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Revisiting Employment Division v. Smith

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REVISITING *EMPLOYMENT DIVISION V. SMITH*

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INTRODUCTION

George Ricks faces a dilemma. Idaho demands that he either violate his religious beliefs or give up his livelihood.[1] Under Idaho law, Ricks must register with the State to work as a contractor.[2] To register, Ricks must list his Social Security number on his contractor application *solely* for identification.[3] But Ricks cannot do so because his religious beliefs forbid him from providing a government number to buy or sell goods and services.[4] Despite Ricks's sincere religious beliefs, Idaho denied Ricks's application because he could not provide his Social Security number.[5]

The Constitution's Free Exercise Clause provides a potential solution for Ricks. It requires Idaho to accommodate Ricks's religious beliefs if it can. The text is plain. The Free Exercise Clause forbids the government from "prohibiting the free exercise [of religion]" thereby guaranteeing the right to freely exercise religion.[6] So the government must avoid laws that burden religion, or it must accommodate religion when law and religion

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1. Ricks v. State Contractors Bd., 435 P.3d 1, 4 (Idaho Ct. App. 2018).
2. *Id.* at 7.
3. *Id.*
4. *Id.* at 4; *see also* Petition for a Writ of Certiorari at 7, 14, Ricks v. State Contractors Bd., 141 S. Ct. 2850 (2021) (No. 19-66).
5. *Ricks*, 435 P.3d at 4.
6. U.S. CONST. amend. I.

conflict.[7] The Supreme Court, however, eliminated this protection.

In *Employment Division v. Smith*, the Supreme Court gutted the Free Exercise Clause.[8] The Court rewrote the clause and replaced it with an equal protection rule: the government *can* prohibit the free exercise of religion under a neutral and generally applicable law.[9] So the Free Exercise Clause does not guarantee the right to exercise religion; under *Smith*, it only promises equal treatment.

Ricks's case illustrates the result. Based on *Smith*, the Idaho Court of Appeals held that Idaho could prohibit Ricks's religious exercise.[10] Even though Ricks was willing to provide a birth certificate[11]—which Idaho accepts in other licensing contexts[12]—*Smith* eliminates any duty to accommodate. So Idaho need not accept alternate identification. Nor must Idaho offer a reason for its rule or its refusal to accommodate. Because the law requiring a Social Security number is neutral and generally applicable, under *Smith*, Idaho may force Ricks to choose between his livelihood and his religion.[13]

In essence, *Smith* allows the government to prohibit religious exercise without a good reason—or with no reason at all—if it treats religion and non-religion equally.[14] Ricks's case is sadly one among many that shows *Smith*'s devastating consequences.[15] *Smith* means that the government need not make even the most minor exception to allow individuals, like Ricks, to practice their faith. Our Founders required more.

The Founders created the Free Exercise Clause to require more than generally applicable equal suppression. They considered religious liberty an unalienable right that supersedes civil society's claims.[16] When law

7. *Cf.* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (examining whether state conduct "imposes any burden on the free exercise of appellant's religion"); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (stating the government violates the Free Exercise Clause when it "unduly burdens the free exercise of religion").

8. Emp. Div. v. Smith, 494 U.S. 872 (1990).

9. *Id.* at 878–79.

10. *Ricks*, 435 P.3d at 12–14.

11. Petition for a Writ of Certiorari at 1, Ricks v. State Contractors Bd., 141 S. Ct. 2850 (2021) (No. 19-66).

12. *Compare* IDAHO CODE § 73-122 (1999) (requiring a Social Security number for a professional or occupational license but providing an exception), *with* IDAHO CODE § 54-5210 (2009) (requiring applicants to provide a Social Security number to register as a contractor without exception).

13. *Ricks*, 435 P.3d at 12–13. The Idaho Supreme Court and the United States Supreme Court denied review. *Ricks*, 141 S. Ct. 2850 (denying certiorari); *see also* Petition for a Writ of Certiorari at 1, *Ricks*, 141 S. Ct. 2850 (No. 19-66). (noting review denied).

14. City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) (*Smith* allows "the government to prohibit [religious exercise], without justification . . . [if] the prohibition is generally applicable.").

15. *Id.* at 547 (citing examples just after *Smith* showing how it "harmed religious liberty").

16. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.

and religion conflicted, the Founders created religious exemptions to allow individuals to freely exercise their religion.[17] They enacted the Free Exercise Clause to do the same. *Smith*, however, abandons religious liberty and cedes the free exercise of religion to the political process. *Smith* is untenable.

At bottom, *Smith* rests on a false policy argument: to prevent anarchy the Court must jettison religious liberty.[18] This argument is untrue.[19] Experience from the federal Religious Freedom Restoration Act ("RFRA"), state RFRAs and constitutional provisions, and the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") show that religious freedom does not create anarchy.[20] Far from it, it allows individuals to live together in peace. In short, *Smith*'s arguments fail.

Thus, there is no reason to retain *Smith*. At least ten Justices have agreed that *Smith* is wrong—including six in *Fulton v. City of Philadelphia*.[21] Yet the Court continues to expand and wrestle with *Smith*'s many ill-defined exceptions. This is not a solution. The exception approach treats symptoms rather than the problem.

The problem is *Smith*. *Smith* does not protect religious liberty or prevent religious persecution and conflict. Even when the Supreme Court vindicates religion under *Smith*, the decisions rest on government missteps—not the freedom to practice religion.[22] Thus, *Smith* always leaves governments free to rectify mistakes and prohibit the free exercise of religion again. *Smith* dismantled the Free Exercise Clause and harms religion. It is time to revisit *Smith*.

In Section I, this Article examines *Smith* and shows that it was wrongly decided: the majority gave no sound reason to abandon religious freedom. In Section II, this Article examines the Free Exercise Clause and shows how *Smith* conflicts with the clause's text, purpose, and original meaning.

I: EMPLOYMENT DIVISION V. SMITH

Before *Employment Division v. Smith*, courts and commentators

17. *See infra* Section II(C)(4).

18. *See infra* Section I(E).

19. *See infra* Section I(E)(1).

20. *Id.*

21. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring) ("No fewer than ten Justices—including six sitting Justices—have questioned [*Smith*'s] fidelity to the Constitution.").

22. *Id.* at 1930 ("[T]he majority's course guarantees that this litigation is only getting started. . . . The City can revise its [ordinance.] . . . Or with a flick of a pen, municipal lawyers may rewrite the City's contract to [prohibit Catholic Social Services' religious exercise.]"); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (protecting religion on narrow grounds and noting "[t]he [final] outcome of cases like this . . . must await further elaboration").

largely agreed on the free exercise framework.[23] The consensus was that the government must satisfy strict scrutiny to burden religion under the Free Exercise Clause.[24] Thus, the government could not enforce a law that burdened religious exercise unless it showed that it had a compelling reason to burden religious exercise, and the burden was the least restrictive means to attain its compelling interest.[25] This is generally deemed the highest standard of constitutional protection.[26] It is reserved for cases that involve fundamental rights or suspect classifications.[27]

Although many cases referenced and applied strict scrutiny, the Supreme Court often ruled against religion. Between *Wisconsin v. Yoder*[28] in 1972 and *Smith* in 1990, all free exercise claims outside the unemployment context lost.[29] Strict scrutiny did not produce surefire victories for religion. In some cases, the Supreme Court may have relaxed the strict scrutiny standard. But federal and state judges, along with legislatures and executive bodies, generally did not.[30] Everyone agreed that the strict scrutiny test applied, even if it led to inconsistent Supreme Court results.[31]

A. Smith needlessly abandoned religious liberty.

Smith, by a 5–4 vote, jettisoned strict scrutiny, or "the compelling interest test"—along with any other heightened protection for religion.[32] The Court held that a person's free exercise right does not relieve his duty to "comply with a 'valid and neutral law of general applicability'" that conflicts with his religion.[33] The majority stated, in other words, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law."[34] Thus, the Free Exercise Clause does not guarantee the right to exercise religion: it does not require exemptions or accommodations from general laws so individuals can practice their faith.

23. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990).

24. *Id.*

25. Sherbert v. Verner, 374 U.S. 398, 406 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *See also* McConnell, *supra* note 23, at 1110.

26. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 443 (2015) (referring to strict scrutiny as "the highest level of First Amendment protection").

27. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

28. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (exempting individuals from a valid, generally applicable school attendance law based on their religion).

29. McConnell, *supra* note 23, at 1110.

30. *Id.*

31. *Id.* at 1109–10.

32. Emp. Div. v. Smith, 494 U.S. 872, 873, 878–90 (1990).

33. *Id.* at 879.

34. *Id.* at 878–79.

In short, no substantive, constitutional right to exercise religion remains after *Smith*.

1. *Smith* altered the Free Exercise Clause based on a hypothetical question.

The case arose when Alfred Smith and Galen Black applied for unemployment benefits.[35] They worked at a drug rehabilitation clinic until the clinic fired them for ingesting peyote—a hallucinogenic drug.[36] Both Smith and Black "ingested peyote for sacramental purposes" as communion at a Native American Church ceremony.[37] The Oregon Department of Human Resources denied their claim for unemployment benefits because their employer fired them for work-related misconduct.[38] But the State intermediate and highest appellate courts reversed. They held that the State could not consider religious exercise as misconduct that bars unemployment benefits.[39] This holding was unexceptional. The Supreme Court had reached the same conclusion in four cases in which it held that states must exempt applicants from unemployment requirements that conflict with their religion.[40]

The Supreme Court, however, vacated and remanded the case to the lower court to decide whether the Free Exercise Clause allowed the State to criminalize religious peyote use.[41] If the State could criminalize religious peyote use, the Court reasoned, the State could also deny unemployment benefits on that basis.[42] The Court tried to distinguish its other unemployment cases by stating that they did not involve criminal misconduct.[43] But the majority ignored contrary state law. The Oregon Supreme Court already held that criminal peyote use does not disqualify an individual from unemployment benefits under state law.[44] So Oregon had no interest in enforcing its criminal laws when it denied unemployment benefits to Smith and Black.[45] Under Oregon law, the

35. *Id.* at 874.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*; Black v. Emp. Div., 721 P.2d 451, 453 (Or. 1986), *vacated sub nom.* Emp. Div. v. Smith, 485 U.S. 660 (1988); Smith v. Emp. Div., 721 P.2d 445, 451 (Or. 1986), *vacated*, 485 U.S. 660 (1988).

40. Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

41. Emp. Div. v. Smith, 485 U.S. 660 673–74 (1988).

42. *Id.* at 670.

43. *Id.* at 671.

44. *Smith*, 721 P.2d at 450.

45. *Smith*, 485 U.S. at 674 (Brennan, J., dissenting) ("The Oregon Supreme Court [disavowed] any state interest in enforcing its criminal laws through the denial of unemployment benefits.").

criminal question was irrelevant.

On remand, the Oregon Supreme Court reiterated that it makes no difference whether religious peyote use is illegal.[46] It is "immaterial to Oregon's unemployment compensation law" if religious peyote use violates "some other law."[47] Thus, the court reaffirmed its decision.[48] It also answered the Supreme Court's hypothetical question. It found that state law prohibits peyote use and makes no exception for religious peyote use.[49] But it determined that the Free Exercise Clause would prevent the State—if it tried—from prosecuting religious peyote use—"a sacrament in the Native American Church."[50]

The United States Supreme Court then granted certiorari to decide whether a state can constitutionally prohibit religious peyote use.[51] *Smith*, therefore, involved a hypothetical question that was "immaterial" under state law.[52] Oregon did not attempt to prosecute Smith or Black, and it made little effort to prosecute other religious peyote users.[53] The case only involved unemployment benefits.

2. *Smith* resolved a question no one asked and adopted a position for which no one argued.

The parties and amici in *Smith* all agreed on the basic Free Exercise Clause framework: to burden a person's religious exercise, the government must have a compelling interest and the burden must be no greater than necessary to achieve that compelling interest.[54] The briefs and arguments focused on whether the State had a compelling interest to prohibit religious peyote use.[55]

No party in the case questioned or asked the Court to review its free

46. Smith v. Emp. Div., 763 P.2d 146, 147 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

47. *Id.*

48. *Id.* at 150.

49. *Id.* at 148.

50. *Id.* at 147–48.

51. Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

52. *Smith*, 763 P.2d at 147.

53. *Smith*, 494 U.S. at 911 (Blackmun, J., dissenting).

54. Brief for Respondents at 16, *Smith*, 494 U.S. 872 (No. 88-1213) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); Brief for Petitioners at 12, 16, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for the American Jewish Congress as Amicus Curiae Supporting Respondents at 24–26, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for the American Civil Liberties Union and the ACLU of Oregon as Amici Curiae Supporting Respondents at 30–41, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for the Council on Religious Freedom as Amicus Curiae Supporting Respondents at 10, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for the Association on American Indian Affairs et al. as Amici Curiae Supporting Respondents at 10, *Smith*, 494 U.S. 872 (No. 88-1213).

55. *See* briefs cited *supra* note 54.

exercise framework.[56] The State conceded that the compelling interest test applied. It made two arguments: First, the "government has a 'compelling' interest in laws that control the use and availability of dangerous drugs."[57] Second, the State could not "'accommodate' [Smith's and Black's] religious drug use without disserving . . . its compelling interest in comprehensive drug control."[58] The State admitted, even if it had a compelling interest, a "question remains whether [the] government can 'accommodate' religious drug use by exempting it from the reach of the criminal prohibition."[59] The State also recognized that the Free Exercise Clause requires exemptions. It wrote in its brief: "If government can allow a religion-based exemption without compromising its interest, the Free Exercise Clause requires it to do so."[60]

C. Smith *ignored the Free Exercise Clause's text.*

Smith's analysis rightly begins with the Free Exercise Clause's text. The text provides that the government "shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[61] *Smith* acknowledged that religiously motivated conduct—like the conduct Oregon prohibited—is an "exercise of religion."[62] Yet *Smith* held that prohibiting Black's and Smith's exercise of religion was not "prohibiting the free exercise [of religion]."[63]

The majority asserted that the text means the government cannot prohibit acts *only* when they are done for religious reasons.[64] But it claimed that it is "one large step further" to say that the text—which forbids "prohibiting the free exercise [of religion]"—forbids enforcing laws that prohibit the exercise of religion.[65] The majority meagerly stated: "As a textual matter, we do not think the words must be given that meaning."[66] The majority summarily concluded that "[i]t is a *permissible* reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not

56. *Id.*
57. Brief for Petitioners at 12, *Smith*, 494 U.S. 872 (No. 88-1213).
58. *Id.* at 18.
59. *Id.* at 16.
60. *Id.*
61. U.S. CONST. amend. I (emphasis added).
62. *Smith*, 494 U.S. at 877–78.
63. *Id.*
64. *Id.* at 877.
65. *Id.* at 878.
66. *Id.*

been offended."[67] In other words, a law only prohibits the free exercise of religion when that is the law's object. Because Oregon's drug laws generally applied and did not intentionally prohibit Black's and Smith's religious exercise, they did not prohibit "the free exercise [of religion]."[68]

D. Smith *conflicts with Free Exercise Clause precedent.*

The *Smith* majority did not consider the Free Exercise Clause's original meaning. The majority instead argued that precedent drove its holding.[69] The majority claimed that the Court "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law."[70] Yet in *Wisconsin v. Yoder*—and many other cases—the Court excused individuals from otherwise valid laws based on religion.[71] What's more, the Court also routinely applied the compelling interest test in free exercise cases, which essentially requires (religious) exemptions from otherwise valid laws. It did so at least three times in the year before *Smith* alone.[72] Two of those decisions were unanimous.[73]

In *Yoder*, a prime free exercise case, the Court excused individuals from an otherwise valid education law based on their religion.[74] The Amish plaintiffs in *Yoder* asserted that a compulsory school attendance law conflicted with their religion.[75] Notably, the Supreme Court rejected the argument that the State could require them to attend school because the law "applies uniformly to all citizens . . . and does not, on its face, discriminate against religions."[76] It is irrelevant, according to *Yoder*, whether a law that burdens religion "is motivated by legitimate secular concerns."[77] The Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* at 878–79.

70. *Id.*

71. *See, e.g.*, Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

72. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384–85 (1990) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989))); *Hernandez*, 490 U.S. at 699 (same); *Frazee*, 489 U.S. at 835 ("And, as we have said in the past, there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.").

73. *Jimmy Swaggart Ministries*, 493 U.S. at 380; *Frazee*, 489 U.S. at 835.

74. *Yoder*, 406 U.S. at 236.

75. *Id.* at 209–10.

76. *Id.* at 220.

77. *Id.*

governmental neutrality if it unduly burdens the free exercise of religion."[78] When a neutral regulation burdens religious exercise, the Court held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[79] The Court in *Yoder* hailed this rule as "[t]he essence of all that has been said and written on the subject."[80] Simply put, precedent contradicted *Smith*.

So too the cases that *Smith* relied on refute the majority's claim that precedent dictated its holding.[81] To support its position, the *Smith* majority could only marshal one overruled opinion and one other opinion—based on a premise that *Smith* itself rejects—as its chief precedents.[82] *Smith*'s chief precedents are *Minserville School District v. Gobitis* and *Reynolds v. United States*.[83]

In *Gobitis*, the Supreme Court allowed the government to prosecute children who refused to recite the Pledge of Allegiance for religious reasons.[84] *Gobitis* held that religious freedom stops when it conflicts with "a general law."[85] The Court argued, in rhetoric quoted by *Smith*, that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[86]

The Supreme Court overruled *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*—a widely celebrated opinion.[87] *Barnette* held that a general law stops when it conflicts with fundamental rights—such as religious freedom.[88] Thus, the Court "relieved" students who had religious objections to pledging allegiance and saluting the flag "from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[89] *Barnette* turned *Gobitis* on its head.[90]

78. *Id.*

79. *Id.* at 215.

80. *Id.*

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

82. *Id.* (relying on two cases in the paragraph contending that precedent guided its interpretation); McConnell, *supra* note 23, at 1124–25 (showing the majority relied on two cases, along with a concurring opinion, as its "primary affirmative precedent"). For a comprehensive discussion reviewing every case the majority relied on and distinguished, see McConnell, *supra* note 23, at 1120–27.

83. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Reynolds v. United States, 98 U.S. 145 (1878).

84. *Gobitis*, 310 U.S. at 600.

85. *Id.* at 594.

86. *Smith*, 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594).

87. *Barnette*, 319 U.S. at 642.

88. *Id.* at 629–30, 638–39, 642.

89. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1913 (2021) (Alito, J., concurring) (quoting *Gobitis*, 310 U.S. at 594).

90. *Id.*

The *Smith* majority also heavily relied on *Reynolds*.[91] In *Reynolds*, the Supreme Court upheld a Mormon's polygamy conviction under the Free Exercise Clause.[92] Yet "the decision was not based on anything like *Smith*'s interpretation of the Free Exercise Clause."[93] The decision hinged on the premise that the Free Exercise Clause protects religious belief—not conduct.[94] The Court, however, repudiated that premise at least half a century before *Smith*.[95] Indeed, the *Smith* majority itself rejected *Reynolds*'s premise and reaffirmed that the Free Exercise Clause protects religious belief *and* conduct.[96] Thus, both *Reynolds* and *Gobitis* fundamentally misapprehended the First Amendment. The Court recognized these errors for nearly fifty years—until *Smith*.

Because *Smith* upended settled precedent, the majority tried to reinterpret the many well-known cases that contradicted *Smith*—based on hybrid rights and unemployment benefits. Both attempts fall well short.

1. *Smith*'s attempts to distinguish conflicting cases based on a hybrid rights theory fail.

The *Smith* majority tried to distinguish the cases like *Yoder* that applied the compelling interest test and exempted religion from general laws.[97] The majority claimed that these cases all involved hybrid rights,[98] meaning the Free Exercise Clause "in conjunction with other constitutional protections."[99] That is supposedly why the Court applied the compelling interest test and exempted religion from general laws.

But constitutional rights do not depend on other rights. They are independent and have distinct meaning. As the Sixth Circuit noted: the argument "that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights . . . is completely illogical."[100] The Free Exercise Clause must mean something, and that meaning cannot depend on a plaintiff's arbitrary decisions about unrelated claims. Either the Free Exercise Clause requires religious exemptions from general laws, or it does not. If a free exercise claim is insufficient, it is irrelevant whether a plaintiff adds another insufficient claim. It is absurd to say that a law violates neither the Free

91. *Smith*, 494 U.S. at 879.
92. Reynolds v. United States, 98 U.S. 145, 166–67 (1878).
93. *Fulton*, 141 S. Ct. at 1913 (2021) (Alito, J., concurring).
94. *Reynolds*, 98 U.S. at 166–67.
95. *E.g.*, Cantwell v Connecticut, 310 US 296, 303–04 (1940).
96. *Smith*, 494 U.S. at 877.
97. *See e.g.*, cases cited *supra* notes 87–87.
98. *Smith*, 494 U.S. at 881–82.
99. *Id.* at 881.
100. Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993).

Exercise Clause nor the Free Speech Clause on its own and yet somehow violates both. If, on the other hand, the hybrid theory requires a viable companion claim, then the free exercise claim is pointless.[101] The theory is untenable.

The hybrid distinction also misrepresents caselaw. The Supreme Court in *Yoder* rejected the hybrid theory. It stated that parents have *no* right to avoid a law for nonreligious reasons.[102] The Court unambiguously held: "A way of life, however virtuous and admirable, may *not* be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[103] Under *Yoder*, parents have no right outside the Free Exercise Clause to avoid compulsory education laws.[104] Professor Michael McConnell, perhaps the foremost scholar on the Free Exercise Clause,[105] suggests that the majority concocted its hybrid theory solely to distinguish *Yoder*.[106]

The distinction, moreover, fails even if it were valid. The problem with *Smith*'s hybrid theory is that virtually every case involves hybrid rights.[107] The Native American Church ceremony, like many religious symbols and practices, communicates a message.[108] If burning a flag and nude dancing are expressive conduct because they communicate a message,[109] the Native American Church ceremony is no less expressive. Thus, the *Smith* plaintiffs could have brought both a free speech and free exercise claim. Even if the speech claim would have lost if brought separately, *Smith*'s logic suggests that the free speech and free exercise claims should have prevailed as a hybrid right.[110] Thus, it is hard to take *Smith*'s hybrid rights

101. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1918 (2021) (Alito, J., concurring) (requiring an "independently viable claim . . . makes the free-exercise claim irrelevant"); Axson-Flynn v. Johnson, 356 F.3d 1277, 1296–97 (10th Cir. 2004) (same).

102. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

103. *Id.*

104. *Id.*

105. City of Boerne v. Flores, 521 U.S. 507, 537–38 (1997) (concurring, J., Scalia) (calling Professor McConnell *Smith*'s "most prominent scholarly critic").

106. McConnell, *supra* note 23, at 1121.

107. *See Fulton*, 141 S. Ct. at 1915.

108. *Id.*

109. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct."); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (holding that burning a flag as a political demonstration is expressive conduct).

110. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

> [T]he distinction . . . [is] untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual.

claim seriously. To date, many courts have not.[111]

2. *Smith*'s attempts to distinguish other conflicting unemployment cases also fail.

It is also unclear, under the majority's unemployment compensation standard, why Smith and Black lost. The *Smith* majority acknowledged that the compelling interest test was appropriate in the unemployment context.[112] Yet the Court seemingly forgot that the case *was* an unemployment case—not a criminal prosecution. The Court acknowledged that it had prevented states many times from applying unemployment compensation rules that conflicted with a person's religion.[113] The Court cited three of the four cases, but oddly omitted the most recent.[114] These are prime examples of cases in which the Free Exercise Clause exempted individuals from generally applicable laws based on religion.

Smith argued that the Court had "never invalidated any governmental action" under the compelling interest test because it burdened religion "except the denial of unemployment compensation."[115] The majority claimed that the unemployment compensation context involves the "individualized governmental assessment of the reasons for [a person's] relevant conduct."[116] Thus, the Court stated that "the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[117]

Yet *Smith* was an unemployment compensation case. It involved individualized government assessments. The criminal question was merely hypothetical. Even if the case were a criminal case, the State would have still needed to individually assess the defendants' motives and actions.[118] Thus, the distinction *Smith* posited does not support the majority's conclusion. Even if it did, it is hard to cabin the distinction to

Id.; *see also* McConnell, *supra* note 23, at 1122 (arguing *Smith* implicated a hybrid free exercise and free speech claim).

111. *E.g.*, Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (refusing to recognize hybrid rights); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (same).

112. Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).

113. *Id.*

114. *Id.* (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)) (omitting Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989)).

115. *Smith*, 494 U.S. at 883.

116. *Id.* at 884.

117. *Id.*

118. *See* United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.").

the unemployment compensation context. Due process requires an individualized hearing in many contexts—not just for unemployment benefits.[119] An individualized governmental assessment is also necessary in most free exercise cases.[120] The majority's argument beggars belief.

E. Smith *rests on the majority's dubious policy preferences.*

Although the *Smith* majority claimed that it relied on precedent, neither text nor precedent supports its decision.[121] The decision rests on the majority's policy argument that religious freedom would cause harm.[122] The majority recognized that its decision would abandon religious liberty and "disadvantage" religious minorities.[123] It claimed that this result is an "unavoidable consequence of democratic government," and it is preferable to the alternatives.[124] If religion excused believers from general laws, the majority argued: (1) society "would be courting anarchy" because it would allow each conscience to become a law unto itself;[125] and (2) judges would have to "weigh the social importance of all laws against the centrality of all religious beliefs."[126] Yet neither hypothetical harm justifies the majority's decision.

1. *Smith*'s anarchy argument fails.

The majority's first fear is based on a circular and false assumption. The *hypothetical* question before the Supreme Court was whether the Constitution—the supreme law—protects religious exercise from general laws.[127] The *Smith* majority argued it does not because "[a]ny society adopting such a system," according to the majority, "would be courting anarchy."[128] This begs the question: if the Constitution protects religious exercise from general laws, then it is not lawless to apply the Constitution *correctly*. Nor is it accurate to claim that believers subvert the law if the supreme law requires religious exemptions. If the Free Exercise Clause—

119. Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976) (noting due process requires a hearing before the government finally deprives a person's liberty or property interest); 16C C.J.S. CONSTITUTIONAL LAW § 1873 (2022) ("Due process requires some form or kind of hearing before an individual is deprived of a protected right, interest, or benefit.").

120. McConnell, *supra* note 23, at 1123.

121. *See infra* Section I(C), Section I(D).

122. *Id.* at 1129.

123. *Smith*, 494 U.S. at 890.

124. *Id.*

125. *Id.* at 888

126. *Id.* at 890.

127. *Id.* at 874.

128. *Id.* at 888.

as it says—removes the government's ability to prohibit religious exercise, it is the government that acts lawlessly when it prohibits religious exercise—not the believer.

The ultimate question is whether the Free Exercise Clause provides substantive protection and therefore requires exemptions from general laws. The *Smith* majority, however, fails to answer that question. It merely concludes, "we do not think the words must be given that meaning."[129] The majority simply assumes its conclusion. And the anarchy policy argument that it gives to support its conclusion circularly depends on the conclusion. Thus, the argument is logically flawed.

The anarchy argument also fails empirically. The majority presumed that anarchy results if the Free Exercise Clause protects believers from general laws.[130] Yet religious liberty did not create anarchy before *Smith*. Since the founding, our nation has shown its commitment to religious freedom through an unbroken tradition of religious exemptions.[131]

When the Supreme Court decided *Smith*, many recognized constitutional exemptions existed along with more than two thousand legislative exemptions.[132] Yet the majority provided no evidence that religious exemptions create anarchy. It merely argued that adopting free exercise exemptions "would be courting anarchy," and "open the *prospect* of [anarchy]."[133] The majority also admitted that the Supreme Court itself exempted individuals from general education laws and unemployment laws based on religion.[134] Yet it could not point to any ill effects from those exemptions.

Time has only confirmed that the majority's policy argument is wrong. Religious exemptions have not led to anarchy since *Smith*. Congress—along with twenty-three states[135]—responded to *Smith* by enacting

129. *Id.* at 878.

130. *Id.* at 888.

131. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1837 (2006).

132. The Supreme Court on at least five occasions mandated free exercise exemptions. *See* cases cited *supra* note 71. Professor Laycock cites evidence, based on a Lexis search and sampling techniques, estimating that 2,000 religious exemptions from state and federal laws existed in 1992. Laycock, *supra* note 131, at 1837 (citing James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 n.215 (1992)).

133. *Smith*, 494 U.S. at 888 (emphasis added).

134. *See* cases cited *supra* note 71.

135. *See* ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); ARK. CODE ANN. § 16-123-401, et seq. (2020); CONN. GEN. STAT. § 52-571b (1993), FLA. STAT. § 761.01, et seq. (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. ANN. 35/1, et seq. (West 1998); IND. CODE § 34-13-9-0.7, et seq. (2015); KAN. STAT. ANN. § 60-5301, et seq. (2013); KY. REV. STAT. ANN. § 446.350 (West 2013); LA. STAT. ANN. § 13:5231, et seq. (2010); MISS. CODE. ANN. § 11-61-1 (2014); MO. REV. STAT. § 1.302 (2003); Mont. Laws ch. 276 (SB 215) (2021); N.M. STAT. ANN. § 28-22-1, et seq. (2000); OKLA. STAT. tit. 51, § 251, et seq (2000); 71 PA. STAT. AND CONS. STAT. § 2403 (West 2002); 42 R.I. GEN. LAWS ANN. § 42-80.1-1, et seq. (West 1993); S.C. CODE ANN. § 1-32-10, et seq. (1999); S.D.

RFRAs and other laws to protect religious liberty.[136] These laws require what the *Smith* majority claimed would lead to anarchy.[137] They prevent the government from substantially burdening religious exercise unless it shows that "the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[138] At least fourteen state courts have also rejected *Smith* and decided that their state free exercise clauses afford similar protection.[139] Yet after nearly thirty years with these religious freedom protections, anarchy has not occurred. *Smith*'s anarchy prediction is wrong: religious liberty does not cause anarchy. Far from it, it allows people with conflicting beliefs to live together in peace.

Experience shows that governments can often accommodate religious individuals without problems. Idaho, for example, could have easily accommodated Ricks. Idaho allows Social Security substitutes in other licensing contexts.[140] It just did not care whether Ricks could follow his faith. *Ricks* shows that religious minorities often face problems—from indifference or hostility—and need protection from general laws. *Smith* worsens the problem. *Smith* sanctions indifference and veiled hostility: governments need not care or grant minor exceptions so individuals can practice their faith. *Smith* abandons constitutional protections for religious individuals based on imaginary problems.

If the *Smith* majority had consulted history, it would have recognized that its anarchy rationale was not new—our Founders considered and rejected it. Roger Williams and William Penn both dismissed this claim in the seventeenth century.[141] In Penn's *The Great Case of Liberty of Conscience*, for example, he called the anarchy claim "fully ridiculous."[142] Penn wrote that religious liberty did not excuse believers from "keeping those excellent Laws, that tend to Sober, Just, and Industrious Living."[143] In other words, Penn recognized the government

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CODIFIED LAWS § 1-1A-4 (2021); TENN. CODE ANN. § 4-1-407 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001, et seq. (West 1999); VA. CODE ANN. § 57-2.02 (West 2007).

136. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb4 (1993); American Indian Religious Freedom Act Amendments, 42 U.S.C. §§ 1996–1996b (1994) (protecting religiously motivated peyote use); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

137. *Smith*, 494 U.S. at 888.

138. 42 U.S.C. § 2000bb-1 (1993).

139. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844 n.22 (2014) (citing cases).

140. IDAHO CODE § 73-122 (1999).

141. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1447–48 (1990).

142. *Id.* at 1447 (updated spelling).

143. *Id.* at 1448.

has a strong interest—in modern parlance, a compelling interest—in some cases to refuse to exempt believers from certain general laws.

In the eighteenth century, John Leland also rejected the anarchy argument.[144] Leland led the Virginia Baptists and helped secure constitutional protections for religion.[145] He condemned the assertion that religious liberty would justify crimes such as murder and tax evasion.[146] He argued, "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."[147]

These arguments for religious liberty ultimately won. The Founders did not consider religious freedom dangerous—they universally protected it.[148] When general laws conflicted with religion, the Founders solved the conflict through religious exemptions.[149] The Founders viewed religious liberty as a solution—not a problem.

2. *Smith*'s judicial balancing argument fails.

The majority's second fear was that religious liberty would require judges to balance "the social importance of all laws against the centrality of all religious beliefs."[150] It assumed that little to no religious liberty is better than judges balancing law and religion.[151] But concerns about judicial balancing do not justify (i) rewriting the Free Exercise Clause; (ii) abandoning the Court's role; (iii) inflicting religious harm; (iv) eliminating free exercise exemptions; and (v) sacrificing religious minorities. The scale tips the opposite way.

i. The majority engaged in judicial balancing to prohibit judicial balancing.

The majority engaged in the ultimate judicial balancing act. Unelected judges ignored and rewrote the Free Exercise Clause based on their policy preferences. Because they thought the Founders' decision to prevent the

144. *Id.*

145. *Id.* at 1448, 1476–77 (noting that Leland led the Virginia Baptists who supported Madison after he endorsed constitutional protection for religious liberty, and they contributed to Madison's narrow margin of victory for the first U.S. Congress). The religion clauses were promoted by "the most fervent and evangelical denominations in the nation," particularly the Baptists. *Id.* at 1437.

146. *Id.* at 1448.

147. *Id.* (emphasis added).

148. *See infra* Section II(C).

149. *See infra* Section II(C)(4).

150. Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

151. *Id.* at 889 n.5 ("[I] it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

government from "prohibiting the free exercise [of religion]"[152] was imprudent, they reinterpreted it. The majority showed no reticence to engage in judicial balancing or fear that it might reach the wrong result.

ii. The majority abandoned the Court's role to avoid judicial balancing.

The Founders created a judicial system in part to protect minorities from majoritarian oppression.[153] They created the Bill of Rights, moreover, to avoid certain "consequence[s]"[154] of democratic government.[155] The Bill of Rights secures fundamental rights from majority dependence and interference. As Justice Jackson wrote in *Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections.[156]

Smith turns this fundamental understanding on its head and leaves freedom of worship to the political process.[157] Disadvantaging minority religions is not "unavoidable"[158] if courts enforce a robust Free Exercise Clause.

Smith erred by turning religious freedom over to the political process. The Founders recognized that the political majority cannot be trusted to protect religious liberty.[159] Legislators represent the majority and are vulnerable to lobbyists and political pressure.[160] Judges are, or at least should be, different.[161] They are at least *sometimes* willing to protect unpopular minorities.[162] Legislators, on the other hand, are seldom willing to because they cannot afford to protect groups that voters disfavor. Thus,

152. U.S. CONST. amend. I.

153. McConnell, *supra* note 23, at 1129.

154. *Smith*, 494 U.S. at 890.

155. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

156. *Id.*

157. *Smith*, 494 U.S. at 890.

158. *Id.*

159. Thus, the Founders enacted a federal Free Exercise Clause and constitutional free exercise provisions in each state. *See infra* Section II(C)(1).

160. Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J. L. & RELIGION 139, 160–62 (2009).

161. *See* Perez v. Mortg. Bankers Ass'n, (Thomas, J., concurring) 575 U.S. 92, 120 (2015) ("One of the key elements of the Federalists' arguments in support of [the judiciary's power] to make binding interpretations of the law was that Article III judges would exercise independent judgment").

162. Laycock, *supra* note 160, at 163.

legislators "are least likely to protect those religious minorities who are most in need of protection."[163]

iii. The majority inflicted religious harm to avoid judicial balancing.

Judicial balancing is a constitutional norm.[164] There is no reason to believe judges are more prone to err when they apply the Free Exercise Clause than when they apply another constitutional provision. The *Smith* majority's opinion suggests that the special problem with religion is that it requires judges to evaluate religious claims' relative merits.[165] This harm, even when judges err, is far less injurious than *Smith*'s alternative. Rather than weigh the religious claim in *Smith*, the majority allowed Oregon to prohibit a central tenet of the Native American Church *without a justification*.[166] It is hard to see how judicial balancing—a common judicial practice—is worse. The plaintiffs in *Smith* did not think so. The government deprived them of their right to exercise their religion.

iv. The majority ended free exercise exemptions to avoid judicial balancing.

To avoid judicial balancing, the majority eliminated free exercise exemptions. The majority argued that it would be a constitutional anomaly to exempt believers under the Free Exercise Clause from generally applicable laws.[167] This is untrue. Individual exemptions are *not* a free exercise anomaly. A constitutional as-applied challenge is a precise parallel.[168] Under an as-applied ruling, a court protects a constitutional right but otherwise leaves the challenged law in place. Moreover, contrary to *Smith*, exemptions from general laws *are* well-established protections under the First Amendment for free speech and press.[169]

Religion, however, is anomalous because general laws uniquely endanger it.[170] Unlike other rights, general laws often capture religion

163. *Id.*

164. McConnell, *supra* note 23, at 1144.

165. Emp. Div. v. Smith, 494 U.S. 872, 886–87 (1990).

166. *Id.* at 889–90.

167. *Id.* at 886.

168. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1916–17 (2021) (Alito, J., concurring); McConnell, *supra* note 23, at 1138; Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018).

169. *Fulton*, 141 S. Ct. at 1916–17 (Alito, J., concurring) (listing cases); McConnell, *supra* note 23, at 1138; Barclay & Rienzi, *supra* note 168, at 1611.

170. Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. L. REV. 685, 692 (1992).

because religion involves conduct. When general laws do affect religion, they distinctly harm it. General laws may abridge free speech, for example, but there are normally other means for the speaker to share his message.[171] When individuals are prohibited from practicing their religion, no alternative means exist to practice it. For Native American Church members in Oregon, after *Smith*, no alternative *legal* means exist to exercise their religion.[172] General laws uniquely burden believers and require them to violate their religious identity. Free exercise exemptions are not unusual—they are a sensible solution to protect believers.

v. The majority sacrificed religious minorities to avoid judicial balancing.

Finally, to avoid judicial balancing, *Smith* sacrificed religious minorities.[173] In doing so, the majority ignored the constitutional directive for denominational neutrality. Supreme Court precedent and history confirm that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[174] Under *Smith*, however, powerful religious groups can obtain legislative exemptions. They can secure the right to practice their faith. Powerless religious groups cannot: thus, they have no right to practice their faith.

The Establishment Clause cannot fix this disparity because accommodation is just as easily accomplished by legislative inaction as action.[175] Legislatures do not usually pass laws that conflict with religious beliefs held by the majority. For example, if the majority shared Ricks's religious beliefs, the State would not require a Social Security number to register, or it would create an exception. A vigorous Free Exercise Clause is the best way to protect religious minorities.[176] *Smith*, however, rejects that solution and leaves minorities vulnerable—who need constitutional protection most.

Although religious liberty may be imperfect, like any other human endeavor, it is preferable to evenhanded repression. Of course, there is a possibility that judges will err. But that possibility does not justify abandoning the constitutional requirement to protect religious liberty.

171. *Id.*
172. *Id.*
173. Emp. Div. v. Smith, 494 U.S. 872, 890 (1990) (admitting it would "disadvantage" minorities).
174. Larson v. Valente, 456 U.S. 228, 244 (1982).
175. McConnell, *supra* note 23, at 1132.
176. *Id.*

II: THE FREE EXERCISE CLAUSE

The Free Exercise Clause provides a substantive right to *freely exercise* religion: it prohibits the government from interfering with religious exercise. This is a sensible solution. General laws and discriminatory laws can equally prohibit religious exercise.

A. Smith *conflicts with the Free Exercise Clause's text.*

Smith contradicts the Free Exercise Clause. The Free Exercise Clause's text is absolute. It provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[177] Other constitutional clauses have limiting terms. For example, security against "*unreasonable* searches and seizures," "*due* process of law," "*excessive* bail," and "*cruel and unusual* punishments."[178] The Free Exercise Clause, on the other hand, does not have any limiting terms. Like protections for free speech and free press, the Constitution unconditionally protects religious exercise. To remain textually faithful, exceptions should be narrow because the text supplies none.[179] The text's absolute prohibition, moreover, requires the government to prove an exception from the rule is necessary to lawfully burden religious practice.

The *Smith* majority's interpretation, however, replaces the absolute rule with an unwritten, absolute exception: the government *can* prohibit religious exercise if it acts neutrally and generally.[180] The exception swallows the rule and allows the government to prohibit the "free exercise [of religion]" without providing a reason.[181] The majority's interpretation as a textual matter is untenable. It is difficult, if not impossible, to arrive at the majority's conclusion from the text. An average reader, now or in the eighteenth century, would not conclude that the text allows the government to prohibit religious exercise if it equally prohibits religious and nonreligious conduct.

The Free Exercise Clause provides substantive protection. It guarantees the right to freely exercise religion—not merely the right to equal treatment. It does not say, for example, that "Congress shall make no law discriminating against religion."[182] Nor does it say: "Congress shall make no law prohibiting the free exercise of religion unless such law is neutral

177. U.S. CONST. amend. I.

178. U.S. CONST. amends. IV, V, VIII (emphasis added). For further discussion about the reasons for this absolute protection, see Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 300 (1986).

179. McConnell, *supra* note 23, at 1116.

180. Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

181. U.S. CONST. amend. I.

182. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 13 (1990).

and generally applicable." It says that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[183] The Constitution allows the government to prohibit many things. But it bars the government from prohibiting religious exercise.[184] This is a substantive protection from government interference with religion.

If the Founders intended to create a free exercise exception for general laws that restrict religion, they knew how to do it. The Founders understood English. And they had statutory examples that used general laws as limiting principles readily available.[185] The English statute that controlled religious and civil laws' reach within the Church of England is a prime example.[186] That statute provided that religious law governed unless it was "repugnant to the laws, statutes, and customs of this realm, [or damaged or hurt] the King's prerogative."[187] If the Founders intended to create an exception to the Free Exercise Clause for neutral and generally applicable laws, "they would have used familiar language."[188] They did not. They protected religious exercise without exception.

B. Smith *conflicts with the Free Exercise Clause's purpose.*

The Founders created the Free Exercise Clause to preserve religious liberty and prevent religious persecution and conflict. *Smith* contradicts these goals.

Religious liberty reduces human suffering—it liberates individuals from the cruel choice between "incurring legal penalties and surrendering core parts of their identity."[189] Religion is important to believers—important enough to suffer and die for.[190] Governmental acts that prohibit religion therefore produce conflict and suffering and seldom convert earnest believers.[191] As Madison wrote in his Memorial and Remonstrance: governments have spilled "torrents of blood" in "vain attempts" to achieve uniformity and forbid disapproved religious practices.[192] Madison argued "the true remedy" for religious conflict is

183. U.S. CONST. amend. I.

184. Laycock, *supra* note 182, at 13.

185. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1898 (2021) (Alito, J., concurring) (noting the Founders did not use equal protection language either, even though other constitutional provisions and several earlier free exercise provisions included equal protection language).

186. 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, 836 (1998).

187. *Id.*

188. *Id.*

189. Laycock, *supra* note 139, at 842.

190. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

191. *Id.*

192. MADISON, *supra* note 15.

"equal and complete [religious] liberty."[193]

Indeed, religious accommodation, or "relaxation" in Madison's words, from "narrow and rigorous policy, wherever it has been tried, has been found to assuage [religious struggles]."[194] The Founders discovered that there is less reason for religious conflict if everyone can practice his religion freely.[195] Thus, they created the Free Exercise Clause.

Smith undermines the Free Exercise Clause by permitting religious persecution. Equal protection is not enough. Imagine a tyrant who suppresses everyone's right to exercise religion. He would achieve perfect equality, but, of course, no religious liberty.[196] This illustration shows the grave error the majority committed.[197]

In essence, *Smith* abolishes religious liberty. Minorities cannot practice their religion if the majority passes a generally applicable law that prohibits it. *Smith* allows Native American Church members in Oregon, and individuals like Ricks in Idaho, to hold their religious beliefs. But they cannot practice them. If they do, *Smith* allows the government to punish them. Thus, *Smith*'s equal protection rule is hollow. It permits the government to persecute believers for practicing their faith.[198]

Moreover, *Smith* ensures conflict because it allows the majority to suppress religious practices. Believers must fight—and win—social and political battles to protect their religious identity. If they lose, even once, the majority may prohibit them from practicing their religion. Rather than religious liberty for all, *Smith* arms the government with the power to prohibit religious conduct that the ruling class dislikes.

When governments prohibit religious conduct, contrary to *Smith*, it is immaterial whether they use a law aimed at religion or a law that is otherwise neutral towards religion.[199] Both laws achieve the same result. For a Quaker during the seventeenth century, it would have made little difference if Massachusetts passed a law that prohibited Quakers from the colony or a *general* law that required everyone to serve in the military and swear oaths. A conscientious Quaker could not live in Massachusetts if he had to serve in the military or swear oaths.[200] If a Quaker did live there, conflict and persecution would have resulted under either law. Both laws

193. *Id.* (updated spelling).

194. *Id.*

195. Laycock, *supra* note 139, at 842.

196. Laycock, *supra* note 192, at 13–14.

197. *Id.*

198. Laycock, *supra* note 160, at 176.

199. Emp. Div. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring) ("There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.").

200. Laycock, *supra* note 160, at 150.

would have empowered the government to arrest and imprison Quakers. General laws that ban religious practices ban believers.[201]

Smith draws its line in the same place that Oliver Cromwell did in the seventeenth century.[202] Cromwell told the Catholics in Ireland that they could believe, but they could not practice their faith.[203] Cromwell promised not to interfere with any Catholic person's conscience, but he prohibited Catholic mass.[204] The *Smith* majority similarly prohibited Native American Church ceremonies.[205] The majority declared that individuals have no substantive right to practice their religion.[206] Although *Smith*'s equal protection rule would have prevented Cromwell from expressly outlawing Catholic mass, *Smith* allows government acts that would achieve the same result.[207] Under *Smith*, Cromwell could have forbidden consuming wine and thereby lawfully prohibited traditional Catholic mass.[208]

The Founders enacted the Free Exercise Clause, at the very least, to prevent religious conflicts like the English Civil War.[209] The Founders did not intend a free exercise provision that permits Cromwellian persecution where the majority may lawfully suppress minority religions.[210] The majority in *Smith*, however, rewrote the Free Exercise Clause to potentially allow for just that. Under *Smith*, Protestants who win a civil war may lawfully suppress Catholic mass, and groups who win political battles may lawfully suppress minority religions.[211]

The Founders recognized that a substantive right to freely exercise religion reduces conflict.[212] It solves the dilemma that many religious minorities face: their faith tells them one thing, but the law requires another. A substantive right to exercise religion requires the government to accommodate religion, whenever possible, so religious individuals can serve God and government. *Smith*, however, disregards this dilemma for religious individuals. As a result, religious individuals like Ricks are forced to choose between the government and God. If Ricks works as a contractor and maintains his faith, he faces fines and jail.[213]

201. *Id.*
202. Laycock, *supra* note 182, at 22.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. MADISON, *supra* note 15.
213. Petition for a Writ of Certiorari at 1, Ricks v. State Contractors Bd., 141 S. Ct. 2850 (2021)

Smith thereby turns principled citizens into criminals for following their faith. *Smith* rejects the difference between religious believers—who cannot comply with a law because of their religion—and ordinary criminals who simply do not comply with a law. Under *Smith*, "[a] soldier who believes he must cover his head before an omnipresent God is constitutionally indistinguishable from a soldier who wants to wear a Budweiser gimme cap."[214] And a believer who consumes wine or ingests peyote during communion receives no more constitutional protection under *Smith* than a recreational drug or alcohol user.[215] *Smith* treats all these individuals the same. Thus, *Smith* allows the state to criminalize the free exercise of religion.

C. Smith conflicts with the Free Exercise Clause's original meaning.

Smith contradicts the Free Exercise Clause's original meaning. The intellectual context at the founding and the free exercise principle's development and application confirm that the text protects a broad, substantive right to practice religion.

1. *Smith* conflicts with the intellectual context at the founding.

The founding generation considered religious liberty an unalienable right.[216] Every state, except Connecticut, had a constitutional provision protecting religious liberty before the federal Bill of Rights.[217] Four states affirmed in their constitutions that religious liberty is an "unalienable right,"[218] and four others proposed a federal amendment that said the same.[219] The Founders, in comparison, often considered other rights in state bills of rights, such as the right to own property and the right to trial by jury, alienable rights that depend on civil society.[220] In contrast, they universally considered religious freedom an unalienable right.

The Founders considered conscience inviolable. This idea is the primary reason given at the founding for religious liberty.[221] James

(No. 19-66).

214. Laycock, *supra* note 182, at 11.

215. *Id.* at 11, 16.

216. McConnell, *supra* note 141, at 1456.

217. *Id.* at 1455.

218. The four states are Delaware, New Hampshire, North Carolina, and Pennsylvania. *See infra* text accompanying notes 319, 323, 326, 327.

219. New York, Virginia, Rhode Island, and North Carolina proposed a constitutional amendment declaring that people have an "unalienable right" to exercise religion "according to the dictates of conscience." McConnell, *supra* note 141, at 1480–81 n.360.

220. *Id.* at 1456 n.238 (citing Madison and Jefferson).

221. McConnell, *supra* note 186, at 823.

Madison perhaps most famously articulated this account in his Memorial and Remonstrance Against Religious Assessments.[222] There, he explained that religious liberty is "in its nature an unalienable right" because it "is a duty towards the Creator"—not merely "a right towards men."[223] Madison wrote that every person owes a duty to God that must be individually determined.[224] "This duty is precedent," according to Madison, "both in order of time and in degree of obligation, to the claims of Civil Society."[225]

Individuals do not surrender this duty to God when they enter society. Before a person joins society, Madison wrote, "he must be considered as a subject of the Governor of the Universe."[226] So when he enters civil society, he "must always do it with a reservation of his duty to the General Authority."[227] And when a person joins a particular civil society, he must "do it with a saving of his allegiance to the Universal Sovereign."[228]

Madison maintained that "Religion is wholly exempt from [Civil Society's] cognizance."[229] The government lacks authority to interfere with a person's religion, which Madison defined as "the duty which we owe to our Creator and the manner of discharging it."[230] Because "religion [is] exempt from the authority of the Society at large," Madison reasoned "still less can it be subject to that of the Legislative Body."[231] Government power, according to Madison, is limited: government branches may not invade other branches or peoples' rights.[232] Government officials who do so "exceed the commission from which they derive their authority, and are Tyrants."[233] Thus, the government exceeds its authority and acts tyrannically when it regulates religion.

The Founders protected religion based on this intellectual context and understanding.[234] They did not consider religious liberty a non-discrimination principle, nor did they protect religion to achieve religious equality.[235] They considered religious liberty an unalienable right. Each person has an irrevocable duty to God, determined by conscience, that is

222. *Id.* at 823–24.
223. MADISON, *supra* note 15.
224. *Id.*
225. *Id.*
226. *Id.* (updated spelling).
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. McConnell, *supra* note 186, at 823–24.
235. *See* MADISON, *supra* note 15.

"precedent . . . to the claims of Civil Society."[236] This theory underlies the Free Exercise Clause, and it corresponds with a broad, substantive right to practice religion.

Smith contradicts this original understanding. It reverses the relationship between God and government. *Smith* rests on the theory that duties to civil society supersede duties to God—contrary to Madison's account. And it converts an unalienable right from God into an alienable right that depends on government.[237] Under *Smith*, the government can regulate religion—and even prohibit it—if the government acts equally.

2. *Smith* conflicts with the free exercise principle developed in the colonies.

The free exercise of religion developed as a legal concept in the American colonies.[238] The term "free exercise" appeared in a legal document in 1648 when Lord Baltimore ordered Maryland officials not to disrupt Christians—Catholics in particular—in the free exercise of their religion.[239] One year later, Maryland enacted the first colonial free exercise clause.[240] It stated:

> [N]o person . . . professing to believe in Jesus Christ, shall from henceforth be any ways troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way be compelled to the belief or exercise of any other Religion against his or her consent.[241]

Rhode Island also protected religious liberty but used the equivalent term liberty of conscience.[242] Its 1663 Charter protected residents from being "molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion [that] do not actually disturb the civil peace of our said colony."[243] The Charter also guaranteed that individuals may "freely and fully have and enjoy his and their own

236. *Id.*

237. Emp. Div. v. Smith, 494 U.S. 872, 888, 890 (1990) (calling free exercise exemptions a "luxury" and "leaving accommodation to the political process").

238. McConnell, *supra* note 141, at 1425.

239. *Id.*

240. *Id.*

241. An Act Concerning Religion (1649), *reprinted in* 1 ARCHIVES OF MARYLAND ONLINE: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 1637–1664, at 244–77 (William Hand Browne ed., Baltimore, Maryland Historical Society 1883) (updated spelling), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--244.html. For the full text, *see infra* Appendix A: Colonial Free Exercise Clauses.

242. Charter of Rhode Island and Providence Plantations (1663), *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 3213 (Francis Newton Thorpe ed., 1909) (updated spelling), https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-vi-porto-rico-vermont.

243. *Id.* (updated spelling).

judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others."[244] The Carolina and New Jersey proprietors used almost identical language to protect religious freedom.[245]

The Rhode Island Charter notably deviated from an earlier legislative decree that made religious freedom subject to general laws.[246] That decree stated that inhabitants could practice their religion "[p]rovided, it be not directly repugnant to [the] government or laws established."[247] The Royal Charter, however, did not limit religious freedom by all "laws established." It only limited religious freedom by laws needed to maintain peace.[248] Thus, believers could exercise their religion unless it conflicted with a law needed for peace or was licentious, profane, or injured others.

Carolina's Charter similarly protected religious liberty like Rhode Island's Charter.[249] But it also explicitly provided for religious exemptions. The Carolina Charter authorized proprietors to grant "indulgences" and "dispensations" to residents who could not "conform" with the general law because of their "private opinions."[250] Indulgences and dispensations were technical terms that referred to the king's power to exempt citizens from the law.[251] In England, Charles II and James II used this power to exempt religious minorities from conflicting laws.[252] In Carolina, proprietors used this authority to exempt Quakers from oath requirements and to allow non-Anglican towns to choose their own

244. *Id.* (updated spelling).

245. The New Jersey proprietors agreed: "[N]o person . . . shall be" troubled or "punished" for any religious "opinion or practice" that does "not actually disturb the civil peace." Every person may "freely" use his religious "judgments and consciences . . . peaceably and quietly, and not using this liberty to licentiousness, nor to the civil injury or outward disturbance of others." The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey (1664), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2537, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands. For the New Jersey and Carolina agreements' full text, *see infra* text accompanying notes 315, 317.

246. Government of Rhode Island—March 16–19, 1641, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 3208, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-vi-porto-rico-vermont.

247. *Id.* (updated spelling).

248. *Id.*

249. The Carolina Charter provided: "[N]o person . . . shall be" troubled or "punished" for any religious "opinion, or practice" that does "not actually disturb the civil peace." Every person may "freely" use his religious "judgments and consciences . . . peaceably and quietly, and not using this liberty to licentiousness, nor to the civil injury, or outward disturbance of others." Charter of Carolina (1665), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2771, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands.

250. *Id.*

251. McConnell, *supra* note 141, at 1428.

252. *Id.*

ministers.[253] Thus, as in England, exemptions resolved conflicts between law and religion.

These colonial provisions reveal at least two features about the early free exercise principle. First, the free exercise principle protects belief *and* practice. The colonial provisions extended protection to all religious "judgments and consciences" and religious "exercise" and "practice."[254] They did not limit protection to religious beliefs, opinions, communications, or worship.[255] This suggests that the American colonists considered the freedom to *practice* religion an essential liberty.

Second, the free exercise principle provides protection from general laws. The colonists did not use general laws—or similar terms—as limiting principles for religious exercise. Colonial compacts often used terms such as "the public good" or "the common good" to convey the full extent of legislative power.[256] Colonial free exercise provisions did not use such terms. Rather, these provisions limited the free exercise of religion *only* when necessary to keep the peace or to prevent licentiousness or injury to others.

Thus, the colonial free exercise principle prohibits the government from interfering with religion unless vital interests require it. This early framework parallels the standard the Supreme Court expressed in *Sherbert v. Verner*[257] and *Wisconsin v. Yoder*[258] but ignored in *Smith*: "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[259]

3. *Smith* conflicts with the free exercise principle protected by early state constitutions.

The colonial free exercise principle animated the free exercise clauses enacted in state constitutions.[260] The state clauses followed the colonial free exercise pattern: they "guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests."[261]

253. *Id.*

254. *See supra* notes 241–250.

255. McConnell, *supra* note 141, at 1427.

256. McConnell, *supra* note 186, at 836.

257. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring a "compelling state interest" and stating, "only the gravest abuses, endangering paramount interests, give occasion for permissible [free exercise] limitation" (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945))).

258. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

259. *Id.*

260. McConnell, *supra* note 141, at 1427.

261. City of Boerne v. Flores, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).

i. State free exercise clauses provided substantive protection from general laws.

State free exercise clauses further show how the founding generation understood the free exercise principle. The people who drafted and adopted the federal clause would have been familiar with the free exercise principle from state and colonial free exercise provisions. Many Founders who participated at the federal level were also involved at the state level.[262] Madison, for example, helped draft both the Virginia Free Exercise Clause and the federal Free Exercise Clause.[263] It is reasonable to infer that the term, "free exercise of religion," in the First Amendment meant what it meant in earlier state and colonial provisions.[264]

The New York Constitution's Free Exercise Clause exemplifies many of its contemporary provisions.[265] The clause granted broad protection with limited exceptions:

> [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 be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[266]

New Hampshire similarly protected religious freedom limited by narrow exceptions:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace, or disturb others, in their religious worship. [267]

Other states generally followed the same pattern.[268] They broadly protected free exercise first, based on the individual believer's

262. *Id.* at 560.

263. McConnell, *supra* note 141, at 1463, 1480.

264. *Flores*, 521 U.S. at 560 (O'Connor, J., dissenting).

265. For the full text for every state free exercise clause at the First Amendment's adoption, see *infra* Appendix B: State Free Exercise Clauses.

266. N.Y. CONST of 1777, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2636–37, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands.

267. N.H. CONST of 1784, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2454, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-iv-michigan-new-hampshire.

268. *See infra* Appendix B: State Free Exercise Clauses.

understanding (conscience).[269] They did not define the right negatively by identifying religious and nonreligious domains. Moreover, the right protected religiously motivated conduct. No state provision confined the free exercise right to beliefs and opinions.[270] Six provisions used the word "exercise," which dictionaries then defined as "action."[271] Two other provisions used broader terms: Maryland used the term religious "practice" and Rhode Island used the term matters of "religious concernment."[272]

After state free exercise clauses protected the broad right, they identified narrow interests that allowed the state to restrict the free exercise of religion. Nine states—the overwhelming majority—limited the free exercise of religion to "peaceable" actions or actions that would not disturb the state's "peace" or "safety."[273] The Georgia Constitution, for example, provided: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[274]

The limitations are instructive. They confirm that the free exercise right protects religiously motivated conduct from general laws. Beliefs, by themselves, do not disturb the peace.[275] More important, if *every* general law limited religious exercise, there would have been no need to identify the laws and interests that limit the right. The New York Constitution, for instance, stated that the free exercise of religion should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State."[276] If *Smith* were correct, such a limitation would have been superfluous. Precise limitations are pointless if the free exercise of religion is subject to all generally applicable laws. The limitations only make sense if the free exercise principle protects religion from most generally applicable laws.[277]

269. McConnell, *supra* note 141, at 1458–59.

270. *Id.* at 1459.

271. The states are Delaware, Georgia, New York, Pennsylvania, South Carolina, Virginia. *Id.*; *see infra* text accompanying notes 319–320, 325, 329–330.

272. *See infra* text accompanying notes 321, 328.

273. The states are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina. *See infra* text accompanying notes 319-325, 328-329.

274. GA. CONST. of 1777, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 784, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-ii-florida-kansas.

275. McConnell, *supra* note 141, at 1462.

276. N.Y. CONST. of 1777, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2637, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands.

277. McConnell, *supra* note 141, at 1462.

ii. The limiting terms in state free exercise clauses did not mean general laws.

The argument that these limitations were synonyms for the public interest, or every general law, is textually and historically wrong. As a textual matter, states had different limits. Nine limited the free exercise of religion to "peaceable" actions or actions that would not disturb the state's "peace" or "safety."[278] Of these nine, four included licentious or immoral acts;[279] two others included acts that interfere with other individuals' religious practices;[280] one added acts that injure or disturb others;[281] another inserted acts contrary to good order;[282] and one more included acts contrary to society's happiness, peace, and safety.[283] It is implausible to presume these terms and variations had the same meaning.

Recorded debates over the limiting terms also occurred in two states.[284] In Virginia, James Madison and George Mason disagreed about the terms and proposed competing limiting provisions.[285] John Jay and Gouverneur Morris did the same in New York.[286] If, as the *Smith* majority must have assumed, the terms referred to any general law, then these debates and conflicting proposals were senseless.[287] Thus, these terms clearly "were not idle rhetorical variations."[288]

iii. No limiting terms in the federal Free Exercise Clause suggests limits apply only by necessity based on the free exercise principle's scope.

Because the federal Free Exercise Clause includes no limitations, courts should imply limits by necessity based on the free exercise principle's scope. The colonial and state free exercise limits show the free exercise principle's scope. At the founding, the principle guaranteed the right to freely exercise religion unless a religious practice undermined peace and safety or, in some cases, conflicted with another vital state interest. Thus, these limitations mark the principle's boundaries. The

278. The nine states are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina. *See supra* note 273.

279. The four states are Maryland, New York, Rhode Island, and South Carolina. *See infra* text accompanying notes 321, 325, 328, 329.

280. The two states are Massachusetts and New Hampshire. *See infra* text accompanying notes 322, 323.

281. The state is Rhode Island. *See infra* text accompanying notes 318, 328.

282. The state is Maryland. *See infra* text accompanying note 321.

283. The state is Delaware. *See infra* text accompanying note 319.

284. McConnell, *supra* note 186, at 837.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

federal Bill of Rights simply adopted the familiar principle without noting its established limits.

The Virginia Bill of Rights is instructive. George Mason proposed a broad free exercise limitation that excluded religious exercise that disturbs society's peace, happiness, or safety.[289] This proposed language arguably included all generally applicable laws.[290] Madison objected and proposed a narrow limitation that only excepted religious exercise when it "manifestly" endangered "the preservation of equal liberty and the existence of the State."[291] The Virginia legislature compromised through silence. It chose to protect the broad right and left others to imply limitations by necessity based on the free exercise principle's scope.[292]

Following this example, Madison did not include a limitation when he first drafted the federal Free Exercise Clause. Congress followed that approach and constitutionally recognized the free exercise principle, omitting any limitations. This suggests that the Founders understood the free exercise principle's scope and expected that others would carefully imply limits by necessity based on the principle's scope.

4. *Smith* conflicts with the free exercise principle's original application.

The colonial and state exemption tradition suggests that the free exercise principle entails religious exemptions from generally applicable laws.[293] During the founding era, conflict between law and religion involved three issues: oath requirements, military conscription, and religious assessments.[294] Religious exemptions resolved each conflict.

Oath requirements were by far the most common conflict.[295] Quakers and other Protestant sects believed that it was wrong to take oaths or swear allegiance to civil authority.[296] Without accommodation, their beliefs would have prevented them from testifying in court, leaving them unable to protect themselves legally from adversaries.[297] A no-exemption policy would have only allowed the government to eliminate the oath requirement for everyone or insist on the requirement without exception. Yet virtually every state rejected those choices. By 1789, nearly all states

289. McConnell, *supra* note 141, at 1462.
290. *Id.* at 1463.
291. *Id.*
292. *Id.*; *see infra* text accompanying note 330.
293. McConnell, *supra* note 141, at 1466.
294. *Id.*
295. *Id.* at 1467.
296. *Id.*
297. *Id.*

resolved the conflict by providing religious exemptions.[298]

Conflicts also occurred over military conscription. Quakers and Mennonites refused to bear arms for religious reasons.[299] Significant debate occurred because of this exemption's cost. An exemption required people with other religious beliefs to disproportionately bear the military burden. Yet Rhode Island, North Carolina, and Maryland exempted religious objectors from military service; New York, Massachusetts, Virginia, and New Hampshire later did the same.[300]

During the Revolutionary War, the Continental Congress, which struggled at times to field an army, granted exemptions for religious objectors using these words:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[301]

This policy is significant. It mirrors the worldview that Madison described in his Memorial and Remonstrance. The policy treats religious conscience as a duty that supersedes society's claims, even during "universal calamity."[302] The policy, moreover, allows the religious objector to determine the appropriate accommodation—it does not compel an alternative payment or cost.

Conflicts between faith and law also occurred in states and colonies with established churches.[303] These governments required citizens to financially support either the established church or another church the citizen preferred.[304] Baptists, Quakers, and others, however, opposed government compelled tithing for religious reasons.[305] The *Smith* principle would have resolved these conflicts by crushing religious opposition. Many states instead offered religious accommodation. Massachusetts, Connecticut, New Hampshire, and Virginia, for example, all responded by exempting religious objectors from these laws.[306]

These exemptions show that the founding generation viewed

298. *Id.* at 1468.
299. *Id.*
300. *Id.*
301. *Id.* at 1469.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*

accommodation as the solution when law and religion conflict.[307] Although legislators granted these exemptions, the source is unimportant since the Constitution—and constitutional judicial review—did not yet exist.[308] The legislature was the only government option for accommodation. The critical question is whether individuals at the founding considered exemption the appropriate *government* remedy when law and conscience clash.[309] The answer, based on practice, is "yes"—the founding generation viewed exemption, not general regulation, as the solution.

The Founders' exemption pattern shows how they applied the free exercise principle. The Founders consistently exempted religiously motivated conduct from laws to protect religious liberty.[310] It did not matter that the laws generally applied, requiring everyone to swear oaths, serve in the military, and tithe. The Founders lifted these laws to preserve religious liberty.[311]

When the Founders enshrined the free exercise principle in the Constitution, they would have expected it to function the same way.[312] They would not have expected a change because of constitutional rather than legislative recognition. The Founders would have expected judges to protect religious liberty under the Free Exercise Clause to the same degree legislators had before the First Amendment.[313] The Founders did not enact the Free Exercise Clause to provide less protection for religious liberty than the protection legislators already offered.

CONCLUSION

Smith was wrongly decided. Without briefing or argument over the issue, *Smith* eliminated the constitutional right to freely exercise religion. It did so under a hypothetical question irrelevant under state law. In its holding, *Smith* ignored the parties, amici, and lower court who all agreed that the Free Exercise Clause protects individuals from generally applicable laws.

There is no reason to retain *Smith*. The *Smith* majority did not determine what the constitutional text means—it simply asserted, without evidence, that its interpretation is "a *permissible* reading."[314] Although it

307. McConnell, *supra* note 186, at 839–40.

308. City of Boerne v. Flores, 521 U.S. 507, 559 (1997) (O'Connor, J., dissenting).

309. McConnell, *supra*, note 141, at 1470.

310. *Id.* at 1466–72.

311. *Id.*

312. *Flores*, 521 U.S. at 559–60 (O'Connor, J., dissenting).

313. *Id.*

314. Emp. Div. v. Smith, 494 U.S. 872, 878 (1990) (emphasis added).

claimed that precedent confirmed its interpretation, the majority could only marshal two discredited opinions as its chief precedents. At the same time, it either ignored or failed to distinguish many precedents that contradict *Smith*. In the end, the decision rests on five Justices' mistaken belief that religious liberty must perish to prevent anarchy and avoid judicial balancing. In short, *Smith* offers no sound reason for its holding.

Above all, *Smith* contradicts the Free Exercise Clause's text, purpose, and original meaning. The text is plain: it promises religious liberty to all. It contains no exception. The reason is simple: as Madison put it, religious duties come from God, and so they come before civil duties. On that basis, the colonies and states adopted provisions protecting the free exercise of religion, and they granted religious exemptions when law and religion conflicted. Through these provisions and practices, a legal principle emerged: the government may not prohibit religious exercise unless it endangers peace and safety. The Founders enshrined this principle in the Free Exercise Clause. *Smith* erases it.

Smith discards a sacred, unalienable right that our Founders guaranteed. All Americans will be poorer until the Court revisits *Smith* and restores the Free Exercise Clause.

APPENDIX A: COLONIAL FREE EXERCISE CLAUSES

1. Carolina Charter (1665)[315]

[N]o person or persons unto whom such liberty shall be given, shall be any way molested, punished, disquieted, or called in question, for any differences in opinion, or practice in matters of religious concernments, who do not actually disturb the civil peace of the province, county or colony, that they shall make their abode in: But all and every such person and persons may, from time to time, and at all times, freely and quietly have and enjoy his and their judgments and consciences, in matters of religion, throughout all the said province or colony, they behaving themselves peaceably, and not using this liberty to licentiousness, nor to the civil injury, or outward disturbance of others.

2. Maryland Act Concerning Religion (1649)[316]

[N]oe person or psons whatsoever within this Province, or the Islands, Ports, Harbors, Creekes, or havens thereunto belonging professing to

315. Charter of Carolina (1665), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2771, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/17th_century/nc04.asp.

316. An Act Concerning Religion (1649), *reprinted in* 1 ARCHIVES OF MARYLAND, *supra* note 241, at 244–77, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--244.html, also available at https://press-pubs.uchicago.edu/founders/documents/amendI_religions5.html.

beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province or the Islands thereunto belonging nor any way compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt. established or to bee established in this Province under him or his heires.

3. New Jersey Agreement (1664)[317]

That no person qualified as aforesaid within the said Province, at any time shall be any ways molested, punished, disquieted or called in question for any difference in opinion or practice in matter of religious concernments, who do not actually disturb the civil peace of the said Province; but that all and every such person and persons may from time to time, and at all times, freely and fully have and enjoy his and their judgments and consciences in' masters of religion throughout the said Province they behaving themselves peaceably and quietly, and not using this liberty to licentiousness, nor to the civil injury or outward disturbance of others; any law, statute or clause contained, or to be contained, usuage or custom of this realm of England, to the contrary thereof in any wise notwithstanding.

4. Rhode Island Charter (1663)[318]

[N]oe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of land hereafter mentioned; they behaving themselves peaceablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others; any lawe, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding.

317. The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey (1664), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2537, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/17th_century/nj02.asp.

318. Charter of Rhode Island and Providence Plantations (1663), *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 3213, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-vi-porto-rico-vermont, also available at https://avalon.law.yale.edu/17th_century/ri04.asp.

APPENDIX B: STATE FREE EXERCISE CLAUSES

1. Delaware Declaration of Rights (1776)[319]

Sect. 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

Sect. 3. That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.

2. Georgia Constitution (1777)[320]

ART. LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.

3. Maryland Constitution (1776)[321]

XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights . . . .

4. Massachusetts Constitution (1780)[322]

Article II. It is the right as well as the duty of all men in society,

319. Delaware Declaration of Rights (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 5 (Philip B. Kurland & Ralph Lerner eds., 1987), https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss4.html.

320. GA. CONST. of 1777, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 784, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-ii-florida-kansas, also available at https://avalon. law.yale.edu/18th_century/ga02.asp.

321. MD. CONST. of 1776, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 1689, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-iii-kentucky-massachusetts, also available at https://avalon.law.yale.edu/17th_century/ma02.asp.

322. MASS. CONST. of 1780, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 1889, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-iii-kentucky-massa

publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

5. New Hampshire Constitution (1784)[323]

IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

V. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.

6. New Jersey Constitution (1776)[324]

XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience . . . .

XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.

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chusetts, also available at https://press-pubs.uchicago.edu/founders/documents/v1ch1s6.html.

323. N.H. CONST. of 1784, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2454, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-iv-michigan-new-hampshire, also available at https://press-pubs.uchicago.edu/founders/documents/amendI_religions42.html.

324. N.J. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2597–98, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/18th_century/nj15.asp.

7. New York Constitution (1777)[325]

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

8. North Carolina Constitution (1776)[326]

XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.

9. Pennsylvania Constitution (1776)[327]

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

10. Rhode Island Charter (1663)[328]

[N]oe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any

325. N.Y. CONST. of 1777, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2636–37, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/18th_century/ny01.asp.

326. N.C. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 2788, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/18th_century/nc07.asp#b5.

327. PA. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 3082, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-v-new-jersey-philippine-islands, also available at https://avalon.law.yale.edu/18th_century/pa08.asp.

328. *See supra* note 318. This is identical to the colonial provision recorded above. It is listed again here as a state provision because Rhode Island's charter governed until it adopted a constitution in 1842.

differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others; any lawe, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding.

11. South Carolina Constitution (1790)[329]

ARTICLE VIII SECTION 1. The 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 thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

12. Virginia Bill of Rights (1776)[330]

Sec. 16. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

329. S.C. CONST. of 1790, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 3264, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-vi-porto-rico-vermont, also available at https://www.carolana.com/SC/Documents/sc_constitution_1790.html.

330. Virginia Bill of Rights (1776), *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 242, at 3814, https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-vol-vii-virginia-wyoming-index, also available at https://avalon.law.yale.edu/18th_century/virginia.asp.