

March 1998

## Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in *City of Boerne v. Flores*

Michael W. McConnell

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

---

### Repository Citation

Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819 (1998), <https://scholarship.law.wm.edu/wmlr/vol39/iss3/11>

# FREEDOM FROM PERSECUTION OR PROTECTION OF THE RIGHTS OF CONSCIENCE?: A CRITIQUE OF JUSTICE SCALIA'S HISTORICAL ARGUMENTS IN *CITY OF BOERNE V. FLORES*

MICHAEL W. MCCONNELL\*

In *City of Boerne v. Flores*,<sup>1</sup> the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA or the "Act"),<sup>2</sup> on the ground that it exceeded Congress's power to "enforce" the provisions of the Fourteenth Amendment.<sup>3</sup> RFRA would have provided protection against governmental acts that "substantially burden" a person's exercise of religion unless the government could demonstrate they are necessary to achieve a compelling governmental interest.<sup>4</sup>

In *Employment Division v. Smith*,<sup>5</sup> the Court held that the Free Exercise Clause of the First Amendment provides protection only against governmental action that singles out, or is specifically directed at, religion.<sup>6</sup> Under *Smith*, neutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion.<sup>7</sup> I shall call the *Smith* interpretation of free exercise

---

\* Presidential Professor, University of Utah College of Law. The author wrote an amicus curiae brief in the case under discussion, without compensation, on behalf of the United States Catholic Conference, the Evangelical Lutheran Church in America, the Orthodox Church in America, and the Evangelical Covenant Church, in support of the constitutionality of the Religious Freedom Restoration Act. None of the opinions expressed in this Comment should be attributed to those organizations, nor have those organizations exercised any influence or control over the writing of this Comment, which solely reflects the opinions of the author.

1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. See *Flores*, 117 S. Ct. at 2168-72; Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

4. 42 U.S.C. § 2000bb-1.

5. 494 U.S. 872 (1990).

6. See *id.* at 877-78.

7. See *id.* at 878-82. In addition to laws that single out religion, *Smith* allowed

the "nondiscrimination" interpretation because it treats the Free Exercise Clause as a protection against discrimination against religion, and I shall call the alternative the "freedom-protective" interpretation because it protects a specific freedom against unnecessary governmental interference. RFRA was Congress's attempt to return to the freedom-protective understanding. The Act was invalidated on the ground that it went beyond the judicial definition of the constitutional right and could not be seen as enforcing the Free Exercise Clause.<sup>8</sup>

In their dissenting opinions, Justices O'Connor, Souter, and Breyer argued, with varying degrees of certitude, that *Smith* was wrongly decided and urged the Court to invite briefing and argument on that specific question.<sup>9</sup> If the Court overruled *Smith*, RFRA would no longer present a clash between congressional and judicial interpretations of the Constitution. Justice O'Connor pointed out that *Smith* had adopted its narrow interpretation of the Free Exercise Clause without briefing or argument by the parties.<sup>10</sup> She argued that the *Smith* decision contradicted precedent and "has harmed religious liberty," citing four cases in which lower courts had invoked the *Smith* rule to prevent "searching judicial inquiry" into infringements on religious exercise.<sup>11</sup> She explained that stare decisis should not dissuade the Court from revisiting *Smith* because the decision was "demonstrably wrong" and because, as a recent decision, it had not "engendered the kind of reliance on its continued application that would militate against overruling it."<sup>12</sup> She devoted the

---

heightened scrutiny for government actions involving individualized governmental assessment of the reasons for the relevant conduct and for free exercise claims that also implicate other constitutional rights. *See id.* at 881-82, 884.

8. *See Flores*, 117 S. Ct. at 2162-72.

9. *See id.* at 2176 (O'Connor, J., dissenting) (stating that "*Smith* was wrongly decided"); *id.* at 2186 (Souter, J., dissenting) (expressing "serious doubts" about *Smith* but stating unwillingness to accept or reject it without additional argument); *id.* at 2186 (Breyer, J., dissenting) (calling for briefing and argument and joining the portion of Justice O'Connor's opinion attacking *Smith* on historical grounds).

10. *See id.* at 2176 (O'Connor, J., dissenting).

11. *Id.* at 2177 (O'Connor, J., dissenting) (citing *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991); *Rectors of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990)).

12. *Id.* (O'Connor, J., dissenting).

vast majority of her dissenting opinion, however, to a detailed examination of historical evidence that, she concluded, "reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion," than as a mere protection against discrimination.<sup>13</sup> A major part of this evidence consisted of various colonial charters and state constitutions that protected religious liberty subject to a proviso that this liberty not be used to disturb public peace or safety.<sup>14</sup> Justice O'Connor pointed out that these provisos would have been "superfluous" if the liberty so granted had been limited to laws discriminating against religion.<sup>15</sup> I have written previously on these historical points,<sup>16</sup> as have other historians and constitutional scholars.<sup>17</sup> I therefore will not comment further on Justice O'Connor's dissent, with which I largely agree.

In his opinion for the Court, Justice Kennedy did not respond to Justice O'Connor's arguments against the *Smith* decision, holding that "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles."<sup>18</sup> In other words, RFRA was unconstitutional because it contradicted the Court, and there was no call to consider whether the Court might have gotten it wrong.

13. *Id.* at 2178 (O'Connor, J., dissenting).

14. *See id.* at 2179-82 (O'Connor, J., dissenting).

15. *See id.* at 2181 (O'Connor, J., dissenting).

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

17. *See, e.g.*, MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71 (1992); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 591 (1990); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996).

18. *Flores*, 117 S. Ct. at 2172.

This left the substantive defense of *Smith* to its author, Justice Scalia. Writing a concurring opinion in *Flores* gave Justice Scalia the opportunity to address the history of the Free Exercise Clause,<sup>19</sup> which he curiously had disregarded in his *Smith* opinion.<sup>20</sup> Justice Scalia described as "extravagant" Justice O'Connor's "claim that the historical record shows *Smith* to have been wrong," and contrasted that conclusion to the assessment of someone whom he described as "the most prominent scholarly critic of *Smith*."<sup>21</sup> After an "extensive review of the historical record," this critic, according to Justice Scalia, "was willing to venture no more than that 'constitutionally compelled exemptions [from generally applicable laws regulating conduct] were *within* the contemplation of the framers and ratifiers as a *possible* interpretation of the free exercise clause.'"<sup>22</sup> Actually, the critic went a little farther than that. He stated that "the modern doctrine of free exercise exemptions [before *Smith*] is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation."<sup>23</sup> I appreciate the gracious compliment from my former teacher—whether or not it is deserved—but after studying his attempted refutation of Justice O'Connor, I remain of the opinion that *Smith* was wrong.

### I. THE INTELLECTUAL CONTEXT

Before turning to the colonial and early state legal materials, on which Justice O'Connor and Justice Scalia placed primary emphasis, it is necessary to place this controversy in the context of the wider philosophical and theological debates over religious toleration and freedom of conscience.<sup>24</sup>

---

19. See *Flores*, 117 S. Ct. at 2172-76 (Scalia, J., concurring in part).

20. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116-19 (1990).

21. *Flores*, 117 S. Ct. at 2172 (Scalia, J., concurring in part).

22. *Id.* at 2172-73 (Scalia, J., concurring in part) (quoting McConnell, *supra* note 16, at 1415) (explanatory brackets and emphasis in Justice Scalia's quotation; misprint corrected).

23. McConnell, *supra* note 16, at 1512.

24. Even before toleration became an issue, conflicts between church and state often raised the question of whether church officials or church property were exempted, by virtue of their religious station, from generally applicable laws. The most

There were many arguments for toleration: that coercion in matters of conscience could breed only hypocrisy and not sincere belief,<sup>25</sup> that civil magistrates are unreliable judges of religious truth,<sup>26</sup> that religious repression causes discord and civil dissension and makes enemies of peaceful citizens,<sup>27</sup> that coercion impedes the search for truth,<sup>28</sup> that it is contrary to the example of Jesus Christ,<sup>29</sup> that it weakens religion by encouraging indolence in the clergy,<sup>30</sup> and that religious intolerance impedes trade and industry.<sup>31</sup> Many of these arguments were but an application of a wider argument for limited government and a liberal state. But by far the most common argument, especially in America, and the argument most pointedly establishing religious freedom as a special case, was based on the inviolability of conscience.<sup>32</sup> Most natural rights were surrendered to the polity in exchange for civil rights and protection, but inalienable rights—of which liberty of conscience was the clearest and universal example—were not.<sup>33</sup>

The most celebrated presentation of this argument in the American context was Madison's *Memorial and Remonstrance Against Religious Assessments*:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This

---

celebrated clash along these lines involved Thomas Becket and Henry II. See C.R. Cheny, *The Punishment of Felonous Clerks*, 51 ENG. HIST. REV. 215 (1936).

25. See JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 295, 299, 301 (Robert A. Rutland et al. eds., 1973).

26. See *id.* at 301.

27. See *id.* at 302.

28. See JOHN LOCKE, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 5, 5-9 (photo. reprint 1963) (London 1823); MADISON, *supra* note 25, at 303.

29. See LOCKE, *supra* note 28, at 9; MADISON, *supra* note 25, at 301.

30. See MADISON, *supra* note 25, at 301.

31. See, e.g., GEORGE DARGO, *ROOTS OF THE REPUBLIC* 79 (1974) (quoting a 1750 Lords of Trade statement that a "free Exercise of Religion is so valuable a branch of true liberty, and so essential to the enriching and improving of a Trading Nation it should ever be held sacred in His Majesty's Colonies"); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 858-59 (1986) (referring to the views of Alexander Hamilton).

32. See generally Witte, *supra* note 17, at 389-94 (discussing the liberty of conscience).

33. See MADISON, *supra* note 25, at 300; Witte, *supra* note 17, at 389-94.

duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>34</sup>

This, Madison explained, is why the freedom of religion is "in its nature an unalienable right": because "what is here a right towards men, is a duty towards the Creator."<sup>35</sup>

This is as clear a statement as can be found of the theory underlying the freedom-protective interpretation of the Free Exercise Clause. The point is not just that governments should not persecute religious dissidents, but that "every man" has a duty to God, defined by conscience, that is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."<sup>36</sup> While the *Smith* interpretation of free exercise is adequate to ward off religious persecution, it is not adequate to achieve a full liberty of conscience, so understood. Thus, in his first draft of what ultimately was enacted as the Religion Clauses of the First Amendment, Madison proposed that "[t]he civil rights of none shall be abridged on account of religious belief or worship . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>37</sup> That civil rights not be abridged "on account of" religious belief or worship protects against persecution or discrimination and approximates the *Smith* reading of the Free Exercise Clause. That the full and equal rights of conscience not be "in any manner, or on any pretext, infringed" goes beyond that.

The question naturally arose, however: What if, under claim of conscience, a religious adherent asserts a right to do some

---

34. MADISON, *supra* note 25, at 299.

35. *Id.*

36. *Id.*

37. 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

terrible thing? The question is found, in some form, in virtually every tract against liberty of conscience, and most of the writings advocating religious toleration offer some variant of the same answer. Pierre Bayle, for example, noted that critics claim that if freedom of religion were adopted, "magistrates would not be able to punish a man who robs or kills, after being persuaded of the lawfulness [meaning lawfulness according to religious law] of these actions."<sup>38</sup> The answer, he said, is that the magistrate "is not obliged to have any regard for conscience except in matters which do not affect the public peace."<sup>39</sup> The magistrate "is obliged to maintain society and punish all those who destroy the foundations, as murderers and robbers do."<sup>40</sup> William Penn described one of the objections to liberty of conscience as follows: "at this Rate ye may pretend to Cut our Throats, and do all Manner of Savage Acts."<sup>41</sup> Penn's response was to deny that believers sought exemptions from any laws "that tend to Sober, Just, and Industrious Living."<sup>42</sup> John Leland, the leader of the Virginia Baptists during the assessment controversy, and constituent of Madison's, stated that should a man

disturb the peace and good order of the civil police, he should be punished according to his crime, let his religion be what it will; but when a man is a peaceable subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience.<sup>43</sup>

---

38. PIERRE BAYLE, *Philosophical Commentary on These Words of Jesus Christ: Compel Them to Come In*, in PIERRE BAYLE'S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION 7, 167 (Amie Godman Tannenbaum trans., 1987).

39. *Id.*

40. *Id.*

41. William Penn, *The Great Case of Liberty of Conscience*, in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443, 457 (photo. reprint 1974) (London, J. Sowle 1726).

42. *Id.*

43. JACK NIPS [JOHN LELAND], *The Yankee Spy*, in THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (photo. reprint 1969) (L.F. Greene ed., New York, G.W. Wood 1845). For a discussion of Leland's relationship with James Madison and his support for religious freedom, see Robert S. Alley, *Public Education and the Public Good*, 4 WM. & MARY BILL RTS. J. 277, 294-96 (1995).



The example of Roger Williams is also significant. He went to some lengths to deny that freedom of conscience would lead to anarchy,<sup>44</sup> and his comments sometimes have been interpreted to mean that believers are compelled to comply with all generally applicable laws.<sup>45</sup> A leading modern scholar of Roger Williams disagrees with this interpretation:

Williams did not simply define an inviolate area of conscience and then leave the government free to act in any manner outside this narrowly prescribed area. Rather, for him, both conscience and government had limits. The civil government was limited to its responsibility for preserving peace and civility. The conscience was limited by its obligation to submit itself to the government as God's ordinance for preserving peace and civility. Thus, neither Williams' letter to Providence concerning taxes nor his famous Ship of State letter may be read as subjecting the claims of conscience to *any* generally applicable law so long as it does not deliberately infringe upon religious belief or act. Rather, in both cases Williams saw conscience subjected to particular laws, and he viewed these laws as within the specific scope of the government's ordained responsibilities.<sup>46</sup>

Two points about these exchanges are significant. First, the argument would not arise if the freedom of religion were generally understood as not embracing exemptions from generally applicable laws; the law already forbade "robbing," "killing," and "savage acts." Thus, the very existence—indeed ubiquity—of the controversy shows that the freedom-protective interpretation was a real possibility in the eighteenth century, and not (as some suggest) a modern Warren Court-style innovation. Second, the typical response was to concede that conscience had to give way to laws necessary for the public peace. Precisely what sorts of laws may fall within this category was often left vague, but it is this issue—what public purposes are sufficiently important

---

44. See Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 478-83 (1991).

45. See West, *supra* note 17, at 630-31.

46. Hall, *supra* note 44, at 486.

that they justify limiting the rights of conscience—that framed the debate.

The most influential work along these lines was John Locke's *A Letter Concerning Toleration*.<sup>47</sup> Unfortunately, Locke supplied two different lines of analysis that, although consistent in his day, point to two different answers under conditions of American constitutionalism. Locke distinguished government regulation of "the outward form and rites of worship" from its treatment of "the doctrines and articles of faith,"<sup>48</sup> which include "[m]oral actions,"<sup>49</sup> and explained that these must be "handled . . . distinctly."<sup>50</sup> As a child of the Reformation, Locke apparently considered the latter more important than the former. With respect to outward worship, Locke advocated a *Smith*-like rule:

Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses. . . . But those things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites. Only the magistrate ought always to be very careful that he do not misuse his authority, to the oppression of any church, under pretence of public good.<sup>51</sup>

With respect to doctrine and moral actions, Locke's discussion is more complex. He began by asserting the primacy of conscience. "Every man has an immortal soul, capable of eternal happiness or misery; whose happiness depends upon his believing and doing those things in this life, which are necessary to

---

47. LOCKE, *supra* note 28. My reading of Locke here differs slightly from my presentation of his views in *Origins*, largely in that I think his understanding of toleration is more liberal, and more complex, than I had originally thought. See McConnell, *supra* note 16, at 1430-35.

48. LOCKE, *supra* note 28, at 29.

49. *Id.* at 41.

50. *Id.* at 29.

51. *Id.* at 34-35.

the obtaining of God's favour."<sup>52</sup> The "observance of these things," he said, "is the highest obligation that lies upon mankind."<sup>53</sup> The principal protection for conscience, he further explained, lies in the strict limits on the powers of civil government imposed by the social contract, which leave government unable to assert jurisdiction over matters of conscience.<sup>54</sup> The "business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person."<sup>55</sup> It is important to understand the close connection between freedom of conscience and Locke's wider advocacy of limiting government to the protection of private interests and the public peace.

These things being thus explained, it is easy to understand to what end the legislative power ought to be directed, and by what measures regulated, and that is the temporal good and outward prosperity of the society, which is the sole reason of men's entering into society, and the only thing they seek and aim at in it; and it is also evident what liberty remains to men in reference to their eternal salvation, and that is, that *every one should do what he in his conscience is persuaded to be acceptable to the Almighty, on whose good pleasure and acceptance depends his eternal happiness; for obedience is due in the first place to God, and afterwards to the laws.*<sup>56</sup>

In Locke's conception, then, duty to God is primary, and a properly ordered commonwealth will respect the claims of conscience. If government is confined to strictly material functions—and in particular, to keeping the public peace—then there would seldom, if ever, be a clash between the legitimate claims of government and those of conscience.

But Locke went on to pose the question—the very same question at the heart of the dispute in *Smith* and *Flores*: "What if the magistrate should enjoin any thing by his authority, that ap-

---

52. *Id.* at 41.

53. *Id.*

54. *See id.* at 40-43.

55. *Id.* at 40.

56. *Id.* at 43 (emphasis added).

pears unlawful to the conscience of a private person?"<sup>57</sup> The answer: the person must obey his conscience, and the magistrate must punish him for it, "for the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."<sup>58</sup> This answer, however, is equivocal, for Locke affirmed in the next breath that

if the law indeed be concerning things that lie not within the verge of the magistrate's authority . . . men are not in these cases obliged by that law, against their consciences; for the political society is instituted for no other end, but only to secure every man's possession of the things of this life.<sup>59</sup>

That leads to the next question: "But what if the magistrate believe that he has a right to make such laws, and that they are for the public good; and his subjects believe the contrary? Who shall be judge between them?"<sup>60</sup> Locke answered, "God alone; for there is no judge upon earth between the supreme magistrate and the people."<sup>61</sup>

This suggests a different answer to the question of moral actions than to that of outward forms of worship. With respect to outward forms of worship, the right of the church is simply to be governed by the same laws that govern everything else. With respect to doctrine and moral actions, which involve the "highest obligation" that lies upon mankind,<sup>62</sup> the answer in principle is that conscience is supreme unless it falls within the scope of civil authority established under the social contract. In practice, because there is "no judge upon earth between the supreme magistrate and the people,"<sup>63</sup> the determination where this boundary lies will be made by the magistrate.

---

57. *Id.*

58. *Id.* at 43.

59. *Id.*

60. *Id.* at 44.

61. *Id.*

62. *Id.* at 41.

63. *Id.* at 44.

## II. TRANSLATION OF THEORY INTO AMERICAN CONSTITUTIONAL LAW

Translated to the American constitutional context, Locke's analysis plays out somewhat differently. The extent of power vested in civil authorities is a matter of constitutional law and not just inference from social contract theory. More importantly, under the United States Constitution, "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."<sup>64</sup> The institution of an independent judiciary and judicial review means that now there is a "judge upon earth" who can mediate disputes between the state and the citizens over the proper reach of conscience and law.

The question is whether our Free Exercise Clause calls for this sort of mediation. Therein lies the significance of the various colonial charters and state constitutions about which Justices O'Connor and Scalia disagreed.<sup>65</sup> As Justice O'Connor pointed out, "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."<sup>66</sup> Although the precise language of these state provisions varied, almost all of them had a common structure: a broad guarantee of free exercise or liberty of conscience, coupled with a caveat or proviso limiting the scope of the freedom when it conflicts with laws protecting the peace and safety, and sometimes other interests, of the state.<sup>67</sup> The New York Constitution of 1777, for example, provided:

[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not

---

64. THE FEDERALIST NO. 78, at 438-39 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

65. See *supra* notes 13-15, 21-23 and accompanying text.

66. City of Boerne v. Flores, 117 S. Ct. 2157, 2180 (1997) (O'Connor, J., dissenting).

67. See *id.* at 2180-81 (O'Connor, J., dissenting) (surveying several state constitutions); McConnell, *supra* note 16, at 1456-57 & n.242 (same).

be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.<sup>68</sup>

These provisions indicate that the American constitutional framers had solved the institutional problem that prevented Locke from providing effectual protection for free exercise. Each such provision affirms the rights of conscience or free exercise of religion subject to the fundamental peacekeeping functions of the state.<sup>69</sup> The difference is that, as constitutional provisions, they entrust the boundary-keeping function to an institution of government other than the legislature.

The existence of these peace and safety provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience. In a regime where all generally applicable laws are enforced even against contrary religious conscience, there is no need to specify that the right should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."<sup>70</sup> Even without the proviso, a *Smith*-like free exercise right would provide no such excuse. In such a regime, as Justice O'Connor pointed out, the provisos would be "superfluous."<sup>71</sup>

I believe these historical materials are best read as indicating an intention not just to forbid overt persecution or discrimination against religion (the nondiscrimination norm), but to enable citizens of many diverse creeds to live together in harmony, without violence to their consciences—even if it required the majority to make accommodations, where consistent with public peace and safety (the freedom-protective norm).<sup>72</sup> As George Washington

---

68. N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2637 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

69. See *Flores*, 117 S. Ct. at 2180-81 (O'Connor, J., dissenting); McConnell, *supra* note 16, at 1456-57 & n.242.

70. N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2623, 2637.

71. *Flores*, 117 S. Ct. at 2181 (O'Connor, J., dissenting).

72. See *supra* notes 7-8 and accompanying text.

expressed the point in a letter to a group of Quakers:

[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.<sup>73</sup>

This desire to accommodate faiths at odds with the government is the most important distinguishing feature of American church-state separation. By contrast to the anticlerical disestablishment proceeding at roughly the same time in France, religion in America was set apart because of its central importance to the lives of our founding citizens, particularly those most active in the popular movement for religious freedom. Religion was not submerged in secular society, as in France, or subordinated to majoritarian secular concerns. Instead, the First Amendment extended special and emphatic constitutional protection to the full and free exercise of religion, achieving the desire of Washington, and many others,<sup>74</sup> to ensure that "the laws may always be as extensively accommodated to [religious minorities], as a due regard to the protection and essential interests of the nation may justify and permit."<sup>75</sup> Translated into modern constitutional doctrine, this history supports the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state.

### III. JUSTICE SCALIA'S RESPONSE

Justice Scalia offered four lines of argument in response to Justice O'Connor.

First, he argued that the language of the colonial charters and state constitutions on which Justice O'Connor relied

protect[ed] only against action that is taken "for" or "in re-

---

73. Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING* 11, 11 (Edward Frank Humphrey ed., 1932) [hereinafter *George Washington Letter*].

74. See *Flores*, 117 S. Ct. at 2184-85 (O'Connor, J., dissenting).

75. *George Washington Letter*, *supra* note 73, at 11.

spect of" religion (Maryland Act Concerning Religion of 1649, Rhode Island Charter of 1663, and New Hampshire Constitution); or action taken "on account of" religion (Maryland Declaration of Rights of 1776 and Northwest Ordinance of 1787); or "discriminat[ory]" action (New York Constitution); or, finally, (and unhelpfully for purposes of interpreting "free exercise" in the Federal Constitution), action that interferes with the "free exercise" of religion (Maryland Act Concerning Religion of 1649 and Georgia Constitution).<sup>76</sup>

These provisions, according to Justice Scalia, support the view that the Free Exercise Clause was thought to protect only against laws that were directed specifically against religion.<sup>77</sup>

The weakness in this argument is its selective quotation. Take Justice Scalia's first example, the Maryland Act Concerning Religion of 1649.<sup>78</sup> It is true that the Act provided that no person believing in Jesus Christ shall be troubled "for" his or her religion—a *Smith*-like protection—but this clause is immediately followed by another, which provided: "nor in the free exercise thereof."<sup>79</sup> On the assumption, which Justice Scalia does not dispute,<sup>80</sup> that the "free exercise of religion" includes conduct mandated by religious faith, this means that no Christian in Maryland could be "troubled" for his *exercise* of religion—meaning his religiously compelled or motivated conduct. The protection is not limited, by its terms, to discriminatory laws, because government may object to conduct for entirely nondiscriminatory reasons. By the same token, the Rhode Island Charter of 1663 used the language "for" in one clause, possibly implying nondiscrimination, but not in the succeeding clause, which provided that residents of the colony may "freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceable and quietlie, and not using this

---

76. *Flores*, 117 S. Ct. at 2173 (Scalia, J., concurring in part) (citations omitted).

77. *See id.* (Scalia, J., concurring in part).

78. Maryland Act Concerning Religion of 1649, *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 49 (Philip B. Kurland & Ralph Lerner eds., 1987).

79. *Id.* at 50.

80. *See Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).



libertie to lycentiousnesse and profanenesse, nor to the civill injurys or outward disturbance of others."<sup>81</sup> This looks very much like a general right to practice one's religion, so long as that practice is peaceable and quiet, is not licentious or profane, and does not injure the private rights of others. Likewise, the New York Constitution of 1777 prohibited "discrimination" against religious exercise, but it was not *limited* to discrimination.<sup>82</sup> Nor do the examples of the Northwest Ordinance of 1787,<sup>83</sup> the New Hampshire Constitution of 1784,<sup>84</sup> or the Maryland Declaration of Rights of 1776<sup>85</sup> support Justice Scalia's reading. These provide that no person shall be molested "for" or "on account of" his religious practice.<sup>86</sup> On their face, these protections extend not only to discriminatory laws, but to any legal action triggered by a person's religious practice. If a member of the Native American Church is arrested for ingesting peyote during a religious ceremony, then he surely is molested "for" or "on account of" his religious practice—even though the law under which he is arrested is neutral and generally applicable.

Justice Scalia's second argument is that the "peace" and "order" provisos "seem[] to have meant, precisely, obeying the laws."<sup>87</sup> He cited a 1704 decision of the Queen's Bench to the effect that "[e]very breach of law is against the peace,"<sup>88</sup> and Noah Webster's 1828 dictionary, which gave as the eighth (eighth!) definition of "peace": "Public tranquility; that quiet,

81. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS of 1663, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 3211, 3213.

82. N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2623, 2636-37.

83. Northwest Ordinance of 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 27.

84. N.H. CONST. of 1784, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2453.

85. Md. Declaration of Rights of 1776, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 1686.

86. *Id.* art. XXXIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 1689; N.H. CONST. of 1784, pt. 1, art. V, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2453, 2454; Northwest Ordinance of 1787, art. I, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 27, 28.

87. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2173 (1997) (Scalia, J., concurring in part).

88. *Id.* (quoting *Queen v. Lane*, 87 Eng. Rep. 884, 885 (Q.B. 1704)).

order and security which is guaranteed by the laws; as, to keep the *peace*; to break the *peace*.<sup>89</sup> If the provisos mean that free exercise is overridden by every law, then Justice Scalia is correct that the state provisions support the *Smith* interpretation—or even that *Smith* is *more protective* than these state constitutions because “breach of the peace” would have included *every* law and not just “neutral laws of general application.”<sup>90</sup>

Justice Scalia’s position would be more powerful if the terms used in the provisos were the same as the terms used to describe the extent of the legislative power. But that is not so. The New York Constitution empowered the legislature to pass laws pertaining to the “good government, welfare, and prosperity” of the State;<sup>91</sup> yet it limited the free exercise right only with respect to “licentiousness” and the “peace or safety” of the State, which appears to be a more limited subset of the laws.<sup>92</sup> According to an 1813 decision, the New York free exercise proviso “has reference to . . . offences of a deep dye, and of an extensively injurious nature.”<sup>93</sup> Justice Scalia is presumably correct that *sometimes* the term “public peace” has the broad meaning of “any law,” but to contend that this was the invariable meaning, or the meaning in this particular context, is not plausible. Blackstone lists thirteen offenses as “offences against the public peace”: riotous assemblies of twelve persons or more; poaching; anonymous threats; damage or destruction of public locks, sluices, or floodgates on a navigable river; public brawling; riots or unlawful assemblies of three persons or more; tumultuous petitioning; forcible entry or detainer; carrying dangerous weapons; spreading false news to provoke public disorder; spreading false prophecies; incitements to breach of the peace; and libel.<sup>94</sup>

---

89. *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 31 (New York, S. Converse 1828)).

90. *Id.*

91. N.Y. CONST. of 1777, art. XIX, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2623-33.

92. *Id.* art. XXXVIII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2637.

93. *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813), reprinted in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 95, 113 (photo. reprint 1974) (New York, Gillespy 1813).

94. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*142-51.

Rather than suggesting that the term "breach of the peace" refers to all laws, this supports the idea that the words are confined to public disorder and violent or tortious injury to other persons.

When lawyers of that day intended to refer to all laws, they knew how to do it. Early colonial compacts generally used the expression "the public good" or "the common good" to denote the scope of legislative power.<sup>95</sup> The English statute that governed the relationship between religious and civil law within the Church of England was a ready model.<sup>96</sup> This law provided that the canon law should govern insofar as it was not "repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative."<sup>97</sup> If the intention of the framers of the state free exercise provisions had been to subordinate the rights of conscience to "every law," then they would have used familiar language of this sort.<sup>98</sup>

More limited interpretations of "public peace or safety" are consistent, moreover, with the Lockean origin of these ideas. In Locke, the principal protection for religious conscience is the restriction of government to certain limited objectives. Locke defined the magistrate's "sword" as limited to acts that are "prejudicial to other men's rights" or that "break the public peace of societies."<sup>99</sup> If the scope of government were expanded beyond

---

95. For example, the signatories of the Providence Agreement of August 20, 1637, promised "to subject ourselves in active and passive obedience to all such orders or agreements as shall be made for the public good of the body in an orderly way." Providence Agreement of August 20, 1637, *reprinted in* DOCUMENTS OF POLITICAL FOUNDATION WRITTEN BY COLONIAL AMERICANS 115, 115 (Donald S. Lutz ed., 1986).

96. See The Submission of the Clergy and Restraint of Appeals, 1533, 25 Hen. 81, ch. 19, § 7 (Eng.).

97. *Id.*

98. Justice Scalia also asserted that "[t]he word 'licentious,' used in several of the early enactments, likewise meant '[e]xceeding the limits of law.'" *City of Boerne v. Flores*, 117 S. Ct. 2157, 2174 n.1 (1997) (Scalia, J., concurring in part) (quoting 2 WEBSTER, *supra* note 89, at 6). The entire definition, however, reads: "[e]xceeding the limits of law or propriety; wanton; unrestrained." 2 WEBSTER, *supra* note 89, at 6. It is unlikely that any normal English language speaker would describe as "licentious" the construction of a larger church building in a historic zone, or the refusal of a priest to divulge the secrets of the confessional. See *Flores*, 117 S. Ct. at 2160; SAMPSON, *supra* note 93, at 8-9. These acts lack the quality of wanton lack of restraint that the word "licentious" connotes.

99. LOCKE, *supra* note 28, at 36-37. Madison's conception was similar: free exer-

these civil interests to "all laws," then liberty of conscience would receive far less protection than a Lockean would have intended.

Finally, the theory that the peace and order provisos "meant, precisely, obeying the laws"<sup>100</sup> is inconsistent with the fact that the various states formulated their provisos in different ways, some including acts of "licentiousness"<sup>101</sup> or infringements upon the laws of morality,<sup>102</sup> some including disturbance of the religious practice of others,<sup>103</sup> and one including acts contrary to the "[h]appiness" of society.<sup>104</sup> We can say with some confidence that these formulations were not idle rhetorical variations because in two states—Virginia and New York—there were recorded debates in which the precise wording was a subject of controversy. In Virginia, James Madison and George Mason sparred over the breadth of the proviso.<sup>105</sup> In New York, John Jay and Gouverneur Morris did much the same.<sup>106</sup> If the provisos simply referred to any violation of law, then these debates and the ensuing differences in wording would have been pointless.

In his third line of argument, Justice Scalia suggested that the various legislative accommodations and statements of "certain of the Framers" in favor of religious accommodation show only that religious accommodation was thought to be "legislatively or even morally desirable" but not "constitutionally re-

cise should prevail, he wrote, "in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *THE WRITINGS OF JAMES MADISON* 98, 100 (Gaillard Hunt ed., 1910).

100. *Flores*, 117 S. Ct. at 2173 (Scalia, J., concurring in part).

101. N.Y. CONST. of 1777, art. XXXVIII, reprinted in 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 68, at 2623, 2637; S.C. CONST. of 1790, art. VIII, § I, reprinted in 6 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 68, at 3258, 3264.

102. See Md. Declaration of Rights of 1776, art. XXXIII, reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 68, at 1686-89.

103. See, e.g., MASS. CONST. of 1780, art. II, reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 68, at 1888, 1889; Md. Declaration of Rights of 1776, art. XXXIII, reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 68, at 1686, 1689.

104. Del. Declaration of Rights and Fundamental Rules of 1776, § 3, reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 78, at 70, 70. See generally McConnell, *supra* note 16, at 1461-62 (discussing the provisos limiting state free exercise rights).

105. See *infra* notes 139-45 and accompanying text.

106. See *infra* notes 129-38 and accompanying text.

quired."<sup>107</sup> This claim is difficult to assess. The Free Exercise Clause, like any other constitutional principle, was the embodiment in constitutional law of what previously had been a principle of political morality, and, in many cases, of common law or legislative practice. The courts do not hesitate—and Justice Scalia does not hesitate—to examine common law practice, legislative compensation practices, and general statements of political theory regarding property rights in the course of attempting to discern what was meant by the Just Compensation Clause of the Fifth Amendment,<sup>108</sup> or general understandings about the nature of nonconstitutional sovereign immunity in interpreting the Eleventh Amendment.<sup>109</sup> To exclude evidence of this sort on the ground that it did not link the political principle to an as-yet-unenacted constitutional provision is to eliminate most of the evidence about the meaning of the Bill of Rights. Justice Scalia's admission that the pro-accommodation statements by Madison and Washington accurately reflect their "views of the 'proper' relationship between government and religion"<sup>110</sup> is thus more damning to his position than he thinks.

Discussions of the nature of religious freedom prior to the First Amendment often used the same vocabulary that informed later constitutional discussions. Thus, when the Continental Congress, for one example, stated that imposing military conscription on "people, who, from religious principles, cannot bear arms in any case" would be an act of "violence to their consciences,"<sup>111</sup> this tells us something about the understood meaning of the rights of conscience, even though the Continental Congress was not—and could not have been—making any statement about the meaning of the First Amendment.<sup>112</sup> To be sure,

107. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2174 (Scalia, J., concurring in part).

108. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-32 (1992); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 998 (1997) ("[I]n takings cases, what is right or wrong in terms of acceptable levels of regulation is governed . . . by the objective, natural law basis of common law property rights.") (footnote omitted).

109. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

110. *Flores*, 117 S. Ct. at 2175 (Scalia, J., concurring in part).

111. Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (Worthington Chauncey Ford ed., 1905).

112. Professor Ellis West, a critic of free exercise exemptions, offers three reasons

Washington's letter to the Quakers spoke in terms of his "wish and desire" that the laws be accommodated to conscientious religious scruple,<sup>113</sup> rather than his opinion about what the First Amendment, which had not yet been ratified, meant. But we are

---

why the practice of exemptions from conscription should not be understood to support a more general principle. See Ellis West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 376-77 (1994). None of the reasons withstands scrutiny. First, he points out that "the exemptions were granted by legislatures, not courts." *Id.* at 376. Of course. The exemptions of the colonial and revolutionary periods took place before the Constitution (even before the state constitutions) and before judicial review. The point of this preconstitutional history is to understand the experience against which the Framers and ratifiers would understand the proposed Amendment.

Second, West notes that "persons seeking exemptions . . . did not necessarily argue that the legislatures were legally or morally bound by either natural law or a constitution to grant the exemptions." *Id.* at 376. Prior to adoption of formal constitutional protections, people made whatever arguments they could. Their principal argument was that the legislature should not violate religious conscience (as West's own evidence demonstrates, see, e.g., *id.* at 387-91). In Pennsylvania, where demands for draft exemptions were most common, "Quakers insisted that pacifism was integral to Penn's definition of rights of conscience, and therefore part of the fundamental law of the colony. It would be illegal or unconstitutional to force military service." J. WILLIAM FROST, *A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA* 34 (1990). West's assumption that dissenters' use of terms such as "privilege" and "indulgence" proves they were not making claims of right, see West, *supra*, at 377, is anachronistic. The term "privilege" is a constitutional term meaning "right," as is evident in the language of the Privileges and Immunities Clause of Article IV. See U.S. CONST. art. IV, § 2, cl. 1. The term "indulgence," in English legal usage, simply meant "exemption." See McConnell, *supra* note 16, at 1428.

Third, West asserts that "even when specific constitutional provisions were cited as the reasons for granting exemptions one cannot infer that the exemptions were sought as 'rights' in the modern sense of the word." West, *supra*, at 377. Rather, he says, such provisions "were thought of as statements of goals or ideals that a government was obligated to realize as much as it could." *Id.* That may have been true of early state constitutions. But the Framers of the federal Bill of Rights, and particularly Madison, had completed the transition from hortatory declarations to judicially enforceable rights. See Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, in CONTEXTS OF THE BILL OF RIGHTS 3, 14 (Stephen L. Schechter & Richard B. Bernstein eds., 1990); Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 115-16 (Institute of Bill of Rights Law ed., 1987). By including free exercise rights in the Bill of Rights, the First Congress and the ratifying states made enforceable the prior "goal or ideal" of free exercise. See 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789) (statement of Rep. Madison) ("If [rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive . . .").

113. George Washington Letter, *supra* note 73, at 11.

justified in supposing that his opinion that "the conscientious scruples of all men should be treated with great delicacy and tenderness," and that "the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit"<sup>114</sup> adumbrates his view of the proper scope of religious freedom.

Finally, Justice Scalia maintained that the "most telling point" is that there is "not . . . a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation."<sup>115</sup> If embodiment in an early court decision were a test of modern constitutional doctrine, then I suspect that very little would survive, including doctrines close to Justice Scalia's heart. I am not aware of any early state or federal cases enforcing freedom of speech in the way it is understood today, ordering compensation for regulatory takings, or striking down legislative invasions of executive power. That does not prove these doctrines are inconsistent with historical meaning. In any event, the courts of five states decided claims for exemptions from generally applicable laws during the years between ratification of the Bill of Rights and the Civil War. In two states, exemptions were required under state constitutions;<sup>116</sup> in two states, exemptions were rejected;<sup>117</sup> and in one state, the exemption was denied on the facts without clear statement of legal principle.<sup>118</sup>

---

114. *Id.*

115. *Flores*, 117 S. Ct. at 2175 (Scalia, J., concurring in part).

116. See *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813) (exempting a Catholic priest from testifying to matters he heard in a confessional); *Commonwealth v. Cronin*, 1 Q.L.J. 128 (Va. Richmond Cir. Ct. 1856) (same). The *Philips* decision was not officially reported, but a full record of the arguments and opinion are found in SAMPSON, *supra* note 93, at 9, and the opinion is excerpted in *Privileged Communications to Clergymen*, 1 CATH. LAWYER 199, 199-209 (1955).

117. See *Philips v. Gratz*, 2 Pen. & W. 412 (Pa. 1831) (holding a litigant was not entitled to a continuance of trial on the grounds that a Sabbath appearance would violate his religious principles); *State v. Willson*, 13 S.C.L. (2 McCord) 393 (1823) (refusing to exempt nonattendance as a grand juror on religious grounds). An early Pennsylvania decision apparently rejected a free exercise exemption claim, but the case became moot before the issue could be reviewed by the appellate court. See *Stansbury v. Marks*, 2 Dall. 213 (Pa. 1793).

118. See *Commonwealth v. Drake*, 15 Mass. (14 Tyng) 161 (1818) (refusing to reverse a conviction when evidence of a defendant's confessions to fellow church members was admitted at trial).

## IV. THE ARGUMENT SPURNED BY JUSTICE SCALIA

In support of a number of points in his concurring opinion, Justice Scalia relied on the work of legal historian Philip Hamburger, who has written the most thorough and persuasive attack on the proposition that the Framers of the Free Exercise Clause could have intended the freedom-protective interpretation.<sup>119</sup> That Justice Scalia failed to endorse, or even mention, Professor Hamburger's principal argument explaining the meaning of the free exercise provisos is, therefore, telling. Hamburger argues that some of the state constitutional provisos could mean not that acts injurious to public peace and safety fall outside the protection of the free exercise clause, but that the state would be entitled to withhold religious toleration from "persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions."<sup>120</sup> Like Justice Scalia, he argues that the peace and safety provisos that triggered this denial of toleration were not confined to nonpeaceful behavior, but were "associated with the notion of violation of law."<sup>121</sup>

Perhaps Justice Scalia failed to adopt this interpretation because, if it were adopted, it would constrict religious freedom even more than it is constricted under *Smith*. If, for example, a church's practice of feeding the poor in an area not zoned for that purpose was deemed to threaten public peace and safety, then the remedy would be not just to prohibit the feeding program but to deny the freedom of worship to the church. That is a harsh interpretation of constitutional provisions recognized throughout the world as models of liberality. But harsh or not, the question must be: Is Hamburger's interpretation correct as a matter of history?

In my view, Hamburger's interpretation works—even as a linguistic matter—only for a few of the state provisions, such as the New Jersey Constitution of 1776<sup>122</sup> and the South Carolina Constitution of 1778,<sup>123</sup> but cannot account for the language of

---

119. See Hamburger, *supra* note 17.

120. *Id.* at 918.

121. *Id.*; see *supra* text accompanying notes 87-106.

122. N.J. CONST. of 1776, art. XVIII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2594, 2597.

123. S.C. CONST. of 1778, art. XXXVIII, reprinted in 6 FEDERAL AND STATE CONSTI-



most of the others. For example, when the New York provision stated that "the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State,"<sup>124</sup> it did *not* mean that violators of law would forfeit their religious liberty, but only that their religious liberty did not excuse or justify certain types of illegal acts. Other provisions stated that a believer should not be "restrained" or "molested" for his religious acts "provided he doth not disturb the public peace,"<sup>125</sup> or "unless, under colour of religion, any man shall disturb the good order,"<sup>126</sup> or "provided [the exercise of their religion] be not repugnant to the peace and safety of the State."<sup>127</sup> The language of these provisions may not be pellucid, but the caveats are most plausibly read as permitting the state to punish religiously motivated conduct that is inconsistent with public order. Contrary to Hamburger, the caveats do not authorize the states to abrogate all religious liberty for religions the authorities deem dangerous.

Moreover, this interpretation runs contrary to the practices of the day. No evidence exists that any churches were banned during the late colonial or early republican period on account of threatening public peace and safety. If such a thing had occurred, the ensuing controversy would surely have been recorded.

Also contrary to Hamburger,<sup>128</sup> the drafting history of the New York provision supports the interpretation that the provisos delimit the scope of the liberty (thus indicating that the provisions entailed religious exemptions), rather than authorizing the state to suppress dangerous religions. At the New York constitutional convention in 1777, anti-Catholic forces led by John Jay made repeated unsuccessful attempts to exclude Catholics from protections of the state's free exercise provision.<sup>129</sup>

TUTIONS, *supra* note 68, at 3248, 3255-57.

124. N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2623, 2637.

125. N.H. CONST. of 1784, pt. I, art. V, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 2453, 2454.

126. Md. Declaration of Rights of 1776, art. XXXIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 1686, 1689.

127. GA. CONST. of 1777, art. LVI, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 777, 784.

128. *See* Hamburger, *supra* note 17, at 924-26.

129. *See* JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY 84-90 (1967); Ham-

Their first attempt was a proposal that read:

that free Toleration be forever allowed in this State to all denominations of Christians without preference or distinction and to all Jews, Turks, and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular[,] of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine . . . .<sup>130</sup>

If it had been adopted, this provision would have meant precisely what Hamburger contends the actual state provisions meant: that "[t]he caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions."<sup>131</sup> The New York constitutional drafting committee, however, *rejected* Jay's draft, proposing instead that "the free Toleration of religious profession and worship be forever allowed within this State to all mankind," without limitation.<sup>132</sup> Jay then repeated his attempt on the floor of the Convention in similar language but withdrew it after extensive debate.<sup>133</sup> He then proposed an express exclusion of Catholics from free exercise protection, but this proposal, too, was rejected, by a vote of nineteen to ten.<sup>134</sup> Having been defeated in these

---

burger, *supra* note 17, at 924-26.

130. CHARLES ZEBINA LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 541 (1906).

131. Hamburger, *supra* note 17, at 918.

132. LINCOLN, *supra* note 130, at 541.

133. See 1 *JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK* 844 (photo. reprint 1972) (1842) [hereinafter *JOURNALS*].

134. See *id.* The tenor of Jay's proposals can be seen in the language of this proposed amendment:

Except the professors of the religion of the church of Rome, who ought not to hold lands in, or be admitted to a participation of the civil rights enjoyed by the members of this State, until such time as the said professors shall appear in the supreme court of this State, and there most solemnly swear, that they verily believe in their consciences, that no pope, priest or foreign authority on earth, hath power to absolve the sub-

attempts, the anti-Catholic faction shifted its focus to imposing a naturalization oath.<sup>135</sup> At that point, Jay proposed an entirely different proviso, limiting the scope of the liberty but not restricting its availability: "provided that the liberty of conscience hereby granted, shall not be construed to encourage licentiousness, or be used in such manner as to disturb or endanger the safety of the State."<sup>136</sup> Supporters of free exercise remained suspicious. Gouverneur Morris inquired whether it was the same as Jay's earlier efforts.<sup>137</sup> Only after the majority was persuaded that Jay's new proposal was *not* a restatement of the old did they seriously consider it—and even then, the language was tightened to ensure that the proviso referred only to overt actions.<sup>138</sup> This drafting history shows conclusively that the Hamburger interpretation was expressly considered and rejected in New York.

The drafting history of the Virginia provision, although less clear, similarly militates against the Hamburger interpretation. In Virginia, George Mason and James Madison proposed alternative versions of a free exercise provision. Mason proposed "that all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience . . . unless under color of religion any man disturb the peace, the happiness, or safety of society."<sup>139</sup> Madison objected to this proposal on two grounds: that it referred to "toleration" and that the state interest proviso was too expansive.<sup>140</sup> Madison proposed a substitute that read that "all men are equally entitled to the full

---

jects of this State from their allegiance to the same.

PRATT, *supra* note 129, at 87. Even worse, the proposal would have required Catholics to "renounce and believe to be false and wicked, the dangerous and damnable doctrine" that they could be absolved of their sins by the pope or of the terms of the required oath. *Id.* It is easy to see why Justice Scalia would be reluctant to associate himself with an understanding of free exercise with this kind of intellectual pedigree.

135. See PRATT, *supra* note 129, at 87.

136. JOURNALS, *supra* note 133, at 845.

137. See *id.*

138. See *id.* at 845, 860. Jay did succeed in adding anti-Catholic, but legally meaningless, language to the preamble of the religious freedom provision. See PRATT, *supra* note 129, at 88-89.

139. SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491 (1902).

140. See *id.* at 492.

and free exercise of religion according to the dictates of conscience."<sup>141</sup> With minor variation, this was adopted. He also proposed that the caveat be altered to read: "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."<sup>142</sup>

The Mason proposal was more restrictive than that adopted by any state other than Delaware; the Madison proposal was more liberal than that adopted in any other state.<sup>143</sup> In the end, the Virginia legislators compromised the proviso issue through silence, adopting the expansive free exercise language with no proviso.<sup>144</sup> Presumably, the legislators expected the meaning to lie somewhere between the two extremes set forth by Mason and Madison and, thus, to resemble the provisions of the other states.

This episode is highly suggestive for two reasons. First, it suggests that the federal Free Exercise Clause, also drafted originally by Madison and lacking an express peace and safety proviso, was expected, like that of Virginia, to strike a middle ground between extremely broad and extremely narrow understandings of countervailing governmental interests. Second, it casts further doubt on the Hamburger hypothesis that the provisos authorized suppression of dangerous religions.<sup>145</sup> If Hamburger's interpretation was correct, then George Mason, who is traditionally regarded as a great civil libertarian, favored a provision that would allow suppression of any religion thought inconsistent with the "happiness" of the state. Moreover, elimination of the peace and safety proviso, rather than being a compromise between the two proposals under consideration, would have amounted to adoption of a view even more liberal than Madison's. Given the tenor of the debate, these conclusions are highly improbable, rendering the premise equally improbable.

The most persuasive interpretation of the state precursors of the Free Exercise Clause, therefore, is that they provided sub-

141. *Id.*

142. *Id.*

143. See McConnell, *supra* note 16, at 1463.

144. See Va. Bill of Rights of 1776, § 16, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 68, at 3812, 3814; McConnell, *supra* note 16, at 1463.

145. See *supra* text accompanying notes 120-21.

stantive protection for religious conduct, except for acts that violate the peace and safety of the state or the rights of others. That is strikingly similar to RFRA. It may well be that RFRA's compelling interest-least restrictive alternative test is more exacting than the constitutional history requires, but it is evident that the *Smith* interpretation of free exercise falls short.

## V. CONCLUSION

To the extent that the argument for religious freedom was based on the inviolability of conscience, virtually all participants in the great debates of the seventeenth and eighteenth centuries realized that recognition of a freedom of conscience would create conflicts with civil law. Naturally, opponents of freedom of conscience played up these conflicts, warning of child sacrifice, murder, and savagery; and advocates of freedom of conscience minimized them, stressing the law-abiding character of Christianity and their obligation to obey the fundamental laws of the state. Neither side had any polemical incentive to raise the hard intermediate case of a law that conflicted with conscience but served state purposes of a distinctly lesser order. But the proponents' answer, in principle, seemed to be that conscience would prevail. Madison called the duties to the Creator "precedent, both in order of time and in degree of obligation, to the claims of Civil Society";<sup>146</sup> Locke stated that "obedience is due in the first place to God, and afterwards to the laws," though in the absence of independent judicial review he was unable to conceive of effectual *legal* protection for the rights of conscience;<sup>147</sup> and Washington stated that the laws should "always be as extensively accommodated" to "the conscientious scruples of all men" as "a due regard to the protection and essential interests of the nation may justify and permit."<sup>148</sup> Moreover, when actual conflicts of this nature arose, it was common for the states and colonies to make accommodations. This interpretation also appears to explain the language of most of the early state constitutions.

---

146. MADISON, *supra* note 25, at 299; *see supra* pp. 819-20.

147. LOCKE, *supra* note 28, at 43; *see supra* pp. 827-29.

148. George Washington Letter, *supra* note 73; *see* pp. 831-32.

It is extremely unlikely that a nation committed to this broad conception of religious freedom would have countenanced an interpretation that would permit the government to dictate matters of worship to the church, such as who could be hired or fired as clergy, so long as it imposed the same regulations on commercial activity. It is equally unlikely that the rights of conscience would be deemed automatically subordinate to any law not passed for discriminatory reasons. Madison's advocacy of a First Amendment stemmed, in part, from a promise to his Baptist constituents to seek constitutional protection for "the rights of Conscience in the fullest latitude."<sup>149</sup> When Daniel Carroll, one of the few non-Protestants in the First Congress, voiced his support for the Free Exercise Clause, he stated that "the rights of conscience . . . will little bear the gentlest touch of governmental hand."<sup>150</sup> To my mind, it would take more powerful evidence of contrary intention to show that Founders with these intentions adopted a provision that would go no further than to prohibit overt persecution or discrimination.

Although none of this may be conclusive, it seems as solid a case for interpretation of the Free Exercise Clause as could be made for modern constitutional doctrine under any of the provisions of the Bill of Rights. Because it is also the interpretation most consistent with the text of the First Amendment, with the pre-*Smith* precedent interpreting it, and with the needs of religious freedom in the modern state, the Court was wrong to conclude that an act of Congress based on this view was not within the legitimate range of legislation enforcing the Bill of Rights.

---

149. Letter from James Madison to George Eve (Jan. 2, 1789), in 11 *THE PAPERS OF JAMES MADISON* 404, 405 (Robert A. Rutland et al. eds., 1977).

150. 1 *ANNALS OF CONG.* 730 (Joseph Gales ed., 1789).