on account of her religion, refused to work on Saturdays and therefore was fired by her employer.[67] Subsequently, she declined other job opportunities that would have required her to work on Saturdays, and the South Carolina Unemployment Commission denied her unemployment benefits on the ground that she did not have "good cause" to refuse the available positions.[68] Although the South Carolina unemployment law that established the good cause standard did not impose constraints on the basis of religion, and although the law created government benefits rather than constraints, the Court held that the denial of benefits to Sherbert violated the Free Exercise Clause.[69] This decision in favor of a

[66] 374 U.S. 398 (1963).
[67] Id. at 399.
[68] Id. at 399–401.
[69] Id. at 401–02.

free exercise right of exemption became the basis for occasional later exemption cases, until the Court in 1990, in *Employment Division v. Smith* reconsidered its exemption doctrine.[70] Even though in *Smith* the Court attempted to distinguish *Sherbert* and the other cases in which it had granted free exercise exemptions, it strongly suggested it would no longer ordinarily accept such claims.[71] A constitutional right of religious exemption, however, continued to be popular both on and off the bench. If a free exercise right of exemption seemed important to many before *Smith*, it seemed all the more essential afterward.

The way in which judicial arguments for a right of exemption have depicted the free exercise of religion as conditional can be observed since prior to *Sherbert*. For example, in 1960 in *Braunfeld v. Brown*, Jewish shopkeepers objected to the enforcement of a Sunday closing law.[72] Although the Supreme Court rejected their claims, Justice Brennan defended what he conceived to be the shopkeepers' free exercise right of exemption, and in so doing, he acknowledged that this right could have been legitimately denied if there had been a sufficiently weighty government interest: "What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?"[73] In 1963, in *Sherbert*, the Court felt it "must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[74] Similarly, in 1972, in *Wisconsin v. Yoder*, the Court held that the Old Order Amish had a constitutional right to be exempt from a

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[70] 494 U.S. 872 (1990).

[71] Id. at 876, 888–90.

[72] 366 U.S. 599 (1961).

[73] Id. at 614 (Brennan, J., concurring in part and dissenting in part). Interestingly, Brennan understood the unique character of religious rights: "The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: '. . . the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . .'" Id. at 616 (Brennan, J., concurring in part and dissenting in part) (quoting I Annals of Cong. 730 (1789) (statement of Rep. Daniel Carroll of Maryland)).

[74] *Sherbert*, 374 U.S. at 406. A page later, the Court repeated its thoughts about what might "be sufficient to warrant a substantial infringement of religious liberties." Id. at 407.

state law requiring children to attend school up through age sixteen—two years longer than was compatible with Amish beliefs.[75] The Court stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[76] Such assertions have become commonplace, as when in 1983, in *Bob Jones University v. United States*, the Court denied a claim of exemption with the observation that "'[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'"[77] Similarly, in 1990 in *Smith*, Justice O'Connor explained in her concurrence that "'[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"[78]

These pronouncements are curiously stated. Their deference to the weight of government interests—what is called a "balancing" of interests—is so familiar as to be mundane in constitutional law. Yet the Court's statements strike an odd note when it is considered that a constitutional right is at stake and that the free exercise of religion was the one freedom that supposedly could not in any way be sacrificed to the interests of civil society or government. The religious dissenters and their associates who struggled for religious liberty in America insisted that the basic religious liberty was peculiarly independent of the concerns of civil society and government. Now, however, the Court envisions the free exercise of religion as

[75] 406 U.S. 205 (1972).

[76] Id. at 215.

[77] 461 U.S. 574, 603 (1983) (quoting United States v. Lee, 455 U.S. 252, 257–58 (1982)).

[78] *Smith*, 494 U.S. at 895 (O'Connor, J., concurring) (quoting Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part). The requirement that the law be "narrowly tailored" is an attempt to limit the dangers of the compelling governmental interest test and therefore is treated here merely as a part of this test.

State courts have apparently taken the same path as federal courts. For example, in *Witters v. State Commission for the Blind*, the Washington Supreme Court cited *Sherbert* for the proposition that "[a] state action is constitutional under the free exercise clause if the action results in no infringement of a citizen's constitutional right of free exercise or if any burden on free exercise of religion is justified by a compelling state interest." 771 P.2d 1119, 1122–23 (Wash. 1989).

limited by compelling government interests and even as conditional upon such interests.[79]

B. Mere Definition Rather than Condition?

What the Supreme Court treats as a condition could also be viewed as a definition. Notwithstanding the Court's own words, one could make sense of its apparently conditional conception of the right of free exercise by assuming that its balancing test merely defines this right. If the balancing test were considered part of the definition of the right rather than a condition on it, then perhaps the right would not be at risk. In other words, one could tuck government interests within the definition of the free exercise of religion and thereby could avoid having such interests burden, limit, or otherwise sacrifice this right.[80]

From such a perspective, it may be supposed that the justices are guilty of nothing more serious than a misnomer. To be sure, the justices say that the right of free exercise is subject to burdens and even sacrifices, encroachments, and infringements.[81] Yet if the justices' casual use of words leads them to confuse the right and the

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[79] The tendencies observed here in cases can also be seen in legislation, particularly that which "restores" the free exercise right to a conditional status. See, e.g., The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2001), and The Religious Land Uses and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2001).

Incidentally, the constitutionality of such statutes remains an interesting question—not merely because of the U.S. Constitution's enumeration of congressional powers but also because of the Establishment Clause. An individual statute exempting religious objectors from its constraints and thus relying on the exemption to define the persons having duties under the statute is not ordinarily a law respecting an establishment of religion. This, however, is less clear as to a statute that frees religious objectors from the constraints imposed by a range of other laws. By providing a single exemption from a series of other laws, such a statute grants these objectors an unequal privilege that extends beyond the definition of the statute's duties and thus gives religious objectors and their beliefs a more substantially elevated status. A statute that excuses persons on religious grounds from a class of other laws may therefore be a law respecting an establishment of religion.

[80] The question is not whether government or social interests should be considered, but when and how they are considered. Are they an element of the definition of a right? Are they a condition to the availability of a right? Or should they, instead, be accommodated earlier, in decisions about the definition of the right?

[81] For "sacrifice" and "encroachment," see *Smith*, 494 U.S. at 895 (O'Connor, J., concurring). For "infringement" or a power to "infringe," see id. at 899 (O'Connor, J., concurring); *Sherbert*, 374 U.S. at 407; Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

activity protected by the right, perhaps one should charitably restate their pronouncements about religious freedom in terms of the practice of religion. For example, in *Rader v. Johnston*, the U.S. District Court Magistrate Judge David L. Piester carefully explained that "if a law is not neutral or of general applicability, the government may justify its infringement upon the particular religious practice only by demonstrating that the infringement is narrowly tailored to further a compelling governmental interest."[82] Similarly, in *City of Boerne v. Flores*, Justice Kennedy described the *Sherbert* balancing test as it could have been applied in *Smith*—as a test in which "we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest."[83] In this way, judges can be understood as considering whether the government interest justifies a burden on a particular religious practice rather than on the right. If judges balance the government interest against the religious practice to determine the extent of the right, they can enforce the right unconditionally.

Yet these word games do not alter the legal and sociological realities. Most obviously, a change of words does not resolve the underlying problem for religious liberty. Even if all judges are imagined to be balancing government interests against religious practices rather than against religious liberty, this liberty has come to be measured by government interests. In an older conception of the free exercise of religion—that which prevailed in the adoption of the First Amendment—the balance of various interests entered into the justification and meta-analysis of the Amendment's guarantee of free exercise of religion but did not become part of the definition of this right or the reasoning used to apply it. In contrast, the modern conception of free exercise is defined in terms of government interests, and its application requires an evaluation of such interests.[84] Whether government interests are lined up against religious liberty or against religious practices, such interests have become the yardstick of a right once thought so peculiarly personal

[82] 924 F. Supp. 1540, 1550 (D. Neb. 1996).
[83] 521 U.S. 507, 513 (1997).
[84] The necessity for case by case determinations of government interests is pointed out by Justice O'Connor in her concurrence in *Smith*. See *Smith*, 494 U.S. at 899 (O'Connor, J., concurring).

and inalienable that it could never be submitted to government or measured by its concerns. However the modern analysis is recharacterized, government interests have intruded into a place where they once seemed not to belong.

Such interests, moreover, have become not merely part of the definition of the right of free exercise, but a condition on its availability. The use of a balancing test within the definition of a right maintains little more than the illusion of an unconditional right, particularly if the balancing of interests is done too directly. In contrast to balancing tests, formal doctrines channel any balancing of government interests through more narrowly legal tests and thus keep any direct balancing at a meta-level. The direct use of balancing tests, however, undermines this effect of formal doctrines by requiring courts, after applying their doctrines, to decide about a right on the basis of government interests.[85] Consequently, when the balancing of interests becomes direct and is no longer confined within the channels of more formal legal doctrines, there is a danger that this balancing becomes, in reality, a means of denying the right and thus a condition. This seems to have occurred in free exercise cases.

In the end, the recharacterization of balancing tests as definitions is unpersuasive, because, in fact, there is nothing culturally or sociologically accidental about the conditional character of many rights. On the contrary, the expansiveness of liberty in America suggests that a conditional vision of American rights is almost inescapable. Americans are relatively individualistic, and (for a range of social, cultural, and political reasons) they expect a broad, even open-ended freedom. Moreover, because of the somewhat egalitarian or "democratic" tendency of America, a simple, generous, bold conception of a right is apt to be especially accessible and popular.[86] In these circumstances, Americans tend to envision their rights with remarkable breadth, and as a consequence, they systemati-

[85] Somewhat similarly, in *Smith*, Justice Blackmun worried about the overbearing weight of highly generalized "fundamental concerns of government" (such as "public health and safety, public peace and order, defense, [and] revenue") in relation to individual interests. Id. at 910 (Blackmun, J., dissenting). He observed that "'[t]o measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.'" Id. (quoting J. Morris Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330 (1969)).

[86] See Alexis de Tocqueville, 2 Democracy in America 13–17 (Knopf 1987) (1835).

cally render them contingent. Less attractively, the judges who have to reconcile diverse cases can most easily avoid the onerous work of accurately generalizing about their decisions by assuming the broadest definition of a right and then explaining the nonconforming cases in terms of countervailing government interests. The judges, however, are not cynical. In a socially fragmented, post-Enlightenment world, in which verity seems to be located in the tensions among conflicting truths, Americans have much occasion to perceive liberty broadly and to consider it necessarily at odds with order. Amid the depth of these reasons for perceiving rights as expansive and inevitably in tension with government interests, it is not fortuitous that the Supreme Court subjects rights to governmental conditions. No recharacterization of a condition as merely part of the definition of a right can alter the underlying sociological and cultural reality: that Americans tend to view rights as expansive and therefore as contingent on the interests of government. In this context, it is only to be expected that the right of free exercise seems both broad and conditional.

C. Historical Explanations

What were the intellectual sources for the conditional conception of the free exercise of religion? The Supreme Court clearly has drawn its contingent understanding of the right from several ideas or doctrines.

In general, the Court derives its notion of balancing from the analysis of the legal realists, who viewed rights as social interests. Considered as mere interests, rights are subject to adjustment and even candid diminution, and conflicting interests therefore can be weighed or balanced against each other in the course of adjudications. During the twentieth century, when judges accepted this somewhat sociological explanation of doctrine as a part of legal doctrine, they became increasingly comfortable importing policy considerations into their conceptions of rights. In *Cantwell v. Connecticut* in 1940, the Supreme Court first came close to recognizing a free exercise right of religious exemption, and already in this

case, the Court said that such a decision "demands the weighing of two conflicting interests."[87]

More specifically, the Court borrowed its free exercise balancing analysis from its speech cases. In its first case recognizing a constitutional right of exemption, *Sherbert*, the Court quoted one of its recent speech cases, *NAACP v. Button*, to argue that "either . . . [the appellant's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or . . . any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest.'"[88] Similarly, the Court quoted the 1945 case of *Thomas v. Collins* to the effect that "[o]nly the gravest abuses, endangering paramount

[87] 310 U.S. 296, 307 (1940). In addressing the conviction of Cantwell for the common law offense of inciting a breach of the peace, the Court seems to have sidestepped any exemption issue by interpreting the offense in a manner that avoided a violation of the U.S. Constitution. The Court concluded that:

> [I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Id. at 311. The Court may have been tempted to hold that the application of the offense to Cantwell violated the First Amendment, but it seems to have interpreted the common law to avoid reaching such a conclusion. The balancing analysis was so much on the mind of the justices that they extended it to their application of the U.S. Bill of Rights to the states, thus reducing the Constitution's allocation of federal and state power to a matter of mere interests:

> The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders.

Id. at 307.

In *Smith*, Blackmun writes that "a state statute that burdens the free exercise of religion. . . . may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting). At the end of his opinion, he concludes that "Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion." Id. at 921. Incidentally, Justice Blackmun cites Roscoe Pound, "A Survey of Social Interests," 57 Harv. L. Rev. 1, 2 (1943) in *Smith*. Id. at 910 (Blackmun, J., dissenting).

[88] *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

interests, give occasion for permissible limitation."[89] In these underlying speech cases, the Court had acknowledged that government interests could outweigh the First Amendment right of freedom of speech, and in its free exercise cases, the Court seems to have followed its own dubious example.

Recently, the Court has further justified its free exercise balancing on the basis of its equal protection doctrine. The justices appropriated their equal protection analysis when they understood Establishment Clause questions in terms of "neutrality," and they made a similar appropriation when they spoke of free exercise "neutrality."[90] For example, in his opinion for the Court in *Church of the Lukumi Babalu Aye v. City of Hialeah*, Justice Kennedy observed that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can . . . find guidance in our equal protection cases."[91]

Equal protection doctrine—like that concerning freedom of speech—is attractive in free exercise cases because it allows the justices to believe that they have given the fullest possible protection to the right of free exercise.[92] For example, in her concurrence in *Smith*, Justice O'Connor alludes to both equal protection and freedom of speech in order to take comfort in the compelling government interest test: "The compelling interest test effectuates the

[89] Id. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[90] Justice Harlan stated that "[n]eutrality in its application requires an equal protection mode of analysis." Walz v. Tax Comm'n of New York, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). There is reason to question whether notions of neutrality can be simply borrowed across constitutional clauses without cost to the distinctions drawn by the different clauses. See infra note 128.

[91] 508 U.S. 520, 540 (1993). The Court's sense of a need to rely upon its Fourteenth Amendment analysis is also evident from its allusion to "religious gerrymanders." Id. at 534.

[92] Not only judges but also academics have taken this view. For example, Edward McGlynn Gaffney, Douglas Laycock, and Michael W. McConnell argued for the Religious Freedom Restoration Act, on the ground that "[a]t a verbal level, the 'compelling' interest test is the strongest test in constitutional law. In the area where the test originated—invidious discrimination against racial minorities—the Supreme Court has not found the test satisfied in almost half a century." Edward McGlynn Gaffney, Douglas Laycock, & Michael W. McConnell, An Open Letter to the Religious Community, First Things, March 1991, at 44, 45–46. Although well aware that this test has not been as stringently applied in religion cases, these professors offered their assurance that, "[i]f taken seriously, the test would be more than strong enough to protect religious liberty." Id. at 46. Incidentally, in his 1998 testimony, McConnell seemed less concerned about the diminished level of scrutiny in religion cases. See infra note 102.

First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'"[93] Thus, "'[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"[94] Similarly, the Court in *Lukumi* assumes that the highest possible equal protection standard—strict scrutiny—is adequate for the Free Exercise Clause: "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[95]

Yet the very fact that this strict scrutiny balancing is useful for Fourteenth Amendment analysis suggests why such a test is peculiarly inapplicable to the First Amendment. Although the equal protection clause of the Fourteenth Amendment was adopted in response to racial inequalities, it does not prohibit inequalities specifically on the basis of race or any other single classification.[96] Accordingly, the Supreme Court has had to distinguish among different classifications and has adopted a scheme in which some are more "suspect" than others. Moreover, the Court has had to subject different types of classification to different degrees of "scrutiny," initially because the Equal Protection Clause did not specify any forbidden classification, but especially during the past half century because the clause has increasingly been understood to protect against not only unequal constraints on natural liberty but also un-

[93] *Smith*, 494 U.S. at 895 (O'Connor, J., concurring) (quoting *Yoder*, 406 U.S. at 215).

[94] Id. (quoting Bowen v. Roy, 476 U.S. 693, 728 (1986)); see also id. at 899. In *Bowen*, Justice O'Connor rejected a "legitimate public interest" test, which she said "relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." *Bowen*, 476 U.S. at 727.

[95] *Lukumi*, 508 U.S. at 546.

[96] Indeed, Congress rejected a proposal to prohibit discrimination specifically on the basis of race. Andrew Kull, The Color-Blind Constitution 67 (1992).

equal privileges from government.[97] Notable among these different degrees of scrutiny is "strict scrutiny," in which a particularly suspect classification (prototypically race) triggers a presumption against any nonneutral law, unless the law is justified by compelling state interests and is narrowly tailored to achieve them. Such an approach is well suited to an equality provision that does not identify the classifications it forbids and that increasingly concerns all types of rights, whether natural rights or privileges. This balancing approach, however, does not seem well suited to the Free Exercise Clause, which states that Congress shall not make any law prohibiting the free exercise of religion, and which thus specifies the forbidden ground for discrimination and focuses on constraints. The First Amendment in this way apparently protects free exercise regardless of government interests, and as a result, the application of a strict scrutiny balancing of interests, which is the height of Fourteenth Amendment analysis, actually lowers the protection for the First Amendment's free exercise of religion.

These intellectual antecedents—legal realism, free speech doctrine, and equal protection doctrine—are the primary sources of the Court's contingent concept of the free exercise of religion. Yet however clear these intellectual ancestors, a mere genealogy of ideas hardly explains why the Court came to adopt a balancing test in its free exercise cases.

In particular, if the free exercise of religion was the most inalienable of rights, why do so many judges and commentators find a contingent understanding of it so attractive? And why do they make this understanding so significant a part of free exercise doctrine? Certainly, the assumption that a right is ultimately defined by a balance of interests has become pervasive, and the widespread acceptance of so simple and overarching a view has made its application to the free exercise of religion not merely possible, but probable. Nonetheless, the popularity of balancing is not a full explanation. In addition, there also is a reason why some such approach—some means of making the freedom of religion contingent—became necessary in free exercise jurisprudence.

[97] For this distinction and its place in the history of the notion of equal protection, see Hamburger, Equality, supra note 28.

D. Expansion and Contingency

For more than half a century, growing numbers of Americans have argued for religious exemptions from general laws, and in defense of their expanded conception of the free exercise of religion, they have argued that this liberty is contingent—that it is unavailable where it conflicts with compelling government interests. To be sure, as already seen, there are other explanations of the contingent understanding of free exercise. Yet at the same time, the logic of the arguments for expanding this right has required that the right be described as subject to governmental interests, and this points to a connection between an expanded definition of a right and the need for government limitations on access.

The conditions on the expanded free exercise of religion have seemed particularly necessary because a claim of religious exemption does not have any obvious limit, other than the extent of an individual's belief. If an individual has a free exercise right to be exempt from laws on the basis of his religious objections, then he might have a constitutional right to escape the effect of any law. Clearly, such a right has an almost infinite potential to undermine the law, and therefore the right is hardly plausible without some condition. Accordingly, a free exercise right of religious exemption has seemed credible only if it is contingent—only if it can be denied when government has a "compelling interest."

That the enlarged right of free exercise is plausible only if contingent is apparent from the positions taken by a leading recent advocate of a constitutional right of exemption—Judge (then-Professor) Michael W. McConnell.[98] When arguing for a free exer-

[98] Incidentally, Judge McConnell and his co-authors suggest that growing regulation has expanded the grounds of conflict between secular law and religious belief and that this justifies an expanded conception of free exercise. Michael W. McConnell et al., Religion and the Constitution 101 (2002). Curiously, however, they do not distinguish state and federal regulation. As they surely would acknowledge, these types of regulation have different histories, and this is important, particularly as so many free exercise cases involve state rather than federal law. Already in the eighteenth century, the states (let alone the federal government in its enclaves, such as the District of Columbia) had extensive regulatory power, which the states often exercised with considerable vigor through their legislatures, their county courts, and their towns. Accordingly, the argument about regulation may require greater historical and conceptual refinement. At the very least, it is not clear why arguments about changes in regulation should be confined to the First Amendment's free exercise clause or why, if the most substantial such changes have taken place under the federal government, these

cise of "religiously motivated conduct," McConnell feels obliged to explain the "Limits on the Liberty."[99] He argues that historically this free exercise of religion was considered exempt from general laws "up to the point that such conduct breached public peace or safety," and he thus assumes that government interests defined rather than constrained the right.[100] In his historical argument, however, he sometimes uses language suggestive of a broader but contingent right, as when he discusses the circumstances in which "the government's interest is sufficiently strong to override an admitted free exercise claim."[101] In his arguments about religious liberty in the twentieth century, moreover, he bluntly says that religious liberty has to give way to compelling government interests—perhaps, even to less compelling "legitimate needs of government" under a mere "intermediate scrutiny."[102] Whatever the standard, "[t]he court must decide what reasons are constitutionally weighty enough to limit religious freedom."[103]

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changes should be relevant for the interpretation of the clause in its application to state governments.

[99] Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1461–66 (1990).

[100] Id. at 1462. For the historical inaccuracy of such views, see Hamburger, Exemptions, supra note 13, at 917–32.

[101] McConnell, supra note 99, at 1464.

[102] In support of the Religious Liberty Protection Act of 1998, McConnell testified to the Senate Judiciary Committee that government interests receive even greater consideration than might be apparent and that this should be reassuring:

> Frankly, the "compelling interest" test of RFRA [the Religious Freedom Restoration Act], like the "compelling interest test" of pre-*Smith* constitutional law, has been interpreted less rigorously than the words suggest. The compelling interest test, in practice, has been little more than intermediate scrutiny: the requirement that government action be narrowly tailored to serve an important governmental purpose. I am not sure that is all bad. Because freedom of religion includes "exercise"—meaning conduct—it is more likely to come into conflict with the legitimate needs of government than rights such as freedom of speech.

Religious Freedom Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary, 105th Cong. 93 (1998) (statement of Michael W. McConnell).

[103] McConnell et al., supra note 98, at 245. McConnell clearly is aware of the tension between, on the one hand, the traditional conception of religious liberty as a right not measured by governmental interests and, on the other hand, the governmental limitations on this liberty that are necessary to make his expansive view of the liberty plausible. For example, he writes:

Justice O'Connor's concurring opinion in *Smith* similarly illustrates the connection between an expansive definition of the free exercise of religion and the need to condition it. O'Connor adopts a conception of the free exercise of religion so broad as to include any religious belief or conduct motivated by it: "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[104] Accordingly, "a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion."[105] Summarizing her view, O'Connor declares:

> [T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.[106]

This is much too broad to be protected. Hence, the need for a condition. As Justice O'Connor explains, "an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms."[107]

> From the religious perspective, the scope of free exercise cannot be defined, *in the first instance*, by asking what matters the public is rightly concerned about. Religion involves itself in many matters of importance to the public. Free exercise must be defined, *in the first instance*, by what matters God is concerned about, according to the conscientious belief of the individual.

McConnell, supra note 99, at 1446 (emphasis added).

[104] *Smith*, 494 U.S. at 893 (O'Connor, J., concurring).

[105] Id. at 893 (O'Connor, J., concurring). At the end of the paragraph, O'Connor recognizes that many might hesitate to go so far, and she therefore offers a more moderate formulation: "It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns." Id. at 893–94 (O'Connor, J., concurring).

[106] Id. at 897 (O'Connor, J., concurring).

[107] Id. at 895 (O'Connor, J., concurring). Quoting *Cantwell,* Justice O'Connor almost reassuringly explains that government can "'not . . . unduly . . . infringe the protected freedom.'" Id. at 899 (O'Connor, J., concurring) (quoting *Cantwell*, 310 U.S. at 304).

E. The Absolute Right of Religious Belief

The justices understand that religious liberty has long been considered distinctively "absolute" (to use their term). Therefore, the justices—particularly those who defend a constitutional right of exemption—go out of their way to acknowledge the absolute character of at least one element of the free exercise of religion: belief. By emphasizing, however, that belief is absolute, they justify a very different conclusion about conduct.

The Court relies upon the absolute protection of religious belief as the foundation for its merely contingent protection of conduct motivated by such belief. In 1878 in *Reynolds v. United States*, the Supreme Court distinguished religious beliefs from practices to suggest that the latter were subject to regulation, regardless of religious objections.[108] In 1940, however, in *Cantwell*, the Court shifted its emphasis. It stressed that belief was absolute but did not indicate that conduct could always be regulated—thereby perhaps leaving room for a balancing of interests with respect to conduct: "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[109] Twenty years later (with citations to *Reynolds* and *Cantwell*), the Court in *Braunfeld* again espoused an absolute understanding of belief and this time more explicitly acknowledged a contingent freedom of religious conduct: "The freedom to hold religious beliefs and opinions is absolute. . . . However, the freedom to act, even when the action is in accord

See also the Court's pronouncement in *Yoder*, 406 U.S. at 220, that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."

Examples of this sort of reasoning can be found throughout federal and state court decisions. For example, in 1975, when the Tennessee Supreme Court upheld the application of the state's snake handling statute, the court explained that "[t]he right to the free exercise of religion is not absolute and unconditional. . . . At some point the freedom of the individual must wane and the power, duty and interest of the state becomes compelling and dominant." Swann v. Pack, 527 S.W.2d 99, 111 (Tenn. 1975). The court also said: "Essentially . . . the problem becomes one of a balancing of the interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate." Id.

[108] 98 U.S. 145 (1878).

[109] *Cantwell*, 310 U.S. at 303–04.

with one's religious convictions, is not totally free from legislative restrictions."[110] Thus, some actions were protected because they were the object of religious convictions—a position to which the Court finally gave effect in *Sherbert* in 1963. In this case, the Court declared that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."[111] These beliefs were absolutely protected, and as a result, the door was left open for a conditional protection of religiously motivated *conduct*.

In fact, the historically inalienable constitutional right of free exercise was not merely a freedom from laws regulating belief—a narrow, interior freedom of religious thought. Instead, as specified in the First Amendment, it was more generally a freedom from laws prohibiting the free exercise of religion. In effect, it was a freedom from penalties—a freedom from laws imposing constraints on Americans on the basis of their religion. This more complete free exercise of religion was often justified in terms of belief, but it included much conduct, and it included conduct in a way that did not necessitate conditions or other governmental measures of the freedom.[112]

The judicial advocates of exemptions, however, have had reason to embrace the much narrower conception of the absolute right as mere belief. If the alternative to a free exercise right of exemption is a mere freedom of religious belief, then it seems clear that the free exercise of religion must include at least some religiously motivated conduct. Proponents of constitutional exemptions therefore

[110] *Braunfeld*, 366 U.S. at 603 (citing *Cantwell*, 310 U.S. at 303–04, 306 and *Reynolds*, 98 U.S. at 166). The Court also said: "We do not believe that such an effect [that is, one resulting in economic disadvantage to some sects and not others] is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." Id. at 606–07.

[111] *Sherbert*, 374 U.S. at 402.

[112] In contrast to the modern commentators who talk about unconditional rights as "absolute," late eighteenth-century lawyers would have found this usage confusing. In particular, they were familiar with a rather different application of the word, which had been popularized by Blackstone. When discussing natural rights (that is, when discussing portions of the liberty enjoyed in the absence of government), Blackstone distinguished absolute rights from the relative—the absolute rights being those held by all individuals in the state of nature, and the relative being those held by only some persons (for example, under their contracts). 1 William Blackstone, Commentaries *119.

surmise that the freedom of religious belief carries over in a non-absolute way to the conduct motivated by belief. Tempted by this logic, these proponents sometimes refer back to the distinction between an absolute freedom of belief and a qualified freedom of conduct. For example, when Justice O'Connor concurred in *Smith*, she echoed *Reynolds* and *Cantwell* in her argument that "the freedom to act, unlike the freedom to believe, cannot be absolute."[113] On this basis, she adopted the openly conditional and breathtakingly broad conception of free exercise as "relief from a burden imposed by government . . . whether the burden is imposed directly . . . or indirectly."[114] The absolute protection of religious belief—an excessively narrow concept of the inalienable freedom—thus seems to justify an expansive but conditional right of conduct based on religious belief.[115]

F. Fratricide (or the Periphery Undermines the Core)

The expansion of the First Amendment right of free exercise has undermined its core. The First Amendment's free exercise of religion once was understood as an unqualified freedom from penalties imposed on the basis of religion, and the unconditional availability

[113] *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

[114] Id. at 897 (O'Connor, J., concurring). Following the words "imposed by government" O'Connor referred to a burden "on religious practices or beliefs." Id. In reasoning similar to O'Connor's, the District Court in *Rader* distinguished absolute freedom of belief from a conditional freedom of conduct: "[W]hile religious beliefs remain absolutely protected from government intrusion, the performance of or forbearance from an act that is otherwise prohibited or required by an individual's religious beliefs may be regulated by government officials so long as the law is not specifically aimed at impeding religious conduct." *Rader*, 924 F. Supp. at 1550. Having said this, the court broadly concluded that "if a law is not neutral or of general applicability, the government may justify its infringement upon the particular religious practice only by demonstrating that the infringement is narrowly tailored to further a compelling governmental interest." Id.

[115] Although the characterization of religious belief as absolute is important for justifying the conditional protection of conduct, it is not clear how significant it is once the protection of conduct is established. Having expectations of a single right of free exercise, even those who distinguish an absolute right of belief sometimes generalize about the right of free exercise in ways that suggest that the right as a whole is conceived as subject to government interests. See, e.g., Justice O'Connor's statements, supra text accompanying notes 105–06. Even if such statements are understood with the qualification that belief is absolute, this is only a small part of the free exercise right, and thus almost the entirety of free exercise is rendered conditional.

of this right was one of the preeminent achievements of eighteenth-century dissenters and their allies. Yet when twentieth-century Americans redefined the free exercise of religion to include a right of exemption from general laws, they had to qualify this otherwise too expansive right. They thereby ended up qualifying not merely the right of exemption, but also the basic freedom from discriminatory constraints. The need to balance the expansion of free exercise with compelling government interests rendered the right of free exercise generally subject to governmental conditions.

It should be no surprise that the qualified character of the periphery affected the previously unqualified core. In theory, the justices could have carefully distinguished between the two—between the freedom from penalties on religion and the expansive freedom of exemption from general laws. Yet both seemed aspects of the free exercise of religion, and they therefore almost inevitably were lumped together and explained as part of a single, unified notion of religious liberty. To have avoided this blending together of different types of "free exercise," the justices would have had to have been much more self-conscious about what constituted the core and what the periphery—about what was old and what new. In making this distinction, the justices might have had to have acknowledged some of the dangers of the modern balancing regime, in which rights are balanced interests rather than unconditional freedoms. The justices certainly would have had to have given up the satisfactions of a unified and simple account of the free exercise of religion.[116] In short, for those who understood a right of exemption as part of the free exercise of religion, it was practically unavoidable that there would be one concept of free exercise, and that it would be understood as conditioned or otherwise limited by government interests. The expanded portion of a right can be considered a distinct addition, but the expansion often ineluctably leads to a reconception of the right as a whole, and as a result, the conditions required on the periphery end up being also applied to the core.

[116] The sacrifice of a unified and simple concept often seems unattractive, particularly in the context of the U.S. Bill of Rights or any other situation in which a label (here "the free exercise of religion") has strong legal, political, or cultural significance. Incidentally, as a result of such contexts, the slippery slopes that may, in theory, be avoidable are often, in fact, not easily escaped.

As one might expect, advocates of a constitutional right of exemption usually characterize exemptions as part of a single concept of the free exercise of religion that implies a right of exemption. For example, Michael W. McConnell, John H. Garvey, and Thomas C. Berg merge free exercise penalties and exemption issues together in a single chapter of their recent casebook, and they make exemption seem a central implication of the Free Exercise Clause by framing the whole chapter in terms of "the idea that the Free Exercise Clause requires religious accommodation."[117] They thereby present the First Amendment's right of free exercise as a unified concept that substantially (and perhaps even primarily) requires exemptions. In so doing, however, they conceive of the right as a whole in a way that leaves it vulnerable to the interests of government.

The cost of such a conception of the free exercise of religion becomes evident when the Supreme Court analyzes laws that impose penalties on the basis of religion. These discriminatory legal constraints are no longer understood to be unconditionally prohibited. Instead, they are now viewed as permissible, as long as there is a compelling state interest and the law is narrowly tailored. In this way, the expanded definition of free exercise, which requires exemptions from general laws, has undermined the older, more essential, and completely unconditional freedom from religious penalties.

The changing conception of even the core free exercise right became evident in 1978 in *McDaniel v. Paty*.[118] In this case, the Supreme Court held that the provision of the Tennessee Constitution barring ministers of the Gospel from the state's House of Representatives violated the First Amendment's free exercise clause.[119] Drawing on its distinction between belief and conduct, the Court noted that "[i]f the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end."[120] The Court, however, concluded that "the Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest'"

[117] McConnell et al., supra note 98, at 102.
[118] 435 U.S. 618 (1978) (per Burger, C.J.).
[119] Id. at 629.
[120] Id. at 626.

and thus "is directed primarily at status, acts, and conduct."[121] In a footnote, the Court candidly explained that it adopted its narrow conception of what constituted a law penalizing belief precisely in order to leave much of the First Amendment right conditional: "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to vindicate compelling state interests."[122] Although the Court ultimately struck down the Tennessee provision, it did so only after considering whether there were state interests that might "overbalance" the free exercise claims.[123] In this way, the Court revealed its assumption that even penalties on religion—laws that discriminate on the basis of religion—might pass muster under the familiar balancing test.

In 1990 in *Smith*, the Supreme Court largely rejected free exercise exemption claims against "neutral" laws, and it therefore may be thought that the Court abandoned its notion that a compelling government interest could justify an infringement of the right of free exercise. Instead, however, the Court in *Smith* took a further step toward imposing the compelling government interest test on the core freedom from discriminatory legal constraints.

Although *Smith* largely rejected claims of exemption, it left in place the conditions developed in exemption cases, and it thereby suggested that such conditions applied even in cases not involving exemptions. In *Smith*, two individuals smoked peyote for religious reasons and were fired by their employer (a private drug rehabilitation organization).[124] The State of Oregon denied them unemployment compensation because they had been discharged for "misconduct," prompting them to allege that this denial violated their First Amendment right to the free exercise of religion.[125] The Supreme Court rejected this claim of religious exemption, and in so doing, the Court indicated it typically would no longer recognize a

[121] Id. at 627.

[122] Id. at 627 n.7.

[123] Id. at 628 (quoting *Yoder*, 406 U.S. at 215). Incidentally, *McDaniel* did not concern a constraint on natural liberty, and in this respect, it raises complex questions not present in more central free exercise cases.

[124] *Smith*, 494 U.S. at 874.

[125] Id.

free exercise right of religious exemption from a neutral, generally applicable law.[126] The Court's opinion, however—written by Justice Scalia—left open the possibility that the Court might continue to entertain free exercise exemption claims against some types of laws, including those that created "a system of individual exemptions."[127] In these instances, in which (at least by implication) the laws might not be neutral or generally applicable, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[128] More broadly, Scalia explained that "we strictly scrutinize governmental classifications based on religion."[129] These classifications were in sharp contrast to "generally applicable, religion-neutral laws," which "need not be justified by a compelling governmental interest."[130]

Thus, *Smith* confirmed earlier hints of what would become an extraordinary irony. Compelling government interest had been in-

[126] Id. at 890.

[127] Id. at 884; see also Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 2 (noting the opportunities for constitutionally required exemptions after *Smith*). Even more than the individualized exemptions, another post-*Smith* category of exemptions—that of so-called "hybrid" claims—seems of little value except as a rather strained explanation of past cases.

[128] *Smith*, 494 U.S. at 884. Through its general concept of "neutral," "generally applicable," or nondiscriminatory laws, the Court blurs the distinction between laws that constrain on the basis of religion and those that give privileges on such a basis, and the Court thus takes a step in the direction of using the Free Exercise Clause to prohibit an establishment of secular interests—precisely what the First Amendment did not do. In particular, the Court assumes that a law permitting individualized privileges on secular grounds—an establishment of secular things—operates as a prohibition on the free exercise of religion.

Yet it is difficult to justify the conclusion that individualized secular exemptions ordinarily become prohibitions on the free exercise of religion. What the law does with the combination of a general secular constraint and various secular exemptions, it could just as easily accomplish with a more complex secular constraint, and it is hardly likely to be suggested that this would not be "neutral."

Perhaps the Court is worried that an unusually wide range of secular exemptions from a general secular duty would at one point transform the duty into a constraint on religion. This danger, however, is present not merely when administrators create individualized exemptions, but whenever government grants exemptions, and therefore if this is the Court's concern, the focus on individualized exemptions is puzzling.

Perhaps, therefore, the Court is concerned about the discretion exercised by administrators who create individualized exemptions under unusually imprecise standards. This problem, however, extends far beyond religious liberty and therefore cannot be analyzed narrowly in terms of the First Amendment.

[129] Id. at 886.

[130] Id. at 886 n.3.

troduced in exemption cases as a condition on claims against nondiscriminatory laws. Now, however, such an interest became a condition on the most central free exercise claims—those against discriminatory legal constraints. Why? The condition necessitated by the exemption claims against nondiscriminatory laws had been generalized as a condition in all free exercise cases, and so when *Smith* largely rejected exemption claims against nondiscriminatory laws, the condition remained in place with respect to discriminatory laws.

The danger intimated by *McDaniel* and *Smith* became more clearly evident in 1993 in *Lukumi*.[131] According to the Supreme Court, *Lukumi* concerned laws directly penalizing religion—laws constraining persons on the basis of their religion. The city had adopted several ordinances, one of which, for example, prohibited the "sacrifice" of any animal—sacrifice being defined as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."[132] It is possible that the phrase "ritual or ceremony" referred only to religious events, and if so, the Hialeah ordinance should have been considered a law that penalized religion. The phrase, however, may not have referred specifically to religious events, and on this assumption, the Court held the ordinances facially "neutral."[133] Yet the Court went on to consider their purpose and effect and eventually decided that they were not in fact neutral. In particular, it concluded that the ordinances were designed to prohibit the practice of the Santeria religion (which requires the ritual slaughter of chickens) and that they had a disproportionate effect on Santeria.[134] Apparently, the Court believed that the ordinances (if not facially, at least in fact) imposed constraints on the basis of religion and thus prohibited its free exercise.

Because the Court concluded that the ordinances penalized religion, it might have stopped at this point and simply held the ordinances unconstitutional. Instead, the Court followed its conception of free exercise and stated that the claim of the Santeria church was contingent upon a "strict scrutiny" balancing test. In particular,

[131] 508 U.S. 520 (1993).
[132] Id. at 527.
[133] Id. at 533–34.
[134] Id. at 542.

the claim depended on whether the ordinances were justified by a compelling state interest (and were narrowly tailored to promote it).[135] Already in the District Court, the decision seemed to be a matter of determining the "balance" between "'the governmental and religious interests.'"[136] Although the Supreme Court rejected the District Court's view that the government interests were compelling, the Court adopted the exemption-style balancing test to determine the constitutionality of what it assumed were discriminatory legal constraints on religion. In an opinion by Justice Kennedy (who had joined Justice Scalia's majority opinion in *Smith*), the Court cited *Smith* to the effect that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[137] Yet the Court was so accustomed to the assumptions underlying exemption claims that it preserved such assumptions for nonneutral laws.[138] In particular, it concluded that a law that failed to satisfy the *Smith* requirements of neutrality and general application and that thus burdened religious practice "must undergo the most rigorous of scrutiny."[139] The law therefore "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[140] As it happens, the Court eventually concluded that "these ordinances cannot withstand this scrutiny."[141] It is disturbing, however, that the Court believed laws penalizing religion and thus prohibiting its free exercise could ever be justified by government interests.

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[135] Id. at 546.

[136] Id. at 529 (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1484 (S.D. Fla. 1989)).

[137] Id. at 531.

[138] Of course, there are alternative explanations. Perhaps some justices self-consciously hoped to use *Lukumi* to restore what was left of free exercise exemptions after *Smith*, and if so, this would confirm the argument here about the role of an expansive definition in rendering the right of free exercise contingent. Another possibility is that notwithstanding what the Court said, the ordinances were nondiscriminatory or "neutral" and thus vulnerable only to an exemption claim and the concomitant balancing of interests. These explanations, however, are speculative, and there is no reason to doubt that the justices meant what they wrote.

[139] *Lukumi*, 508 U.S. at 546.

[140] Id. at 531–32. Indeed, the Court insisted that "[t]he compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'" Id. at 546 (quoting *Smith*, 494 U.S. at 888).

[141] Id. at 546.

If (as the Court said in *Lukumi*) "[t]he ordinances had as their object the suppression of religion," and if they therefore were "not neutral," why was any balancing or other consideration of government interests necessary?[142] The Court itself observed: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[143] Nonetheless, in *Lukumi*, the Court protected this "essential" free exercise freedom from religious penalties only after weighing it against government interests. In this way, the compelling government interest condition, which once limited and justified claims of exemption against nondiscriminatory laws, now seemed to bar more fundamental claims against penalties.

Although, in general, the Court spoke about the ordinances' burden on "religious practice," it recognized that the burden also fell on religious liberty. In particular, the Court noted that "[t]he neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation."[144] The problem in *Lukumi* was not that "First Amendment freedoms" were "curtailed," but that they were curtailed for inadequate reasons. Accordingly, even after concluding that the ordinances in *Lukumi* imposed constraints on the basis of religion and thus violated the First Amendment, the Court proceeded to consider whether this infringement was justified by compelling state interests.[145]

[142] Id. at 542.

[143] Id. at 543. Even this passage, however, could be questioned for its focus on conduct motivated by belief rather than on legal constraints imposed on the basis of religion.

[144] Id. at 539.

[145] Id. at 546. For similar state court treatment of a law that concededly was "not neutral," see *First Covenant Church v. City of Seattle*, 840 P.2d 174, 182 (Wash. 1993), in which the Washington Supreme Court applied the *Sherbert* compelling interest test to a city ordinance designating a church as a landmark. Another example is *Rader*. The District Court there found that the parietal rule of a state university was not generally applicable and that the university had not applied the rule in a neutral manner. Yet the Court held the actions of the University unconstitutional only after considering whether the policy served a compelling state interest. *Rader*, 924 F. Supp. at 1550, 1555. The case, however, concerned the allocation of government benefits, and therefore *Lukumi* is a better illustration of this Essay's thesis.

Clearly, the conditional character of the right of exemption has spread to the more basic freedom from penalties on religion. The right of exemption requires a balancing of government interests, and most justifications for the right of exemption depend upon a unitary understanding of the free exercise of religion. Consequently, as the First Amendment's right of free exercise has expanded to include a right of exemption, the central freedom from penalties has come to seem conditional upon government interests. The periphery has required a reconceptualization of the core.

G. No Harm, No Foul?

Thus far, the costs of the expanded definition of free exercise have been more conceptual than practical, and they therefore may seem insignificant. In other words, no harm, no foul. The harms, however, are very real.

As a practical matter, there may seem to be little concrete danger from the conditional conception of free exercise. To be sure, the courts have denied free exercise exemptions in deference to the weight of government interests, but if the exemption doctrine is a modern addition to the older, core right of free exercise, there has only been an expansion of religious liberty, and the denial of exemptions does not reduce the core of free exercise. Although the Supreme Court has come to think of free exercise as conditional, this conceptual change has not clearly led the Court to uphold any constraints imposed on the basis of religion. Accordingly, the evolution of free exercise into a conditional right seems mostly a conceptual problem. Perhaps this really is harmless error.

Nonetheless, there is reason to worry, for the notion of conditional religious liberty may eventually become a more pervasive reality. In the eighteenth century, the states with conditional guarantees of religious liberty rarely, if ever, employed these provisions to deny religious liberty, and in this sense, the danger even then remained largely conceptual. Yet in the constitutions of Virginia, Pennsylvania, Vermont, and eventually Georgia and the United States, and (after 1791) various other jurisdictions, Americans thought it necessary to secure an unconditional freedom. Similarly, today, although the danger remains mostly conceptual, it should hardly therefore be considered less real. Not only in *Lukumi*, but in almost all of the Supreme Court's free exercise decisions of the

past half century, the Court has emphasized that the free exercise of religion is conditional on government interests. Consequently, it should come as no surprise if Americans one day assimilate this assumption so far as to endorse laws penalizing religion. Already in a period in which there has been little political demand for such laws, the Court has repeatedly stated that violations of the free exercise of religion can be justified by compelling government interests. What then will the Court do—what will it be able to do—in a period in which legal penalties are supported by deeply felt popular sentiments and apparently irresistible government interests?[146]

The danger is all the greater because one of the most important ways in which the U.S. Bill of Rights limits the power of government is by shaping popular conceptions of rights. Indeed, the Bill of Rights may have a far more reliable effect in securing liberty through the people than the judiciary. In a 1788 letter to Thomas Jefferson, James Madison observed that "overbearing majorities" had repeatedly violated the "parchment barriers" formed by state bills of rights.[147] On this basis, he worried that a bill of rights was of limited value in a popular government:

> [I]n a monarchy, the latent force of the nation is superior to that of the sovereign, and a solemn charter of popular rights must

[146] In 1770, when penal laws against dissenters remained in place and were unenforced because of the Toleration Act and the personal tolerance of contemporaries, Philip Furneaux asked whether an individual's religious liberty should be left so dependent upon "the moderation of his superiors, or the spirit of the times?" Letters from Philip Furneaux to the Honorable Mr. Justice Blackstone, Preface to the First Edition, *in* An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England, supra note 17, at x. The danger lay in the uncertainty of the future:

> For if it be proper, that such rights should be possessed in the extent in which they are through the lenity of the times, it is proper there should be a legal security for the possession of them; that they may not be trampled upon through the possible caprices of men in power, or some unaccountable turn in the sentiments of the public. And though I would not be understood to insinuate, that there is at present any likelihood of such an infringement; yet the rights of human nature, (and religious liberty in its full extent is one of these) should never lie at the mercy of any; but on the contrary, should have every protection and ground of security, which law, and the policy of free states, can give them.

Id. at xi. See also Blasi's argument that interpretation the First Amendment "should be targeted for the worst of times." Blasi, supra note 5, at 450.

[147] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 The Papers of James Madison, supra note 1, at 295, 297.

> have a great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community; whereas in a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community.[148]

A bill of rights would therefore be valuable in the United States primarily because "[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."[149] In modern terms, the people would "internalize" the truths enumerated in the Bill of Rights. Yet if the U.S. Bill of Rights in this way moderates impulses of interest and passion, there is great danger even in the mere conception of free exercise as conditional. Through such a conception, not only the judges but also the people become accustomed to thinking that religious liberty is subject to the interests of government.

The degree to which the unqualified concept of free exercise is no longer even part of constitutional debates is strikingly evident from the concurrence of two justices in *Lukumi*. Blackmun and O'Connor recognized that the Court in *Lukumi* was extending its balancing test from the right of exemption to the more basic freedom from penalties. Yet even these justices did not discard the balancing test. Instead, they modestly argued that "regulation that targets religion . . . *ipso facto*, fails strict scrutiny"—as if a legal presumption could repair the conceptual damage.[150] Equally revealing, the protest of these justices did not induce the other justices to hesitate. The protest by Blackmun and O'Connor served as a warning to the effect that penalty cases should be analyzed differently than exemption cases, but their fellow justices adhered to the contingent conception of the right that had been developed in exemption cases and blithely applied it to the core freedom from penalties.

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[148] Id. at 298.
[149] Id. at 298–99.
[150] *Lukumi*, 508 U.S. at 579 (Blackmun & O'Connor, JJ., concurring).

At a time when Americans are giving fresh consideration to the dangers of both religious enthusiasm and religious prejudice, they should worry about a judicial doctrine that opens up space for both. On the one hand, the Court for decades defined the First Amendment right of free exercise so broadly as to include religiously motivated departures from law. On the other hand, in the wake of this experiment, the Court conditions free exercise on government interests, even in cases involving penalties on religion. These are conceptual extremes in the definition and denial of religious liberty, and they seem to legitimize both religious resistance to law and governmental intrusions on religious liberty.

In contrast, Americans can take comfort in the traditional First Amendment religious liberty, which simultaneously assumes conformity to law and protects a freedom from penalties on religion. This religious liberty offers Americans a clear and invaluable alternative to the religiously motivated lawlessness and prejudice that tear apart so many other nations. Long after American governments ceased imprisoning individuals on the basis of their religion, the First Amendment's free exercise clause continues to hold out to the world an ideal of religious liberty in which this freedom is not contingent upon government interests and yet is fully compatible with such interests. In this conception of the liberty, the extent of the right does not require that it be less secure.

H. Other Examples

If the modern development of free exercise doctrine illustrates that sometimes more is less, then there may be other examples. Most rights have not traditionally been considered as utterly unconditional as the free exercise of religion, and therefore the contingency of these other rights should not be quite as disturbing. Nonetheless, in response to individualistic expectations, other rights have also been defined expansively, and they reveal that the dynamic observed in the free exercise of religion is part of a more widespread tendency in American law.

The freedom of speech and press can illustrate the dynamic observed here in free exercise doctrine. The Supreme Court's speech and press cases were the immediate source from which the Court imported the compelling state interest test into its religion cases, and this should not come as a surprise. As Vincent Blasi points out,

the freedom of speech and press has expanded far beyond its core, and this enlargement tends to undermine the capacity of the First Amendment to preserve the freedom of speech and press in the very situations in which the Amendment's guarantees are most needed.[151] In particular, it is suggested here that broad conceptions of the freedom of speech and press have invited governmental conditions, even on the very core of this right.

The "clear and present danger" test may be one of these conditions. In 1919 in *Schenck v. United States*, the Court recognized a First Amendment freedom against a statute that forbade various types of interference with military activities of the United States.[152] To be precise, Schenck had been convicted under a portion of the federal Espionage Act that prohibited causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, and that prohibited willfully obstructing the recruiting and enlistment service of the United States.[153] Schenck had violated these prohibitions by distributing leaflets to men who had been called and accepted for military service, and he appealed his conviction on the basis of the First Amendment's freedom of the press. Recognizing that the statute was being applied to Schenck on account of his leaflets, the Supreme Court conceded that Schenck might have a First Amendment claim. Of course, there was good reason to worry about the breadth of the statute. Yet the Court focused on the defendant's use of the press and whether this triggered a First Amendment question, and it therefore did not more generally consider whether the statute was otherwise unconstitutional. In a manner suggestive of the later exemption cases, the Court almost predictably introduced a condition: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[154] Although the Court employed this standard to address what it understood to be a problem of "proximity and degree," it

[151] Blasi, supra note 5, at 476–79.
[152] 249 U.S. 47 (1919).
[153] Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917); Brief for the United States at 8–10, Schenck v. United States, 249 U.S. 47 (1919).
[154] *Schenck*, 249 U.S. at 52.

thereby opened up the possibility that the freedom of speech and press was directly conditional on the danger to government and its interests.[155]

The public forum doctrine provides an even clearer example. After *Schenck*, the Supreme Court explored different versions of the clear and present danger test, and it eventually came close to saying that a compelling government interest could justify content-based discrimination, but it never openly went so far in free speech doctrine, until it expanded its understanding of a public forum. Traditionally, the First Amendment was understood to forbid laws abridging and thus in one way or another placing constraints on the freedom of speech and press. Some equal protection decisions, however, and eventually even some free speech decisions contemplated the possibility that the Constitution protected speech in various public fora. These potentially included not only streets and sidewalks but also, in some circumstances, less open government property and resources (such as a public school mail system), the use of which was more clearly a government privilege.[156] Of course, government makes much of its property and other resources available for speech by others, and it cannot always do so without concern for the content. Indeed, government often relies upon those who receive its support to disseminate messages (for example, toleration, safety, and public service) and relies on them not to convey other messages (such as intolerance, carelessness, and disregard for communal interests). Accordingly, when considering whether the freedom of speech and press extended to an ever broader range of potential public fora, the Court eventually drew some lines. In particular, it denied that some of these fora (including the above-mentioned mail system) had really been opened up to the public. More generally, however, it began to say that the freedom of speech and press was subject to compelling government interests, even in cases of content discrimination.

The danger became apparent in *Simon & Schuster v. New York Crime Victims Board*—the 1991 case that overturned the "Son of Sam" law.[157] This New York law required any entity, such as a pub-

[155] Id. at 52.
[156] See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).
[157] 502 U.S. 105 (1991).

lisher, who contracted with an accused or convicted person for a book or other work describing the crime to relinquish to the New York State Crime Victims Board any income owed to the person under the contract. The Supreme Court overturned the statute but only after weighing the compelling government interest, thus making this a condition in a case that had nothing to do with the public forum doctrine. Justice Kennedy recognized the threat to the core of the freedom of speech and press and protested in his concurrence. The other justices, however, had become so accustomed to imposing governmental conditions that none of them shared Kennedy's fears.

Kennedy's protest identified exactly what had happened. It bluntly spelled out how the compelling government interest condition had hopped from one doctrine to another and yet another: "[A] principle of equal protection [was] transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech."[158] This test undermined the core First Amendment right of speech and press that had preexisted the public forum doctrine: "Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so."[159] Kennedy therefore said that the compelling state interest test (together with the related requirement that the statute be narrowly drawn) "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums."[160]

[158] Id. at 125 (Kennedy, J., concurring).
[159] Id. at 124–25 (Kennedy, J., concurring).
[160] Id. at 124 (Kennedy, J., concurring). Arguably, the intrusion of government interests had begun at least by the time of *Schenck*. See supra text accompanying notes 154–55. Kennedy acknowledged that "[t]here are a few legal categories in which content-based regulation has been permitted or at least contemplated," among which he included not only obscenity and incitement but also "situations presenting some grave and imminent danger the government has the power to prevent." *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring).

Of course, Kennedy understood that the majority's decision had overturned the Son of Sam statute and that therefore the Court's imposition of a condition had not yet infringed anyone's freedom of speech and press. Yet Kennedy also recognized that:

> [A]n enterprise such as today's tends not to remain *pro forma* but to take on a life of its own. When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment, as is true in the case before us.[161]

Accordingly, *Simon & Schuster* presented "the opportunity . . . to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment."[162]

Evidently, the dynamic by which more can be less is a general problem that reaches beyond the right of free exercise. Although

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[161] Id. at 127 (Kennedy, J., concurring).

[162] Id. at 128 (Kennedy, J., concurring). The public forum doctrine is part of a broader dynamic that has occurred when rights (those which sometimes have been called "natural rights" or "civil rights") have been extended to include privileges.

Incidentally, this expansion of rights to include privileges can be illustrated by the doctrine of free exercise exemptions. Some of the Supreme Court's exemption cases involved not penalties, but exemptions from conditions on government benefits. For example, in *Sherbert*, the Court considered the claim of a woman denied unemployment benefits by South Carolina on the ground that she refused to take positions that required work on Saturday. *Sherbert*, 374 U.S. at 399–401. She claimed that she should not be denied benefits because her refusal was based on her religious beliefs, which forbade her from working on Saturday, which was her Sabbath. Id. at 401–02. The Court stated:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. Of course, it is improbable that privileges (such as the unemployment compensation at stake in *Sherbert*) would ever really have the same degree of free exercise protection as rights (such as a freedom from religious penalties). Accordingly, it should be no surprise that the Court proceeded to subject the free exercise claim in *Sherbert* to a balancing test in which the Court "consider[ed] whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right." Id. at 406. The free exercise of religion—once a freedom from legal constraints or penalties—here was extended to a freedom from a condition placed upon the receipt of a government benefit, and this expansion probably made it easier for the Court to qualify the right—perhaps, this even helped to make the qualification necessary.

most rights are not as inalienable as the free exercise of religion and therefore are not necessarily as unconditional, many rights are understood in ways that avoid balancing tests and their inherently crude deference to government. These rights, which accommodate government interests without being directly defined or conditioned in terms of such interests, provide a basis for preserving freedom more securely than the rights that forthrightly allow such interests to be weighed. Obviously, some unconditional rights can carefully be given new, more expansive definitions that do not directly submit the right (or at least its core) to government interests. All too often, however, the expansion of rights has invited a direct acknowledgment of government interests at both the periphery and the core, thus leaving all other interests vulnerable.

CONCLUSION

For the free exercise of religion, more really has been less. It had been the one right considered entirely unqualified by government interests. In the last several decades, however, it has been expanded and concomitantly rendered contingent on such interests. This has profound consequences for religious liberty, and it reveals the underlying dynamic by which more is often less.

The twentieth-century Supreme Court has not reintroduced conditions of exactly the same sort that eighteenth-century Americans excluded from the First Amendment's right of free exercise. Nonetheless, the Supreme Court has reimposed a dependence on government interests that Americans long ago eliminated from the nation's religious liberty. Indeed, the Court has said that government interests can justify "nonneutral" laws—laws that impose penalties on religion. In an era in which Americans have been reawakened to the dangers of religious lawlessness and prejudice, the Court's view that free exercise is contingent upon government interests poses its own, not unrelated dangers—perils of a sort that Americans went out of their way to avoid in the First Amendment.

Of course, no one has tried to undermine the First Amendment's free exercise of religion. On the contrary, the definition of this right has been expanded by its numerous friends in academia, at the bar, and on the bench. Yet this offers no comfort, for it instead reveals the depth of the problem. The conditional character of religious liberty that dissenters and their confederates sought to defeat

through careful drafting, the latter-day friends of religious liberty have revived through interpretation, and they thereby have accomplished what opponents of religious liberty could never have achieved. In pursuit of a more expansive freedom, the friends of religious liberty have made it less secure.

To avoid this risk, one might begin with the First Amendment's words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[163] If the amendment thus forbids laws that penalize religion, it arguably avoids the dangers of both understatement and overstatement. In rhetoric, both have their virtues. In law, however, there sometimes is reason to have neither less nor more.

This points to the second, broader problem: the relationship between expanded definitions of rights and diminished access. Although described in terms that invert the familiar adage that less is more, this play upon words should not prompt hasty assumptions that if more freedom carries risks, then less freedom is desirable. Nor should it suggest that the definition and accessibility best for one right is optimal for all rights. The basic point here is simply that the two features of any right are likely to be connected and that as the definition expands, there is apt eventually to be a risk of diminished access.

Some Americans may be content with the costs of expanding a right to the point that the expansion invites the direct intrusion of government interests. This is, perhaps, little more than a redefinition, with a shift in gains and losses. The larger loss, however, may be not merely in the qualification of particular rights, but in the general conception of rights as being necessarily (or at least typically) conditional on government interests. Whereas it once could be assumed that the definitions of constitutional rights were compatible with government interests, it now is often taken for granted that eventually such rights must inevitably conflict with government interests and that such rights are therefore always subject to the concerns of government. This is a profound change, and its implications are sobering even for rights that are not as inalienable as religious liberty. If the most essential means by which rights are protected is through the sentiments of the people, and if even a bill

[163] U.S. Const. amend. I.

of rights preserves liberty primarily by shaping and focusing popular opinion, then it is difficult to remain complacent about a tendency that leads Americans to conceive of their rights as conditional on government interests.

In a brief moment of optimism, one might imagine that the expansion of rights could become more self-conscious, so that choices could be made with greater care. For example, judges could require litigators who seek the enlargement of a right to show that the broader right is susceptible of a carefully measured definition—one that will not provoke the imposition of a caveat protecting government interests. Alternatively, judges could preserve a right's core unconditionally and could qualify only the extended periphery. If judges distinguished the preexisting liberty from additions, they could prevent the expansion from leading to a reconceptualization of the whole and thus could avoid generally reducing the right to a contingency. These approaches, however, would delay and perhaps even diminish the expansion of rights, and they therefore are not likely to appeal to judges, let alone the public.

The underlying problem will not easily be solved, because, as illustrated by the expansion of religious liberty, the tendency of more to become less flourishes as part of the inescapable individualism of American society. Living in circumstances in which they have good reason to hope for an expansion of their individual freedom, Americans have rarely hesitated to seek more and have not been inclined to contemplate the possibility that sometimes more is not more. Their inattention to this danger is dramatically evident among the advocates and judges who take an expansive view of religious liberty and thereby reduce it to a conditional right. The problem, however, is pervasive, for on account of their individualism, Americans take similar risks with many of their rights. Americans have reason to celebrate the enlargement of their individual liberty. Yet if in expanding their liberty, they render it directly contingent on government interests, the eventual effect of their individualism may be less than individualistic.