NOTE

THE ORIGINS OF ACCOMMODATION: FREE EXERCISE, DISESTABLISHMENT, AND THE LEGEND OF SMALL GOVERNMENT

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This Note brings novel historical evidence to bear on the question of whether religious exemptions from neutral, generally applicable laws are compelled by the First Amendment. In the wake of the Supreme Court's decision in Smith *(1990), a robust scholarship on relevant historical practice has emerged on both sides of the issue. Those in favor of religious exemptions argue that history supports their position because (1) the period after ratification was marked by extensive religious freedom and (2) the early United States was characterized by a limited government that stayed in its lane, out of the way of religion.*

This Note shows how recently uncovered evidence about the disestablishment regulation of religious institutions, especially the proliferation of the corporate form, undermines both of these propositions. Religious freedom in the period after ratification was sought through government regulation, not through exemption, and early state governments were hardly limited in their invasions into church domain. An accurate history matters here. The Supreme Court's recent return to history in its Establishment Clause jurisprudence and the addition of Justices committed to constitutional interpretation centered on historical meaning indicate that the history of free exercise during the Founding era may prove decisive the next time that the Court considers the issue of religious exemption.

* J.D., University of Virginia School of Law, 2021; PhD, English Literature, University of Virginia, 2018. I am deeply grateful to Professor Micah Schwartzman for suggesting this research and for his support during the development of this Note. This Note also owes much to the rich research of Professor Sarah Gordon. My thanks as well to the excellent editors at the *Virginia Law Review* whose hard work has greatly improved the piece. I am especially grateful to Jonah Panikar for his sharp editing.

INTRODUCTION

In 1813, Father Anthony Kohlmann, rector of St. Peter's Church in New York City, found himself between a rock and a hard place.[1] One of his parishioners, James Keating, had reported a theft of jewelry to the police.[2] Later, Keating withdrew his complaint after his property was returned.[3] Keating, out of fear of being arrested, admitted that Father Kohlmann arranged the return of his stolen goods.[4] Based on other evidence, two immigrants who were members of St. Peter's were indicted as receivers of the stolen property, and Father Kohlmann was called as a witness to identify those whom he had convinced to return the stolen

[1] See generally Walter J. Walsh, The First Free Exercise Case, 73 Geo. Wash. L. Rev. 1 (2004) (recounting the history of Father Kohlmann's case at length).
[2] William Sampson, The Catholic Question in America 5 (N.Y., Edward Gillespy 1813).
[3] Id.
[4] Id.

jewelry.[5] The priest had a choice: refuse to testify and be jailed, or reveal the names of his penitent parishioners and, in his own words, "become a traitor to my church, to my sacred ministry and to my God."[6] A lower state court found that the choice Father Kohlmann had been put to was untenable. It held that an exemption from the evidentiary requirements of the courtroom was mandated by the New York Constitution's religious free exercise provision.[7]

As the first state court decision to require an exemption on the basis of free exercise,[8] Father Kohlmann's case—known as *People v. Philips*—has become a popular object of study.[9] For those who believe that the Federal Constitution's Free Exercise Clause requires similar exemptions, Father Kohlmann's case is evidence that early state practices were consonant with a pro-exemption interpretation of the First Amendment.[10] Recent scholarship calls the case "the first constitutional victory for religious freedom," and argues that this lower state court decision belongs "at the historical center of judicial and scholarly free exercise discourse."[11] That history, according to those in favor of exemptions, was characterized by an "Expansive Conception of Religious Freedom," one that emerged in the context of a limited American government that stayed in its lane, out of the way of religion.[12]

But the story of Father Kohlmann's Scylla and Charybdis, and of this rare[13] early litigation, central to the historical case for free exercise exemptions, has been read in isolation. A fuller assessment of the nature of the religious freedom that New York recognized in 1813 requires considering not only Father Kohlmann's exemption but also the laws that his *church* was subject to at the time: onerous and invasive state regulations from which no exemption was sought or given. In 1813, St. Peter's Church, like others in New York, was governed by a board of

[5] Id. at 5–6.

[6] Id. at 9; Walsh, supra note 1, at 21.

[7] See Sampson, supra note 2, at 108–14.

[8] See Walter J. Walsh, The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence, 80 Ind. L.J. 1037, 1038 n.4 (2005).

[9] See Walsh, supra note 1; Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1410–12 (1990).

[10] Walsh, supra note 1, at 2, 95; McConnell, supra note 9, at 1410–12.

[11] Walsh, supra note 1, at 1–2.

[12] McConnell, supra note 9, at 1436; see also infra Section II.A (summarizing the pro-exemption view of the historical record).

[13] McConnell notes that there was little litigation over early religion clauses in either the state or Federal Constitutions. See McConnell, supra note 9, at 1503.

trustees.[14] These lay members of the church were vested with power from the state and controlled church property and decision making.[15] As the earliest Catholic Church in New York City, St. Peter's had elected to incorporate under state law in 1785, just one year after the state extended the power to incorporate to Catholic churches.[16] In 1813, the same year that Father Kohlmann won his exemption, the state updated its corporate law governing religious institutions and placed the control of church property, minister salaries, "rules and orders for managing the temporal affairs" of the church, and even the power to break ground in cemeteries firmly in the hands of the majority of lay trustees.[17]

In light of the requirements of New York's corporate law, the Catholic Church which Father Kohlmann led was not only his to control. As Walsh points out, while the district attorney sought to drop the prosecution, it was the church's lay trustees, not its priest, who insisted that the case be brought to trial, hoping to publicly secure the priest-penitent privilege in New York.[18] Contrary to Catholic ideology, then, St. Peter's temporal property and direction were held by the church's lay trustees, backed and governed by the state's corporate laws.[19] These legal mechanisms controlling religious institutions in New York were typical of regulations across the country, most of them passed during the era that Sarah Gordon calls the "First Disestablishment."[20] Sounding in corporate law, these regulations restricted church property, interfered with internal church governance, and shaped what "religious freedom" meant in New York and in the early United States.[21] Yet this history has thus far been largely ignored, both by those championing *People v. Philips* as a high watermark of religious freedom and, more generally, in the fierce debate over the history of the Free Exercise Clause.[22] This Note refracts that debate

[14] See Walsh, supra note 1, at 21.

[15] See Patrick J. Dignan, A History of the Legal Incorporation of Catholic Church Property in the United States, 1784–1932, at 53–54 (1933).

[16] See id. at 54.

[17] See An Act to Provide for the Incorporation of Religious Societies, ch. 60, §§ 3–4, 8, 2 N.Y. Sess. Laws 212, 214–15, 217 (1813).

[18] See Walsh, supra note 1, at 21.

[19] See Sarah Barringer Gordon, The First Disestablishment: Limits on Church Power and Property Before the Civil War, 162 U. Pa. L. Rev. 307, 347–50 (2014) (documenting the disruptive quality of disestablishment corporate law for Catholicism in America).

[20] Id. at 307, 311–12. Gordon dates the First Disestablishment as occurring between 1786 and 1833. Id. at 310.

[21] Id. at 321–24.

[22] See infra Section II.D.

through the lens of disestablishment regulation of religious institutions. In doing so, it posits that state interventions into religion during the First Disestablishment undermine the historical case for religious exemptions.

It is important to precisely identify the constitutional issue at play, one that remains hotly contested some 200 years after Father Kohlmann took confession. The question is this: Where a neutral, generally applicable law imposes an incidental burden on an individual's free exercise of religion, does the Constitution mandate an exemption?[23] The center of the exemptions debate thus turns on the *standard of judicial review* applicable to incidental burdens on religion.[24] Must the government offer merely some form of rational basis to defend a generally applicable law against a claim of exemption, or does the government need to demonstrate that it has a compelling interest and has narrowly tailored the statute at issue?[25] Those in favor of exemptions argue that the government must do the latter in order to impose incidental burdens on religious free exercise.[26] Those opposed to exemptions contend that no such showing is required and that neutral and generally applicable laws do not trigger heightened review under the Free Exercise Clause.[27]

Since the Supreme Court first encountered the issue of religious exemptions in 1878,[28] the doctrine has evolved between these positions. In contrast to the Court's Establishment Clause jurisprudence,[29] the Court

[23] This framing of the issue reflects the Supreme Court's most recent significant re-appraisal. See Emp. Div. v. Smith, 494 U.S. 872, 883–89 (1990).

[24] See Douglas Laycock, The Religious Exemption Debate, 11 Rutgers J.L. & Religion 139, 141–42 (2009).

[25] Compare *Smith*, 494 U.S. at 879 (asserting that the right to free exercise does not reach a "valid and neutral law of general applicability"), with id. at 894–95 (O'Connor, J., concurring in judgment) (citing precedent that requires the government to justify a substantial burden on free exercise with a "compelling state interest and by means narrowly tailored to achieve that interest").

[26] See, e.g., Laycock, supra note 24, at 151.

[27] See, e.g., *Smith*, 494 U.S. at 879 (holding that heightened review was not required for a neutral, generally applicable law that imposed an incidental burden on the free exercise of religion); Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915, 936–40 (1992) (arguing that the original understanding and practice under the Free Exercise Clause provides no support for a right to regulatory exemptions).

[28] See Reynolds v. United States, 98 U.S. 145, 166 (1878).

[29] Recent Establishment Clause jurisprudence has featured various forms of historical analysis as part of the Court's decision making. See, e.g., Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019) ("The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives

has often ruled on free exercise exemption claims without reference to the history of the First Amendment.[30] However, in the aftermath of *Employment Division v. Smith*—one of the Court's most significant and least historically inflected decisions on the issue—a vibrant scholarly debate developed around the history of the Free Exercise Clause, with academics interpreting Founding-era historical sources in order to support their preferred interpretation of the First Amendment.[31] Faced with an ambiguous constitutional provision and little legislative history, scholars and Supreme Court Justices have turned to persuasive authority in an attempt to determine whether the Free Exercise Clause at the time of the Founding accorded with, required, or ran against, constitutionally compelled exemptions for religion.

The sources of historical authority relied on in the exemptions debate are numerous, yet recent research on disestablishment regulation of religious institutions has hitherto been ignored. Gordon's intervention—analyzing state regulation of religious institutions as states removed government support for the church following ratification—casts doubt on two of the premises undergirding the historical case for religious exemptions. Those in favor of constitutionally compelled religious exemptions argue that (1) the period after ratification was marked by an "expansive conception of religious freedom" consonant with constitutionally required exemptions for religious free exercise and (2) the early United States was characterized by a limited government that stayed in its lane, out of the way of religion.[32] The history of disestablishment regulations complicates the first of these arguments because, as Gordon argues, religious freedom during disestablishment was sought *through government regulation* of the church, not through the

of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional."); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 8–14 (1947) (tracing disestablishment history beginning with immigration from Europe); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 852–62 (1995) (Thomas, J., concurring) (contextualizing Madison's Memorial and Remonstrance Against Religious Assessments to argue that the Establishment Clause does not require the government to exclude religious adherents from generally available government subsidies); id. at 868–72 (Souter, J., dissenting) (denying Justice Thomas' characterization of Madison's letter).

[30] See Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793, 1794–95 (2006).

[31] See infra Part II.

[32] See, e.g., McConnell, supra note 9, at 1415, 1436–49 (advancing both of these positions).

exemption of religious institutions from the law.[33] The proposition that early American government was "limited" is even more seriously undermined by the history of disestablishment, which demonstrates that early state government relations with the church were characterized by invasive state oversight, especially through corporate laws regulating private property and lay governance.[34]

This limited intervention does not add to Gordon's impressive recent work on disestablishment history. Instead, this Note draws out the full significance of that history, by showing how disestablishment regulation unsettles the free exercise exemption debate. Gordon framed her intervention in terms of the relationship between religious institutions and individual conscience.[35] Yet the story that she uncovered—of religious liberty sought in and through state regulation—is also powerful evidence of the nature of the Free Exercise Clause after ratification. A full account of the history matters for two reasons. On the one hand, disestablishment regulations of religious institutions bear on how we think about the rights of religious individuals and institutions.[36] On the other, this history may well shape the Supreme Court's future free exercise jurisprudence. The Supreme Court's recent return to history in its Establishment Clause jurisprudence,[37] and the addition of Justices committed to constitutional interpretation centered on historical meaning,[38] indicate that the history

[33] See infra Part III.

[34] Id.

[35] See Gordon, supra note 19, at 311 ("This first system of disestablishment imposed discipline on religious institutions . . . based on concerns for individual conscience and lay control.").

[36] See, e.g., Michael W. McConnell, John H. Garvey & Thomas C. Berg, Religion and the Constitution 64 (4th ed. 2016) (a leading textbook on the subject).

[37] See supra note 29 and accompanying text.

[38] There is good reason to believe that Justices Gorsuch, Kavanaugh, and Barrett are open to, if not outright supporters of, historical analysis as a supplement to constitutional interpretation. See Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case W. L. Rev. 905, 906 (2016) (arguing that judges should seek to apply the law by looking to "text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be"); Tucker Higgins, Read Brett Kavanaugh's Full Opening Remarks in his Supreme Court Confirmation Hearing, CNBC (Sept. 4, 2018), https://www.cnbc.com/2018/09/04/read-brett-kavanaughs-full-remarks-to-the-senate-judiciary-committee.html [https://perma.cc/6QRM-H8K2] ("A judge must interpret statutes as written. A judge must interpret the Constitution as written, informed by history and tradition and precedent."); Kanter v. Barr, 919 F.3d 437, 453–65 (7th Cir. 2019) (Barrett, J., dissenting) (performing an in-depth historical analysis to conclude that "[h]istory does not support the proposition that felons lose their Second Amendment rights solely

of free exercise during the Founding era may well prove decisive the next time that the Court considers the issue of religious exemptions.[39]

The first Part of this Note summarizes the three major phases of free exercise doctrine in the Supreme Court, with particular attention to the Court's irregular engagement with historical evidence. Second, the extant scholarship on the history of free exercise is summarized, along with its influence in the Supreme Court. The Note's third Part considers recent research on early state regulations applicable to religious institutions during the First Disestablishment. This Part shows how disestablishment history qualifies claims about expansive religious freedom and "limited" government during the Founding era. This Part also considers three objections to the use of disestablishment history to interpret the meaning of the Constitution's Free Exercise Clause. The Note concludes by reflecting on the importance of the exemptions issue during the Founding era and today, the stakes of historical analysis for the Supreme Court's Religion Clauses jurisprudence, and the potential for a historically inflected reappraisal of Free Exercise Clause doctrine.

because of their status as felons," but "it does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous").

[39] The Supreme Court has granted certiorari and received merits briefs on the question of whether to overrule *Smith*. As of this Note's writing, the Court's opinion has not been released. Petition for Writ of Certiorari at i, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123); Brief for Petitioners at 37, *Fulton*, 140 S. Ct. 1104 (No. 19-123); Brief for City Respondents at 47, *Fulton*, 140 S. Ct. 1104 (No. 19-123); see also Micah Schwartzman, Richard Schragger, & Nelson Tebbe, Symposium: Religious Privilege in *Fulton* and Beyond, SCOTUSblog (Nov. 2, 2020, 9:29 AM), https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/ [https://perma.cc/42ED-WRNT] (discussing the new conservative majority's likely path in expanding free exercise rights). And four of the Court's conservative Justices have signaled an intent to reverse *Smith*. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (signaling an intent to "revisit" *Smith*); Howard Gillman & Erwin Chermerinsky, The Weaponization of the Free Exercise Clause, Atlantic, (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/ [https://perma.cc/3GJZ-EEVN] (arguing that "the conservative justices on the current Court reject Scalia's reasoning and may be about to overrule *Employment Division v. Smith*"); Eugene Volokh, Will the Court Read the Free Exercise Clause as Often Mandating Religious Exemptions from Generally Applicable Laws?, Volokh Conspiracy (Jan. 1, 2019), https://reason.com/2019/01/22/will-the-court-read-the-free-exercise-cl/ [https://perma.cc/7LDL-W788] (observing that the statement denying certiorari in *Bremerton* suggested the four Justices' willingness to overrule *Smith* and that Justice Breyer had echoed this sentiment in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

I. THE RELIGIOUS EXEMPTIONS DOCTRINE

The Supreme Court's Free Exercise Clause[40] jurisprudence can be best categorized into three phrases. First, beginning with its 1878 decision in *Reynolds v. United States*, the Court refused to grant exemptions from generally applicable laws on the basis of a conduct/belief distinction.[41] In 1963, the Court issued a new rule in *Sherbert v. Verner*.[42] The Court held that laws that incidentally burden religious freedom should be reviewed under a compelling interest test.[43] Finally, the Court's present approach was inaugurated in 1990, with *Employment Division v. Smith*.[44] The *Smith* Court distinguished its *Sherbert*-era decisions and lowered the standard of judicial review where laws were found to be "neutral" and "generally applicable."[45] This Part summarizes these three phases of free exercise doctrine in order to better understand the Court's engagement with history on this subject and the contemporary state and stakes of accommodations jurisprudence.

A. Early Exemptions Doctrine – Reynolds

Nearly a century passed between the ratification of the Bill of Rights and the Supreme Court's first encounter with the issue of religious exemptions. In 1878, however, George Reynolds, a member of the Mormon Church, was charged with bigamy under a federal statute.[46] At trial, Reynolds asked for a jury instruction that would compel the jury to acquit if it found that he had been married "in pursuance of and in conformity with what he believed at the time to be a religious duty."[47] Considering this request for an exemption, the Supreme Court began its assessment with a historical analysis.[48] The Court noted that "religion" was not defined in the Constitution itself and instead sought the word's meaning in the "history of the times in the midst of which the provision

[40] The applicable portion of the First Amendment is "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Amendment has been incorporated, and thus applies to the states, through the Due Process Clause of the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[41] 98 U.S. 145, 161–67 (1878).

[42] Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

[43] Id. at 403, 406–09.

[44] 494 U.S. 872, 881–85 (1990).

[45] Id.

[46] *Reynolds*, 98 U.S. at 146.

[47] Id. at 161–62.

[48] Id. at 162.

was adopted."[49] The Court rehearsed the early history of state establishment, and the rise of resistance, especially in Virginia.[50] Citing Madison and Jefferson, the Court rehearsed the history behind the First Amendment and noted in particular that Jefferson had distinguished between religious beliefs—or in his words, "opinions"—over which the government could exert no authority, and "actions" which were properly within the reach of the state.[51] Based on its reading of Founding-era history, the belief/action distinction, and on the long criminalization of polygamy "among the northern and western nations of Europe," the Court found that no exemption was required.[52]

For nearly a century, *Reynolds* foreclosed the possibility of exemptions from general laws based on the free exercise of religion.[53] It also had the effect of laying down an important marker in the Court's historical understanding of the Free Exercise Clause, one centered on the state of Virginia, James Madison, and Thomas Jefferson. Following *Reynolds*, the Court repeatedly denied petitioners who sought exemptions from such laws on the basis of religious exercise.[54]

B. Compelling Government Interest – Sherbert

In 1963, the Court changed course. In *Sherbert v. Verner*, Justice Brennan, writing for a seven-Justice majority, found South Carolina's application of a program for unemployment benefits to be in violation of the Free Exercise Clause, where that program imposed an incidental burden on an appellant's free exercise of religion.[55] Having been fired because she "would not work on Saturday, the Sabbath Day of her faith," Adell Sherbert was, in turn, denied unemployment benefits on the basis of her failure to accept suitable work without "good cause."[56] The Court

[49] Id.

[50] Id. at 162–63.

[51] Id. at 164 (relying on a letter from Thomas Jefferson to the Danbury Baptist Association written after the First Amendment was adopted).

[52] Id. at 164, 166–67.

[53] On the *Reynolds* era, see McConnell, supra note 9, at 1412; Vincent Philip Muñoz, The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress, 31 Harv. J.L. & Pub. Pol'y 1083, 1083–84 (2008).

[54] See, e.g., Prince v. Massachusetts, 321 U.S. 158, 167–70 (1944) (refusing to grant an exemption based on religious exercise from a child labor law).

[55] 374 U.S. 398, 401–03 (1963).

[56] Id. at 399–401.

distinguished its earlier caselaw[57] and, rather than assess South Carolina's application of the unemployment program under some form of reasonableness review, required showing that incidental burdens on the free exercise of religion were justified by a "compelling state interest."[58] Applying that heightened review, the Court found that the disqualification for benefits did impose a burden on Sherbert in the form of an unconstitutional condition.[59] No compelling state interest was found to justify the burden.[60]

The *Sherbert* Court did not address the history of the Free Exercise Clause, an absence of analysis that came under fire from scholars of the Founding era.[61] Similarly, as McConnell noted, in the intervening decisions between *Sherbert* and *Smith* the Court also declined to ground its rulings in Founding-era history or practice.[62] This approach was somewhat surprising, insofar as other areas of the Court's Religion Clauses jurisprudence at this time were often grounded in historical understanding.[63]

The compelling interest test first applied in *Sherbert* remained the law of the land for nearly three decades. As McConnell noted in his account of the decision, *Sherbert* "created the potential for challenges by religious groups and individual believers to a wide range of laws that conflict with

[57] The Court did so in two ways: It argued that cases where governmental regulation had been upheld involved (1) "overt acts" and (2) "conduct or actions [that] invariably posed some substantial threat to public safety, peace or order." Id. at 402–03 (first citing Braunfeld v. Brown, 366 U.S. 599, 603 (1961); then citing *Reynolds*, 98 U.S. at 166). In Sherbert's refusal to work on Saturday, the Court reasoned, there was "no conduct . . . of a kind within the reach of state legislation." Id. at 403.

[58] Id. at 403, 406 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

[59] Id. at 404 ("The [disqualification] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

[60] Id. at 406–09.

[61] See, e.g., McConnell, supra note 9, at 1413 (critiquing the *Sherbert* Court's departure from the Lockean principles of the Founding and its inconsistent use of originalism between the Free Exercise and Establishment Clauses); Walter Berns, The First Amendment and the Future of American Democracy 38, 43–44 (1976) (criticizing the Supreme Court's lack of reliance on Founding-era thinkers and its misconstruction of the Constitution in cases like *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

[62] McConnell, supra note 9 at 1413.

[63] See, e.g., Sch. Dist. of Abingdon Twp. v. Schempp, 374 US 203, 294 (1963) (Brennan, J., concurring) (arguing, in an Establishment Clause case concerning school prayer, that the Court should rule in line with "the understanding of the Founding Fathers"); Everson v. Bd. of Educ., 330 U.S. 1, 33, 40 (1947) (Rutledge, J., dissenting) (offering, in an Establishment Clause context, a lengthy historical interpretation of both Religion Clauses).

the tenets of their faiths, because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct."[64] Yet while religious claimants had some early success under the *Sherbert* doctrine,[65] beginning in 1972, the Court consistently rejected claims for free exercise exemptions, except in those cases within the unemployment benefits area closely governed by *Sherbert*.[66]

C. A Retreat from Exemptions – Smith *and After*

Free exercise doctrine evolved for a third time in *Smith* (1990), where Justice Antonin Scalia, writing for a 5-4 majority, held that the Free Exercise Clause does not bar incidental burdens on religious free exercise in most situations.[67] The Court held that where a law is found to be "neutral" and "generally applicab[le]," the "right of free exercise does not relieve an individual of the obligation to comply" with the law.[68] Working hard (and not, perhaps, successfully) to distinguish *Sherbert*-era decisions, Justice Scalia anchored the Court's ruling to decisions in *Gobitis* and *Reynolds* and refused to apply *Sherbert*'s compelling government interest analysis.[69] In justifying a return to the *Reynolds* standard, the Court argued that a compelling interest test was inappropriate to protect the free exercise of religion because such an approach "would produce . . . a private right to ignore generally applicable laws."[70] The Court's opinion was also grounded in institutional considerations, with Justice Scalia offering the legislative branch as the proper arena for exemptions issues.[71]

[64] McConnell, supra note 9, at 1412.

[65] See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (holding that an exemption from a mandatory school attendance law was required where Amish parent-plaintiffs made a "convincing showing, one that probably few other religious groups or sects could make"); Thomas v. Review Bd., 450 U.S. 707, 717–20 (1981) (applying the *Sherbert* test to find that petitioner was substantially burdened when denied unemployment benefits and forced to choose between continued employment and his religious convictions).

[66] See McConnell, supra note 9, at 1417.

[67] Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

[68] Id. at 879–80 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

[69] Id. at 879, 884–85 (first citing Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940); then citing Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

[70] Id. at 886.

[71] Id. at 890.

In *Smith*, for the second time, the Court substantially revised free exercise doctrine in a case almost devoid of historical analysis.[72] Unlike the decision in *Sherbert*, however, the ruling in *Smith* triggered a sharp public backlash.[73] Congress and many states moved to reinstate an exemptions-friendly standard of review.[74] On the Court, those opposed to *Smith*'s ruling sought new historical ammunition for subsequent clashes over the issue.[75]

What is the state of free exercise doctrine today, vis-à-vis exemptions? The short answer is that *Smith* remains the law of the land. So long as they are reasonably related to a legitimate governmental purpose, incidental burdens on the free exercise of religion imposed by neutral, generally applicable laws will be found to be constitutional. Yet subsequent decisions that have further defined "neutrality" and "general applicability" have eroded what at first appeared to be *Smith*'s firm barrier against religious exemptions.[76] And while the bipartisan coalition that passed the Religious Freedom Restoration Act ("RFRA") in the early 1990s has splintered over the conflict between religious free exercise and civil rights protections,[77] support on the Court for the *Smith* ruling has always been tenuous.[78] In light of recent jurisprudence, ongoing popular support, and the addition of two conservative Justices to the Supreme Court, *Smith* appears to be on shaky ground.[79]

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[72] McConnell, supra note 9, at 1413, 1420.

[73] See Laycock, supra note 24, at 142 ("*Smith* triggered a fierce political reaction, which made the exemptions debate far more contentious than it had ever been before.").

[74] Id.

[75] See City of Boerne v. Flores, 521 U.S. 507, 544–65 (1977) (O'Connor, J., dissenting) (attacking *Smith* with historical evidence that the Founders believed the Free Exercise Clause provided a substantive right to practice religion and deserved accommodation from all but the most important laws). But see *City of Boerne*, 521 U.S. at 537–44 (Scalia, J., concurring in part) (arguing that the historical support used by the dissent to suggest *Smith* was wrongly decided is indeterminate at best).

[76] See, e.g., Fraternal Order of the Police v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (holding that a law is not "generally applicable" under *Smith* if it includes a single secular exemption); Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (finding that a college's rule requiring that students live in dormitories is not generally applicable because there were a number of secular exceptions); Keeler v. Mayor of Cumberland, 940 F. Supp. 879. 886 (D. Md. 1996) (holding that because a historic preservation ordinance created a system of individualized exemptions, the law was not neutral and generally applicable).

[77] See Laycock, supra note 24, at 148–49.

[78] See Douglas Laycock, The Supreme Court and Religious Liberty, 40 Cath. Law. 25, 26 (2001).

[79] See supra note 39 and accompanying text.

II. THE RELIGIOUS EXEMPTIONS DEBATE

In the wake of *Smith*, Supreme Court Justices,[80] legislators,[81] and advocates[82] sought new arguments with which to bolster the case for religious exemptions. They did not have far to look. The same year that *Smith* was decided, Michael McConnell published The Origins and Historical Understanding of Free Exercise of Religion, which made a compelling case that the Founding era's history and practice were consonant with, if not outright supportive of, religious exemptions from generally applicable laws.[83] While McConnell was not the first academic to address the history of the Free Exercise Clause,[84] his intervention arrived at a crucial moment. A glut of scholarship followed in McConnell's wake, both in favor of and opposed to exemptions.[85] This Part summarizes that vibrant debate, considers its influence on the Supreme Court's free exercise jurisprudence, and identifies a key weak point in the extant research.

A. The Historical Case for Exemptions

In Origins and Historical Understanding, McConnell made three claims:

[80] See, e.g., *City of Boerne*, 521 U.S. at 544–65 (1997) (O'Connor, J., dissenting) (rehearsing the history of the Free Exercise Clause and calling for a reconsideration of *Smith*).

[81] See Robert F. Drinan & Jennifer I. Huffman, The Religious Freedom Restoration Act: A Legislative History, 10 J.L. & Religion 531, 531–38 (1993) (detailing the history behind the passage of RFRA in Congress).

[82] See, e.g., id. at 533 (noting that "a large number of law professors as well as many religious and public interest groups" unsuccessfully petitioned the Supreme Court for rehearing immediately after *Smith*); Laycock, supra note 24, at 142 (discussing the turn to state law after *Smith*).

[83] McConnell, supra note 9, at 1410–12.

[84] For historical analyses of the Free Exercise Clause prior to 1990, see Sanford H. Cobb, The Rise of Religious Liberty in America (1902); Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); William Lee Miller, The First Liberty (1986); Arlin M. Adams & Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559 (1989); Philip B. Kurland, The Origins of the Religion Clauses of the Constitution, 27 Wm. & Mary L. Rev. 839 (1986).

[85] See, e.g., Hamburger, supra note 27, at 916–17 (arguing that historical evidence does not support the claim that there was a general constitutional right of religious exemption); Laycock, supra note 24, at 176 (concluding that "regulatory exemptions are an essential part of meaningful religious liberty"); Laycock, supra note 30, at 1795 (arguing that the claim that exemptions violate the Establishment Clause is "inconsistent with the original understanding" of the clause); Walsh, supra note 1, at 2–4 (agreeing with McConnell's conception of historical religious liberty).

> (1) [T]hat exemptions were seen [by those who drafted and ratified the Bill of Rights] as a constitutionally permissible means for protecting religious freedom, (2) that constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) that exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.[86]

In short, McConnell argued, history was behind *Sherbert*: The compelling interest analysis offered in that case harmonized with the origins and historical understanding of the First Amendment.[87] Beyond doctrinal ramifications, McConnell also argued that the history of free exercise exemptions showed that the First Amendment was not "an instrument of secularism to be interpreted in secular terms," but was, rather, the product of a "peculiarly American conception of the relation between religion and government – one that emphasizes the integrity and diversity of religious life rather than the secularism of the state."[88]

In defense of these claims, McConnell analyzed the history of free exercise before and after ratification. Beginning with a brief review of the "English legacy" of "religious strife and intolerance,"[89] the article considered four different colonial approaches to the relationship between church and state, looking in particular at statutory provisions guaranteeing some form of free exercise.[90] The only limits on these early guarantees, McConnell argued, was that the State could infringe on free exercise in order to prevent "Lycentiousnesse," "injury," or "outward disturbance" to others.[91]

McConnell argued that an "expansive conception of religious freedom" took shape in the years preceding and directly following independence.[92] In particular, McConnell linked the pursuit of free exercise with the evangelical movement, and noted that "[t]he most intense religious sects" opposed state establishment of religion "on the ground that it injured religion and subjected it to the control of civil authorities."[93] McConnell

[86] McConnell, supra note 9, at 1414–15.
[87] Id. at 1415.
[88] Id. at 1416.
[89] Id. at 1421.
[90] Id. at 1421–30.
[91] Id. at 1427 (quoting Cobb, supra note 84, at 117).
[92] Id. at 1436–44.
[93] Id. at 1438–39.

argued that the ideology espoused by evangelicals ran up against republican thinking, which held that the promotion of public virtue ought to be a central government project.[94] While republicans held that government should actively support public virtue through establishment, evangelicals posited that "governmental support [was not] necessary, or even useful, to religion," and that religion ought not be used as "an instrument of statecraft."[95]

Two other elements of McConnell's analysis are relevant here.[96] First, in what would become a flashpoint of contention in the Supreme Court, McConnell analyzed state provisions that guaranteed religious freedom. McConnell found that "the free exercise right [guaranteed by these post-independence provisions] plainly extends to some forms of conduct," and that "provisos" that limited free exercise to actions that were "peaceable" indicated that religious liberty was constrained only by third-party harms.[97] "Where the rights of others are not involved," McConnell concluded, "the free exercise right prevails."[98] This understanding comported with the practice of the states, insofar as "the early free exercise clauses seem to allow churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements without state interference."[99] Second, McConnell's argument about the nature of the free exercise right was intimately related to his conception of a limited early American government.[100] The scope of the free exercise right, for McConnell, was strong evidence of the "wider liberal political theory," whereby "[g]overnmental powers are

[94] Id. at 1441 ("The political theory of the advocates of free exercise sharply conflicted with the 'republican' ideology that prevailed among most Antifederalists (as well as many Federalists). The central preoccupation of republican political theory was the necessity of public 'virtue.' In its religious manifestation, this meant that government should support and encourage religion in order to promote public morality." (footnote omitted)).

[95] Id. at 1442.

[96] This brief summary of McConnell's work should indicate the wide-ranging scope of his analysis. In addition to those subjects summarized here, the article also considers the language of the actual constitutional provision. See id. at 1485–88. For instance, McConnell found the choice to protect "free exercise" rather than "rights of conscience" significant, indicating support for exemptions. Id. at 1486. Of the history after adoption, McConnell acknowledged that the evidence "is inconclusive but tends to point against exemptions." Id. at 1513.

[97] Id. at 1459, 1461–62.

[98] Id. at 1464.

[99] Id. at 1464–65.

[100] See id.

limited" and did not include the "promotion of the good life for its citizens."[101]

Subsequent scholarship has added to McConnell's historical case for exemptions under the Free Exercise Clause. James Gordon's account of the period aligned with McConnell's limited government thesis.[102] Douglas Laycock addressed religious exemptions in light of the history of the Establishment Clause and found the claim that "exemptions prefer religion and thus violate the Establishment Clause" to be "inconsistent with the original understanding."[103] Laycock argued that *legislative* exemptions, including from laws requiring the taking of oaths, removal of hats, paying of taxes to support the established church, and serving in the military, were common during the establishment period and, while controversial, were also enacted during disestablishment.[104] Laycock found that such exemptions, and those few required by courts, did not run afoul of the Establishment Clause.[105]

On another tack, Kurt Lash argued that the history that matters for applications of the First Amendment to the states is that at the time of incorporation.[106] Because the Free Exercise Clause "was adopted a second time" through its incorporation against the states in the Fourteenth Amendment, Lash contended that "the Privileges or Immunities Clause incorporated a conception of religious liberty vastly different from that intended in 1791," one which made "[r]eligious exemptions from generally applicable laws . . . necessary and proper."[107] Surveying the drafting of the Fourteenth Amendment, Lash concluded that the Reconstruction Congress, aware of the conflict between the "laws of the majority" and the "religious exercise of individuals," extended the "protection of the Free Exercise Clause beyond laws that regulated religion *qua* religion."[108]

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[101] Id. at 1465.

[102] See James D. Gordon III, Free Exercise on the Mountaintop, 79 Calif. L. Rev. 91, 94 (1991) ("[C]onstitutionally compelled exemptions were within the framers' contemplation as a possible interpretation of the [F]ree [E]xercise [C]lause, and . . . exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.").

[103] Laycock, supra note 30, at 1795.

[104] Id. at 1803–25.

[105] Id. at 1824–25.

[106] Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106, 1109 (1995).

[107] Id.

[108] Id. at 1110.

B. The Historical Case Against Exemptions

Some scholars looked at the same evidence that McConnell considered and reached the opposite conclusion. Michael Malbin, for one, concluded that the First Amendment did not grant a broad right of religious exemptions, based largely on evidence from James Madison, George Mason, Thomas Jefferson, and John Locke.[109] Ellis West reached a similar conclusion, based on the perspectives of two religious dissenters, John Leland and Isaac Backus.[110] While both of these historical accounts of the Free Exercise Clause offered evidence against constitutionally required exemptions for religious exercise, neither matched the scope and diversity of evidence that McConnell brought to bear in his intervention.

In 1992, Philip Hamburger answered McConnell's challenge. In A Constitutional Right of Religious Exemption: An Historical Perspective, Hamburger offered contrary interpretations for much of McConnell's evidence and considered new sources on the historical understanding of religious exemptions.[111] Hamburger's account began by returning to the evidence that McConnell considered, reinterpreting the caveats that qualified state constitutional free exercise provisions.[112] While McConnell had argued that provisions that limited free exercise to that which did not disturb the "public peace" meant that exemptions were required for all but non-peaceful behavior,[113] Hamburger contended that such caveats were understood to apply to any breaches of the law, whether concerned with peacefulness or not.[114] Thus, according to Hamburger, the state could interfere with the free exercise right in order to enforce any general law.[115] Hamburger argued that James Madison, whose writings McConnell had read as indicating support for religious exemptions based on his preference for a "right" of free exercise, rather than "toleration," was actually opposed to exemptions.[116] Madison's preference for a "right

[109] Michael J. Malbin, Religion and Politics 19–29 (1978).

[110] Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 631–33 (1990).

[111] Hamburger, supra note 27, at 916–17.

[112] Id. at 917.

[113] McConnell, supra note 9, at 1461–62.

[114] Hamburger, supra note 27, at 917–19 (relying on the "caveats" in Maryland, New York, and South Carolina, along with English common law tradition, to conclude that "the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions").

[115] Id.

[116] Id. at 926–27.

to free exercise," Hamburger contended, did not equate to support for a "right of exemption from civil laws."[117] Hamburger cast legislatively enacted exemptions as individual grants that reflected the "sympathy" of the majority, rather than as products of a "general constitutional right of religious exemption."[118] Further, Hamburger concluded that the Founders' skeptical views of judicial discretion indicated that it was improbable that the Framers had intended a balancing test in the courts for religious exemptions.[119]

Considering new evidence, Hamburger found that during the Founding era the free exercise of religion was not generally considered "a particularly extensive or radical claim of religious liberty," that advocates for religious freedom "did not seek a constitutional right of exemption from objectionable civil laws," and, most controversially, that "a right of exemption may have been considered a 'law respecting religion.'"[120] Religious free exercise, for Hamburger, was the product of a growing individualism in religious America, yet this right was not extreme or particularly expansive.[121] What those who sought free exercise wanted was "an equality of civil rights and an absence of laws respecting religion," not a "right of exemption from religiously objectionable civil laws."[122] In fact, government was not viewed by Americans as limiting liberty, but rather as protecting religious freedom: "Liberty could only be obtained by submission to the civil laws of civil government."[123] Dissenters in the Founding era were more concerned with "an end to establishments [of religion]" than they were with exemptions.[124] Finally, Hamburger agreed with McConnell that Founding-era Americans assumed that government and religion would not often come in conflict with one another.[125] Conflicts that did arise between religion and

[117] Id. at 927.
[118] Id. at 929.
[119] Id. at 931 ("In the framing and ratification debates, . . . both Federalists and Anti-Federalists repeatedly said that the written constitution should delineate with precision the extent of federal power and that federal judges should not be left with vague rules that might become sources of judicial discretion. . . . Thus, it is improbable that the framers and ratifiers of the Bill of Rights deliberately adopted a balancing test as the standard of individual religious liberty and federal power when these were in conflict.").
[120] Id. at 932–33.
[121] Id. at 933.
[122] Id. at 936.
[123] Id.
[124] Id. at 946.
[125] Id. at 937–39.

government, he contended, resulted in only "marginal" claims for religious exemptions.[126]

In the decades since Hamburger wrote, Professor Philip Muñoz has extended the historical case against exemptions. Muñoz examined the legislative history of the Second Amendment, and, in particular, a proposed religious exemption from military service, to argue that the First Congress did not understand the Free Exercise Clause to include a right to religious exemptions from generally applicable laws.[127] Based on his examination of debate surrounding the provision, Muñoz concluded that the Founders "viewed exemptions from military service more as a privilege than a right."[128] The implication of the Second Amendment debate, for Muñoz, was that exemptions were not constitutionally compelled by the First Amendment.[129]

C. An Influential Debate: The Supreme Court on History and Free Exercise After Smith

In the aftermath of the Supreme Court's ruling in *Smith*, it was far from clear that the majority in favor of a lowered standard of review for incidental burdens on the free exercise of religion would hold. In subsequent decisions, Justices on both sides of the debate brought the scholarly debate over the history of free exercise into the courtroom.

Concurring in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the *Smith* rule was upheld, Justice Souter noted that the "Court has not explored the history of the [Free Exercise] Clause since its early attempts in 1879 and 1890."[130] The Court's early attempts at historical analysis, Justice Souter wrote, were "incomplete" according to recent scholarship, citing McConnell's work in particular.[131] Looking forward to an opportunity to re-examine *Smith*, Justice Souter wrote:

[126] Id. at 939.

[127] Muñoz, supra note 53, at 1109–19.

[128] Id. at 1115.

[129] Id. at 1119–20 ("If the right of religious 'free exercise' was understood to include exemptions from generally applicable but religiously burdensome laws, there would have been no need for an additional constitutional provision to safeguard conscientious objectors.").

[130] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 574 (1993) (Souter, J., concurring) (citing Reynolds v. United States, 98 U.S. 145, 162–66 (1878) and Davis v. Beason, 133 U.S. 333, 342 (1890)).

[131] Id.

> There appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State.[132]

In *City of Boerne v. Flores*, the Court reaffirmed the central holding of *Smith*.[133] Justice O'Connor dissented, arguing that *Smith* "was wrongly decided."[134] Justice O'Connor argued that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[135] In a lengthy analysis building substantially on McConnell's work, Justice O'Connor argued that "the words 'free exercise' had a precise meaning" at the time of the Founding[136]—one which ought to be sought in (1) the statutory guarantees of religious freedom from the colonies and states before and after ratification,[137] (2) relevant legislative practice prior to ratification,[138] and (3) the "writings of the early leaders who helped to shape our Nation."[139] Like McConnell, Justice O'Connor found that relevant statutory provisions allowed the state to interfere with religious free exercise "only when necessary to protect . . . civil peace or to prevent 'licentiousness,'" which O'Connor interpreted as equivalent to a requirement for a "significant state interest."[140] Similarly, Justice O'Connor found that state legislative practice in the aftermath of ratification, especially in the areas of "oath requirements, military conscription, and religious assessments" generally supported an exemptions doctrine.[141]

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[132] Id. at 575–76.
[133] 521 U.S. 507, 533–36 (1997).
[134] Id. at 544–45 (O'Connor, J., dissenting).
[135] Id. at 546.
[136] Id. at 550.
[137] Id. at 552–57.
[138] Id. at 557–60.
[139] Id. at 560–64.
[140] Id. at 552.
[141] Id. at 557–58 ("The ways in which these conflicts were resolved suggest that Americans in the Colonies and early States thought that, if an individual's religious scruples prevented

Justice Scalia wrote a concurrence responding to Justice O'Connor's historical analysis.[142] Rather than supporting Justice O'Connor's claim, Justice Scalia argued that the evidence in question "either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause."[143] Justice Scalia pointed to McConnell's cautious assessment of the historical record—that "constitutionally compelled exemptions . . . were *within the contemplation* of the framers and ratifiers as a *possible interpretation* of the free exercise clause"—as evidence that exemptions were not constitutionally required.[144] Justice Scalia then discussed the particular sources of evidence underlying Justice O'Connor's argument. First, he argued that state statutory provisions disabled purposeful discrimination, not the imposition of incidental burdens by neutral, generally applicable laws.[145] Second, like Hamburger, Justice Scalia interpreted statutory provisions that authorized government intervention where necessary to maintain the "public peace" and "order" as indicating a general requirement to "obey[] the laws."[146] Justice Scalia distinguished early state exemptions practice as legislative in nature and argued that it did not follow from such practice that subsequent judicial review must accommodate religious practices.[147] The Framers' statements were not decisive for Justice Scalia, because "[t]here is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable."[148] Finally, Scalia pointed to a complete lack of state or federal case law wherein a court refused "to enforce a generally applicable statute because of its failure to make accommodation."[149]

D. A Missing Chapter

As the competing historical analyses in *Boerne* indicate, the scholarly debate over the meaning of "free exercise" has proven influential, in and

him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage.").

[142] Id. at 537 (Scalia, J., concurring).

[143] Id.

[144] Id. at 537–38 (quoting McConnell, supra note 9, at 1415).

[145] Id. at 538–39.

[146] Id. at 539–40.

[147] Id. at 541.

[148] Id. at 541–42.

[149] Id. at 542–43.

out of court. If the Supreme Court revisits *Smith*, as seems increasingly probable,[150] it is likely to prove influential once more. As this brief summary has demonstrated, however, the history of the Free Exercise Clause has resisted easy definition. All sides acknowledge that neither the language of the First Amendment nor relevant legislative history, are dispositive.[151] In the absence of clear meaning or legislative intent, the conflict has turned on less proximate sources of authority: colonial practices before ratification, state practices after ratification, colonial and state statutory and constitutional provisions, legislatively enacted exemptions, the varied statements of the Framers, the history of the evangelical movement, and those few cases where the courts adjudicated requests for exemptions. Complicating the inquiry at all times is the institutional factor: while judicial review was inaugurated in the United States in 1803,[152] it would be more than a half-century before the Court considered the issue of religious exemptions.[153]

Recent scholarship on the history of disestablishment in the states, and on the early regulation of religion, adds a much-needed chapter to this complicated story and ultimately supports the historical case against religious exemptions. The next Part shows how that research—demonstrating that religion after disestablishment was highly regulated—is strong evidence that the Free Exercise Clause was not understood at the time of the Founding to require accommodations from generally applicable laws.

III. DISESTABLISHMENT AND THE LEGEND OF SMALL GOVERNMENT

For historians of free exercise, the period known as the First Disestablishment has largely been studied through state constitutional provisions and rare early examples of exemption litigation in state court.[154] The mechanisms of disestablishment—the various regulatory measures adopted by states eliminating established support for religion between the Revolution and the Civil War—have not yet been considered as sources of authority for the meaning of the Free Exercise Clause. There

[150] See supra note 39 and accompanying text.

[151] See McConnell, supra note 9, at 1485–86 (acknowledging that important changes to the Free Exercise Clause are ambiguous and that the legislative history of ratification is "unilluminating"); Hamburger, supra note 27, at 927–28.

[152] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[153] See Reynolds v. United States, 98 U.S. 145, 161–67 (1878).

[154] See supra Part II.

are strong reasons to do so. Disestablishment regulations in the states were arguably the clearest point of contact between government and religion in the wake of ratification.[155] And while much ink has been spilt on the precise meaning of state constitutional provisions guaranteeing the free exercise of religion,[156] these provisions (and their implications for the meaning of the First Amendment) should be read in light of the contemporaneous state regulations that governed religious institutions.

The history of the First Disestablishment has important ramifications for two of the central claims made by those in favor of religious exemptions: (1) that the period after ratification was one marked by an "expansive conception of religious freedom" consonant with constitutionally required exemptions for religious free exercise; and (2) that the early United States was characterized by a limited government that stayed in its lane, out of the way of religion.[157] This Part shows how recent historical analyses of disestablishment regulations undercut these claims and support the view that exemptions from neutral, generally applicable laws on the basis of religion were not constitutionally required by Founding-era conceptions of free exercise.

A. Disestablishment and the Regulation of Religion

Professor Sarah Gordon's seminal 2014 article, The First Disestablishment: Limits on Church Power and Property Before the Civil War, analyzed the inner workings of disestablishment in its first decades.[158] Gordon set out to answer the question, "What did it mean for a state to be disestablished, rather than just to announce that religious establishment was now prohibited?"[159] While disestablishment had long been considered synonymous with the erection of a "wall of separation" between church and state, Gordon's history demonstrated that, paradoxically, "disestablishment set the stage for extensive legislative and judicial oversight of churches and other religious organizations."[160] This oversight took two forms: strict controls on the "ability of religious

[155] This proposition is supported by the lack of litigation over exemptions during the period. See City of Boerne v. Flores, 521 U.S. 507, 542–43 (1997) (Scalia, J., concurring).

[156] See supra Part II.

[157] McConnell makes these claims most distinctly in his work. See McConnell, supra note 9, at 1415, 1436–49.

[158] See Gordon, supra note 19, at 347–50.

[159] Id. at 310.

[160] Id. at 310–11.

organizations to acquire and hold wealth," and controls on church governance that "mandat[ed] the election of lay trustees to hold and manage church property."[161]

The corporation was, in Gordon's account, a key mechanism of state control over religious institutions that evolved during disestablishment. "The private law of religion," Gordon argued, "that is, the world of contracts, deeds, donations, mortgages, bank accounts, and so on, all owned and managed in corporations . . . became the source of the ongoing management of disestablishment."[162] Distinguishing the incorporation of "religious societies of small means and deeply local scope" from "more dangerous," powerful organizations, Gordon argued that states "adapted the corporate form to empower the laity, giving congregants the right to control religious societies through incorporation statutes that secured property (in limited amounts) and required the election of trustees to manage all corporate assets."[163]

On the one hand, the corporate form led to intense and extensive government regulation of religious organizations.[164] In contrast to accounts of early America as a "vacuum of authority" characterized by limited government, Gordon argued that the history of corporate regulation, as seen in the era's legislation and litigation, was marked by "active government intervention."[165] This intervention most often took the form of extensive property regulations, including strict limits on the amount of acreage, value of property, or annual income for a religious corporation.[166] And with these regulations came invasive judicial oversight, often featuring property disputes among congregants that devolved "into outright schism."[167] Because incorporation of religious organizations made the inner workings of the church subject to judicial review, churches were exposed to the public eye, often in cases that "pitted the faithful against each other and against their ministers and priests."[168]

[161] Id.
[162] Id. at 317.
[163] Id. at 318–20.
[164] Id. at 320.
[165] Id. at 320–21.
[166] Id. at 323 ("Limitations on total acreage or value of property (or annual income for a religious corporation) were common elements of this new regulatory map.").
[167] Id. at 325–26.
[168] Id. at 320.

While disestablishment corporate law thus led to significant and intrusive state intervention into religious organizations, Gordon's account of the era is one of privilege, along with discipline, wherein the cause of religious liberty was understood to be served by and through the regulation of religious institutions.[169] In accepting the discipline of state control, Gordon argued, religious associations gained an "empowerment of institutional life associated with the corporate form."[170] The security of state recognition and property protection were two notable aspects of this empowerment.[171] Crucially, however, the religious liberty served by disestablishment regulations functioned through state law, not through exemptions from that law.[172] As Gordon puts it, "[t]hrough incorporation, separation of church and state . . . entailed freedom of conscience from state control, not freedom of institutional religion from state oversight."[173]

A further privilege that religious organizations gained through disestablishment regulations was the institution of lay governance, the second major mechanism of state influence over religious institutions that characterized disestablishment. Trustees, "chosen democratically and ruling by majority vote," became the state-recognized "embodiment of a religious society."[174] Gordon framed the development of lay control as a facet of religious corporations as part and parcel of the evangelical impulse towards individual choice: "The power to choose . . . was expressed in both religious doctrines and corporate organization."[175] Outside of the Protestant churches, moreover, Gordon traced the influence of the lay governance model in the Catholic Church and the unfortunate effects of this novel development: the proliferation of schisms between various sects of believers within a given society.[176] Gordon's work is central here, not because she is the first to consider this era of history, but rather because she attended to the mechanisms of religious regulation during disestablishment that had hitherto gone unexamined.[177]

[169] Id. at 314–15.
[170] Id. at 324.
[171] Id.
[172] Id. at 325.
[173] Id.
[174] Id. at 334.
[175] Id. at 340.
[176] Id. at 344, 347–48.
[177] Some other perspectives on disestablishment history are relevant. David Sehat's study, for example, noted the way in which states during disestablishment regulated morality. David Sehat, The Myth of American Religious Freedom 52–57 (2011). Sehat did not offer a specific position on the question of exemptions, yet his work suggests that evangelicals in the wake of

B. The Implications for the History of Free Exercise

Disestablishment regulation of religious institutions erodes two of the central claims undergirding the historical case for religious exemptions. First, this history indicates that while an expansive conception of religious freedom did emerge following ratification, that religious freedom was sought in and through state regulation of religious institutions, not by exempting religion from state oversight. Second, the invasive and extensive regulation of religious institutions during disestablishment refutes the proposition that early American government was "limited."

1. An Expansive Conception of Regulated Religious Freedom

In McConnell's account, the evangelistic movement after the Revolutionary War was responsible for disestablishment because "[g]uaranteed state support [for religion] was thought to stifle religious enthusiasm and initiative."[178] Disestablishment was the confluence of evangelical arguments and secular liberalism, triumphing in the name of religious liberty over civic republicanism and its invasive government promotion of moral virtue.[179] These groups believed that "voluntary religious societies—not the state—are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue. The only support that churches can legitimately expect from the government, apart from equal participation in the benefits of civil society, is protection and noninterference."[180] This view of disestablishment undergirds McConnell's claim that the Founding era witnessed an "expansive conception of religious freedom."[181]

Gordon's account of disestablishment regulations on religious institutions qualifies, but does not fully undercut, McConnell's narrative. Gordon agreed with McConnell, for instance, that the evangelical movement was in some ways aligned with the push for

disestablishment did not seek or require exemptions because they sought to achieve Christian moral aims through majoritarian politics. Id. at 55. Professor Thomas Buckley's thorough study of Virginia politics also breaks ground for Gordon's argument. See Thomas E. Buckley, Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786–1801, at 45 Wm. & Mary Q. 33, 35 (1988).

[178] McConnell, supra note 9, at 1438.

[179] Id. at 1442–43.

[180] Id. at 1443.

[181] Id. at 1436.

disestablishment.[182] The "[l]iberty from government-controlled religion" she argued, "creat[ed] space for great innovation."[183] Both scholars also agreed that disestablishment was a period of "individual empowerment in religious life," a moment when religious freedom became personal.[184]

Gordon parted ways with McConnell, however, by showing how the state "reconfigured," but did not abandon, its control over religion.[185] There was no "separation of government from religious life" in the wake of disestablishment, Gordon argued, because religions operated in an "administered market," regulated by various legal regimes restricting wealth and requiring lay control of religious institutions.[186] A second significant difference is that Gordon highlighted the factionalism and fragmentation that resulted from the evangelical impulse. Backed by incorporation law, "[p]arishioners felt new power to vote not only with their feet, but also with lawsuits."[187]

State regulation of religious institutions was more than incidental: it was essential to the nature of religious freedom during disestablishment. The enthusiasm of the era was produced and enhanced by the state's regimes of institutional control.[188] Lay empowerment aligned with the rising feelings of individual duty to God.[189] The ease with which religions could achieve legal protection through incorporation elevated unsophisticated and developing sects that lacked political influence.[190] Courts backed claims of individual conscience from lay trustee petitioners over the interests of "long-established religious traditions," orthodox

[182] Compare Gordon, supra note 19, at 336 (arguing that the "Second Great Awakening was powered by disestablishment"), with McConnell, supra note 9, at 1438 (arguing that the "most intense" evangelical sects "opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities").

[183] Id. at 337.

[184] Id. at 370; see McConnell, supra note 9, at 1442–45 (describing evangelicalism as essentially opposed to the use of religion as "an instrument of statecraft" and arguing that the Free Exercise Clause, emerging from that movement, authorized courts to determine "the proper boundary between *individual* conscience and the magistrate's authority") (emphasis added)).

[185] See Gordon, supra note 19, at 337.

[186] Id.

[187] Id. at 338.

[188] Id. at 335–44 (explaining how state incorporation regimes democratized religious practice by lowering the barriers to starting a congregation, legitimizing smaller congregations, empowering individuals to choose their congregation, and validating certain ecclesiastical doctrines in lawsuits, all of which thereby increased religious enthusiasm).

[189] Id. at 338–39.

[190] Id. at 339.

beliefs, and ministers.[191] And, as seen in the case of Father Kohlmann, lay trustees made crucial decisions about the future of their churches, authority gained by and through the state.[192]

As Gordon shows, one feature of disestablishment regulations is that they were widely accepted, even sought out by the religious. The lack of litigation over state regulation of the church speaks volumes about the nature of religious freedom during disestablishment. McConnell, Walsh, and other advocates of religious exemptions hold up those few examples of litigation over exemptions as key sources of evidence.[193] Yet the silent-majority perspective of the era, it seems, was one of acceptance of invasive regulation of religion. The mass of litigation involving religious institutions that arose during disestablishment was not in the form of challenges to the regulations themselves but was most often disputes fought in and through the governing legal regimes.[194]

In sum, then, Gordon's account of disestablishment history supports the idea that the era was one of "expansive religious freedom." But this history shows that the era's religious freedom was sought in and through legal regulation. In the terms of the exemption debate, disestablishment regulations cut against the idea that the "freedom" protected by the Free Exercise Clause was a freedom *from* government interference. Rather, this chapter in the Founding era indicates that religious freedom was about the "power to choose" one's religious doctrines, the power of lay individuals to control religious organizations, and a government system that promoted a diverse set of religious faiths. The era was not, however, defined by the power to exempt oneself and one's church from the law.

2. A Not-So-Limited Government

A second, related claim supporting the historical case for religious exemptions is the Founding era was characterized by a "limited government," one that avoided conflict with religion.[195] Looking especially at state constitutional provisions, McConnell argued that "the early free exercise clauses [in the states after ratification] seem[ed] to allow churches and other religious institutions to define their own

[191] See id. at 342.

[192] See supra notes 13–17 and accompanying text.

[193] See McConnell, supra note 9, at 1466 (noting that the "issue of exemptions" did not often arise in actual free exercise controversies); Walsh, supra note 8, at 2–3.

[194] See Gordon, supra note 19, at 342.

[195] See, e.g., McConnell, supra note 9, at 1415.

doctrine, membership, organization, and internal requirements without state interference."[196] This view aligns with an account of disestablishment wherein evangelicals and secular liberals banished republican values from the public sphere, with religion laying sole claim to the promotion of public virtue and seeking only "protection and noninterference" from the state.[197]

Disestablishment regulation of religious institutions directly contradicts this account.[198] That religious institutions were incorporated and that corporate law specified which groups of individuals had the power to define church "doctrine, membership, organization, and internal requirements," constitutes significant and invasive state interference. As Gordon argued:

> Disestablishment . . . was not widely understood as a mandate for government deference to religious institutions or the separation of those institutions from government, at least according to today's understanding of those terms. Quite the opposite—during the foundational period of American law, deep government involvement in religious institutions, rather than strict separation or respectful support, was characteristic and widely accepted.[199]

This Note has already touched on many of the regulatory measures that constituted this "deep government involvement," but some specific examples, including those drawn from litigation over these laws, are useful here.

In the 1827 case *Quaker Society of Contentnea v. Dickenson*, the North Carolina Supreme Court barred a congregant from transferring slaves to the corporation of which he was a part, on the basis of a statute that prohibited religious societies and their trustees from acquiring any

[196] Id. at 1464–65.

[197] Id. at 1442–43.

[198] A point that Gordon made explicitly, though not in the context of the exemptions debate. As she put it:

> Many Americans, especially those of the Tea Party persuasion, venerate "Christian" liberty (together with small government) as a central pillar of an inspired national Constitution. In this story, they overlook the key features of legislation and the judicial management of disestablishment. In reality, this world was built just as much from political, legal, and religious furnishings of state legislation in the early nineteenth century as from the convictions of individual believers. Regulation . . . was widely understood as the surest means of protecting individual liberty to believe.

Gordon, supra note 19, at 371.

[199] Id. at 311.

property unless it was "for the use" of the society.[200] In addition to limiting the uses for which a church could hold property, the 1796 statute on which the case turned also limited the church's ability to hold any property at all and the amount of annual income it could derive from that property.[201] The emancipation of slaves, which was the underlying purpose of the transfer at issue, was found to violate the "use and benefit" constraint on church disposition of property.[202]

While litigation such as that in *Dickenson* turned on onerous and invasive property restrictions imposed by the state on a religious corporation, courts were also called in to settle disputes between church factions, newly empowered by state requirements for lay control. For instance, four years after Father Kohlmann's exemption was decided, trustees at St. Peter's and St. Patrick's (both New York City Catholic churches) fell out over a debt for building at St. Patrick's.[203] A Bishop's handpicked supporter was publicly challenged by lay petitioners at St. Peter's.[204] In a defamation suit, the New York court held that church trustees had the right to investigate their pastor's conduct and character.[205] In other words, the legally recognized representatives of St. Peter's—its trustees—had the right to investigate and invalidate the pastor of their church, a man chosen and placed by the church hierarchy itself.[206]

These cases illustrate an inconvenient truth for those in favor of religious exemptions: early state governments, at least in the sphere of religious liberty, were hardly "limited." Church doctrine, leadership, organization, and property were all shaped by state corporate law. Far from declaring such areas off limits on the basis of religious freedom provisions, the judiciary enforced these laws and found itself deep into sensitive church disputes. In many ways, the governments of disestablishment were less limited by religious freedom provisions than they are today.

[200] Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. (1 Dev.) 189, 200–03 (1827) (opinion of Taylor, C.J.).

[201] Id. at 200; see also Gordon, supra note 19, at 326 (detailing the limitations imposed by the 1796 statute).

[202] *Dickenson*, 12 N.C. at 200–03.

[203] See Dignan, supra note 15, at 96, 98–99.

[204] Id. at 97–100.

[205] Gordon, supra note 19, at 350.

[206] See id. at 349–50.

3. An Anachronism Objection

One challenge to the use of disestablishment state regulatory practice to shed light on the meaning of the Free Exercise Clause is that many of these practices, if considered today, would not be constitutional.[207] The Court's recent caselaw makes clear that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[208] Furthermore, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[209]

Many disestablishment regulations, considered today, would be found to have imposed "special disability" on religious institutions based specifically on their "religious status," or, alternatively, to have discriminated on the basis of religious belief. To cite one example of many, the New York incorporation statute of 1813 is divided into three sections, each offering specific, unique treatment for the "Protestant Episcopal church," "every Reformed Protestant Dutch church or congregation," and "any other church."[210] For instance, the law requires that incorporated Protestant Episcopal churches hold elections for the positions of warden and vestryman on a day during Easter week, but includes no such requirement for the timing of elections for officers of incorporated Reformed Protestant Dutch churches.[211] While this is not the space for a full constitutional analysis of this or other disestablishment regulations, it seems clear that such differential treatment—singling out religion in general and specific denominations in particular for unique regulation—would be unlikely to withstand judicial review under the *Lukumi* standard.

What are we to do with such evidence of free exercise, then? Should the present unconstitutionality of past acts disqualify this evidence? If the goal of historical analysis of free exercise is to understand the Founding

[207] On "outmoded" precedent and historical interpretation in the law, see Jack M. Balkin, The New Originalism and the Uses of History, 82 Fordham L. Rev. 641, 691 (2013).

[208] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

[209] *Lukumi*, 508 U.S. at 532.

[210] An Act to Provide for the Incorporation of Religious Societies, ch. 60, §§ 1–3, 2 N.Y. Sess. Laws 212, 212–14 (1813).

[211] See id. §§ 1–2.

era, and not to curate it, then the answer must be "no." Disestablishment laws that targeted particular sects or disabled religion show us the gap between modern free exercise doctrine and what free exercise looked like during the Founding era. If scholars and Justices are serious about using past practice to inform modern jurisprudence, the evidence of disestablishment regulations is powerful testimony about the extent of religious freedom during the Founding. That subsequent decisions have expanded or narrowed that freedom should not disqualify an inconsistent past for evidentiary purposes.

4. A Categorical Objection

The history of disestablishment regulations is, as Gordon framed it, primarily about the relationship between early state government and religious institutions.[212] A second objection to using this history to interpret the Free Exercise Clause might be that disestablishment tells us something about the free exercise rights of *institutions*, but not about free exercise rights of *individuals*. Religious institutions, in other words, are not people, and their rights should not be taken as synonymous with those of individuals.

On its face, this argument appears plausible. After all, the most important scholarship[213] and judicial precedent[214] that addresses the historical meaning of the Free Exercise Clause focuses on the rights of individuals, not institutions. Despite these facts, however, recent Supreme Court precedent indicates that the modern Court considers the free exercise rights of individuals and institutions to be connected, suggesting that evidence about the historical scope of institutional religious freedom should be relevant to future interpretations of the Free Exercise Clause more generally. Furthermore, this modern interpretation is supported by the historical record as seen in McConnell's own analysis, which uses evidence of institutional religious freedom during the Founding era to help define the scope of the Free Exercise Clause generally.

[212] See Gordon, supra note 19, at 315 ("[R]eligious liberty was tightly bound up with institutional discipline.").

[213] See, e.g., McConnell, supra note 9, at 1416 n.22 (focusing on individuals' right to religious exemptions from neutral laws); Hamburger, supra note 27, at 916 (responding to McConnell).

[214] For a list of the Supreme Court's exemptions cases, see Hamburger, supra note 27, at 915 n.1.

The Supreme Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, building on Court precedent in the areas of church property and governance, made clear that religious institutions are protected by the Free Exercise Clause.[215] More than that, Chief Justice Roberts's majority opinion noted that the First Amendment "gives special solicitude to the rights of religious organizations."[216] Justice Roberts grounded his opinion in a historical analysis, including of *individual* free exercise rights, arguing that the Puritans left for the New World in order to escape state control of the church and "establish their own modes of worship."[217] On the basis of this historical analysis that blended individual and institutional history, Justice Roberts argued that "the Free Exercise Clause prevents [the government] from interfering with the freedom of religious groups to select their own [ministers]."[218] For the purposes of this Note, *Hosanna-Tabor* matters because the Court indicated that institutional religious freedom is broader than individual freedom and used historical evidence about individuals in order to analyze the extent of institutional religious freedom. In other words, the decision indicates that the modern Supreme Court does not identify a categorical distinction between institutions and individuals, suggesting that institutional evidence is relevant to understanding the scope of the Free Exercise Clause more generally.

Burwell v. Hobby Lobby Stores, Inc.[219] also tells us something about the modern Court's understanding of the linked relationship between institutional and individual religious freedom. That case was decided on the basis of language in RFRA, which is identical to *Sherbert*'s standard of review for religious exemptions.[220] Writing for the majority, Justice Alito held that for-profit corporations possess free exercise rights under RFRA.[221] As was the case in *Hosanna-Tabor*, Justice Alito in no way indicated that the meaning of the Free Exercise Clause should be construed differently depending on the category of actor in question.

[215] 565 U.S. 171, 173, 188 (2012) (finding that "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission through its appointments").

[216] Id. at 189.

[217] See id. at 182–83.

[218] Id. at 184.

[219] 573 U.S. 682 (2014).

[220] See id. at 705 (citing 42 U.S.C. § 2000bb-1(a) to (b) (2014)).

[221] Id. at 706–09, 714 (holding that "exercise of religion under the First Amendment" in RFRA was not meant to be tied to the "Court's pre-*Smith* interpretation of that Amendment," but rather the First Amendment itself).

Justice Alito specifically rejected a series of categorical arguments raised by the Obama Administration in an attempt to show that for-profit corporations should not be granted free exercise rights.[222] Underscoring the continuity between institutional and individual religious freedom, the Court also noted that promoting for-profit corporations' religious freedoms also "furthers individual religious freedom."[223]

Together, *Hosanna-Tabor* and *Hobby Lobby* suggest that the Roberts Court could consider evidence about the historical scope of institutional religious freedom when asked to define the meaning of the Free Exercise Clause more generally. Such an approach is consonant with the historical evidence itself. In making the historical case for exemptions as permissible under the Free Exercise Clause, McConnell deploys institutional evidence. He begins his history of free exercise prior to the Constitution by analyzing approaches to "Church-State Relations."[224] In his account of evangelicalism prior to ratification, McConnell relies in part on evidence that churches and organized groups of adherents opposed establishment, seeking freedom from state control.[225] In discussing the limits on early state free exercise provisions, McConnell notes that those provisions defined the rights of "churches and other religious institutions," not merely individuals.[226] While there may well be some theoretical distinction to be made between the historical rights of churches and individuals, McConnell's own account of the relevant history suggests that such a distinction has no basis in the Founding-era evidence itself.

Gordon's attention to the significance of disestablishment practices to our understanding of the relationship between the state and religious institutions is valuable. But the institutional significance of this history does not exhaust its authority. As the work of both McConnell and Gordon indicates, there is no clear distinction in the historical record between individual and institutional religious freedoms. Recent precedent at the Supreme Court, interpreting that record, supports the proposition that evidence of institutional religious freedom bears on the scope of individual freedom as well. Disestablishment regulations of religious

[222] Id. at 709–19.
[223] Id. at 709.
[224] McConnell, supra note 9, at 1421–30.
[225] Id. at 1438 ("The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities.").
[226] Id. at 1464–65.

institutions are thus compelling evidence for our understanding of the Free Exercise Clause *generally*, both for individuals and institutions.

5. A Federalism Objection

A final objection to the use of state disestablishment practices to interpret free exercise rights sounds in federalist principles. Specifically, one might argue that state regulatory practices should not be taken as indicative of the meaning of a federal constitutional provision. Alternatively, because disestablishment practices varied in the states, one might argue that this evidence is too fractured and diverse to be persuasive.

The answer to these points is readily given by scholars on both sides of the exemptions debate and by the Supreme Court itself. That Justices O'Connor and Scalia, on opposite sides of the exemptions debate in *City of Boerne*, both cited state constitutional provisions in defense of their preferred interpretations of the United States Constitution's Free Exercise Clause underscores the importance of state history on this question.[227] While it is by no means clear exactly which historical sources the Supreme Court might turn to the next time it is called to interpret the Free Exercise Clause, the decision in *Boerne* and the scholarly debate over the historical meaning of free exercise indicate that state practices during disestablishment are persuasive evidence on the question of exemptions. Furthermore, while it is true that there was some variety in state regulatory practice during disestablishment, a coherent narrative of the era can be framed, one that indicates a general acceptance of state regulation,[228] not a sphere of religious liberty independent of government and consonant with theories of religious exemptions. In short, the record indicates that institutions and individuals sought religious freedom through the power and protection derived from state regulation, not through exemption.

CONCLUSION: THE PASTS AND FUTURES OF ACCOMMODATION DOCTRINE

This Note does not advocate for the use of history in determining the meaning of the Free Exercise Clause. Rather, it contends that if one does

[227] See City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in part); id. at 553–54 (O'Connor, J., dissenting).

[228] This was Gordon's conclusion, after acknowledging the diversity of state data. See Gordon, supra note 19, at 315.

judge the extent of religious liberty based on historical sources, those sources ought to include the full range of relevant evidence. The history in question here is complex and contradictory, which helps explain why so many of the Court's Religion Clauses cases are deeply divided. What disestablishment regulation of religious institutions shows, however, is that while an expansive conception of religious liberty grounded in individualism did arise in the Founding era, that freedom was sought in and through government regulation, not through exemptions from the law. It also shows that the period in question was not one where government was limited, at least insofar as the regulation of religion was concerned.

The issue of exemptions on the basis of religious free exercise is divisive, sometimes spectacular, and often deeply personal. To study the individuals who make it to court—the Father Kohlmanns and Adell Sherberts—is to see one part of the story. But disestablishment history shows that free exercise in early America, and the relationship between church and state more generally, also turns on less personal and passionate encounters. Corporate law, restrictions on property, and the institution of lay governance may not seem as obviously to bear on the question of religious exemptions as do conflicts between an individual's faith and a particular law. However, that these regulations did not generate litigation, passion, or outrage during the First Disestablishment does not lessen their probative value on the meaning of free exercise. The widespread acceptance of these practices makes it all the more evident that disestablishment history stands firmly against religious exemptions.