EARLY AMERICAN PUBLIC COMMITMENT TO FAITH AND RELIGIOUS FREEDOM, INCLUDING AN INQUIRY INTO SERMONS OF THE ERA, AS EVIDENCE FOR A STRONG FREE EXERCISE CLAUSE

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I. INTRODUCTION

"Congress shall make no law . . . prohibiting the free exercise" of religion.[1] The federal struggle over the past several decades to develop a test for religious objections compatible with the meaning of this constitutional provision reads much like a drama. The United States Supreme Court initially settled on a standard—only to change the standard a couple decades later. After which, Congress and the President passed legislation trying to reinstate the original test. And then the Court limited the legislation so that it would not apply to States. Each chapter after the last, hitting the paper like plot twists in a novel. What is more, the justices one would expect—based on their judicial philosophies—to pen each chapter have often appeared on the unexpected side.

Free exercise jurisprudence today consists of different standards to test religious objections, with the particular standard resting on whether a federal or state action is challenged. Moreover, the judiciary as a whole—state and federal—has trended toward a lower protection for conscience. The most significant victory for a stronger protection of free exercise, the Religious Freedom and Restoration Act ("RFRA"), was the result of a congressional—not a judicial—decision. Particularly strange in this landscape is the idea that free exercise (an express protection in the Bill of Rights) should give way to other rights that have been judicially created. Also curious, free exercise appears to be less

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The views expressed in this paper are exclusively those of the author and do not necessarily represent the views of the author's current employer or any former employer or the forum where this is published.

[1] U.S. CONST. amend. I.

jealously guarded by the courts than many other protections in the Bill of Rights.

The recent history of free exercise jurisprudence has involved inquiries into original meaning, policy considerations, and practical implications. This paper, after a summary of the recent history of free exercise jurisprudence, explores evidence related to the original meaning of "free exercise," specifically the meaning that this clause would have had to the American people at the time of the ratification of the First Amendment. Sources of evidence considered include religious teaching during the founding period of America, state constitutions at the time of ratification, evidence from the first Congress and state ratifying conventions, a few early state court decisions, and various writings from the time of America's founding.

While prior scholarship has explored some of these categories, much of the specific evidence in this paper has not been addressed. Also, prior scholarship has given little attention to influential religious teaching of early America; this omission is critical. To best understand the religious liberty sought and expected by Americans at the time when Congress and the States ratified the First Amendment, sentiments from the pulpit should be the *first* place to look. As John Adams wrote in 1776, "Statesmen, my dear Sir, may plan and speculate for liberty, but it is Religion and Morality alone, which can establish the Principles upon which freedom can securely stand. . .The only foundation of a free Constitution, is pure Virtue . . ."[2]

If a court is applying the correct original understanding of a constitutional provision, then the court should be comfortable that the people at the time of the provision's ratification would approve of the court's position.[3] The evidence gathered and set forth in this paper illustrates that America in the late 1700s would have soundly rejected a weak protection of religion. This conclusion challenges the recent trend toward lesser judicial protection of religious freedom.

This paper does not propose a specific standard of protection for religious liberty, but its evidence instead demonstrates that free exercise requires more than a weak rational-basis standard. To the contrary, America's founding fathers, the American people in the late 1700s, and certainly most American clergy from that time would have expected a

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[2] Letter from John Adams, Second President of the U.S., to Zabdiel Adams, Minister (June 21, 1776).

[3] *Cf.* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding [of free exercise] is relevant, even if not dispositive.").

robust protection of religious liberty, with liberty valued over conformity with an objectionable law. While the people expected government to support and promote Christianity, they also believed—adamantly—in individual freedom.[4]

II. RECENT FEDERAL FREE EXERCISE JURISPRUDENCE HAS CREATED DIFFERENT STANDARDS TO JUDGE STATE AND FEDERAL ACTION

The recent history of the legal standard used to test government action that potentially infringes on free exercise begins with two Supreme Court case opinions, the 1963 opinion *Sherbert v. Verner* followed in 1972 with *Wisconsin v. Yoder*. In those opinions, the United States Supreme Court judged government action against a strict scrutiny standard that is difficult for the government to overcome. In 1990, in *Employment Division, Department of Human Resources v. Smith*, the Supreme Court drastically lowered the standard to rational basis, which is relatively easy to overcome. Under rational basis review, there is a "strong presumption of validity."[5] A challenger has the burden "to negate every conceivable basis which might support" the law.[6] Congress and the President responded in 1993, passing RFRA, which restored the strict scrutiny standard. Only four years later, however, in 1997, the Supreme Court decided that the heightened standard of RFRA applies only to actions by the federal government, leaving *Smith* applicable to state action that allegedly violates the federal free exercise clause.

Today, there are two standards for the federal Constitution's free exercise clause: the difficult *Sherbert*, *Yoder*, and RFRA standard for the federal government, and the lower *Smith* standard for state actions. This dual standard has resulted in a mixed landscape where objections to laws based on the Constitution's free exercise clause are unlikely to prevail when a State—rather than the federal government—enacts a law that infringes on religious conscience. While a petitioner against a State may also turn to religious protection in the State's constitution, state courts often follow *Smith* and apply a weak protection for state free exercise provisions that, like the standard in *Smith*, is easily overcome.

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[4] *See generally* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHTS OF THE OPPONENTS OF THE CONSTITUTION 22-23 (1st ed. 1981) (discussing how the anti-federalists "favored religious toleration" but also "saw no inconsistency between liberty of conscience and the public support of the religious, and generally Protestant, community as the basis of public and private morality").
[5] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993).
[6] *Id.* at 15.

A. The United States Supreme Court Protected Free Exercise with Strict Scrutiny

Adell Sherbert was a member of the Seventh-day Adventist Church and was unable to find employment because she declined to work on Saturdays, the Sabbath Day of her faith.[7] The South Carolina Employment Security Commission disqualified Sherbert's eligibility for unemployment benefits.[8] Sherbert litigated through South Carolina's courts and lost.[9] The South Carolina Supreme Court "held specifically that [Sherbert's] ineligibility infringed no constitutional liberties" because there was "no restriction upon the appellant's freedom of religion" and the State did not "in any was prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[10]

The United States Supreme Court reversed and ruled that South Carolina improperly denied Sherbert of her benefits.[11] Applying strict scrutiny, the Supreme Court held that South Carolina's decision could only withstand a constitutional challenge if either (1) the State did not infringe upon Sherbert's right of free exercise, or (2) any "incidental burden" on the free exercise of religion is justified by a "compelling state interest . . . ."[12] With respect to the first prong (*i.e.*, whether actual infringement existed), "[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[13] With regard to the second prong (*i.e.*, if a compelling state interest existed), South Carolina suggested that granting benefits could open the door to "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work . . . ."[14] The Supreme Court noted that South Carolina did not make this argument in the state court proceedings, but even if the Court considered the argument, "it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties," particularly because South Carolina would also need to

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[7] Sherbert v. Verner, 374 U.S. 398, 399-400 (1963).
[8] *Id.* at 400-01.
[9] *Id.* at 401.
[10] *Id.*
[11] *Id.* at 402.
[12] *Id.* at 403.
[13] *Sherbert*, 74 U.S. at 404.
[14] *Id.* at 407.

"demonstrate that no alternate forms of regulation would combat such abuses without infringing First Amendment rights."[15]

The Court remarked, "the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs" and "[g]overnment may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views."[16] That said, "overt acts prompted by religious beliefs or principals" are not totally free from potential regulation if the "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[17]

Wisconsin v. Yoder is a second free exercise case where the United States Supreme Court applied a strict standard before a State could permissibly burden the free exercise of religion.[18] There, Wisconsin convicted two Old Order Amish men, Jonas Yoder and Wallace Miller, of violating the State's compulsory school-attendance law.[19] This law required parents to have their children attend public or private school until reaching the age of sixteen[20]; Yoder and Miller declined to send their children to school after the children had completed the eighth grade.[21]

The Court found that "Amish objection to formal education beyond eighth grade is firmly grounded in [] central religious concepts."[22] The "worldly influence" of higher education is "in marked variance with Amish values and the Amish way of life . . . ."[23] "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith."[24]

The Court held that only state "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[25] Against this test, Wisconsin's justification for

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[15] *Id.*
[16] *Id.* at 402.
[17] *Id.* at 403.
[18] 406 U.S. 205 (1972).
[19] *Id.* at 207-08.
[20] *Id.* at 207.
[21] *Id.*
[22] *Id.* at 210.
[23] *Yoder*, 406 U.S. at 210, 211
[24] *Id.* at 210.
[25] *Id.* at 215.

universal compulsory high school—preparing youth to be self-reliant and effective participants in society—failed.[26] Although Wisconsin's requirement was "uniformly [applied] to all citizens of the State," it did not rescue the law; "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[27] In their concurrence, Justices Stewart and Brennan bluntly said, "Wisconsin has sought to brand these parents as criminals for following their religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so."[28]

B. In 1990, the United States Supreme Court Shifted to Weak Protection of Free Exercise

In 1990, the Supreme Court deviated from *Sherbert* and *Yoder* in *Employment Division, Department of Human Resources v. Smith*.[29] *Smith* reviewed Oregon's denial of unemployment compensation to two individuals, Alfred Smith and Galen Black, after they had been "fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members."[30] The Court chose not to examine the case under *Sherbert* and *Yoder* and instead held that the First Amendment is not offended "if prohibiting the exercise of religion . . . is not the object" of a law "but merely the incidental effect of a generally applicable and otherwise valid provision . . . ."[31] The *Smith* Court changed the free exercise inquiry from strict scrutiny to whether the law in question is a "neutral law of general applicability . . . ."[32]

Affirming the denial of benefits to Smith and Black, the Court expressed concern that *Sherbert*'s and *Yoder*'s "compelling interest"

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[26] *Id.* at 225.
[27] *Id.* at 220.
[28] *Id.* at 237 (Stewart, J., concurring).
[29] 494 U.S. 872 (1990). Of note, however, Justice Scalia wrote that *Sherbert* and *Yoder* were distinguishable and inapplicable, and therefore *Smith* did not revise any applicable standard. *Id.* at 883. Others disagree. *See*, *e.g.*, *id.* at 898 (O'Connor, J., concurring) ("[W]e have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases.").
[30] *Id.* at 874.
[31] *Id.* at 878.
[32] *Id.* at 879.

test, "applied across the board," would be "courting anarchy . . . ."[33] The Court feared

> the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes; to health and safety regulation such manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, . . . and laws providing for equality of opportunity for the races.[34]

Justices O'Connor, Brennan, Marshall, and Blackmun wrote a concurrence that was sharply critical of the majority's departure from *Sherbert* and *Yoder*:

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. 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.[35]

They also countered that the majority's "parade of horrible [consequences] . . . fails as a reason for discarding the compelling interest test,"[36] and "it instead demonstrates just the opposite: that courts

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[33] *Smith*, 494 U.S. at 888, 890. A stronger protection for religious exercise would not necessarily result in countless voided statutes; instead, more common relief in a successful lawsuit should consist of an individualized injunction. *See generally* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 490-91 (2016) (overviewing how narrow injunctions tailored to individual plaintiffs are often preferable to completely invalidating a statute).

[34] *Smith*, 494 U.S. at 888-89.

[35] *Id.* at 901 (O'Connor, J., concurring).

[36] *Id.* at 902.

have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[37]

C. Congress and the President Responded to the Supreme Court's Lower Standard by Passing the Religious Freedom Restoration Act

In 1993, in response to *Smith*, Congress and the President passed RFRA, which restored the pre-*Smith* standard of *Sherbert* and *Yoder* to judge free exercise challenges.[38] Under RFRA, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of 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."[39]

In passing RFRA, Congress stated that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution," and the purpose of RFRA was "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[40] Congress also stated that "governments should not substantially burden religious exercise without compelling justification," and "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[41]

D. The United States Supreme Court Held that the Religious Freedom Restoration Act Applies Only to the Federal Government

In 1997, in *City of Boerne v. Flores*, the Supreme Court responded to the passage of RFRA, holding that RFRA does not apply

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[37] *Id.*

[38] 42 U.S.C. § 2000 bb-1(b) (a)(4-5) (1994) ("in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.").

[39] 42 U.S.C. § 2000 bb-1(b).

[40] 42 U.S.C. § 2000bb(a)(1), (b)(2).

[41] 42 U.S.C. § 2000 bb(a)(3), (a)(5).

to the States because it is not a "preventive power" that would be permissible under Section 5 of the Fourteenth Amendment.[42] The *Flores* Court criticized Congress for passing RFRA, stating, "Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches,"[43] and "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."[44]

In their dissent, Justices O'Connor and Breyer encouraged the Court to reconsider *Smith* and argued it was "wrongly decided . . . ."[45] O'Connor and Breyer argued that the Court's pre-*Smith* jurisprudence in *Sherbert* and *Yoder* was more consistent with the "historical evidence" for the intended meaning of the free exercise clause.[46] They wrote:

> By 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution. These state provisions, which were typically longer and more detailed than the federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses.[47]

O'Connor and Breyer concluded that the early state constitutions "strongly suggest[] that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice."[48] The state constitutional provisions demonstrated to them that "the right to

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[42] *Flores*, 521 U.S. at 531.
[43] *Id.* at 535-36.
[44] *Id.* at 519.
[45] *Id.* at 545 (O'Connor, J., dissenting). In Justice Souter's dissent, he observed that Justice O'Connor's dissent "raises very substantial issues about the soundness of the *Smith* rule," but he was not prepared to join O'Connor and Breyer without briefing and arguments regarding the proper test to be used in free exercise cases. *Id.* at 565 (Souter, J., dissenting).
[46] *Id.* at 549.
[47] *Flores*, 521 U.S. at 553.
[48] *Id.* at 555.

free exercise was viewed generally superior to ordinary legislation" and that free exercise could be "overridden only when necessary to secure important government purposes."[49]

With *Flores*, federal-based religious objections effectively became subject to two standards, with RFRA applying to federal action and *Smith* applicable at the state and local levels. Free exercise protections in state constitutions remain decided by state courts. For example, the Supreme Judicial Court of Massachusetts stated, "Despite the similarity [of the phraseology of free exercise protection in the Massachusetts and federal constitutions, Massachusetts] should reach its own conclusions . . . and should not necessarily follow the reasoning adopted by the Supreme Court of the United States under the First Amendment."[50]

Even though state courts interpret the free exercise protection of State constitutions, a number of state courts have followed *Smith* and applied a rational-basis standard to state law free exercise claims. By way of example, the Court of Appeals of New York relied on *Smith* in a challenge by ten faith-based social service organizations against a state law that required health insurance policies to include coverage for contraception.[51] The plaintiffs "believe contraception to be sinful, and assert[ed] that the challenged provisions . . . compel[led] them to violate their religious tenets by financing conduct that they condemn."[52] The court, following *Smith*, ruled against the faith-based organizations.[53] It held, "Strict scrutiny is not the right approach to constitutionally-based claims for religious exemptions," and "the principle stated by the United States Supreme Court in *Smith*—that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral law, even ones offensive to their religious tenets—should be the usual, though not the invariable, rule."[54]

Likewise, the Colorado Court of Appeals "recognize[d] that, with regard to some individual rights, the Colorado Constitution has been interpreted more broadly than the United States Constitution, and

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[49] *Id.*

[50] Attorney Gen. v. Desilets, 418 Mass. 316, 321 (Mass. 1994). The issue in that case was whether the free exercise clause of the Massachusetts constitution protected the "sincerely held religious belief" of Roman Catholic landlords who declined to rent to unmarried couples, believing that to do so would "facilitate sinful conduct, including fornication." *Id.* at 318, 319.

[51] Catholic Charities v. Serio, 7 N.Y.3d 510, 518, 520 (N.Y. 2006).

[52] *Id.* at 520-21.

[53] *Id.* at 526.

[54] *Id.*

that we apply strict scrutiny to many infringements of fundamental rights."[55] With regard to the free exercise clause in the Colorado Constitution, however, "Colorado appellate courts . . . have regularly relied on federal precedent . . . ."[56]

II. THE COLLISION OF FAITH AND LEGISLATION IN RECENT YEARS

Recent legislation, including state statutes adding sexual orientation as a protected class and federal mandates that businesses provide insurance coverage for contraception and abortions, has led to a collision between faith and legislation that the *Smith* Court likely never envisioned. In his dissent in *Obergefell v. Hodges*, the decision by the United States Supreme Court overturning state laws defining marriage as between one man and one woman, Justice Thomas predicted:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.[57]

One could reasonably assume that an express protection in the Constitution, such as free exercise, would prevail in a conflict with rights judicially created, but the opposite has been true. With a weak *Smith* standard judging federal free exercise claims against States, when religious conscience has conflicted with the Court's interpretation of the Fourteenth Amendment or with state statutes, faith-based objections have often lost. A few recent examples illustrate the trend.

A same-sex couple in New Mexico requested that a photography business photograph the couple's commitment ceremony.[58] The business declined and a co-owner explained that she is unable to "photograph any image or event that violates her religious beliefs."[59] The same-sex couple sued, and asserted that the business violated the

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[55] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 292 (Colo. App. 2015).
[56] *Id.* at 293.
[57] 135 S. Ct. 2584, 2638 (2015) (Thomas, J., dissenting).
[58] Elane Photography, LLC v. Willock, 309 P.3d 53, 58-59 (N.M. 2013).
[59] *Id.* at 59-60.

New Mexico Human Rights Act ("NMHRA"), which prohibits, *inter alia*, "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services . . . or goods to any person because of . . . sexual orientation, gender identity, [or] spousal affiliation . . . ."[60] The business countered that the NMHRA violates the Constitution's free exercise clause.[61] The Supreme Court of New Mexico, applying the reasoning of *Smith*, ruled against the photography business, holding that the NMHRA is a law of general applicability and does not "evince any hostility toward religion."[62]

The Colorado Civil Rights Commission ordered, and was upheld by the Colorado Court of Appeals, that a baker, against his religious objections, bake same-sex wedding cakes. The Commission also required the bake shop to:

> (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with [the Colorado Anti-Discrimination Act ("CADA")]; and (2) file quarterly compliance reports for two years with the [Commission] describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.[63]

Bakers in Oregon were fined a stunning $135,000 after refusing to bake a cake for a same-sex couple's wedding.[64] In New York, farmers were fined $13,000 after declining to allow a same-sex wedding to take place on their property.[65] Atlanta's fire chief was fired after writing a book that briefly discusses biblical teaching about marriage.[66]

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[60] *Id.* at 60 (quoting N.M. STAT. ANN. § 28-1-7 (2008)).
[61] *Id.* at 59.
[62] *Id.* at 75.
[63] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276, 277 (Colo. App. 2015).
[64] Casey Parks, *Sweet Cakes by Melissa, Bakery that Turned Away Lesbians, Closes*, OREGONLIVE (Oct. 6, 2016), http://www.oregonlive.com/portland/index.ssf/2016/10/sweet_cakes_by_melissa_bakery.html.
[65] Chelsea Scism & Kelsey Harkness, *Christian Farmers Fined $13,000 for Refusing to Host Same-Sex Wedding Fight Back*, DAILY SIGNAL (June 25, 2015), http://dailysignal.com/2015/06/25/christian-farmers-fined-13000-for-refusing-to-host-same-sex-wedding-fights-back/.
[66] *Court Allows Lawsuit of Unjustly Fired Fire Chief to Go Forward Against City of Atlanta*, ALLIANCE DEFENDING FREEDOM (Dec. 16, 2015), http://www.adfmedia.org/News/PRDetail/9520.

Moral objections have been losing in other contexts. For example, the Ninth Circuit, applying *Smith* and rational basis, upheld a Washington pharmacy law that did not contain any exemption allowing pharmacists to decline prescribing emergency contraceptives based on religious or moral grounds.[67] The Ninth Circuit held that the pharmacists could not "negat[e] every conceivable basis which might support" the law.[68]

Alliance Defending Freedom, an organization that has taken on "numerous legal matters in defense of the freedom of citizens to live according to their faith and conscience without punishment by the government," depicts on its website many additional recent examples of similar government action.[69] These include allegations of: state agencies "forcing pro-life organizations, churches, and religious organizations to pay for insurance coverage that covers elective abortions"; state officials telling a couple, both ordained ministers, that they are "required to perform same-sex ceremonies or face months in jail and/or thousands of dollars in fines"; and a state agency forbidding a "studio and its proprietors from publicly expressing their Christian belief that marriage is the union of one man and one woman . . . ."[70]

In contrast to these experiences involving state and local action, petitioners objecting on religious grounds to federal action—where RFRA governs—have had more success. As one example, in *Burwell v. Hobby Lobby Stores, Inc*., the Supreme Court held that the United States Department of Health and Human Services was not permitted under RFRA "to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[71]

Should conscientious objectors and people of faith continue to face fines and loss of employment because of their beliefs? Is rational basis the right standard to protect free exercise? What was the original understanding of this phrase in the Constitution? The next section explores the original meaning and context of free exercise, a search that tests the recent assumption that a lesser standard is the right level of protection for religious freedom.

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[67] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071, 1081, 1084-85 (9th Cir. 2015).
[68] *Id.* at 1084 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).
[69] *Freedom of Conscience,* ALLIANCE DEFENDING FREEDOM (Mar. 23, 2017), http://www.adfmedia.org/News/PRDetail/9463.
[70] *Id.*
[71] 134 S.Ct. 2751, 2759 (2014).

III. THE SEARCH FOR THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE

As Justice Antonin Scalia and Bryan A. Garner wrote, "Originalism does not always provide an easy answer, or even a clear one. Originalism is not perfect. But it is more certain than any other criterion. And this is not even a close question."[72]

To understand the original public meaning of "free exercise," one can consider multiple sources including Christian teaching during the colonial period and the Revolutionary War-era, state constitutions at the time of ratification of the Bill of Rights, the state ratifying conventions and the first Congress, the treatment of religious conscience in early state courts, and writings from the founding period.

A. Christian Teaching from the Colonial Period and the Revolutionary War Era Provides Evidence that the People and States Sought to Protect Faith

Most Americans at the time of the Revolutionary War belonged to one of several Christian denominations.[73] Faith was of central importance to early Americans and freedom of religion was a core part of the patriot cause.[74] Historian Carla Gardina Pestana wrote that "the right to liberty of conscience was an inherent part of the American Revolutionary ideology," and "[l]iberty of conscience was one of the freedoms such an experiment in republican government required."[75]

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[72] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 402 (2012).

[73] *See generally* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 319 (5th ed. 2013) ("Religion and morality—these were the Founders' indispensable supports for good government, political prosperity, and national well-being."); 3 MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 413 (1805) ("[I]t must be acknowledged, that the religious and moral character of Americans yet stands on a higher grade of excellence and purity, than that of most other nations."); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 338 (Library of Am. 2004) (1841) ("Americans so completely confound Christianity with liberty that it is almost impossible to induce them to think of one without the other.").

[74] *See* JAMES P. BYRD, SACRED SCRIPTURE, SACRED WAR: THE BIBLE AND THE AMERICAN REVOLUTION 164 (2013) ("[P]atriots fought the Revolutionary War in a society in which the Bible was the most read and respected book in the colonies."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1437 (1990) ("America [in the 1780s] was in the wake of a great religious revival.").

[75] CARLA GARDINA PESTANA, LIBERTY OF CONSCIENCE AND THE GROWTH OF RELIGIOUS DIVERSITY IN EARLY AMERICA, 1636 -1786, at 91 (1986).

Similarly, Professors Daniel L. Dreisbach and Mark David Hall wrote how "a vibrant religious culture, facilitated by religious liberty, was thought necessary to nurture civic virtue, preserve social order, and promote political prosperity."[76] Given this importance of religion, it follows that individuals would have sought and expected protection of their religious freedom.

Sermons by prominent preachers during the Revolutionary War era and in the decades beforehand shed light on religious thought at the time. Sermons had a profound impact on early America.[77] Indeed, most Americans throughout the late 1700s and early 1800s likely heard more sermons each year than they received individual pieces of mail correspondence.[78] From the 1760s through 1805, the most frequently cited book in public political literature was the Bible,[79] and the overwhelming majority of political pamphlets published during the 1770s were transcribed sermons.[80]

Religion was more than going to church on Sundays. Preachers taught that faith should guide *all* action.[81] They also taught that obedience to God is paramount.[82] And they asserted that liberty and religious freedom are inseparable.[83] This—influential religious teaching—is perhaps some of the strongest evidence for a robust free exercise clause that places a higher value on religious liberty than obedience to general laws that conflict with faith.

A few decades prior to the Revolutionary War, the colonies experienced what some historians refer to as the First Great Awakening.[84] This was a time of spiritual revival. Influential preachers such as George Whitefield and Jonathan Edwards traveled from place

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[76] DANIEL L. DREISBACH & MARK DAVID HALL, THE SACRED RIGHTS OF CONSCIENCE xxviii (2009).

[77] *See generally* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 373 (1996) ("The American experiment in religious liberty initially inspired exuberant rhetoric throughout the young republic and beyond.").

[78] MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 201 (2002).

[79] DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 140 (1988).

[80] *Id.* at 140-42.

[81] See infra pp. 31-32.

[82] See infra pp. 26-31.

[83] See infra pp. 32-36.

[84] THOMAS S. KIDD, THE GREAT AWAKENING: THE ROOTS OF EVANGELICAL CHRISTIANITY IN COLONIAL AMERICA xiv (2007).

to place and preached to large crowds, sometimes numbering in the thousands.[85]

From 1738 to 1770, Whitefield made seven trips from his native England, to preach and manage construction of an orphanage in Georgia.[86] Historical writer Stephen Mansfield has commented that Whitefield "would leave his mark on the lives of virtually every English-speaking soul living on this side of the Atlantic . . . ."[87] Mansfield and others have observed that Whitefield's influence extended into the Revolutionary War, with, for example, accounts of some soldiers taking squares of fabric from Whitefield's garments into battle.[88] Christian historian William Federer has observed that Whitefield's "preaching up and down the Eastern seaboard of America did more than anything else to turn the thirteen isolated, individual colonies into one country."[89] Benjamin Franklin wrote in his autobiography of the effect that Whitefield's preaching had on the colonies, saying, "It was wonderful to see the change soon made in the manners of our inhabitants. . . . [I]t seemed as if all the world were growing religious [with] psalms sung in [the houses of] different families of every street."[90]

Jonathan Edwards was a second important revivalist minister from the 1730s until his death in 1758.[91] Like Whitefield, Edwards' preaching also helped to unite the American colonies prior to the Revolutionary War.[92] Churches throughout New England, and particularly in New York and New Jersey, invited Edwards to speak.[93] Other notable preachers from the Great Awakening included William Tennent and Tennent's sons and Samuel Davies.[94] Notably, Davies' sermons influenced Patrick Henry, who called Davies "the greatest orator he ever heard."[95]

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[85] KIDD, supra note 84, at 47; JOSEPH TRACY, THE GREAT AWAKENING, A HISTORY OF THE REVIVAL OF RELIGION IN THE TIME OF EDWARDS AND WHITEFELD 217 (1842).
[86] STEPHEN MANSFIELD, FORGOTTEN FOUNDING FATHER: THE HEROIC LEGACY OF GEORGE WHITEFIELD 21-22 (2001).
[87] *Id.* at 9.
[88] *Id.* at 27-31; KIDD, *supra* note 84, at 288.
[89] WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 684 (1994).
[90] *Id.* at 686.
[91] JONATHAN EDWARDS, SINNERS IN THE HANDS OF AN ANGRY GOD AND OTHER GREAT SERMONS 15, 27 (Mark Trigsted ed., 2003).
[92] FEDERER, *supra* note 89 at 223.
[93] EDWARDS, *supra* note 91 at 17.
[94] KIDD, *supra* note 84, at 18, 47, 290.
[95] *Id.* at 290.

These preachers of the First Great Awakening were followed during the Revolutionary War by a host of influential ministers, including John Witherspoon, a delegate to the Continental Congress and signatory of the Declaration of Independence,[96] and George Duffield and Jacob Duché, chaplains to the Continental Congress.[97] As one example of the influence of these pastors, on September 6, 1774, the Continental Congress passed its first official act—a resolution that Duché would open proceedings on the following day with prayer.[98] In a letter to his wife, John Adams wrote of Duché's prayer:

> You must remember this was the next morning after we heard the terrible rumor of the cannonading of Boston. I never saw greater effect upon an audience. It seemed as if Heaven had ordained that Psalm to be read on that morning. After this, Mr. Duché, very unexpectedly to every body, struck out into an extemporary prayer, which filled the bosom of every man present. I must confess I never heard a better prayer or one so well pronounced.[99]

The pastors who during the war supported the American cause are sometimes referred to as the "Black Robe Regiment."[100] The Regiment included well-educated clergy, some of whom held multiple college degrees, as well as clergy who held positions of influence in society beyond their pastoral work, such as serving as delegates to state ratifying conventions or holding positions in state government.[101] There is no question that their sermons and teaching influenced the views of American patriots.[102] Indeed, clergymen were so influential at the time

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[96] FEDERER, *supra* note 89 at 702.

[97] *See* J.T. HEADLEY, THE CHAPLAINS AND CLERGY OF THE REVOLUTION 354 (New York, Charles Scribner 1864) ("The patriots of the first Congress flocked to [Duffield's] church, and John Adams and his compeers were often his hearers . . .").

[98] FEDERER, *supra* note 89, at 220.

[99] HEADLEY, *supra* note 97, at 84 (quoting Letter from John Adams to Abigail Adams (Sept. 16, 1774)).

[100] *See* KIDD, *supra* note 84, at 291 ("The patriotic evangelical ministers, . . . called the 'black regiment,' played a prominent role in recruiting the people at large for the Patriot cause.").

[101] See *infra* at pp. 29-36.

[102] *See* KIDD, *supra* note 84 at 289 ("Evangelical faith clearly influenced many Patriots' views, giving them a framing vocabulary through which to discuss the imperial crisis."); *see also* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at xii (Ellis Sandoz ed., 2nd ed. 1998) (hereinafter POLITICAL SERMONS) ("Religion gave birth to America . . .").

that some were even dispatched into the backcountry of North Carolina and South Carolina to recruit volunteers to join the patriot side.[103] Writing in 1864, J.T. Headley observed that Revolutionary War era sermons taught, among other points, "that the object of concentrated power was to protect not invade personal liberty, and when it failed to do this, and oppressed instead of protected, assailed instead of defended rights, liberty became lawful, nay, obligatory."[104]

The sermons by Whitefield, Edwards, Witherspoon, Duffield, and Duché (and others) are relevant to the inquiry into free exercise. These Christian sermons taught that (1) obedience to God supersedes civil laws, (2) faith is not limited to worship but rather influences all aspects of one's life, and (3) the freedom to practice faith is inextricably tied with civil liberty. The following sub-sections explore these three points.

1. Influential Colonial and Revolutionary Era Pastors Taught that Obedience to God has Supremacy over Civil Law

The Great Awakening preachers taught that a Christian's priority is obedience to God. Edwards stated in a sermon that "[h]e that do[es]n't love Christ above other Things, that treats him with such Indignity, as to set him below earthly Things, shall be treated as *unworthy* of Christ; his Unworthiness of Christ, especially in that Particular, shall be marked against him, and imputed to him."[105] He asserted on a different occasion how "a godly man prefers God to anything for which he has desire in this world."[106] In his autobiography, Edwards wrote that he "had such a Sense, how sweet and blessed a Thing it was, to walk in the Way of Duty, to do that which was right and meet to be done, and agreeable to the holy Mind of GOD . . . ."[107]

Whitefield likewise preached, "The care of the soul is of so comprehensive a nature, that everything truly worthy of our regard may be considered . . . subservient to it."[108] Whitefield observed that scripture states that Christians shall suffer persecution for

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[103] KIDD, *supra* note 84, at 291, 293.
[104] HEADLEY, *supra* note 97, at 22.
[105] JOHNATHAN EDWARDS, *Justification by Faith Alone*, *in* JOHNATHAN EDWARDS: WRITINGS FROM THE GREAT AWAKENING 502 (Philip F. Gura ed., 2013).
[106] EDWARDS, *supra* note 91, at 144.
[107] JOHNATHAN EDWARDS, *An Account of His Conversion, Experiences, and Religious Exercises, Given by Himself*, as printed in EDWARDS, *supra* note 105, at 696.
[108] GEORGE WHITEFIELD, *The Care of the Soul Urged as the One Thing Needful*, *in* SERMONS OF GEORGE WHITEFIELD 137 (2009).

uncompromising faith, but this "is the privilege of their discipleship, and [] their reward will be great in heaven. . . . Paul and Silas sang praises [to God] even in a dungeon . . . ."[109] And he asked his listeners, "Are you resolved to live godly in Christ Jesus, notwithstanding the consequence will be, that you must suffer persecution?"[110] Samuel Davies warned his listeners to be directed by God's will, not that of man, stating:

> This, then, you may be sure of, that if you love Jesus, it is the labour of your life to please him. The grand inquiry with you is not, will this or that please men? will it please myself? or will it promote my interest? but, will it please my God and Saviour? If not, I will have nothing to do with it. This is the standing rule of your practice: Let others consult their own inclinations, or the taste of the age; let them consult their own secular interest, or the applause of mortals; you consult what is the good, and acceptable, and perfect will of God.[111]

Revolutionary War-era preachers also taught that a Christian's priority is obedience to God. Duché preached, "The Apostle enjoins us to '*submit to every ordinance of man for the Lord's sake*.' But surely a submission to the unrighteous ordinances of unrighteous men, cannot be '*for the Lord's sake:*' For 'He loveth Righteousness, and his Countenance beholds the things that are just.'"[112] Witherspoon explained:

> True piety encounters the greatest dangers with resolution. The fear of God is the only effectual means to deliver us from the fear of man. Experience has abundantly shown that the servants of Christ have adhered to his cause and make profession of his name in opposition to all the terrors which infernal policy could

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[109] GEORGE WHITEFIELD, *Walking with God*, *in* SELECT SERMONS OF GEORGE WHITEFIELD 178 (reprt. 1997).
[110] GEORGE WHITEFIELD, *Persecution: Every Christian's Lot*, *in* WHITEFIELD, *supra* note 108, at 308.
[111] SAMUEL DAVIES, *The Nature of Love to God and Christ Opened and Enforced*, in 2 SERMONS ON IMPORTANT SUBJECTS 324 (Boston, Lincoln & Edmands 1811).
[112] JACOB DUCHÉ, THE DUTY OF STANDING FAST IN OUR SPIRITUAL AND TEMPORAL LIBERTIES 13 (Philadelphia, T. Evans 1775).

> present to them and all the sufferings with which the most savage inhumanity could afflict them.[113]

He also stated:

> Another reason why the servants of God are represented as troublesome is, because they will not, and dare not, comply with the sinful commandments of men. In matters merely civil, good men are the most regular citizens and the most obedient subjects. But, as they have a Master in heaven, no earthly power can constrain them to deny His name or desert His cause.[114]

Jonathan Mayhew, an influential Boston preacher and graduate of Harvard and Aberdeen, Scotland,[115] wrote, "Our obligation to our Creator is prior in the order of nature to our obligation to our fellow-men."[116] John Joachim Zubly, a preacher in Savannah Georgia in the 1760s and 1770s, and member of the First Provincial Congress of Georgia, remarked, "The Christian religion, while it commands due respect and obedience to superiors, nowhere requires a blind and unlimited obedience on the part of the subjects; nor does it vest any absolute and arbitrary power in the rulers."[117] He also said, "The gospel sets conscience above all human authority in matters of faith, and bids us to stand fast in that liberty wherewith the Son of God has made us free."[118] John Mellen, a pastor in Hanover, Massachusetts asserted that "think[ing] and judg[ing] for ourselves[] is the *natural* right of reasonable beings" endowed by God and "surely no mere civil, human

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[113] JOHN WITHERSPOON, *Christian Magnanimity*, *in* THE SELECTED WRITINGS OF JOHN WITHERSPOON 122 (Thomas Miller ed., 1990).
[114] John Witherspoon, *The Charge of Sedition and Faction Against Good Men*, BIBLE HUB (last visited Apr. 9, 2017), http://biblehub.com/sermons/auth/witherspoon/the_charge_of_sedition_and_faction_against_good_men.htm.
[115] POLITICAL SERMONS, *supra* note 102, at 232; PATRIOT PREACHERS OF THE AMERICAN REVOLUTION 7 (Frank Moore ed., New York, Charles T. Evans 1862) (hereinafter PATRIOT PREACHERS).
[116] JONATHAN MAYHEW, SEVEN SERMONS UPON THE FOLLOWING SUBJECTS 133 (Boston, Rogers & Fowle 1748).
[117] John Joachim Zubly, *The Law of Liberty*, *in* PATRIOT PREACHERS, *supra* note 115, at 113-14, 130.
[118] *Id.* at 131.

power on earth has a right, by any forcible, coercive measures, to deprive us" of such liberty.[119]

John Leland, a Virginia minister, delegate to the Virginia ratifying convention, and later a member of the Massachusetts legislature,[120] wrote in 1771:

> Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in a way that he can best reconcile to his conscience. If government can answer for individuals at the day of judgment, let men be controlled by it in religious matters; otherwise let men be free.[121]

He also wrote, "It would be sinful for a man to surrender that to man, which is to be kept sacred for God."[122] Another unknown Revolutionary War-era apologist, who used the pen-name "A Moderate Whig," argued that "power and government, which is not of God, may be resisted."[123] Finally, Samuel Stillman, a Boston minister and delegate to Massachusetts' ratifying convention, declared:

> [S]ome of the natural rights of mankind are unalienable, and subject to no control but that of the Deity. Such are the sacred rights of conscience; which, in a state of nature and civil society, are exactly the same. They can neither be parted with nor controlled by any human authority whatever.[124]

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[119] JOHN MELLEN, THE GREAT AND HAPPY DOCTRINE OF LIBERTY 17 (Boston, Samuel Hall 1795).
[120] POLITICAL SERMONS, *supra* note 102, at 1080.
[121] John Leland, *The Rights of Conscience Inalienable*, *in* DREISBACH & HALL, *supra* note 76, at HALL 337.
[122] *Id.*
[123] A Moderate Whig, *Defensive Arms Vindicated and the Lawfulness of the American War Made Manifest*, *in* POLITICAL SERMONS, *supra* note 102, at 713, 735.
[124] Samuel Stillman, *The Duty of Magistrates*, *in* PATRIOT PREACHERS, *supra* note 115, at 258.

2. Influential Colonial and Revolutionary War Era Pastors Taught that Faith Encompasses all Aspects of a Christian's Life

Colonial and Revolutionary War-era pastors preached that faith permeates all parts of a Christian's life. Edwards cautioned:

> [Christians must b]e directed as it were to sacrifice every Thing to your Souls eternal Interest. Let seeking this be so much your Bent, and what you are so resolved in, that you will make every Thing give Place to it. Let nothing stand before your Resolution of Seeking the Kingdom of God. Whatever it be that you used to look upon as Convenience, or Comfort, or Ease, or Thing desirable on any Account, if it stands in the Way of this great Concern, let it be dismiss'd without Hesitation . . . .[125]

He said, "We are accountable to God for our time . . . God will, at the day's end, call us to an account. We must give account to Him of the use of all our time."[126]

Whitefield told his audiences to "Take heed, therefore, that ye walk worthy of the vocation wherewith ye are called."[127] He stated that "works" are not "any cause of our justification in the sight of God" but rather "good works" are "proof of our having righteousness imputed to us" and "declarative evidence of our justification in the sight of men."[128]

In 1773, Isaac Backus, a Massachusetts minister,[129] wrote, "The true liberty of man is, to now, obey and enjoy his Creator, and to do all the good unto . . ."[130] In 1781, Henry Cumings, a Harvard graduate who served as a pastor in Billerica, Massachusetts, wrote that "freedom from the dominion of sin" and "the habit and practice of all the virtues of a

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[125] JONATHAN EDWARDS, *Pressing Into The Kingdom of God*, *in* EDWARDS, *supra* note 105, at 543.
[126] EDWARDS, *supra* note 91, at 228.
[127] GEORGE WHITEFIELD, *Christ the Believer's Wisdom, Righteousness, Sanctification and Redemption*, *in* WHITEFIELD, *supra* note 108, at 114.
[128] GEORGE WHITEFIELD, *The Lord our Righteousness*, *in* WHITEFIELD, *supra* note 108, at 122.
[129] POLITICAL SERMONS, *supra* note 102, at 328. Backus also served as a trustee of Brown University from 1765 to 1799. *Id.*
[130] Isaac Backus, *An Appeal to the Public for Religious Liberty*, *in* DREISBACH & HALL, *supra* note 76, at 206.

good life" is of "infinite importance."[131] Last, New York preacher John Rodgers, who in his youth heard a number of sermons by George Whitefield, urged that "God calls us to testify our joy in him and gratitude to him, by lives devoted to his fear and service."[132]

3. Revolutionary War Era Pastors Connected Faith and Liberty

Perhaps of most importance to this article's analysis, Revolutionary War-era pastors asserted that religious freedom was inseparable with and would rise and fall with civil liberty. Witherspoon asserted that American independence resulted from

> a deep and general conviction that our civil and religious liberties, and consequently in a great measure the temporal and eternal happiness of us and our posterity, depended on the issue. . . . There is not a single instance in history in which civil liberty was lost, and religious liberty preserved entire. If therefore we yield up our temporal property, we at the same time deliver the conscience into bondage.[133]

He prayed, "God grant that in America true religion and civil liberty may be inseparable . . . ."[134] Duché preached:

> Civil liberty must at least be allowed to secure, in a considerable degree, our well-being here. And I believe it will be no difficult matter to prove, that the latter is as much the gift of God in Christ Jesus as the former, and consequently that we are bound to stand fast in our civil as well as our spiritual freedom.[135]

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[131] Henry Cumings, *A Sermon Preached at Lexington on April 19th of April*, *in* POLITICAL SERMONS, *supra* note 102, at 658, 680-81.
[132] John Rodgers, *Divine Goodness Displayed*, *in* PATRIOT PREACHERS, *supra* note 115, at 310-11, 312, 342.
[133] JOHN WITHERSPOON, *The Dominion of Providence over the Passions of Men*, *in* WITHERSPOON, *supra* note 105, at 126, 140-41.
[134] *Id.* at 147.
[135] DUCHÉ, *supra* note 112, at 9.

After the Revolutionary War had ended, George Duffield proclaimed, "A nation has indeed been born," and, "Here has our God erected a banner of civil and religious liberty."[136]

In 1784, a couple years after ratification of the First Amendment, Samuel McClintock, a New Hampshire pastor with degrees from Harvard, Yale, and the College of New Jersey, preached before New Hampshire's Senate and House of Representatives, stating:

> As religion has a manifest tendency to promote the temporal as well as eternal interests of mankind, it is the duty of rulers to give all that countenance and support to religion *that is consistent with liberty of conscience*. And it is perfectly consistent with that liberty and equal protection which are secured to all denominations of christians, by our excellent constitution, for rulers in the exercise of their authority to punish profane swearing, blasphemy, and open contempt of the institutions of religion, which have a fatal influence on the interests of society, *and for which no man, in the exercise of reason, can plead conscience* . . . .[137]

Importantly, McClintock's statement implies that *genuine* religious conscience would demand exemption from laws of general applicability.

In 1744, Elisha Williams, a Connecticut pastor, judge, and member of the Connecticut Assembly, wrote:

> [T]he rights of conscience are sacred and equal in all, and strictly speaking, unalienable. This *right of judging every one for himself in matters of religion* results from the nature of man, and is so inseparably connected therewith, that a man can no more part with it than he can with his power of thinking . . . .[138]

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[136] George Duffield, *A Sermon Preached in the Third Presbyterian Church in the City of Philadelphia*, *in* POLITICAL SERMONS, *supra* note 102, at 773, 776, 783.
[137] Samuel McClintock, *A Sermon on Occasion of the Commencement of the New-Hampshire Constitution*, *in* POLITICAL SERMONS, *supra* note 102, at 789, 790, 806-07 (emphasis added).
[138] Elisha Williams, *The Essential Rights and Liberties of Protestants*, *in* DREISBACH & HALL, *supra* note 76, at 178.

William Gordon, chaplain to the Provincial Congress of Massachusetts, asserted that independence would do no harm to Great Britain from a religious perspective, but that it would benefit the United States:

> Nay, we may derive a benefit from [separation from Great Britain], even beyond what is enjoyed in Britain, by embracing the present happy moment for establishing to all the peaceable enjoyment of the rights of conscience, while they approve themselves good members of civil society, be their religious principles what they may.[139]

In 1747, Charles Chauncy, a Boston pastor, delivered a sermon in which he stated:

> Justice . . . should guard every man from all insult and abuse on account of his religious sentiments, and from all molestation and disturbance, while he endeavors the propagation of them, so far as he keeps within the bounds of decency, and approves himself a peaceable member of society.[140]

In 1776, Judah Champion, a minister in Connecticut, preached, "As our civil liberties . . . are nearly connected with . . . our religious . . . so our religious privileges are not inferior to our civil."[141] In 1768, Amos Adams, a pastor in Roxbury Massachusetts, warned, "Although *religious liberty* be such an unalienable right of nature, . . . there have been frequent attempts to deprive Christians of this *liberty*."[142] Samuel Cooper, a pastor and graduate of Harvard and Edinburgh, speaking before the Governor and Congress of Massachusetts in 1780, stated how "we were led into a wilderness, as a refuge from tyranny, and a preparation for the enjoyment of our civil and religious rights . . . ."[143]

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[139] William Gordon, *Separation of the Jewish Tribes*, *in* PATRIOT PREACHERS, *supra* note 102, at 158, 159, 181.
[140] Charles Chauncy, *Civil Magistrates Must be Just, Ruling in the Fear of God*, *in* DREISBACH & HALL, *supra* note 76, at 188.
[141] THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 178 (1986).
[142] AMOS ADAMS, RELIGIOUS LIBERTY AN INVALUABLE BLESSING 9 (Boston, Kneeland & Adams 1768).
[143] Samuel Cooper, *A Sermon Preached Before His Excellency John Hancock, Esq., Governour, the Honorable the Senate, and House of Representatives of the*

John Rodgers said, "We ought carefully to manifest our joy in God, and gratitude to him, . . . [because] he has, by the revolution we this day celebrate, put all the blessings of liberty, civil and religious, within our reach."[144] Finally, William Smith, pastor and first Provost of the University of Pennsylvania from 1775 until 1779, preached that "we know that our civil and religious rights are linked together in one indissoluble bond . . . ."[145] He warned that "[r]eligion and liberty must nourish or fall together in America. We pray that both may be perpetual."[146]

Notably, these sermons survive because they were memorialized in print. Thus, the messages were available for reading beyond the congregations where each sermon was heard. In addition to influencing readers across the colonies, these written works, which serve as evidence of religious teaching of the era, likely had numerous similar sermons as counterparts that were not transcribed.

A. State Constitutions Evince a Strong Protection of Free Exercise

"Religious liberty, is a foundation principle in the constitutions of the respective states, distinguishing America from every nation in Europe, and resting religion on its proper basis . . . ."[147] Next among the sources of evidence for the meaning of "free exercise" is the state constitutions at the time of ratification of the Bill of Rights. At the time of ratification, many citizens would have been primarily concerned with state—rather than federal—interference with religious conscience. The States were viewed as holding most power over domestic affairs.[148] In the Federalist Number Forty-Five, Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined."[149] Proponents of the Constitution argued that the federal government had little responsibility over domestic concerns and, therefore, few powers that could interfere with religion. In the Federalist Number Thirty-Two, Alexander Hamilton wrote, "But as the

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Commonwealth of Massachusetts, *in* POLITICAL SERMONS, *supra* note 102, at 628, 629, 631.

[144] Rodgers, *supra* note 132, at 339.

[145] William Smith, *The Crisis of American Affairs*, *in* PATRIOT PREACHERS, *supra* note 115, at 90, 92, 105.

[146] *Id.* at 105.

[147] Duffield, *supra* note 136, at 783.

[148] Steven T. Voigt, Toward a Judicial Bulwark Against Constitutional Extravagance—A Proposed Constitutional Amendment for State Consent over Federal Judicial Appointments, Akron ConLawNow 14-15 (2015).

[149] THE FEDERALIST NO. 45 (James Madison).

plan of the Convention aims only at partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."[150] Defending the proposed federal Constitution, James Wilson asserted:

> [W]e are told, that there is no security for the rights of conscience. I ask the honorable gentleman, what part of this system puts it in the power of congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defence.[151]

Despite the domestic power of the States, the States and the People remained wary of the new Constitution and they demanded the protections in the Bill of Rights.[152] It is logical to assume that the people would have demanded the same protection in the federal Constitution as they had in state constitutions. To the contrary, it makes little sense to think that the people would have been opposed to state interference in their lives but somehow accepting of federal intrusion.

At and around the time of ratification of the Bill of Rights, most state constitutions contained strong provisions protecting free exercise.[153] For example, Pennsylvania's 1776 Declaration of Rights states, in part, that no "man, who acknowledges the being of a God" can "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 government has no right to interfere with "the right of conscience in the free exercise of religious worship."[154]

The Constitution of Virginia provided that

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[150] THE FEDERALIST NO. 32 (Alexander Hamilton).

[151] JAMES WILSON, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787*, *in* 1 COLLECTED WORKS OF JAMES WILSON, 212 (Kermit L. Hall & Mark David Hall eds., 2007).

[152] *See* Steven T. Voigt, *How the Tenth Amendment Saved the Constitution, Contradicts the Modern View of Broad Federal Power, and Imposes Strict Limitations*, 64 Clev. St. L. Rev. Et Cetera 1, 10 (Jan. 26, 2016) ("The Constitution acquired the support that it did from the States and the people only *because* the people and the States expected amendments controlling federal power to quickly follow ratification.").

[153] *See* City of Boerne v. Flores, 521 U.S. 507, 549 (1997) ("By 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution.").

[154] PA. CONST. of 1776, art. II.

> 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.[155]

Georgia's Constitution stated that no person can "be denied the enjoyment of any civil right merely on account of his religious principles."[156] The Constitution of South Carolina stated, in part:

> That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.[157]

Some States included an exception to their protection of free exercise for public safety. For example, the New York Constitution stated "[t]hat 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."[158] Similarly, the Massachusetts Constitution stated:

> It is the right as well as the duty of all men in society, 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.[159]

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[155] VA. CONST. of 1776, § 16.
[156] GA. CONST.,of 1798, art. IV, § 4.
[157] S.C. CONST. of 1778, art.XXXVIII.
[158] N.Y. CONST. of 1777, art. XXXVIII.
[159] MASS. CONST. of 1780, art. II.

That protection for religious freedom existed in nearly every state constitution supports the conclusion that the public expected, at the time of the ratification of the Bill of Rights, that they had freedom to practice religion, safe from government intrusion. While the wording differed from State to State, protecting religious conscience was plainly of prime importance.

B. The State Ratifying Conventions and the First Congress Reflect Concerns over Protecting Religion

Despite assurances by federalists that the Constitution would be strictly construed and the federal government would have limited powers, many of the States and the majority of the people demanded express limitations on the federal government inscribed into the Constitution.[160] Among the concerns with the newly proposed government was the concern that the federal government might trample on rights of conscience

Statements from the ratifying conventions reflect this concern. In the New York ratifying convention, Thomas Tredwell said that he "wished also that sufficient caution had been used to secure to us our religious liberties," and feared the "dreadful" "tyranny" of the government invading individual religious conscience.[161] He cautioned that the government would assuredly tyrannize the people's conscience "whenever it shall be thought necessary for the promotion and support of their political measures."[162] In the Virginia convention, Governor Randolph remarked how "[n]o part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion."[163]

In the North Carolina ratifying convention, Henry Abbot observed that some citizens "wish[ed] to know if their religious and civil liberties be secured under this system, or whether the general

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[160] *See* Steven T. Voigt, *How the Tenth Amendment Saved the Constitution, Contradicts the Modern View of Broad Federal Power, and Imposes Strict Limitations*, 64 CLEV. ST. L. REV. ET CETERA 1, 10 (Jan. 26, 2016)..

[161] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 399 (Jonathan Elliot ed., 2nd ed., Washington 1836).

[162] *Id.*

[163] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 469 (Jonathan Elliot ed., 2nd ed., Washington 1836).

government may not make laws infringing on their religious liberties."[164] James Iredell stated, "Those in power have generally considered all wisdom centered in themselves; that they alone had a right to dictate to the rest of mankind; and that all opposition to their tenets was profane and impious."[165] Yet, as he went on, "America has set an example to mankind to think more modestly and reasonably—that a man may be of different religious sentiments from our own, without being a bad member of society."[166]

The record of the first Congress, where Congress considered the issue of amendments and ultimately passed the First Amendment, likewise depicts an interest in protecting matters of faith. James Madison said that an amendment protecting "conscience" was "required by some of the State Conventions . . . ."[167] Some were concerned, he said, that laws made pursuant to the necessary and proper clause "might infringe the rights of conscience . . . ."[168] Representative Carroll similarly observed:

> As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of the governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more toward conciliating the minds of the people to the government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.[169]

While some commentators have concluded that little about the meaning of "free exercise" can be gleaned from the drafts and proposals

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[164] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 191 (Jonathan Elliot ed., 2nd ed., Washington 1836).
[165] *Id.* at 192.
[166] *Id.* at 193.
[167] 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1843).
[168] *Id.*
[169] *Id.* at 757-58.

for the first amendment,[170] at least one conclusion is clear: free exercise means protecting more than merely attending church. On September 9, 1789, the Senate proposed this phraseology: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ."[171] If the First Amendment was intended to only protect the style of worship at a church, then the last phase is the Senate proposal would not have been needed. "Mode of worship" would have been enough, yet, the Senate stated that "mode of worship" *and* "free exercise" shall be protected. This further supports a broader understanding of free exercise.

Finally, some of the drafts of the amendment were phrased as protecting "conscience." That Congress settled instead on the word "exercise" may be significant. Michael W. McConnell observed that "[t]he choice of the words 'free exercise of religion' in lieu of 'rights of conscience' is [] of utmost importance" because "'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief."[172]

C. Early State Court Cases Support Protection of Religion

There are limited judicial opinions from the 1790s and early 1800s discussing conscientious objections.[173] In part, this is because the government at the time was much smaller and less intrusive into everyday life than today's large bureaucracy.[174] In another part, this is because early laws conflicted far less with faith than some laws do today.[175] Nevertheless, there exist some examples where state courts addressed state free exercise protections. These decisions illustrate, to

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[170] *See, e.g.*, Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1085 (2008) ("This Article contends that the drafting of the Free Exercise Clause sheds almost no light on the text's original meaning.").

[171] S. JOURNAL, 1st Cong., 1st Sess. 77 (1789).

[172] McConnell, *supra* note 74, at 1488, 1489.

[173] *Id*. at 1503 ("The religion clauses of the federal and state constitutions did not engender many lawsuits in the early years of the Republic, and fewer still raised the question of free exercise exemptions.").

[174] *Id*. at 1466 ("the governments of that era were far less intrusive than governments of today").

[175] *Id*. at 175 ("The Protestant moral code . . . was, for the most part harmonious with the mores of the larger society. . . . Thus, the occasions when religious conscience came into conflict with generally applicable secular legislation were few.").

some degree, the significance of protecting religious liberty.[176] In this section a few of those decisions are explored.

In 1793, in *Kamper v. Hawkins*, the General Court of Virginia considered the legality of a legislative proposal to combine Virginia's general courts and courts of equity.[177] The *Kamper* opinion consists of five separate opinions by judges of the court and a referral to the General Assembly for further consideration.[178] In their opinions, the judges commented on the structure of Virginia's government and Constitution. Their discussion of Virginia's free exercise protections is notable. Judge Henry observed, "In the year 1776, the people of this country[, *i.e.*, Virginia,] chose deputies, to meet in general convention, to consult of, and take care for, their most valuable interests."[179] He wrote, "[T]hese deputies declared that certain rights were inherent in the people, which the public servants who might be intrusted with the execution of this government, were never permitted to infringe; . . . the legislative branch were declared to be restrained from . . . meddling with the rights of conscience, in matters of religion . . . ."[180] Judge Tyler wrote:

> In the Bill of Rights many things are laid down, which are reserved to the people— . . . liberty of conscience, &c. Can the legislature rightfully pass a law taking away these rights from the people? Can the executive do any thing forbidden by this bill of rights, or the constitution? . . . The answer to these questions must be in the negative.[181]

Judge Tucker observed that the Virginia Constitution "secures the free exercise of our religious duties, according to the dictates of every man's own conscience."[182]

The Massachusetts Constitution in 1810 required for the public support of Protestant Christian ministers who served the people in a

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[176] *See generally* Steven T. Voigt, *Two Early Events that Can Help Us Better Understand the Commerce Clause*, 30 VA. J.L. & POL. ONLINE 1, 2 (2015) (considering "some of the earliest applications of the federal commerce power and the debates associated with those efforts" to better understand the meaning of the commerce clause).
[177] 3 Va. (1 Va. Cas.) 20, 22 (1793).
[178] *Id.* at 22, 35, 44, 56, 66, 108.
[179] *Id.* at 46.
[180] *Id.* at 47.
[181] *Id.* at 59.
[182] *Id.* at 80.

public role.[183] That year, the Supreme Judicial Court of Massachusetts heard a case brought by Universalist teacher who sought payment from public taxes for his work.[184] The court held that the plaintiff did not qualify for payment.[185] Regarding conscience, the court stated, "As religious opinions, and the time and manner of expressing the homage due to the Governor of the universe, are points depending on the sincerity and belief of each individual, and do not concern the public interest . . . ."[186] In addition,

> no man can 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 sentiment, provided he does not disturb the public peace, or obstruct others in their religious worship. . . .[187]

The court said that the use of public funds to support Christian teaching is proper, but no person is compelled to "attend on the instructions of any teacher, whom they cannot conscientiously hear."[188]

In an early case from Kentucky, *White v. M'Bride*,[189] the Court of Appeals of Kentucky considered the appeal of Shakers or Friends, who were fined for failing to attend militia musters for the defense of the State.[190] The court held that the fines were improper and stated that "[t]he free exercise of the rights of conscience . . . excuse[s individuals] from bearing arms who entertain conscientious scruples against it."[191]

In 1817 and again in 1848, the Supreme Court of Pennsylvania tested an early blue law against the Pennsylvania Constitution's free exercise protection, which stated:

> All men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship, or to

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[183] Barnes v. Inhabitants of the First Parish, 6 Mass. 401, 404 (1810).
[184] *Id.*
[185] *Id.* at 417.
[186] *Id.* at 406-07.
[187] *Id.* at 407.
[188] *Id.* at 415.
[189] 7 Ky. (4 Bibb) 61 (1815).
[190] *Id.* at 61.
[191] *Id.*

> maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given, by law, to any religious establishments or modes of worship.[192]

The 1848 case arose after Jacob Specht, a Seventh Day Baptist, was charged with conducting "worldly employment" (in this instance, hauling manure) on Sunday.[193] Specht's defense was that the Sabbath under his religion was Saturday, not Sunday.[194] The court upheld the blue law, holding that it did not compel Specht to work on his day of rest, Saturday.[195] Of the blue law, the Supreme Court of Pennsylvania stated:

> It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship.[196]

The court reasoned, "[T]he inconvenience of two successive days of withdrawal from worldly affairs, it is an incidental worldly disadvantage, temporarily injurious, it may be, to them, but conferring no superior religious position upon those who worship upon the first day of the week."[197]

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[192] PA. CONST. of 1838, art. IX, § 3. *Compare id.*, *with* PA. CONST. of 1790, art. IX, § 3 (showing nearly identical language aside from some syntactical differences).
[193] Specht v. Commonwealth, 8 Pa. 312, 313 (1848).
[194] *Id.*
[195] *Id.* at 325.
[196] *Id.*
[197] *Id.* The defendant in the 1817 case, *Commonwealth v. Wolf*, who likewise "performed worldly employment on the Lord's Day, commonly called Sunday," was a man of the Jewish faith who argued that, not only was Saturday his faith's "day set apart for rest," but also that the Old Testament "binds [him] to work six days in each week." 3 Serg. & Rawle 48, 48, 50 (Pa. 1817). The court did not directly address the defendant's legal argument, but instead decided, notably without citation to any specific religious passages, that the defendant's understanding of his own faith was in error. *Id.* at 50-51.

D. Early Writings Reflect the Importance of Protecting Faith

As a final category of evidence, early writings (in addition to the published sermons discussed earlier) show that protecting religious freedom was important to the people and to the founders.[198] In his 1789 Thanksgiving Proclamation, George Washington said that "it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor . . . ."[199] However, Washington also believed in protecting individual conscience. In a letter, also penned in 1789, he wrote:

> [I]n my opinion, the Consciencious scruples of all men should be treated with great delicacy & tenderness, and it is my wish and desire that the Laws may always be as extensively accommodated to them, as a due regard to the Protection and essential Interests of the Nation may Justify and permit.[200]

Washington was not alone in his views. "A Countryman," likely Roger Sherman, wrote that the "rights of conscience" are "much too important to depend on mere paper protection."[201] "Timoleon" objected to the proposed federal Constitution because it did not contain an "*express* declaration in favor of the *rights of conscious* . . . as we see was carefully done in the Constitutions of the states composing this union . . . ."[202] John Leland "fear[ed religious] liberty is not Sufficiently [secured]" in the proposed Constitution,[203] and Mercy Otis Warren

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[198] *See generally* Steven T. Voigt, *The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on The Treaty Power*, 12 U.N.H. L. REV. 85 (2014) (analyzing the debates in the state ratifying conventions as well as early writings to ascertain the original meaning of the federal treaty making power and whether the treaty power is limited by state sovereignty).

[199] George Washington, President of the U.S., Presidential Thanksgiving Proclamation (Oct. 3, 1789).

[200] Letter from George Washington, President of the U.S., to the Society of Quakers (Oct. 13, 1789).

[201] A Countryman [Roger Sherman], *The Letters: II*, NEW HAVEN GAZETTE (Nov. 22, 1787), *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 179, 180 (Colleen A. Sheehan & Gary L. McDowell eds., 1988).

[202] *Timoleon*, N.Y.J. (Nov. 1, 1787), *in* THE COMPLETE BILL OF RIGHTS 74, 75 (Neil H. Cogan ed., 1st ed. 1997).

[203] Letter from Joseph Spencer to James Madison (Feb. 28, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, Part Two, 267 (The Library of America 1993).

warned that "[t]here is no security in the [proffered] system . . . for the rights of conscience."[204]

"An Old Whig" warned of eventual religious persecution without an express protection of religion in the Constitution:

> But supposing our future rulers to be wicked enough to attempt to invade the rights of conscience; I may be asked how will they be able to effect so horrible a design? I will tell you my friends — *The unlimited power of taxation* will give them the command of all the treasures of the continent; *a standing army* will be wholly at their devotion, and the authority which is given them over the *militia*[.] . . . Suppose a man alledges that he is conscientiously scrupulous of bearing Arms. — By the bill of rights of Pennsylvania he is bound only to pay an equivalent for this personal service. — What is there in the new proposed constitution to prevent his being dragged like a Prussian soldier to the camp and there compelled to bear arms? . . . Such flagrant oppressions as these I dare say will not happen at the beginning of the new government . . . but it is a duty we owe to ourselves and our posterity if possible to prevent their ever happening.[205]

John Adams penned, "From a sense of the government of God, and regard to the laws established by his Providence, should all our actions for ourselves and for other men primarily originate . . . ."[206] Madison wrote, "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[207] Madison also explained in a separate writing that government "is instituted to protect property of every sort; as well that which lies in the

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[204] A Columbian Patriot [Mary Otis Warren], *Observations on the New Constitution, and on the Federal and State Conventions* (Feb. 1788), *in* THE DEBATE ON THE CONSTITUTION, *supra* note 191, at 290.

[205] *An Old Whig, No. 5*, PHILA. INDEP. GAZETTEER (Nov. 1, 1787), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 203, at 75, 77.

[206] THE WISDOM OF JOHN ADAMS 93 (Kees de Mooy ed., 2003).

[207] James Madison, *Memorial and Remonstrance against Religious Assessments*, FOUNDERS' CONST., http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Apr. 11, 2017).

various rights of individuals. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*. . . . Conscience is the most sacred of all property. . . ."[208] In 1791, Thomas Jefferson wrote, "I would rather be exposed to the inconveniencies attending too much liberty than those attending too small a degree of it."[209]

Writing several decades later in 1833 about the meaning of free exercise, Justice Joseph Story remarked:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> . . . .
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> But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires. . . . The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority. . . .[210]

Lastly, in 1772, before the Declaration of Independence, Samuel Adams, writing for Boston's Committee of Correspondence, asserted:

> If men through fear, fraud, or mistake, should *in terms* renounce and give up any essential right, the eternal law of reason and the great end of society, would absolutely

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[208] James Madison, *Property*, FOUNDERS' CONST., http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (last visited Apr. 11, 2017).

[209] Letter from Thomas Jefferson to Archibald Stuart (Dec. 23. 1791).

[210] JUSTICE JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 726, 727 (Boston, Hilliard, Gray, & Co. 1833).

> vacate such renunciation; the right to freedom being *the gift* of God Almighty.[211]

III. CONCLUSION

Requiring a free exercise plaintiff "to negate every conceivable basis which might support" the challenged law (an immensely difficult undertaking) is incongruent with the original understanding of free exercise protection. The American people at the time of ratification of the Bill of Rights would have soundly rejected such weak protection for religion. This is apparent from the various sources of historical evidence discussed in this paper. This conclusion challenges the United States Supreme Court's use of a weak rational basis standard to protect free exercise and it should give pause to state courts before choosing to follow the reasoning of *Smith* when interpreting state free exercise protection.

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[211] Samuel Adams, *The Rights of the Colonists*, *in* DREISBACH & HALL, *supra* note 76, at 188.