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The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment

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THE SECOND ADOPTION OF THE FREE EXERCISE CLAUSE: RELIGIOUS EXEMPTIONS UNDER THE FOURTEENTH AMENDMENT

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INTRODUCTION

> The First Amendment to the United States Constitution reads today as it did when it was ratified on December 15, 1791.[1]

So wrote the District Court on its way to upholding laws that effectively prohibited the practice of the Santeria religion within the City of Hialeah, Florida. The statement is uncontroversial enough. From the beginning, eighteenth-century interpretations of the First Amendment have guided the jurisprudence of religious liberty.[2] In *Reynolds v. United*

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[1] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1482 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 2217 (1993).

[2] The following are only a small sample of Supreme Court opinions that look to the Founders, particularly Jefferson and Madison, for the original intent behind the religion clauses: County of Allegheny v. ACLU, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring in part, dissenting in part) (citing George Washington's Thanksgiving Proclamations); Edwards v. Aguillard, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring) (citing Madison's Memorial and Remonstrance Against Religious Assessments and Jefferson's Bill for Establishing Religious Freedom); McDaniel v. Paty, 435 U.S. 618, 624 (1978) (Madison's writings); Meek v. Pittenger, 421 U.S. 349, 383 n.4 (1975) (Brennan, J., concurring and dissenting) (Memorial and Remonstrance); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (Memorial and Remonstrance); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (Memorial and Remonstrance); Lemon v. Kurtzman, 403 U.S. 602, 633-34 (1971) (Memorial and Remonstrance); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (Jefferson's writings, Memorial and Remonstrance); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 213 (1963) (writings of Madison, Jefferson, and Roger Williams); McGowan v. Maryland, 366 U.S. 420, 430 (1961) (Memorial and Remonstrance); Braunfeld v. Brown, 366 U.S. 599, 604 (1961) (Jefferson's letter to Danbury Baptist Association); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948) (Danbury Letter); Everson v. Board of Educ., 330 U.S. 1, 12-13 (1947) (Memorial and Remonstrance, Bill for Establishing Religious Freedom); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Jefferson's writings); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 n.3 (1940) (writings of Jefferson and Madison).

States,[3] the first case to consider religious exemptions from generally applicable laws, Chief Justice Waite cited Thomas Jefferson's famous "Danbury Letter" as being "almost . . . an authoritative declaration of the scope and effect of the [religion clauses]."[4]

Even when not explicitly invoking the assistance of the Founders, the Supreme Court nonetheless looks to eighteenth-century interpretations of the Free Exercise Clause. For example, in *Employment Division v. Smith*,[5] the Court held that the Free Exercise Clause does not exempt Native American religious ceremonies from a state law prohibiting the use of peyote.[6] Justice Scalia rooted his interpretation of the Free Exercise Clause in the 1878 opinion of Chief Justice Waite—who in turn relied on Madison and Jefferson.[7]

In fact, the available evidence supports the view that the Founders did not anticipate the need for religious exemptions from generally applicable laws.[8] At most, the Free Exercise Clause prevented the federal government from passing laws targeting religion *qua* religion.[9] Accordingly, if we look for guidance in the writings of the Founders, *Smith*'s rejection of an exemption for the Native American Church seems to be on solid historical ground.

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[3] 98 U.S. 145 (1879). In *Reynolds*, the Supreme Court rejected a Mormon's free exercise claim to practice polygamy in contravention of federal law.

[4] *Id.* at 164 (citing Thomas Jefferson's letter to a Committee of the Danbury Baptist Association (Jan. 1, 1802)).

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

[6] Although the *Smith* decision has its supporters, *see, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991), the general response among scholars has been one of dismay, *see* John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990). In late 1993, Congress gave its response to *Smith* by passing the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993), which requires both state and federal governments to forward a compelling interest to justify any law that substantially burdens religious exercise. Assuming the statute is a constitutional exercise of congressional power, RFRA is an ironic vindication of Justice Scalia's reasoning in *Smith* that providing religious exemptions is best left in the hands of political majorities. *See Smith*, 494 U.S. at 890. Ironic, because RFRA is intended to eviscerate the impact of *Smith*.

Nevertheless, RFRA is thin gruel for those who reject *Smith*'s narrow reading of the Free Exercise Clause. RFRA is a majoritarian protection subject to later repeal or modification by shifting political coalitions. Even if left intact, the statutory terms themselves may receive the same narrow reading as that given to the Free Exercise Clause in *Smith*. As this Article points out, such a reading fails to recognize the impact of the Fourteenth Amendment and the intentions of those who made that amendment part of our higher law.

[7] *See Smith*, 494 U.S. at 879. The Court continues to rely on Justice Scalia's reasoning in *Smith*. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225 (1993).

[8] *See infra* part I. *But cf.* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the Framers accepted an interpretation of the Free Exercise Clause that mandated religious exemptions).

[9] *See infra* part I.

But perhaps we have been looking in the wrong place. If 1791 was the first and last time We the People considered the proper scope of our religious liberty, it may be appropriate (if not mandatory) that the Court seek the guidance of those who originally drafted and adopted the clause.[10] If, on the other hand, the original scope of the Free Exercise Clause was later found inadequate and subsequently altered by way of a constitutional amendment, then a jurisprudence that relies on the intentions of the Founders does so at the expense of popular sovereignty and the People's right to amend their Constitution.

This Article explores the proposition that the Free Exercise Clause was adopted a second time through its incorporation into the Privileges or Immunities Clause of the Fourteenth Amendment and that the scope of the new Free Exercise Clause was intended to include protections unanticipated at the Founding. Contrary to Jeffersonian notions of "separate spheres," the nation by the time of Reconstruction had experienced decades of clashes resulting from the overlapping concerns of religion and government. In particular, the suppression of slave religion called into question the government's power to interfere, even indirectly, with legitimate religious exercise. Accordingly, the Privileges or Immunities Clause incorporated a conception of religious liberty vastly different from that intended in 1791 and constitutes a constitutional modification of the original "rights of conscience." Religious exemptions from generally applicable laws, considered unnecessary and improbable at the Founding, now became necessary and proper.

Part I explores the federalist structure of the original First Amendment, as well as contemporary assumptions regarding the proper relationship between religion and government. Although the drafters of the First Amendment religion clauses intended to prevent Congress from exercising any power over the *subject* of religion, the prohibition likely went no further than laws attempting to regulate religion *qua* religion. Moreover, whatever *indirect* effect Congress's enumerated powers might have on religious exercise, the separationist assumptions held by both Madison and Jefferson indicated that such effects would be minimal. Believing that church and state had separate and distinct concerns (touching only on "unessential points"), it is unlikely that either Madison or Jefferson anticipated a need for religious exemptions.

Part II looks at the interaction between religion and government that occurred in the period between the Founding and Reconstruction.

[10] This Article accepts the interpretive legitimacy of inquiring into the intentions of those who adopted or amended a particular constitutional text. Indeed, such an inquiry seems unavoidable if courts are to distinguish between the ordinary laws of transient majorities and the majority-proof laws of the Constitution. *See* BRUCE ACKERMAN, WE THE PEOPLE (1992) (describing American constitutional law as a "two-track" system where the People enact "higher law" and then withdraw from the political scene, leaving "ordinary politics" to their representatives). As this Article hopes to show, however, one must locate the relevant intent.

Religious republicanism and socially activist religion both challenged the separationist admonition that church and state each keep to its own concerns. Although, like separationism, religious republicanism rejected the need for religious exemptions, the view that government had a duty to support and protect the religious exercise of the majority laid the theoretical groundwork for the eventual support and protection of *minority* religious exercise.

Part III describes the obliteration of the separate spheres theory resulting from the clash between the abolitionists and the slaveholding states. Given the political activities of the abolitionists and slavery's suppression of religious exercise, the idea that religion and government had "wholly distinct concerns" became demonstrably untenable. While the Founders may have thought religious-political conflicts would involve only "unessential points," it now was apparent that the most crucial concerns of religion and government could clash irreconcilably.

In light of decades of experiences entirely different from those anticipated by the Founders, Part IV explores the new interpretations of the Free Exercise and Establishment Clauses that arose in the period prior to the adoption of the Fourteenth Amendment. Originally intended as an establishment-neutral reservation of power to the state majorities, the words of the Establishment Clause were now invoked by the states themselves as expressing the rights of citizens against state majorities. Most significantly, for the first time the rights of conscience were interpreted at a federal level to require a religious exemption from military service.

Finally, Part V focuses on the drafting of the Fourteenth Amendment and the scope of religious liberty intended to be embraced within the Privileges or Immunities Clause. Explicitly targeting the "generally applicable" laws of the southern states as impermissible intrusions upon the rights of conscience, the Thirty-ninth Congress signaled its intent to extend the protection of the Free Exercise Clause beyond laws that regulated religion *qua* religion. On the assumption that religion and government would occasionally come into conflict as each pursued its legitimate ends, it was now conceivable that the laws of the majority would sometimes be required to accommodate the religious exercise of individuals.

I. THE RELIGION CLAUSES AND THE FOUNDERS: FEDERALISM AND SEPARATIONISM

Professor Michael McConnell has made the most significant attempt to date to identify an intention to include religious exemptions within the scope of the original Free Exercise Clause.[11] McConnell relies heavily on

[11] *See* McConnell, *supra* note 8. *But see* Philip Hamburger, *A Constitutional Right to Religious Exemptions: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that 18th-century Americans assumed that the Free Exercise Clause did not provide religious exemptions); Ellis West, *The Case Against a Right to Religious-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB.

two historical sources: (1) the contemporary protection of free exercise within the states[12] and (2) the writings of James Madison.[13] The first, state law, faces a translation problem; it assumes that the protection of religious freedom in the states can be translated into the federalist structure of the original First Amendment. The second source is considerably weakened by separationist assumptions held by both James Madison and Thomas Jefferson; as long as religion and government remained in separate spheres, there would be no occasion for religious exemptions.

A. The Federalist First Amendment

Any attempt to equate religious rights provisions in contemporary state constitutions with those contained in the First Amendment must first confront striking differences in how those provisions were constructed. To begin with, no state constitution had ever used the term "respecting" (as in "Congress shall make no law respecting an establishment of religion") in regard to religious freedom. The "respecting an establishment" language does not express a value of "nonestablishment." In fact, opinion was divided at the time of the Founding over whether religious establishments were a danger to, or essential for, democracy.[14] Instead, the establishment-neutral Clause expressed a principle of nonenumeration: power "respecting establishments" was prohibited to the federal government and reserved to the states.

The Amendment begins by stating that "Congress shall make no law."[15] By referring at the outset to *Congress*, the First Amendment be-

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POL'Y 591, 623 (1990) (same); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90) (same).

12 For example, McConnell believes that contemporary state constitutions "provide the most direct evidence of the original understanding [of the Free Exercise Clause], for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, *supra* note 8, at 1456. McConnell points to the use of terms like "exercise," "duties," and "worship" for the proposition that the freedom extended beyond mere "beliefs," *id.* at 1458-61, and "peace and safety" provisos as indications that religious exercise was to be exempt from generally applicable laws so long as it did not disturb the public peace, *id.* at 1461-66. *But see*, Hamburger, *supra* note 11, at 918 (noting that, to an 18th-century lawyer, "every breach of law is against the peace").

13 McConnell, *supra* note 8, at 1473-1503. McConnell distinguishes the views of Madison from those held by Thomas Jefferson. Both Madison and Jefferson, however, read the First Amendment as an expression of nonenumeration, and both were religious separationists. As this section shows, these views cut against a theory of the religion clauses that requires religious exemptions. *See, e.g.*, *id.* at 1488.

14 The last state establishment did not disappear until the 1830s—long after the adoption of the Establishment Clause. Even at that time, there were those who believed that government support of religion was essential to democracy. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 986 (Carolina Academic Press 1987) (1833) ("[T]he right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice.").

15 The First Amendment reads, "Congress shall make no law respecting an establishment of

gins a theme that runs as a leitmotif throughout the original Bill of Rights, that of federalism. When read in conjunction with other provisions, in particular the Tenth Amendment, the First Amendment signals an intention to give Congress no enumerated power over matters such as religion and speech, reserving the same "to the States respectively, or to the people."[16] Indeed, fears that the new government might attempt to exercise powers not granted soon were borne out in the controversy surrounding the Alien and Sedition Acts when the party in power criminalized criticism of the government. Speaking from the sanctuary of the state legislative assemblies, Jefferson and Madison respectively drafted the Kentucky and Virginia Resolutions, which claimed the Acts were a direct violation of the principles of federalism as expressed in the First and Tenth Amendments.[17] According to Thomas Jefferson:

> [T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people; and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people.[18]

Although the Tenth Amendment speaks of powers retained by the people as well as the states, the Kentucky Resolutions go on to specify that the "liberty and happiness" that had been violated was that of "the several *states*."[19] Similarly, the Virginia Resolutions, drafted by James Madison, declared that by passing the Acts, Congress had "exercis[ed] . . . power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto."[20] The Acts were thus a violation of "rights, and liberties, reserved to the states respectively, or to the people."[21] As did Jefferson, Madison believed the right violated was that of the states, not of "the people."[22]

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religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

16 *Id.* amend. X.

17 *See* Thomas Jefferson, The Kentucky Resolutions (Nov. 10 & 14, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 131 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONST.]; James Madison, The Virginia Resolutions (Dec. 21, 1798), *reprinted in* 5 FOUNDERS' CONST., *supra*, at 135.

18 Jefferson, *supra* note 17, at 132.

19 *Id.* at 135. As Jefferson explained to Abigail Adams in 1804: "While we deny that Congress has a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so." Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 n.1, 311 n.1 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1897).

20 Madison, *supra* note 17, at 136.

21 *Id.* at 135.

22 *See* James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *in* 5 FOUNDERS' CONST., *supra* note 17, at 139, 139 (declaring that, by the

Although Madison would have amended the Constitution to protect the "equal rights of conscience" within the several states, Congress rejected his attempt to do so.[23]

Even if the original Free Exercise Clause was intended to express norms of individual freedom, the scope of the Clause appears to be limited to a prohibition of laws that abridge religion *qua* religion. As Professor McConnell points out, although the original Free Exercise Clause withholds congressional power over religion as such, Congress had a great deal of enumerated power in other areas that might implicate religious exercise.[24] Accordingly, when Madison claimed that Congress had "no power to abridge,"[25] he can only have meant that Congress had no power to abridge religion through a religion-based law. If this is the "original intention" incorporated against the states, it does not protect free exercise from generally applicable (religiously-neutral) laws.

In addition to the logic of the text, the very spirit of the federalist First Amendment cuts against an interpretation of the original Clause as protecting minority religious exercise. Madison saw two main problems facing republican governments: (1) protecting citizens generally from government officials pursuing their own self-interested agendas at the expense of their constituents and (2) protecting individuals and minorities from tyrannical majority factions of fellow citizens.[26] The fact that the First Amendment restrained only Congress indicates that its primary purpose was to guard against the first—attenuated representation—rather than tyrannical majorities.[27]

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principles embodied in the Acts, "the *States* will be stripped of every right reserved, by the concurrent claims of a paramount Legislature") (emphasis added).

23 Madison proposed an amendment to the Constitution which would have prohibited state majorities from infringing upon "the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." 1 ANNALS OF CONGRESS 783 (Joseph Gales ed., 1789). Madison's proposal passed the House of Representatives but died in the Senate. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1149 (1991).

24 McConnell, *supra* note 8, at 1478. Madison's speech introducing the Bill of Rights to Congress indicates that he understood that granted powers could be overextended and abused. *See* 1 ANNALS OF CONGRESS, *supra* note 23, at 456 ("It is true, the powers of the General Government are circumscribed, they are directed at particular objects; but even if the government keeps within those limits, it has certain discretionary powers with respect to the means."). The danger was Congress taking on "implied powers" as the means for carrying out its duties. *Id.* The solution was a Bill that explicitly stated that Congress had "no power" over certain subjects, as in "Congress shall make no law respecting an establishment of religion." But even this would do no more than prevent the federal government from using religion as a means to accomplish an enumerated responsibility. Madison's interpretation of the Bill of Rights does not implicate generally applicable laws that do not target religion as either an end or a means. *But cf.* Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711 (1990).

25 James Madison, Report on the Virginia Resolutions, *excerpted in* 5 FOUNDERS' CONST., *supra* note 17, at 141, 146-47.

26 THE FEDERALIST NO. 51, at 323-25 (James Madison) (Clinton Rossiter ed., 1961).

27 *See* Amar, *supra* note 23, at 1148. Madison himself believed that the greater danger was in

To our ears, the Bill of Rights in general, and the First Amendment in particular, sound in terms of libertarianism—the protection of individual rights against unwarranted intrusion by the government.[28] However, as the Virginia and Kentucky Resolutions make clear, the First Amendment was originally understood to protect the rights of popular majorities against a possibly unrepresentative and self-interested Congress. Not only were the rights of individuals in the states not protected, but an attempt to exempt the religiously scrupulous from military service—a common exemption in contemporary state constitutions[29]—failed.[30]

Given the above background, interpreting the original First Amendment to include religious exemptions is problematic on several grounds. First, the primary concern of the Founders was the right of the majority to representative government, not the needs of minorities (and minority faiths). Second, even if the original Free Exercise Clause could be read as an expression of individual rights, it would prohibit only those laws that directly targeted religion. Thus, an intention to provide for religious exemptions was, at the very least, unlikely. In fact, given the separationist views held by Thomas Jefferson and James Madison, religious exemptions appear unnecessary.

B. Separationism

To men like Thomas Jefferson and James Madison, the concerns animating the religion clauses of the First Amendment did not end at the federal level.[31] Jefferson's advocacy of a "wall" between church and state was based on his assumption that religion and government belonged to separate spheres and that each could and ought to be prevented from

"that which possess the highest prerogative of power. But this is not found either in the executive or the legislative departments of Government, but in the body of the people, operating by the majority against the minority." 1 ANNALS OF CONGRESS, *supra* note 23, at 454-55. Madison's attempt to amend the Constitution to protect against state majorities, however, was rejected. *See supra* note 23 and accompanying text.

28 A "mistake" that reflects the passage of the Fourteenth Amendment, at which time minority rights *were* explicitly protected. Thus, as this Article attempts to show, the relevant "original intentions" are those of the persons who effected the transformation.

29 *See* Hamburger, *supra* note 11, at 940.

30 As with Madison's proposed amendment protecting the rights of conscience, a proposed militia exemption passed the House, but was removed by the Senate. *See id.* at 928. *But see* McConnell, *supra* note 8, at 1501-02 (arguing that the rejection of a militia exemption is not a rejection of exemptions per se, but a reflection of the government's compelling interest).

31 This Article concentrates on the views of Madison and Jefferson not because those views were representative of all the Founders. *See, e.g.*, ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 21 (1990) (describing the Founders' main strands of thought on the religion question as "enlightenment separationist," "pietistic separationist," and "political centrist"). Nor do I mean to minimize the difference in views among the men themselves. *See* McConnell, *supra* note 8, at 1452 (distinguishing between the religious views of Jefferson and Madison). Rather, the focus is meant only to highlight those points upon which Madison and Jefferson *did* agree, and to consider the appropriateness of using their views as a guide to post-Fourteenth Amendment religion clause jurisprudence.

intruding upon the other's domain.[32] To Jefferson, this meant not only that government should be prevented from interfering with matters of religious belief,[33] but also that it should stay out of religious matters altogether.[34] The federal government was prohibited from passing any law "respecting religion."[35]

The free exercise of religion had its boundaries as well. Although religion was to be protected in its "doctrines, discipline, or exercises,"[36] it had no right to be excluded from "social duties."[37] Religious faith, moreover, was a personal affair and should be free from interference by

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[32] The famous "wall between church and state" comes from Jefferson's letter to the Danbury Baptist Association in which he writes:

> I contemplate with sovereign reverence that act of the whole American people which declared that the legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802) [hereinafter Danbury Letter], *in* THOMAS JEFFERSON: WRITINGS 510, 510 (Merrill D. Peterson ed., 1984) [hereinafter WRITINGS]. Jefferson was influenced by the writings of John Locke, who had deemed it necessary "to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." JOHN LOCKE, A LETTER CONCERNING TOLERATION (1686), *reprinted in* JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 78 (1987); *see also*, Hamburger, *supra* note 11, at 938-946 (canvassing eighteenth-century writings which differentiated between the temporal and spiritual worlds).

[33] *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *reprinted in* WRITINGS, *supra* note 32, at 123, 285 ("The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.").

[34] Jefferson's belief in the separation of church and state was influenced by the Enlightenment. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991). There were also religious reasons for advocating separationist principles. *See id.* at 159 (distinguishing between the "political rationale" of Madison and Jefferson and the "theological rationale" represented by Roger Williams). Again, the point is not to discount the influence of other views on the intended meaning of the Free Exercise Clause, but to specifically explore the intentions of those who have had the greatest impact on subsequent interpretation of the Clause.

[35] Jefferson described the religion clauses as "the provision that no law shall be made *respecting the establishment or free exercise, of religion*" without any sense of having reworded the amendment. *See* Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* WRITINGS, *supra* note 32, at 1186, 1186-87 (emphasis added). The description is a telling example of Jefferson's belief that government was to remain agnostic towards religion, neither supporting nor abridging its exercise.

Early in his career Jefferson seemed to endorse government support of religion, if only on a state level. *See* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1203 (1990) (pointing out that as a legislator Jefferson voted in favor of a bill empowering Virginia's governor to declare a day of prayer and thanksgiving, as well as making such a decree himself as governor). Yet in his later years, Jefferson clearly rejected the idea that government had any business involving itself in religious matters. The "alliance" of Church and State was antithetical to the advance of science and Reason. *See* Thomas Jefferson, Report of the Commissioners for the University of Virginia (Aug. 14, 1818), *in* WRITINGS, *supra* note 32, at 457, 462; Letter from Thomas Jefferson to Moses Robinson (March 23, 1801), *in* WRITINGS, *supra* note 32, at 1087. Moreover, the alliance was completely unnecessary—religion and government could both survive without the support of the other. *See* Smith, *supra* note 34, at 165 n.68.

[36] Letter from Jefferson to Rev. Miller, *supra* note 35, at 1186.

[37] Danbury Letter, *supra* note 32, at 510.

priests or proselytizers.[38] In fact, Jefferson was deeply troubled by the "fanatical" religious revivals that swept the country in the initial decades of the nineteenth century.[39]

Similarly, James Madison rejected the idea that government had any proper role in the establishment or support of religion.[40] Because of the "tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them," the best solution was "an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others."[41] Significantly, Madison believed that although a complete separation of religion and government was not possible, whatever overlap remained would involve only "unessential points."[42]

Jefferson and Madison were both what I call "separationist" republicans by which I mean they believed religion and government could and ought to remain in separate spheres. Although most often invoked in terms of the Establishment Clause, separation of church and state had free exercise implications as well. Jefferson's famous Wall was supported by assumptions regarding the proper roles of religion and government—roles that made the need for religious exemptions highly unlikely.

Supporting one side of the Wall was the belief that republican government could survive without active support of religion.[43] Government

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38 Letter from Thomas Jefferson to Mrs. Samuel H. Smith (Aug. 6, 1816), *in* WRITINGS, *supra* note 32, at 1403, 1404 ("I have ever thought religion a concern purely between our God and our consciences for which we were accountable to him, and not to the priests. I have never told my own religion, nor scrutinized that of another. I have never attempted to make a convert, nor wished to change another's creed.").

39 In a letter to Dr. Thomas Cooper, Nov. 2, 1822, Jefferson lamented

> [t]he atmosphere of our country is unquestionably charged with a threatening cloud of fanaticism, lighter in some parts, denser in others, but too heavy in all. . . . In our Richmond there is much fanaticism, but chiefly among the women. They have their night meetings and praying parties, where, attended by their priests, and sometimes by a hen-pecked husband, they pour forth the effusions of their love to Jesus, in terms as amatory and carnal, as their modesty would permit them to use to a mere earthly lover.

Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), *in* WRITINGS, *supra* note 32, at 1463, 1464.

40 Madison explicitly rejected the idea that "without some sort of alliance or coalition between Govt. & Religion neither can be duly supported." Letter from James Madison to Edward Livingston (July 10, 1822), *excerpted in* 5 FOUNDERS' CONST., *supra* note 17, at 105, 105. He fought religious assessments in Virginia, *see* James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 5 FOUNDERS' CONST., *supra* note 17, at 82, and in his later years believed that the appointment of Chaplains to the Houses of Congress violated the Establishment Clause, *see* James Madison, Detached Memoranda (ca. 1817), *in* 5 FOUNDERS' CONST., *supra* note 17, at 103, 104.

41 Letter from James Madison to Rev. Adams (1832), *excerpted in*, 5 FOUNDERS' CONST., *supra* note 17, at 107, 107-08.

42 *Id.*

43 Advocating what they termed an "experiment," both Jefferson and Madison maintained that government and religion could survive without either actively supporting the other. *See* Smith,

therefore had no reason to involve itself in the affairs of religion.[44] Supporting the other side was the assumption that religion is a private matter that need never involve itself with worldly matters—so long as the world refrained from establishing a particular sect.[45]

Neither Jefferson nor Madison believed the Wall to be impenetrable—there remained some overlap between religious rights and civil authority. Yet, by removing the authority of the government to legislate directly on religion *qua* religion and by advocating a "rational" and, above all, *personal* religion, separationists could expect that whatever conflicts arose would involve only trivial matters.

C. Implications for Religious Exemptions

The federalist First Amendment left little room for religious exemptions. When the federalist reading of the Bill of Rights is combined with separationist assumptions, the door to religious exemptions seems to close. As long as religion and government kept to themselves, there would be no reason to expect *legitimate* religious exercise to clash with the *legitimate* powers of government. Clashes that did occur meant that either religion or government had moved beyond its appropriate bound-

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supra note 34, at 164 n.68. While government required some degree of religious faith among the citizenry, *id.* at 164 n.63, both would best flourish when freed from interference by the other.

44 William Rawle braces this side of Jefferson's Wall when he asserts that, since religious intolerance is the *only possible motive* Congress could have for legislating on the subject of religion, "the power was thus removed." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121 (Philadelphia, H.C. Carey & I. Lea, 2d ed. 1829). Although individual states were free to legislate on religious matters, most had "recognized the perfect freedom of conscience." *Id.* at 122.

45 Laws "establishing a religion" could be expected to conflict with minority faiths. In fact, at the time of the Founding, the paradigmatic example of a religious exemption was a minority sect seeking to be exempt from a religiously based law, such as an oath requirement or religious assessment. Derisively referred to as "tolerations," the concept was excoriated by many including Thomas Paine. *See* THOMAS PAINE, THE RIGHTS OF MAN (1791), *excerpted in* 5 FOUNDERS' CONST., *supra* note 17, at 95, 95 ("Toleration is not the *opposite* of intoleration, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it. The one is the Pope, armed with fire and faggot, and the other is the Pope selling or granting indulgences. The former is church and state, and the latter is church and traffic.").

Writing in 1803, St. George Tucker quotes Paine's *Rights of Man* and then states:

> Toleration can take place only where there is a civil establishment of a particular mode of religion; that is, where a predominant sect enjoys exclusive advantages, and makes the encouragement of its own mode of faith and worship a part of the constitution of the state; but at the same time thinks fit to suffer the exercise of other modes of faith and worship.

ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803), *excerpted in* 5 FOUNDERS' CONST., *supra* note 17, at 96, 97.

Tucker did not limit religious freedom to "opinions" only, but explicitly stated that liberty of conscience included religious duties as well. *Id.* at 96-97. Professor McConnell cites this as evidence that Tucker had a broader conception of religious freedom than Jefferson. *See* McConnell, *supra* note 8, at 1452. As the above passage illustrates, however, Tucker placed "exemptions" in the same category as Thomas Paine: "tolerations" that would disappear with the abolishing of establishments.

ary. As the previous section points out, attempts to place religious exemptions in the Constitution failed, as did the attempt to protect religious equality in the states. At the very least, then, the evidence is ambiguous regarding the Founders' intent to provide for exemptions from generally applicable laws.

The Founding, however, is not the end of the story. In the years following the adoption of the Constitution and the Bill of Rights, new experiences shaped assumptions regarding the optimal scope of religious liberty. Different theories of the proper relationship between church and state would find expression in the actions of the government as well as religious groups. Focus on Founders like Jefferson and Madison, and one sees federalism and separationism. By Reconstruction, however, a very different picture had emerged.

II. THE NEW REPUBLIC: RELIGIOUS REPUBLICANISM AND THE RISE OF RELIGIOUS SOCIAL ACTIVISM

A. Expanding the Sphere of Government: Religious Republicanism

1. The Religious Republican View of the Role of Religion in a Democracy.—At the same time that separationists were fighting the good fight against government-supported religion in Virginia, a number of states had enacted laws that assumed it was the government's duty both to support and to protect the religious exercise of the majority.[46] I call this approach religious republicanism.

In his Farewell Address, George Washington issued a warning:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure; reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[47]

Since the time of the Revolution, republican political theory had embraced the idea that government had a responsibility to support and encourage religion as a means to promote public morality.[48] Separation-

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[46] This fact by itself calls into question an interpretation of the religion clauses that focuses solely on the views of Jefferson and Madison. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (2d ed. 1988).

[47] 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 494-95 (1950) (quoting George Washington, Farewell Address (1796)).

[48] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 426-29 (1969). If anything, the "new" idea was the separationist theory that religion and government did not require one another's support. According to James Madison, "the prevailing opinion in Europe, England not excepted, has been that Religion could not be preserved without the support of the Government nor Government be supported without an established religion." Letter from James Madison to Rev. Jasper Adams (1832), *in* CHURCH AND STATE IN AMERICAN HISTORY 77 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987). Therefore, "[i]t remained for North America to bring the great & interesting subject to a fair, and finally to a decisive test." *Id. See generally,*

ists like Jefferson read the religion clauses as requiring government to take an agnostic stance—no law could issue "respecting religion" whether that law be for or against religious exercise.[49] The new United States, however, was anything but agnostic. Major religious movements occurred between the Revolution and the Civil War.[50] By the early nineteenth century, it had become apparent that the *federal* government, as well as the states, would play a role in the promotion of "general religion."[51]

Where constitutional scholars like Rawle and Tucker had stressed separationism in their interpretation of the First Amendment,[52] by the 1830s Joseph Story could write that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice."[53] Indeed, those who believed in the truth of Christianity

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Smith, *supra* note 34, at 164-65 (discussing the received wisdom that church and state must work together).

49 Letter from Jefferson to Rev. Miller, *supra* note 35, at 1186-87 (describing the religion clauses as "the provision that no law shall be made respecting the establishment, or free exercise, of religion").

50 In particular, the Second Great Awakening, which occurred in the 1820s-30s. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992). What is known as the First Great Awakening occurred in the mid-eighteenth century. *See* 1 STOKES, *supra* note 47, at 240-41.

51 In the period between the Founding and the Civil War, the government in Washington explicitly supported religion in a variety of ways. Perhaps the first exhibition of religious republicanism was George Washington's Inaugural in 1789 which included the "divine service." *See* 1 STOKES, *supra* note 47, at 484. Maj. Pierre Charles L'Enfant, as part of his design for the "national city," presented designs to President Washington for "the grand church," which was "intended for national purposes, such as public prayer, thanksgivings, funeral Orations, &c., and assigned to no particular Sect or denomination, but equally open to all." *Id.* at 493; *see also* George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), *in* 5 FOUNDERS' CONST., *supra* note 17, at 94, 94 ("[I]t 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 . . . . And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations . . . to enable us all . . . to promote the knowledge and practice of true religion and virtue . . . .").

The sentiment radiated beyond Washington. The Northwest Ordinance of 1787 established public education for the purpose of promoting "religion, morality, and knowledge." Northwest Ordinance of 1787, ch. 8, art. III, 1 Stat. 50, 52 n.(a) (1789). There was also federal support of Christian education of the Indians, including Jefferson's treaty with the Kaskasia Indians, which provided for a salary paid by the United States government for a Catholic priest and for U.S. funding of the erection of a Catholic church. *See* Treaty Between the United States of America and the Kaskasia Tribe of Indians, Aug. 13, 1803, *reprinted in* ROBERT CORD, SEPARATION OF CHURCH AND STATE 261 (1982); *see also* Vidal v. Philadelphia, 43 U.S. (2 How.) 127, 198-199 (1844) (Story, J.) ("It is unnecessary for us . . . to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country . . . .").

52 *See supra* notes 44-45.

53 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833), *excerpted in* 5 FOUNDERS' CONST., *supra* note 17, at 108, 108.

had the right to expect the government "to foster, and encourage it among all the citizens and subjects."[54]

Implicit in nineteenth-century religious republicanism was the idea that We the People were a *religious* people and had created a national government grounded on religious principles.[55] The idea of a national faith was symbolically represented in a variety of actions by the first administration[56] and found expression in law in the 1811 case of *People v. Ruggles*.[57] In *Ruggles*, Chancellor James Kent upheld a conviction for blasphemy on the grounds that, although New York had no explicit blasphemy laws, "to revile with malicious and blasphemous contempt, the religion professed by almost the whole community . . . strike[s] at the root of moral obligation, and weaken[s] the security of the social ties."[58] Declared Chancellor Kent: "[W]e are a christian people, and the morality *of the country* is deeply ingrafted upon christianity."[59]

Similarly, in *Updegraph v. Commonwealth*,[60] Judge Duncan repeats Chancellor Kent's statement that "we are a christian people" and notes that "[n]o society can tolerate a wilful and despiteful attempt to subvert its religion, no more than it would break down its laws—a general, malicious, and deliberate attempt to overthrow Christianity, general Christianity."[61] Religion was "the cement of civil union, and the essential support of legislation."[62]

Again, what is striking in these decisions is the assumption of a *national* faith.[63] If the government is based upon adherence to certain prin-

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54 *Id.*; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292 (George Lawrence trans., J.P. Mayer ed., 1969) (1833) ("Religion, which never intervenes directly in the government of American society, should . . . be considered as the first of their political institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof.").

55 According to Tocqueville, "For the Americans the ideas of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other." *Id.* at 293.

56 *See supra* note 51.

57 8 Johns. 290 (N.Y. 1811), *reprinted in* 5 FOUNDERS' CONST., *supra* note 17, at 101.

58 *Id.* at 101-02.

59 *Id.* at 101 (emphasis added). The idea that law should reflect the religious character of the people survived well into the twentieth century. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (Douglas, J.) ("We are a religious people whose institutions presuppose a Supreme Being.").

60 11 Serg. & Rawle 394 (Pa. 1824), *reprinted in* 5 FOUNDERS' CONST., *supra* note 17, at 170.

61 *Id.* at 173. Judge Duncan goes on to state that "[b]y general Christianity is not intended the doctrine or worship of any particular church or sect; the law leaves these disputes to theologians; it is not known as a standard by which to decide political dogmas." *Id.* at 174.

62 *Id.* (paraphrasing Plutarch).

63 For example, the New York State Constitutional Convention of 1821 declared their support for the *Ruggles* decision and turned back an attempt to include a provision stating that no particular religion shall be "declared or adjudged" the law of the land. *See* REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821: ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 464, 574-77 (1821); *see also* State v. Ambs, 20 Mo. 214, 216-17 (1854) ("[The Missouri constitution] appears to have been made by Christian men. The constitution, on its face, shows that the Christian religion was the religion of its framers.");

ciples of religious faith, it is both "necessary and proper" for the government to support and protect that faith.[64] Note that under the separationist-federalist reading of the First Amendment, this is exactly what the national government could *not* do; the national government was intended to have *no* power "respecting religion."[65] The religious republicans, however, shifted the focus of the religion clauses from the agnostic term "respecting" and onto (what they believed to be) the sectarian term "establishment."

Recall that to Jefferson and Madison, the term "respecting" applied to both the Establishment and Free Exercise [66]—it was an agnostic term representing the intention to reserve power over religion to the states. The religious republicans, on the other hand, particularized "respecting" by focusing on the Establishment Clause and interpreting it to refer to the establishment of a particular Christian sect. According to Joseph Story,

> The real object of the amendment was, not to countenance, much less advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[67]

Although the Establishment Clause prevented the federal govern-

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Lindenmuller v. People, 33 Barb. 548, 562 (N.Y. App. Div. 1861) ("Religious tolerance is entirely consistent with a recognized religion. Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession.").

64 Joseph Story, in his *Commentaries on the Constitution*, noted that "there will probably be found few persons in this, or in any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage Christian religion generally, as a matter of sound policy, as well as revealed truth." STORY, *supra* note 53, at 108. "Probably at the time of the adoption of the Constitution, and of the [First Amendment] . . . 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." *Id.* at 109.

65 *See, e.g.*, Letter from Jefferson to Rev. Miller, *supra* note 35, at 1186-87 (emphasis added); *see also supra* note 17 and accompanying text.

66 *See supra* note 35 and accompanying text; *see also* Madison, *supra* note 17, at 146-47 ("For if Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only 'they shall not abridge it,' and is not said, 'they shall make no law respecting it,' the analogy of reasoning is conclusive that Congress may *regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it; because it is said only 'they shall not prohibit it,' and is *not* said 'they shall make no law *respecting*, or no law *abridging* it.' ").

67 STORY, *supra* note 53, at 109. At different points in his *Commentaries*, Story appears to adopt both the old federalist view of the First Amendment and the new religious republican view of the religion clauses. On the one hand, Story asserts that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons," and that the duty "to foster, and encourage [Christianity] among all the citizens and subjects" was "a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience." *Id.* at 108. On the other hand, "the *whole* power over the subject of religion is left *exclusively* to the *state* governments, to be acted upon according to their

ment from establishing a particular religious sect, it did not prevent the support and encouragement of what Judge Duncan called "general Christianity."[68] Government action was constitutional as long as all (Christian) sects were benefitted.[69] Prosecuting someone for blaspheming the person of Christ involved a matter of concern to all Christians and was, therefore, a matter "independent of any religious establishment or the rights of the church."[70]

In its rejection of the separationist admonition that government remain aloof from spiritual affairs, religious republicanism constitutes a breach of Jefferson's Wall. The breach, however, moved in only one direction; although the government had an interest in involving itself with religion, religion was still expected to remain in its sphere. More than this, government wielded the power to define the scope of that sphere.

2. Religious Exemptions Under Religious Republicanism: Defining the Sphere of Minority Free Exercise.—In the age of religious republicanism, the emphasis was on republicanism. Although good government was served by encouraging religion in general, the public good still took precedence over religious scruples; where the two conflicted, religion had to yield to the majority. Accordingly, the sphere of religion expanded or contracted according to the majority's definition of "the public good." Religious exemptions from generally applicable laws under such a system would rarely be granted; compliance with a generally applicable law was almost *per se* in the public interest.

In fact, religious exemptions were regularly denied.[71] According to

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own sense of justice, and the state constitutions." *Id.* at 110 (emphases added). Story may have intended to distinguish "sectarian power" from "power over general religion." To Story, the latter would be within the legitimate scope of civil government.

68 *See* Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824), *reprinted in* 5 FOUNDERS' CONST., *supra* note 17, at 173; *see also id.* at 174 ("By general Christianity is not intended the doctrine or worship of any particular church or sect.").

69 *See* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49 (1815) (rejecting a claim that state laws incorporating the Episcopal Church in Virginia violated that state's constitution and noting that "it is difficult to perceive, how it follows as a consequence, that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns").

70 *Ruggles*, 8 Johns. at 290; *see also* STORY, *supra* note 53, at 108.

71 *See* Commonwealth v. Drake, 15 Mass. 161 (1818) (refusing, without explanation, to overturn a criminal conviction based on a confession made by a man to members of his church); People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), *excerpted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 209 (1955) (denying motion of defendant in a murder trial to bar testimony of a Protestant clergyman to whom he had confessed while in prison); Specht v. Commonwealth, 8 Pa. 312 (1848) (rejecting challenge of Sunday closing law by member of the Seventh Day Baptist Congregation); Simon's Executors v. Gratz, 2 Pen. & W. 412 (Pa. 1831) (rejecting argument of Jewish plaintiff who had taken a nonsuit rather than appear in court on a Saturday, argument based on the state liberty of conscience clause); Commonwealth v. Wolf, 3 Serg. & Rawle 48 (Pa. 1817) (rejecting challenge by a Jewish merchant to state Sunday closing law); Stansbury v. Marks, 2

John Bannister Gibson, Chief Justice of the Pennsylvania Supreme Court, the rights of conscience involved

> [s]imply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal.*[72]

To Chief Justice Gibson, "there are no duties half so sacred as those which the citizen owes to the laws . . . . That every other obligation shall yield to that of the laws, as to a superior moral force, is a tacit condition of membership in every society, whether lay or secular, temporal or spiritual, because no citizen can lawfully hold communion with those who have associated on any other terms."[73] Thus, while there may be good policy reasons for religious exemptions from generally applicable laws, "considerations of policy address themselves with propriety to the legislature, and not to a magistrate whose course is prescribed not by discretion, but rules already established."[74]

The very premise of religious republicanism made religious exemptions almost nonsensical. If religion was supported for the public good, "conscientious doctrines and practices can claim no immunity from the operation of general laws made for the government and to promote the welfare of the whole people."[75] Although the cases reveal no clear pattern in their rejection of religious exemption claims,[76] they are all consistent with the religious republican belief that the needs of society come

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Dall. 213 (Pa. 1793) (Jewish man threatened with fine of £10 for refusing to be sworn as a witness because it was Saturday, his Sabbath); State v. Willson, 13 S.C.L. (2 McCord) 393 (1823) (rejecting claim by a member of religious sect that an individual could refuse grand jury duty on the ground of religious conscience).

72 Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160 (Pa. 1828) (Gibson, C.J., dissenting) (majority holding, on grounds not implicating the religion clauses of the state constitution, that trial court did not err in excluding a juror whose religious beliefs were opposed to capital punishment).

73 Simon's Executors v. Gratz, 2 Pen. & W. 412, 417 (Pa. 1831).

74 *Id.*

75 *Specht*, 8 Pa. at 322.

76 *Gratz* and *Willson* are explicit rejections of religious exemptions. *See supra* note 71. *Stansbury* and *Drake*, however, are unexplained, and *Wolfe* and *Specht*, given the secular interests at stake, can be distinguished from cases involving abridgment of religious exercise. *See supra* note 71. Finally, *Lesher*, apart from the dissent that presages the views Gibson would later write into law in *Gratz*, is constitutionally irrelevant. Even if not clear evidence of Religious Republicanism at work, the "mixed-bag" nature of these cases is even less evidence of an operating principle in favor of religious exemptions. McConnell discusses these cases and concludes that although religious exemptions may have been disfavored at the appellate level, they may have been frequently granted as a matter of judicial discretion in the lower courts. *See* McConnell, *supra* note 8, at 1510-11. Even if true, it is difficult to see how this would support a view of *constitutionally compelled* religious exemptions. It is also possible that religious scruples were protected on a more informal level. *See* Carol Weisbrod, *Comment on Curry and Firmage Articles*, 7 J.L. & RELIGION 315 (1989). This certainly appears to be the case with juries refusing to convict those assisting runaway slaves. *See infra* part V. Such exemptions were discretionary, of course, and do not implicate the constitutional restraints on government.

before the beliefs of a religious minority.[77]

In this belief, religious republicanism shared the majoritarian ideology animating the original First Amendment. Indeed, both religious republicanism and Jeffersonian separationism required religion to defer to the perceived needs of the majority. According to Alexis de Tocqueville:

> The more people are assimilated to one another and brought to an equality, the more important it becomes that religions, while remaining studiously aloof from the daily turmoil of worldly business, should not needlessly run counter to prevailing ideas or the permanent interests of the mass of the people . . . . So in all matters not contrary to faith one must defer to the majority.[78]

Although (because) religion was essential to a democracy, the interests of the community prevailed over the claims of a minority sect. Nowhere was this more evident than in the case of polygamy.

3. Polygamy.—The antipolygamy laws, introduced in the Thirty-sixth Congress and passed in the Thirty-seventh, provide an excellent window on the scope of religious freedom in the first half of the nineteenth century. Here we find all the elements of classic religious republicanism: the government's active involvement in religious matters, the belief that religion and government are inextricably linked, and finally, the requirement that minority faiths defer to the majority.

On February 15, 1860, in the House of Representatives, Justin Morrill of Vermont introduced a bill "to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah."[79] The bill's preamble read:

> [I]t is admitted that polygamy is permitted by the municipal regulations of one of the Territories of this Union, and is sought to be justified on the ground that this abomination in a Christian country is a religious rite of the

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[77] There is one contemporary example of a true religious exemption. *See* People v. Philips, *excerpted in Privileged Communications to Clergymen*, *supra* note 71, at 199. In this case from the early 1800s, the New York Court of General Sessions held that a Catholic priest could not be compelled to testify about statements made to him by the defendant during confession. *Id.*; *see also* 1 STOKES, *supra* note 47, at 838. *Philips*, however, appears to be unique. In fact, another New York municipal court expressly declined to apply *Philips* to a case involving confession to a Protestant clergyman. *See* People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817). Moreover, *Philips* itself was criticized by at least one other state court. *See* Simon's Executors v. Gratz, 2 Pen. & W. 412, 417 (Pa. 1831).

[78] TOCQUEVILLE, *supra* note 54, at 448. Tocqueville's caveat "in all matters not contrary to faith" appears to leave the door open a crack to conscientious objection. The doorway, however, was extremely narrow. Tocqueville limited the legitimate sphere of "faith" to matters having nothing to do with civil government. *See id.* at 445 ("[R]eligions should be most careful to confine themselves to their proper sphere, for if they wish to extend their power beyond spiritual matters they run the risk of not being believed at all. They should therefore be at pains to define the sphere in which they claim to control the human spirit, and outside that sphere it should be left completely free to follow its own devices.").

[79] CONG. GLOBE, 36th Cong., 1st Sess. 793 (1860).

> inhabitants of said Territory; and that no principle of self-government or citizen sovereignty can require or justify the practice of such moral pollution.[80]

The bill criminalized the practice of polygamy and repealed the ordinance of the territorial government incorporating the Church of Jesus Christ of Latter Day Saints "and all other acts . . . which establish, support, maintain, shield, or countenance, polygamy."[81] Finally, the bill carried a proviso:

> [P]rovided, that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance, the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.[82]

(a) A threat to the Republic.—What made polygamy so abhorrent—one of the "twin relics of barbarism" to the Republicans[83]—was

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[80] *Id.* at 1410. Interestingly, the bill's preamble was eventually removed on the ground that "[i]t contains what is true; but it contains what should not be inserted in a law.... A law should speak in the language, not of apology, or remonstrance, or entreaty, or argument, but of mandate—of command." *Id.* at 1495 (remarks of Mr. Millson).

[81] *Id.* at 1410.

[82] *Id.*

[83] The other "twin" was slavery. In fact, by the mid-nineteenth century, the fates of slavery and polygamy were inextricably bound together. As early as 1853, Charles Sumner had equated polygamy with slavery in support of his argument that Congress had power to regulate "domestic institutions" in the territories. Arguing against the Kansas-Nebraska Act, Sumner stated:

> The relation of master and slave is sometimes classed with the domestic relations. Now, while it is unquestionably among the powers of any State, within its own jurisdiction, to change the existing relation of husband and wife, and to establish polygamy, I presume no person would contend that a polygamous husband, resident in one of the States, would be entitled to enter the national Territory with his harem—his property if you please—and there claim immunity. Clearly, when he passes the bounds of that local jurisdiction, which sanctions polygamy, the peculiar domestic relation would cease; and it is precisely the same with Slavery.

CONG. GLOBE, 33rd Cong., 1st Sess. 268 app. (1854).

The Republican Party platform of 1856 declared that "the Constitution confers upon Congress sovereign power over the territories of the United States for their government, and that in the exercise of this power it is both the right and the duty of Congress to prohibit in the territories those twin relics of barbarism—Polygamy and Slavery." HORACE GREELEY & JOHN F. CLEVELAND, POLITICAL TEXT-BOOK FOR 1860, at 22 (Negro Universities Press 1969) (1886). The Republican assertion that the power to regulate the one included the power to regulate the other was not lost on the Democrats in the 36th Congress. *See* CONG. GLOBE, 36th Cong., 1st Sess. 1410 (1860) (remarks of Mr. Branch) ("I will suggest to my friends upon this side of the House, that if we render polygamy criminal, it may be claimed that we can also render criminal that other "twin relic of barbarism," slavery, as it is called in the Republican platform of 1856."). In fact, it was Democratic opposition to the antipolygamy bill that prevented its passage until after the Civil War had begun and the seceding states had withdrawn from Congress. *See* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416 n.39 (1986).

Mormonism originally was opposed to slavery. In his 1844 campaign for the Presidency of the United States, Joseph Smith ran on a platform calling for the "break down [of] slavery" and removal

the fact that it was a direct affront to the religious beliefs of the majority. Polygamy was "a reproach to the Christian civilization."[84] It was a "monstrosity," and an "offense against religion, and against the laws of God."[85] Congress thus had a duty to "overrule and correct Mormon abuses and vices—to enforce among them the canons of an approved and Christian morality."[86] Mormons should be "made subservient to the standard of Christian morality, as well as the legal authority of the Constitution."[87]

The emphasis on forcing the Mormons to follow the standards of "Christian morality" *and* "the legal authority of the Constitution" is telling—polygamy was not simply out of step with "accepted Christianity," but the domestic arrangements of the Mormons were likewise "repugnant to every principle of republican government."[88] Indeed, polygamy was *impossible* under a republican form of government "while the sexes continue to be equal in numbers. Wherever it has existed . . . it has always been protected by absolute military despotism. It can be sustained under no other system of government."[89]

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of "the shackles from the poor black man." Newell G. Bringhurst, *The Mormons and Slavery—A Closer Look*, 50 PAC. HIST. REV. 329 (1981), *reprinted in* 16 [RELIGION AND SLAVERY] ARTICLES ON AMERICAN SLAVERY 65, 68 (Paul Finkelman ed., 1989) [hereinafter RELIGION AND SLAVERY] (quoting JOSEPH SMITH, JR., VIEWS ON THE GOVERNMENT AND POLICIES OF THE UNITED STATES 3 (1844)). In 1852, however, Brigham Young and other Mormon leaders legalized slavery in Utah. *Id.* The Mormons thus saw the southern members of Congress as natural allies when Mormon polygamy came under increased attack in the 1850s and '60s. By that time, "both the Saints and slaveholding southerners looked upon popular sovereignty and states rights as the best means to protect their respective 'peculiar institutions' from outside attack." *Id.* at 69.

84 CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (remarks of Mr. McClernand).

85 *Id.* at 1498 (remarks of Mr. Etheridge); *see also id.* at 1540 (remarks of Mr. Gooch) ("[Polygamy is] an evil which corrupts the morals of the community, pollutes the blood, and confounds all title to property.").

86 *Id.* at 1515 (remarks of Mr. McClernand).

87 *Id.* (remarks of Mr. Clark).

88 *Id.* at 1496 (remarks of Mr. Pryor).

89 *Id.* at 1520 (remarks of Mr. Thayer). Thayer believed that as long as a democratic form of government was maintained in the territories, polygamy would disappear on its own. The concern of other members of Congress was, as Thayer himself pointed out, precisely that polygamy could survive under a despotic government—*i.e.*, society under Brigham Young.

Along with an abhorrence to polygamy, there was also widespread suspicion of the Mormons themselves. According to Mr. Simms of Kentucky, the Mormons "do not recognize the obligations of our religion, or the oaths that are made sacred by it. They do not even recognize allegiance to our Federal Government. They have set up for themselves; they stand in opposition to both." CONG. GLOBE, 36th Cong., 1st Sess. 202 app. (1860). The belief that the Mormons were setting up a government in opposition to the United States was widespread—and may have had some truth to it. Originally, the Mormons proclaimed the kingdom of Deseret and did not recognize American authority until threatened with military force in 1858. *See* Laycock, *supra* note 83, at 416 n.39; *see also* Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 352, 352-53 (Roy P. Basler ed., 1946) (suggesting that it "is probable . . . that the people of Utah are in open rebellion to the United States"). Indeed, some believed the Mormons were engaged in setting up a theocracy in Utah in violation of the Establishment Clause of

It is this link between "proper" religion (Protestant Christianity) and the proper functioning of the republic that lies at the heart of the antipolygamy laws. In fact, it would be difficult to find a practice more offensive to the principles of the age, for polygamy not only implicated religion in general, but also implicated the nation's source of religious faith: women.

Alexis de Tocqueville, in his treatise on the United States, *Democracy in America*, commented on women's special role in maintaining religion:

> I do not doubt for an instant that the great severity of mores which one notices in the United States has its primary origin in beliefs. There religion is often powerless to restrain men in the midst of innumerable temptations which fortune offers. It cannot moderate their eagerness to enrich themselves, which everything contributes to arouse, but it reins supreme in the souls of the women, and it is women who shape mores. Certainly of all the countries of the world America is the one in which the marriage tie is most respected and where the highest and truest conception of conjugal happiness has been conceived.[90]

To the religious republican, religion was necessary for the survival of the Republic, and women, in their role as the head of the domestic household, were essential to religion. Regulation of the "domestic relation" was something "which every age has demanded; which every nation has practiced; which is necessary for the good of the whole community, and even for the protection of and advantage of those for whom its restraints are intended."[91] The virtue of society depended on the virtue of women and the influence of that virtue exerted in the home. According to Mr. Nelson, society

> was designed that [woman] should give her whole heart in exchange for the undivided affection of man, and become his partner in lawful marriage. Enthroned in the domestic circle, she becomes our refuge amidst the storms and conflicts of life, and sheds a halo of happiness around the joys of home.[92]

In this respect, women and the virtue they inculcated in society were a "public good."[93]

"[W]oman," according to Joseph Hopkinson, "is inseparably connected with everything that civilizes, refines, and sublimates man."[94]

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the First Amendment. *See, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. 190 app. (remarks of Mr. Nelson).

90 TOCQUEVILLE, *supra* note 54, at 291. Thomas Jefferson also noted, though with a negative connotation, the special role of women in 19th-century religion. *See* Letter from Jefferson to Dr. Cooper, *supra* note 39, at 1464.

91 CONG. GLOBE., 36th Cong., 1st Sess. 1494 (1860) (remarks of Mr. Millson).

92 *Id.* at 194 app. (remarks of Mr. Nelson).

93 WOOD, *supra* note 50, at 357.

94 *Id.* (quoting Joseph Hopkinson, Annual Discourse, delivered before the Pennsylvania Academy of the Fine Arts (1819)) (internal quotation marks and citation omitted). Gordon Wood describes the 19th century practice in which "wives and mothers were . . . urged to use their special

Thus, it is not surprising to find Representative Nelson proposing that the antipolygamy law be passed "in the name of the respectable and virtuous women of the United States."[95] Indeed, far from "interfering" with the domestic relations in the territories, the proposed legislation was intended to *protect* the domestic institution of marriage[96] and thereby to protect the republic's crucial source of public virtue.

(b) Polygamy and the First Amendment.—As evidenced in the bill's proviso,[97] Congress was aware that the proposed legislation might conflict with the "rights of conscience"—a phrase linked to the religion clauses of the First Amendment.[98] While Congress could have argued that it had plenary authority in the territories and was thus unrestrained by the Bill of Rights in that arena,[99] this argument was never made. By explicitly stating in the law itself that it was not to be construed in a way that might violate the "right to worship God according to the dictates of conscience," while at the same time criminalizing a religious practice, the law provides insight into the contemporary understanding of the scope of constitutionally protected religious liberty.

The idea that free exercise of religion might require immunity from laws passed for the public good was a "pernicious philosophy."[100] In fact, the very idea seems anomalous in an age when most viewed religion as a necessary safeguard against the dangers of a radically individualized society.[101]

[I]t seems to me that there would be just as much logic and as much propri-

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talents to cultivate in their husbands and children the proper moral feelings—the virtue, benevolence, and social affections—necessary to hold a sprawling and competitive republican society together." *Id.*

95 CONG. GLOBE, 36th Cong., 1st Sess. 194 app. (1860) (remarks of Mr. Nelson).

96 *Id.* at 198-99 app. (remarks of Mr. Simms).

97 *See supra* note 82 and accompanying text.

98 The quotation in the proviso probably comes from the 1849 Constitution of the State of Deseret (better known as Mormon-controlled Utah Territory) which read:

> All men shall have a natural and inalienable right to worship God according to the dictates of their own consciences, and the General Assembly shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof . . . .

CONSTITUTION OF THE STATE OF DESERET (1849), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 375, 380 (William F. Swindler ed., 1973-79) [hereinafter SOURCES AND DOCUMENTS]; *see also* Madison, *supra* note 25, at 146 (describing the First Amendment religion clauses as securing the "liberty of conscience").

99 *See* U.S. CONST. art. IV, § 3, para. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

100 Mr. Pryor of Virginia, for example, explicitly rejected the principle of religious exemptions under the First Amendment on the grounds that "this argument, if sound in principle, will avail to cover any abomination which affects a religious character. It will suffice for the protection of Thugism or Suttee, as well as polygamy. Plainly, then, it is an unsound argument and a pernicious philosophy which conducts to such absurd and mischievous consequences." CONG. GLOBE, 36th Cong., 1st Sess. 1496 (1860).

101 *See* WOOD, *supra* note 50, at 332-34 (noting the 19th century's reliance on religion to incul-

> ety in asserting that any given number of men might band themselves together as robbers, murderers, and thieves, and call that their religion, as to say that the people of Utah can, by joining together under the designation of "Latter Day Saints," claim an especial protection under the provisions of the laws of the United States.[102]

Although religion was essential to society, religious freedom could never be invoked to justify "licentious" behavior.[103] To nineteenth-century religious republicans, the scope of both the Establishment and Free Exercise Clauses was limited by the majority's concern with the virtue and good order of society.

4. Removing a Doctrinal Barrier Against Religious Exemptions.— Although religious republicanism rejected the concept of religious exemptions from generally applicable laws, it nevertheless opened the door to a new understanding of the values underlying the religion clauses. By recognizing the peculiar status of religion in a democracy, religious republicanism removed a doctrinal barrier against attempts to protect the free exercise of religion. Where separationists might reject special pro-

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cate the virtue necessary to sustain a democracy in the face of the radical individualism that grew out of the Revolution and the First Great Awakening). Tocqueville was also concerned with how to sustain public morality in a society based on equality and individualism. *See* Marvin Zetterbaum, *Alexis de Tocqueville, in* HISTORY OF POLITICAL PHILOSOPHY 761, 778 (Leo Strauss & Joseph Cropsey eds., 1987).

102 CONG. GLOBE, 36th Cong., 1st Sess. 192 app. (1860) (remarks of Mr. Nelson); *see also id.* at 1514 (remarks of Mr. McClernand) ("[Mormonism] combines all the incentives which can appeal to the passions of bad men. It concedes to the sensual many wives; to the military adventurer the distinctions of military position; and to the priest abundant tithes and perfect impunity to the civil authority."); *id.* at 191 app. (remarks of Mr. Nelson) (the Mormons are "a set of fiends, who know no mercy, no law, but who murder and plunder at will").

As the above quotes imply, animosity against the Mormons went beyond distaste for their domestic arrangements. Indeed, public reaction against the Mormons did not begin with the endorsement of polygamy. As early as the 1830s, mobs had razed a Mormon newspaper and tarred a Mormon Bishop in Missouri. *See* 2 STOKES, *supra* note 47, at 42. Polygamy, on the other hand, was not "revealed" to Joseph Smith until 1843 and not publicly advocated until after his death in 1847. *Id.* at 47. It was to escape the same persecutions that resulted in Smith's death that led the Mormons to Utah in the first place. *See* Laycock, *supra* note 83, at 416.

Mere prejudice against a new and unorthodox faith explains a great deal of the reaction against the Mormons. Nevertheless, however predisposed the majority was to find fault with the Mormons, the practice of polygamy would have struck a nerve deep in the psyche of the religious republicans regardless of the practitioners. The fact that it was practiced by a group already targeted by the majority no doubt made the reaction that much more pronounced.

103 Thus, Pryor's belief that protecting polygamy under the free exercise clause would be stretching that Amendment too far:

> Sir, there is something shockingly incongruous in the association of the polygamous practices of a barbarous age and a debased people with the Christian civilization of the nineteenth century and the chastened liberties of this enlightened nation. . . . [The Mormons] are a reproach in the eyes of the nations—a reproach upon civil liberty, as exhibiting to what extravagance of licentious development republican institutions may conduce; and a reproach upon religious freedom, as betraying the excesses of depravity which may flourish under shelter of indiscriminate toleration.

CONG. GLOBE, 36th Cong., 1st Sess. 1496 (1860).

tections as "laws respecting religion," the religious republicans believed that legislation supporting religion *qua* religion did not necessarily violate the Establishment Clause and might even be required. This insight would play a crucial role in the adoption of the Fourteenth Amendment, when the religious republican duty to support and protect the religious exercise of the majority would be transformed into the duty to support and protect the free exercise of the individual.

That day, however, had not yet arrived. Even if religion had a special role in a democracy, that role was defined by the majority—religion had no right to claim exemption from laws passed in pursuit of the common good. This majoritarian approach to religious rights required cooperation on the part of the religious community. Indeed, there is reason to believe that until the 1830s, the majority of religious faiths went out of their way to avoid conflicts with the civil government:

> I have said that American priests proclaim themselves in general terms in favor of civil liberties without excepting even those who do not admit religious freedom; but none of them lend their support to any particular political system. They are at pains to keep out of affairs and not mix in the combination of parties.[104]

We might call this religious accommodation of the government. There would be no need, no call, for religious exemptions as long as religion remained accommodating. Religion did not.

B. Expanding the Sphere of Religion: The Rise of Religious Social Activism

Religion was not immune to the heady individualism that characterized post-Revolutionary America. In the First Great Awakening, "[r]evivalist clergymen urged the people to trust only in 'self-examination' and their own private judgments."[105] The Second Great Awakening, which occurred in the first decades of the nineteenth century, expanded on these same ideas. According to Baptist evangelist Elias Smith, the people were "wholly free to examine for ourselves what is truth, without being bound to a catechism, creed, confession of faith, discipline or any rule excepting the scriptures."[106] The impact of this individualistic gospel impressed contemporary political theorists. James Mill, in his *Essay on Government*, described how "[t]he power of personal interpretation of the Bible, without priestly guidance, 'has totally altered the condition of human nature and exalted man to what may be called a

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104 TOCQUEVILLE, *supra* note 54, at 291; *see also* Hamburger, *supra* note 11, at 943-46 (noting that, at the Founding, neither dissenters nor established churches sought to be exempt from civil laws).

105 WOOD, *supra* note 50, at 145.

106 *Id.* at 332 (quoting ELIAS SMITH, THE LOVING KINDNESS OF GOD DISPLAYED IN THE TRIUMPH OF REPUBLICANISM IN AMERICA (1809)).

different stage of existence.' "[107]

This radical individualism led to a massive fragmentation among the denominations.[108] As the influence of denominations waned, evangelists like Lyman Beecher feared that nothing protected "society against depravity within and temptation without" except the force of God's law "written upon the heart of each individual."[109] Only the moral character of individuals remained to hold together an unruly and splintered society.[110] According to Gordon Wood, "[t]o be successful in America, religion had to pre-occupy itself with morality."[111] To the dismay of separationists like Jefferson and Madison,[112] the clergy took their newfound responsibility for society's character to heart and formed societies against, among other things, gambling, drinking, Sabbath-breaking, profanity, and horse racing.[113] Rejecting both separationist and religious republican admonitions that religion remain aloof from political affairs, the religious activists of the nineteenth century invaded the public arena on an unprecedented scale.

Of course, the issue that would occasion the greatest conflict between religion and government was slavery. Here, the separationist belief that the overlap of church and state would be so minor as to involve only "unessential points" became demonstrably untenable. Moreover, the suppression of slave religion would provide the framers of the Fourteenth Amendment with clear examples of why a second adoption of the Free Exercise Clause was necessary.

III. THE ABOLITIONISTS AND THE SUPPRESSION OF SLAVE RELIGION

A. The Abolitionists

Abolitionism had its roots in the evangelistic movements arising out of the Second Great Awakening.[114] To the religiously inspired abolition-

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107 Timothy Fuller, *Jeremy Bentham and James Mill*, *in* HISTORY OF POLITICAL PHILOSOPHY, *supra* note 101, at 710, 728 (quoting James Mill, *An Essay on Government* (1820)).

108 WOOD, *supra* note 50, at 332-33.

109 *Id.* at 333 (quoting Lyman Beecher, *The Necessity of Revivals of Religion to the Perpetuity of Our Civil and Religious Institutions*, THE SPIRIT OF THE PILGRIMS (1831)).

110 *Id.*

111 *Id.*

112 *Id.* at 366-69 (describing the Founders' gloomy reaction to the rise of evangelical Christianity and the decline of enlightenment separation of church and state). Jefferson in particular was troubled by the rise of "fanatical" evangelicalism. *See* Letter from Jefferson to Dr. Cooper, *supra* note 39, at 1464.

113 WOOD, *supra* note 50, at 335.

114 Of particular importance was the religious revival begun under Charles G. Finney in Western New York in 1824-25, whose converts went on to play a major role in abolitionism. 2 STOKES, *supra* note 47, at 145. Those influenced by Finney's preaching included Theodore Dwight Weld and the "New York Philanthropists" whose money financed a great many abolitionist activities. *Id.* The revivals discarded the self-absorption of Calvinism and embraced a more liberal theology that "laid

ist,[115] slavery was an affront to the laws of God[116] and was "irreconcilable with the manifested will of our Great Creator, and with the imperative declaration of our blessed Savior 'all things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets.' "[117] William Lloyd Garrison went so far as to claim that because of its seeming endorsement of slavery, the Constitution itself was "a covenant with death and an agreement with Hell."[118] When efforts to free the slaves conflicted with the laws of the state, the more radical abolitionists exhorted the people to conform to a higher law.[119]

Believing God would deny his blessing to a nation that permitted slavery, the abolitionists embarked on a campaign to convert the country. In 1835, antislavery forces sent tracts by the hundreds to southern clergymen and postmasters with the direction that they be distributed in their communities.[120] In New England, the "Conscience Whigs" joined abolitionists in issuing a tract in which clergy were "entreated in the name of God and Christ to pray for the slave; and preach at least one sermon against the admission of Texas as a slave state, as soon as may

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emphasis on the fact that salvation was the beginning of religious experience rather than its end, and that converts must begin a new life . . . ." *Id.* The faithful were encouraged to do benevolent social work and "not merely to try to increase their personal religious life." *Id.* The revivals actually inspired two movements having to do with the slaves: the "colonizationalists" and the more radical "abolitionists." *Id.* The abolitionists themselves were encouraged by the work of William Wilberforce and Thomas Clarkson, who led the movement to abolish slavery in the British Empire, succeeding in 1833. *Id.* at 146.

115 Slavery, of course, could be opposed on a variety of grounds. As this Article is concerned with conflicts between religion and politics, it focuses on the arguments of those abolitionists who believed slavery violated the religious conscience.

116 *See* United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Joseph Story declaring that the slave trade was illegal in America because it was "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice"); *see also* 3-4 [THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35] G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 677 (1988).

117 Address to the Citizens of the State of Ohio, Concerning What Are Called The Black Laws (Issued in Behalf of the Society of Friends of Indiana Yearly Meeting, 1848) *reprinted in* SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM, 1700-1872, SER. NO. 7, 2 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 101, 101 (Paul Finkelman ed., 1988) [hereinafter STATUTES ON SLAVERY].

118 2 STOKES, *supra* note 47, at 190.

119 *See* S.G. HOWE, SLAVERY AT WASHINGTON, *reprinted in* SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM, 1700-1872, SER. NO. 4, 2 SLAVE REBELS, ABOLITIONISTS, AND SOUTHERN COURTS: THE PAMPHLET LITERATURE 445, 463 (Paul Finkelman ed., 1988) [hereinafter SLAVE REBELS]; *see also* REV. W. BEARDSLEY, NARRATIVE AND FACTS, RESPECTING ALANSON WORK, JAS. E. BURR AND GEO. THOMPSON, PRISONERS IN THE MISSOURI PENITENTIARY, FOR THE ALLEGED CRIME OF NEGRO STEALING (1842), *reprinted in* 2 SLAVE REBELS, *supra*, at 1, 23 ("By what rule is [assisting runaway slaves] justifiable? By the commands of the bible, and the whole spirit of the gospel.").

120 2 STOKES, *supra* note 47, at 153.

be."[121] Beginning with the words "[i]n the Name of Almighty God" and bearing the names of 3050 New England clergymen, a two hundred foot long memorial against the extension of slavery was presented to Congress.[122] Within a few months, 125 separate remonstrances came from the ministers of these New England states.[123] Not only had the Second Great Awakening changed the conception of the proper sphere of religion generally, but it had now become the specific duty of the abolitionists to fight what they believed was an ungodly *political* institution. Religion was invading the "sphere" of government with a vengeance.

B. The Southern Suppression of Religious Exercise

Southern governments were not disposed to take the invasion lightly. Less than a decade after Finney's religious campaign that so inspired religious interest in government activities,[124] an event occurred in Virginia that would inspire southern governments to become extremely interested in religious activities.[125] On August 22, 1831, a group of slaves headed by Nat Turner began a bloody rebellion in which seventy whites were killed before Turner and his group were captured.[126] The fact that Turner was a preacher confirmed Southern suspicions that religion, if left unregulated, could be used to dangerously subversive ends. Not only would the religious exercise of blacks in the South have to be closely monitored and controlled, but also religious sentiments flowing in from the North would have to be stanched lest slaves be incited to follow the example of the Reverend Turner. What emerged was a complex and highly regulated system of religious exercise—a system so abhorrent to

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121 NOONAN, *supra* note 32, at 170 (quoting HOW TO SETTLE THE TEXAS QUESTION (1845)).

122 2 STOKES, *supra* note 47, at 153.

123 *Id.* Southern Congressmen were so offended by the efforts of the abolitionists that they initiated the so-called "gag rules," temporarily banning such petitions from being received in Congress. *See* 1 [SECESSIONISTS AT BAY, 1776-1854] WILLIAM W. FREEHLING, THE ROAD TO DISUNION 372-73 (1990). The rules remained in effect from 1832 to 1844. *Id.* at 351; *see also* CONG. GLOBE, 27th Cong., 1st Sess. 27-28, 51, 63 (1841) (debates on the "gag rules").

124 *See supra* note 114.

125 In the slaveholding states, the relationship between the free exercise of religion (recognized in the southern state constitutions) and slavery was problematic from the beginning. For example, in 1819, Rev. Jacob Gruber, a Methodist minister, was arrested for a sermon that some Maryland residents thought might incite slaves to revolt. DAVID MARTIN, TRIAL OF THE REV. JACOB GRUBER, MINISTER IN THE METHODIST EPISCOPAL CHURCH, AT THE MARCH TERM, 1819, IN THE FREDERICK COUNTY COURT, FOR A MISDEMEANOR (1819), *reprinted in* 1 SLAVE REBELS, *supra* note 119, at 1, 3-5. In his sermon Gruber attacked cruel masters and pronounced slavery to be against the fundamental principles of Christianity; nevertheless, slaves were to be obedient to their masters lest they follow them to Hell. *Id.* at 17-20. Gruber's defense to the incitement charge was that he had a right to preach any doctrine that was not "immoral" or "contrary to the peace and good order of society." *Id.* at 34-35. Rev. Gruber was acquitted, in part because there was no evidence he had broken any laws. *Id.* at 5. Ironically, Gruber was defended by Roger B. Taney, the man who, as Chief Justice of the Supreme Court, would author the *Dred Scott* decision. *See id.* at 32.

126 1 FREEHLING, *supra* note 123, at 178-81.

members of the Thirty-ninth Congress that its abolition was explicitly cited as one of the purposes behind the Fourteenth Amendment.

1. Direct Regulation of Religious Exercise.—In response to the Turner uprising, laws were passed that directly impinged upon certain types of religious activities. For instance, in many southern states it was a crime, punishable by death, to "write, print, publish or distribute" abolitionist literature.[127] Persons found with abolitionist pamphlets or books were subject to public lashings, regardless of whether the literature had been distributed.[128] Those who attacked slavery through sermons, speeches, or written documents risked death by law[129] or at the hands of proslavery mobs.[130] The mail, with the assistance of southern federal postmasters, was "cleansed" of letters seeking to convert slaveholders to antislavery Christianity.[131] Congress itself, at the insistence of southern Democrats, instituted "gag rules," whereby antislavery petitions would be received, but immediately rejected.[132]

Direct burdens on free exercise in the South went beyond mere prohibitions of "incendiary" language or literature. Black religious assemblies were heavily regulated with severe punishments authorized for improper religious gatherings.[133] Slaves were not permitted to have their

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127 *See, e.g.*, DIGEST OF THE LAWS RELATIVE TO SLAVES AND PEOPLE OF FREE COLOUR IN THE STATE OF LOUISIANA (Published by the Louisiana Constitutional and Anti-Fanatical Society 1835) [hereinafter DIGEST], *reprinted in* 2 STATUTES ON SLAVERY, *supra* note 117, at 47, 68. The law specifically targeted "any thing having a tendency to produce discontent among the free coloured population of the State, or insubordination among the slaves therein." *Id.*

128 *See* 2 STOKES, *supra* note 47, at 151.

129 In Louisiana, language from the pulpit having the "tendency" to "produce discontent among the free coloured population of this State, or to incite insubordination among the slaves therein" was punishable by death or imprisonment. DIGEST, *supra* note 127, at 68.

130 For example, the Rev. Elijah Pomeroy Lovejoy, editor of the *Observer*, a St. Louis religious journal that attacked slavery, had his presses destroyed by proslavery mobs three times. On November 7, 1837, while defending his fourth press from destruction, he and one of his companions were killed. *See* 2 STOKES, *supra* note 47, at 36.

131 *See* 1 FREEHLING, *supra* note 123, at 290-91. Believing that such appeals were a disguised call for black revolution, Charleston Postmaster Huger locked up the "insurrectionary sheets" and sought guidance from President Jackson in Washington. *Id.* at 291. Jackson directed the sheets be held until the recipients demanded delivery, and their names taken down and published "thru the Publick journals as subscribers to this wicked plan of exciting the negroes to insurrection and to massacre." *Id.*

132 *Id.* at 372-73; *see supra* note 123.

133 In South Carolina, it was unlawful for "assemblies of slaves, free negroes, mulattoes and mestizoes" to meet "in a confined or secret place," the magistrate being authorized to "inflict such corporal punishment, not exceeding twenty lashes, upon such slaves, free negroes, &c., as they may judge necessary for deterring them from the like unlawful assemblage in the future." GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (1827), *reprinted in* 1 STATUTES ON SLAVERY, *supra* note 117, at 157, 245 (citing 2 BREVARD'S DIGEST). In the District of Columbia, "all meetings for religious worship, beyond the hour of ten o'clock at night, of *free negroes*, mulattoes or slaves, shall be and they are hereby declared to be unlawful." WORTHINGTON G. SNETHEN, THE BLACK CODE OF THE DIS-

own ministers or to worship without the presence of a white man.[134] Even when a religious gathering received the state's imprimatur, the content of the sermon was dictated by proslavery Christian ideology with the message invariably focused on the biblical admonition that slaves "obey their masters."[135]

2. Indirect Regulation of Religious Exercise.—In addition to laws that directly regulated or prohibited certain religious activities, numerous laws were passed that indirectly burdened the most basic religious freedoms. For example, laws prohibiting the assembly of blacks at night for any purpose had an unavoidable impact on black religious assemblies.[136] Of course, the "generally applicable" law having the greatest impact on free exercise in the South was the prohibition against teaching slaves how to read and write.[137] This prevented slaves from reading the Bible.[138]

TRICT OF COLUMBIA IN FORCE SEPTEMBER 1ST, 1848 (A. & F. Antislavery Society, 1848), *reprinted in* 2 STATUTES ON SLAVERY, *supra* note 117, at 179, 224 (reprinting and quoting ORDINANCES OF THE CORPORATION OF WASHINGTON (Oct. 29, 1836)); *see also* THE PERSONAL NARRATIVE OF MRS. MARGARET DOUGLASS, A SOUTHERN WOMAN, WHO WAS IMPRISONED FOR ONE MONTH IN THE COMMON JAIL OF NORFOLK, UNDER THE LAWS OF VIRGINIA, FOR THE CRIME OF TEACHING FREE COLORED CHILDREN TO READ (1854) [hereinafter DOUGLASS NARRATIVE], *reprinted in* 2 SLAVE REBELS, *supra* note 119, at 373, 435 (quoting *Virginia Code of 1833*, § 31) ("Every assemblage of negroes for the purpose of religious worship, when such worship is conducted by a negro, and every assemblage of negroes for the purpose of instruction in reading or writing, or in the nighttime for any purpose, shall be an unlawful assembly.").

134 *See* 2 STOKES, *supra* note 47, at 194.

135 A slave's Christian duty to obey her master was a major theme in the sermons and writings of antebellum southern clergymen. Focusing on the letters of St. Paul, particularly *Ephesians* 6:5-8, *Colossians* 3:22, and *Philemon*, southern theologians provided a biblical justification for slave obedience. *See* 3 THE BLACK ABOLITIONIST PAPERS 435 n.17 (C. Peter Ripley ed., 1991) [hereinafter ABOLITIONIST PAPERS].

136 *See* STROUD, *supra* note 133, at 244-45 (citing *Virginia Revised Code of 1819*).

137 Typical was the Louisiana statute of 1835 declaring that "all persons who shall teach, or permit or cause to be taught, any slave in this State to read or write, shall, on conviction thereof, before any court of competent jurisdiction be imprisoned not less than one month nor more than twelve months." DIGEST, *supra* note 127, at 68; *see also* NEGRO LAW OF SOUTH CAROLINA (John B. O'Neall ed., 1848), *reprinted in* 2 STATUTES ON SLAVERY, *supra* note 117, at 139; DOUGLASS NARRATIVE, *supra* note 133, at 435 (quoting *Virginia Code of 1833*, § 32) ("If a white person assemble with negroes for the purposes of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months, and fined not exceeding one hundred dollars."). Prohibitions on slave literacy were in place long before the Civil War. As early as 1740, North Carolina had a statute directing that any person who "teach or cause any slave or slaves to be taught to write, or shall use or employ any slave as a scribe in any manner of writing whatsoever hereafter taught to write" shall "forfeit the sum of one hundred pounds current money." STROUD, *supra* note 133, at 244 (quoting 2 BREVARD'S DIGEST).

138 The prohibition included those instructors who otherwise supported slavery. In 1853, Mrs. Margaret Douglass of Norfolk, Virginia was accused of "unlawful assembly" (teaching slaves to read and write). *See* DOUGLASS NARRATIVE, *supra* note 133, at 387. Mrs. Douglass began her defense by declaring, "I have been a slaveholder myself, and, if circumstances rendered it necessary or practicable, I might be such again." *Id.* at 379. Nevertheless, "I deem it the duty of every Southerner, morally and religiously, to instruct his slaves, that they may know their duty to their masters, and to

The South, sensitive to Northern accusations that slavery prohibited the free exercise of religion,[139] pointed to their practice of allowing "oral instruction" of the slaves whereby "[a]ll the knowledge which is necessary to salvation, all the knowledge of our duty toward God, and our duty toward our neighbor, may be communicated . . ., and therefore a law of the land interdicting other means of instruction does not trench upon the law of God."[140] Thus, the slaveholders had hit upon a means of supporting and encouraging religious exercise, while at the same time ensuring that only "true Christianity" was inculcated in the slaves—all this through oral instruction which, although it may conflict with some aspects of religious exercise, entrenched upon only "unessential points."[141]

C. The Abolitionist Critique

Despite Southern protestations to the contrary, northern abolition-

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their common God." *Id.* at 407. Mrs. Douglass was convicted of unlawful assembly and served one month in jail. *Id.* at 418-19.

139 South Carolina Judge John Belton O'Neall, for example, reported to the state assembly that laws prohibiting black religious assemblies after nine o'clock at night ought to be repealed. "They operate as a reproach upon us in the mouths of our enemies, in that we do not afford our slaves that free worship of God, which he demands for all his people." NEGRO LAW OF SOUTH CAROLINA, *supra* note 137, at 140.

140 Luther P. Jackson, *Religious Instruction of Negroes, 1830-1860, with Special Reference to South Carolina*, 15 J. NEGRO HIST. 72 (1930), *reprinted in* RELIGION AND SLAVERY, *supra* note 83, at 190, 197 (quoting editor of *The Churchman*, a contemporary publication of the Episcopal church). The institution of oral instruction was excoriated by abolitionists as both inadequate protection of the right of free exercise, as well as a bald-faced attempt by the slaveholder to control the content of religious information getting to the slave. According to James McClune Smith:

> [The Southern] churches grant nothing but *oral instruction* to the slaves, whom they do not teach to read the Bible. And may I not be excused from calling that "Christian fellowship," which expressly denies the common rights of men to those whom they have enrolled as brethren? Are those churches, wherein bishops, priests and deacons, ministers, and preachers who *perfusi sanie vittas atroque veneno* their hands bound and their utterance choked, whilst in their ministrations before the alter, not of God, but of slavery, they croak the changes upon "*Servants obey your masters*"?

Letter from James McClune Smith to Horace Greeley (Jan. 29, 1844), *in* 3 ABOLITIONIST PAPERS, *supra* note 135, at 430, 435 (the latin is from Virgil's *Aeneid*, bk. 2, line 221, translated by Smith as "priestly headbands drenched with gore and venom."); *see also* Testimony by Lewis Hayden, delivered at the Massachusetts State House (Feb. 13, 1855), *reprinted in* 4 ABOLITIONIST PAPERS, *supra* note 135, at 266, 266 ("It is true sir, I sometimes of my own free will, and sometimes by compulsion, attended what my brother calls 'a church' and heard the 'Missionary' to whom he has alluded preach that Gospel which is so peculiar to the South—'*Servant obey thy master!*' This is the sum total of the 'Gospel' which slaves have preached unto them."); HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM'S CABIN 38 (Boston, J.P. Jewett 1853).

141 Not only had southern state governments taken religious republicanism to its logical conclusion by engaging in pervasive regulation of minority religious exercise, but Southern religious denominations played their part as well. At the same time that political majorities were suppressing religious dissent, many Southern denominations were declaring neutrality on the subject of slavery. *See* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 40 (1972). For example, in 1861, the Presbyterian Church of the C.S.A. announced: "We have no right, as a Church, to enjoin [slavery] as a duty, or to condemn it as a sin." *Id.*

ists saw the cumulative effect of laws circumscribing black assemblies, "incendiary language," and the ability to read and write as devastating slaves' ability to exercise their religious faith. Violation of religious freedom was seized upon by abolitionists and proclaimed as one of the greatest evils of the peculiar institution.[142]

It was not simply a matter of equal protection—it would be as unreasonable to the abolitionist to prohibit *all* from reading the Bible as it was to prohibit only the slave. What was being denied was "access to that heavenly chart, which is laid down by Jehovah as the only safe rule of faith and practice, the liberty of reading and understanding how he may serve God acceptably."[143] Denying access to the Bible was an offense over and above mere political deprivations—it was its own justification for the abolition of slavery.[144]

If the original Free Exercise Clause was intended to prohibit nothing more than laws that targeted religion *qua* religion, the abolitionists challenged the adequacy of that protection. Laws preventing blacks from learning to read the Bible were no less violations of religious liberty because the abridgement was the result of a religiously neutral law. The abolitionists thus joined a growing chorus of voices calling for a broader interpretation of the original Bill of Rights, one that emphasized the rights of the individual over the prerogatives of state majorities.

IV. REINTERPRETING THE WORDS OF THE RELIGION CLAUSES

A. Reinterpreting the Federalist First Amendment

In *Barron v. Mayor of Baltimore*,[145] the Supreme Court held that the protection of the Bill of Rights bound only the federal government, not states or municipalities. In *Permoli v. City of New Orleans*,[146] the Court upheld the conviction of a Roman Catholic priest for violating a city ordinance making it unlawful to expose dead bodies to public view (the

142 *See* Letter from Charles Sumner to John Jay (May 25, 1843), *in* 1 THE SELECTED LETTERS OF CHARLES SUMNER 129, 129-30 (Beverly W. Palmer ed., 1990) ("Is it not strange that the Church, or any body of men, upon whom the faintest ray of Christianity has fallen, should endeavor to exclude the African, 'guilty of a skin not coloured as their own,' from the freest participation in the privileges of worshipping the common God?—It would seem as if prejudice, irrational, as it is uncharitable, could no further go."); *see also* Speech by Henry Highland Garnet, delivered before the National Convention of Colored Citizens, Buffalo, New York (Aug. 16, 1843), *in* 3 ABOLITIONIST PAPERS, *supra* note 135, at 403, 406 ("Nearly three millions of your fellow citizens, are prohibited by law . . . from reading the Book of Life.").

143 Speech by Charles W. Gardner, delivered at the Broadway Tabernacle, New York, New York (May 9, 1837), *in* 3 ABOLITIONIST PAPERS, *supra* note 135, at 206.

144 *See id.* at 211 ("See then, the wickedness of those laws which go contrary to the law of God, and say to the slave, 'You shall not read these Scriptures, nor understand them, nor teach them to your children, nor obey them.' Is it not morally right, and politically safe, to abolish such a system?").

145 32 U.S. (7 Pet.) 243 (1833).

146 44 U.S. (3 How.) 589 (1845).

priest had blessed the deceased at a Catholic funeral mass). Echoing *Barron*, the Court held:

> The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.[147]

Even if it did not directly bind the states, however, the Bill of Rights could still be viewed as expressing certain fundamental rights of individuals. As Professor Akhil Amar has pointed out, lawyers and judges of the nineteenth century, unlike us with our modern positivist approach to law, looked not only to statutes and constitutions, but also to codes, charters, and legal precedents "in an effort to distill their animating principles—the spirit of the common law."[148] Even as it functioned as a structural document delineating the powers reserved to the states, the First Amendment could also serve as a declaration that certain fundamental "rights" and "freedoms" preexisted the Constitution.[149]

For example, even if not "legally" bound to do so, state judges could look to the First Amendment for guidance in interpreting the free exercise provisions in their own constitutions.[150] Federal judges, although precluded from applying the Bill of Rights directly against the states, might do so indirectly. For example, state constitutional provisions could be interpreted by reference to the First Amendment.[151] More significantly, state constitutional provisions that seemed to run afoul of natural rights could be struck down by way of other clauses in the Constitution that *did* apply against the states. Arguing against a state constitutional amendment that prevented clergy from exercising ministerial functions without first swearing they had been loyal in the recent Civil War, Reverdy Johnson conceded that

> [t]he Constitution of the United States, to be sure, so far as the article which proclaims that there shall be no interference with religion is concerned, is

147 *Id.* at 609.

148 Amar, *supra* note 23, at 1205.

149 *Id.* at 1205-06.

150 For example, Mayer Clinton in *People v. Philips* explicitly looked to the federal Constitution for guidance in interpreting state law. *See* 1 STOKES, *supra* note 47, at 849 (quoting from the court's decision) ("[U]ntil men under pretense of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion. . . . They are protected by the laws *and constitution of this country*, in the full and free exercise of their religion.") (emphasis added). For an explanation of the case, see *supra* note 77.

151 While riding on circuit, Supreme Court Justice Henry Baldwin rejected recent holdings of Pennsylvania's highest court, as well as contrary pronouncements by the state legislature, and held that the constitution and laws of Pennsylvania required allowing unincorporated religious groups to take property by devise. Magill v. Brown, 16 F. Cas. 408 (C.C.E.D. Pa. 1833) (No. 8952). To guide him in determining the common law of Pennsylvania, Justice Baldwin explicitly looked to the federal Constitution. *Id.* at 423 ("[W]hen we add to these [common-law rights of religious organizations], those expressly secured to them by the constitutions of the state and Union, we cannot doubt that they are as inviolable as a charter could make them.").

> not obligatory upon the State of Missouri; but it announces a great principle of American liberty, a principle deeply seated in the American mind . . . that as between a man and his conscience, as relates to his obligations to God, it is not only tyrannical but unchristian to interfere. It is almost inconceivable that in this civilized day the doctrines contained in this [state] constitution should be considered as within the legitimate sphere of human power.[152]

Mr. Johnson's belief that persons had a natural right to exercise their religion free from government interference was more than adversarial rhetoric. We have already seen that Congress explicitly sought to avoid running afoul of the Free Exercise Clause when it passed the anti-polygamy laws.[153] If the First Amendment was understood as a declaration of states' rights, religious exercise in the territories would be a matter of congressional policy, not constitutional constraint.

The federal government was not alone in its reinterpretation of the originally federalist First Amendment. The 1849 Constitution of the

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152 Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 313 (1866). In *Cummings*, the Supreme Court struck down on ex post facto grounds an amendment to the Missouri Constitution that prevented clergy from teaching or preaching in the state without having first taken an oath swearing they had been loyal to the Union in the recent Civil War. *Id.* The Court held that states may not "under the form of creating a qualification or attaching a condition, . . . inflict a punishment for a past act which was not punishable at the time it was committed." *Id.* at 319. The oath requirement was a punishment because "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment." *Id.* at 320. Presumably, the right to preach was a civil right. In reaching its conclusion, the Court explicitly invoked natural law: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Id.* at 321-22.

The fact that *Cummings* recognized a natural right to pursue one's religious mission in the face of contrary state law appears to conflict with the Court's earlier holding in *Permoli*. *See supra* text accompanying note 146. The conflict was not lost on Justice Miller, who, in his dissent, compared the facts of *Cummings* with the facts of *Permoli* and noted, "I leave the two cases to speak for themselves." 71 U.S. (4 Wall.) at 398 (Miller, J., dissenting). Interestingly, *Cummings* was cited in the Forty-second Congress for the proposition that the right to preach the gospel is one of the privileges or immunities of citizens of the United States. *See* CONG. GLOBE, 42d Cong., 2d Sess. 762 (1872) (remarks of Matthew Carpenter).

153 Recall that the law criminalizing polygamy carried a proviso: "[P]rovided that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor the right 'to worship God according to the dictates of conscience,' . . . ." CONG. GLOBE, 36th Cong., 1st Sess. 1410 (1860).

The proviso begins by protecting the right to property in the Territories, a subject recently addressed by the Taney Court in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). By coupling the right to property with the rights of conscience, the drafters of the proviso signaled their belief that both were protected within the territories by the federal Constitution. Justice Taney himself expressed this view in *Dred Scott*. *See id.* at 450 ("[N]o one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion or the free exercise thereof.").

State of Deseret (better known as Mormon-controlled Utah Territory) contained the following provision:

> All men shall have a natural and inalienable right to worship God according to the dictates of their own consciences, and the General Assembly shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof. . . .[154]

Similarly, a group drafting a constitution for Jefferson Territory (in what is now the state of Colorado) included a provision stating:

> The General Assembly shall make no laws respecting an establishment of religion, nor shall any religious test be required of any citizen; neither shall any one be required to support any sect or denomination.[155]

Finally, in 1846, Iowa ratified a constitution which included the following provision in its Bill of Rights:

> The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[156]

The language of the First Amendment now appeared, to the letter, in both state and territorial constitutions. Words once intended to signal a reservation of power *to* state majorities were now invoked to express the rights of citizens *against* state majorities. In fact, the core value of the Establishment Clause is transformed through its adoption into state constitutions. The original Clause was establishment neutral, expressing neither a preference for nor an opposition to existing religious establishments. Once adopted by a state, however, the words lose their neutrality; the core value is transformed from federalism to nonestablishment. Words that once expressed the rights of states now expressed the rights of individuals.[157]

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154 CONSTITUTION OF THE STATE OF DESERET, *supra* note 98, at 380. Utah's draft constitution of 1860 contained essentially the same provisions, including the language of the federal constitution. 9 SOURCES AND DOCUMENTS, *supra* note 98, at 388.

155 CONSTITUTION OF JEFFERSON TERRITORY, art. I, § 3 (1859), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 98, at 17, 18.

156 IOWA CONST. of 1857, art. I, § 3, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 552, 552-53 (Ben. Perley Poore ed., Washington, Government Printing Office, 2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

157 This has implications for the long-standing debate over the original intention to incorporate the Establishment Clause into the Fourteenth Amendment. Assumed to be part of the Fourteenth ever since Everson v. Board of Education, 330 U.S. 1 (1947), incorporation of the Establishment Clause has been criticized on the ground that it makes no logical sense to incorporate *against* the states a provision originally intended *for* the states. *See* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1207 (1990) (incorporation of Establishment Clause "irrational"); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 392 (1954) (arguing that the Establishment Clause could not be incorporated into the Fourteenth Amendment because, unlike the Free Exercise Clause, "the [E]stablishment [C]lause imposed a political duty upon the federal government without directly conferring a constitutional right upon the citizen"). If, by the time of the adoption of the Fourteenth Amendment, the words of the Establishment Clause were thought to express individual rights, the federalism argument loses its sting.

B. Reinterpreting the Scope of Religious Liberty: The Militia Exemptions

The clash between the abolitionists and the southern states dispelled whatever remained of the idea that religion and government had separate and distinct concerns. By the time of the Civil War, it was clear that the spheres of church and state overlapped a great deal. More than just the assumptions underlying the original religion clauses had changed; the words themselves could now be read as declarations of individual rights. These developments created new interpretive possibilities; perhaps religious exemptions rejected at the Founding now could be revisited with different results. This appears to have happened in the case of exemptions for the religiously scrupulous from military service.

1. State Constitutional Militia Exemptions.—Of the thirty-seven states in existence at the end of the Civil War, twenty explicitly provided, in one form or another, for exemption of the religiously scrupulous from military service.[158] Of those that did not explicitly provide for an exemption, most left open the possibility that the courts or the legislature might mandate an exemption.[159] Interestingly, both of the exemptions written at the beginning of the nineteenth century were placed in the bill of rights

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158 *See* ALA. CONST. of 1867, art. I: Declaration of Rights, § 29, *reprinted in* 1 SOURCES AND DOCUMENTS, *supra* note 98, at 82, 84; *id.* art. X, § 1; ARK. CONST. of 1868, art. XI, § 1, *reprinted in* 1 SOURCES AND DOCUMENTS, *supra* note 98, at 381, 395; GA. CONST. of 1868, art. VIII, § 3, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 98, at 497, 510; ILL. CONST. of 1848, art. VIII, § 2, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 449, 463; IND. CONST. of 1851, art. XII, § 6, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 512, 524; IOWA CONST. of 1857, art. VI, § 2, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 552, 561; KAN. CONST. of 1859, art. VIII, § 1, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 629, 638; KY. CONST. of 1850, art. VII, § 1, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 98, at 166, 177-78; ME. CONST. of 1820, art. VII, § 5, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 788, 797; MICH. CONST. of 1850, art. XVII, § 1, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 995, 1010; N.H. CONST. of 1792, part I: Bill of Rights, art. 13, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1294, 1295; N.Y. CONST. of 1846, art. XI, § 1, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1351, 1365; N.C. CONST. of 1868, art. XII, § 1, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 98, at 414, 429; OR. CONST. of 1857, art. X, § 2, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1492, 1502-03; PA. CONST. of 1838, art. VI, § 2, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1557, 1562; S.C. CONST. of 1868, art I: Declaration of Rights, § 30, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 98, at 494, 496; TENN. CONST. of 1870, art. I: Declaration of Rights, § 28, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 98, at 171, 174; TENN. CONST. of 1870, art. VIII, § 3, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 98, at 171, 183; TEX. CONST. of 1870, art. XVI, § 47, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 98, at 319, 349; VT. CONST. of 1793, chap. I: Declaration of Rights, art. IX, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1875, 1876; VA. CONST. of 1870, art. IX, § 1, *reprinted in* 10 SOURCES AND DOCUMENTS, *supra* note 98, at 112, 134.

159 For example, the Mississippi Constitution of 1868 provided that "[a]ll able-bodied males . . . shall be liable to military duty in the militia of this State, in such manner as the legislature shall provide, *not incompatible with this constitution and the Constitution and laws of the United States.*"

or declaration of rights sections of their respective constitutions.[160] Thereafter, exemption clauses were written as part of general provisions regarding the state militia.[161] The idea that the exemption should be part of the bill of rights reappeared after the Civil War when the exemption was written into the bills of rights of three southern states seeking readmission into the Union.[162]

By the time of the adoption of the Fourteenth Amendment, most states had removed militia exemptions from the control of the majority. Moreover, state constitutional conventions were writing the exemption not only in those sections authorizing a state militia, but more compellingly, in the state declaration of rights.

2. Military Exemptions During the Civil War.—Making religious exemptions from military service a federal constitutional requirement was considered and rejected at the time of the Founding.[163] Until the Civil War, religious exemption from military duty was a matter of state

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MISS. CONST. of 1868, art. IX, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 98, at 377, 386-87 (emphasis added).

160 *See* N.H. CONST. of 1792, part I, art. 13, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1294, 1295; VT. CONST. of 1793, chap. I, art. IX, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1875, 1876.

161 *See supra* note 158. Only one state constitution during this period *removed* an exemption. The militia exemption in the 1820 Missouri Constitution, *see* MO. CONST. of 1820, art. XIII: Declaration of Rights, § 18, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 98, at 477, 488 ("That no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service."), was removed under rather unusual circumstances. The State's governor, Claiborne Jackson, called a convention in 1861 for the purpose of clarifying the state's constitutional position on the War. Before the convention could come to any conclusions, Gov. Jackson issued a proclamation of "neutrality" and fled across Confederate lines. The convention became the provisional government of the state and functioned as the "virtual civil arm of the Union Armies crossing from Illinois to St. Louis." 5 SOURCES AND DOCUMENTS, *supra* note 98, at 465 (Introductory Note to Missouri Constitutions). A new convention was called in 1865, this one dominated by radicals seeking to impose a locally devised form of reconstruction in the state. It was at this convention that the religious exemption was removed and replaced with the following: "All able-bodied males . . . shall be liable to military duty in the militia of this State; and there shall be no exemption from such duty, except of such persons as the general assembly may, by law, exempt." *See* MO. CONST. of 1865, art. X, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 98, at 515, 532-33. Accordingly, it would be difficult to see the removal of the religious exemption clause as reflective of either the will of the people of Missouri or the intentions of the civil government in Washington. Indeed, the religious exemption clause was reintroduced in Missouri's constitution of 1875. *See* MO. CONST. of 1875, art. XIII, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 98, at 544, 573.

162 *See* ALA. CONST. of 1867, art. I: Declaration of Rights, § 29, *reprinted in* 1 SOURCES AND DOCUMENTS, *supra* note 98, at 82, 84; S.C. CONST. of 1868, art I: Declaration of Rights, § 30, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 98, at 494, 496; TENN. CONST. of 1870, art. I: Declaration of Rights, § 28, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 98, at 171, 174.

163 *See* McConnell, *supra* note 8, at 1500-03. The Continental Congress had recommended exemptions for the religiously scrupulous, but had no authority to make its recommendation law. *Id.* at 1469.

law and not an issue of national concern.[164] It took the Civil War's insatiable appetite for soldiers to raise the issue of conscientious objection to a national level.[165]

At the start of the Civil War, northern troops came from state militias and volunteers.[166] Despite liberal bounties, an insufficient number volunteered, and in 1863, Congress enacted the first federal draft law.[167] No provision was made for the religiously scrupulous. In 1864, Senator Henry Anthony responded to this deficiency by declaring the original conscription act defective and that "the invasion of the rights of conscience is one of the most serious of those defects."[168] Anthony thus proposed as follows:

> [M]embers of religious denominations conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denomination, may, when drafted into military service, be considered non-combatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of $300 to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers; and such drafted persons shall then be exempt from draft during the time for which they shall have been drafted.[169]

Some objected that the exemption was too broad and would under-

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164 During the War of 1812, a bill was introduced in Congress providing for federal conscription but was never passed. *See* R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 418 (1952).

165 This article will focus on the religious exemptions enacted by the Union during the Civil War for the obvious reason that many of the same people that voted for these exemptions also voted for, and in some instances helped frame, the Fourteenth Amendment. The South, however, also addressed the issue of religious exemptions during the Civil War. Realizing that the forces provided through state militia and volunteers would be inadequate, in 1862 the Confederate Congress passed a draft law for the entire Confederacy. *Id.* at 419 (citing CONFEDERATE STATES OF AMERICA, THE STATUTES AT LARGE 29 (1861-1864)). The act made no provision for the religiously scrupulous. An act passed later that same year remedied this deficiency, exempting "[a]ll persons who have been and are now members of the society of Friends, and the Association of Dunkards, Nazarenes, Mennonists in regular membership in their respective denominations: Provided, Members of the Society of Friends, Nazarenes, Mennonists and Dunkards shall furnish substitutes or pay a tax of five hundred dollars each into the public treasury." *Id.* (quoting CONFEDERATE STATES OF AMERICA, THE STATUTES AT LARGE 78 (1861-1864)). This provision had been removed by the end of the War, the result of growing suspicions about those claiming the exemption. *Id.* at 419-20. Given the tremendous odds facing the South in terms of manpower, it is testimony to the strength of the claims of conscience that the exemption was provided at all.

166 *See id.* at 418.

167 Act of Mar. 3, 1863, ch. 75, 12 Stat. 731.

168 CONG. GLOBE, 38th Cong., 1st Sess. 204 (1864).

169 *Id.* Anthony's original proposal also exempted ministers of the gospel. *Id.* at 254. This exemption was objected to on several grounds. John Sherman felt it unnecessary—the proposed exemption for individuals would protect those clergy members religiously scrupulous of bearing arms. *Id.* James Harlan objected to the exemption on the ground that ministers themselves had not requested it. *Id.* The special provision for ministers was ultimately removed, and subsequent attempts to revive it were rejected. *Id.* at 254, 141 app.

mine the whole point of the act, which was "to get soldiers."[170] Proponents responded that the exemption would apply only to that narrow group whose denomination made opposition to arms part of their faith and creed.[171] By channeling money to the hospitals, the amendment relieved the religiously scrupulous without "injur[ing] or weaken[ing] the Government in any respect."[172]

A number of Senators attacked the legitimacy of the religious objections. Senator Conness, for example, believed that the Friends' historical opposition to slavery estopped their requests for exemption—this was, after all, "a Quaker's war."[173] Similarly, other Senators maintained that if the religious objection were sincere, it would not be satisfied by the proposed exemption, which required a payment of a fee to go to the use of hospitals. There could be no logical distinction between paying money to the Government to go to hospital services in a time of war and paying money for the purpose of paying bounties to soldiers—both monies would normally come out of the same Treasury.[174]

The reply, which carried the day, was that religious exemptions must be seen from the point of view of the individual's conscience, not what makes sense to the majority:

> Gentlemen say [providing that the money go to the use of hospitals] makes no difference; they are just as much supporting the war in this way as if they paid the money directly to procure a substitute and place him in the field with arms in his hands. Perhaps you think so; perhaps I think so; but they do not; they draw a distinction; and in legislation we must regard as facts the prejudices and the religious convictions of a people.[175]

The argument focuses on the conscience of the individual, and in this it differs tremendously from the traditional approach of the religious republican. Recall for a moment the crisis facing the Congress: it is hard to imagine a more sacred duty to a religious republican than the duty to help preserve the Republic. Significantly, the tension between the needs of the Union and the claims of conscience was explicitly noted and resolved *in favor* of religious conscience.[176] In providing for the exemption of those religiously opposed to military service, Congress explicitly recognized that the claims of conscience could on occasion supersede mere societal responsibilities. The issue was more than mere paternalistic pro-

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170 *Id.* at 205 (remarks of Mr. Conness).

171 *Id.* at 206 (remarks of Mr. Wilson).

172 *Id.*

173 *Id.* at 205. Conness also claimed no one's Christian salvation *could* be at issue because "the shortest and truest way to heaven is to strike a rebel wherever you can reach him." *Id.*

174 *See id.* at 206 (remarks of Mr. Powell).

175 *Id.* at 208 (remarks of Mr. Doolittle).

176 Acknowledging the tension between the teachings of Christ and waging war against the South, Senator Anthony remarked, "I believe them both, but I cannot reconcile the two together; and I wish to manifest a respect for the consciences of those who cannot reconcile them and will not undertake to do so." *Id.* at 206.

tection of "sickly sentimentality."[177] Those who truly believed that God forbade the bearing of arms were answering to a higher law:

> Gentlemen may smile when the question is raised as to the exemption of those men who from conscientious religious convictions cannot take arms in their hands and go upon the bloody field of conflict; but they do not understand or they certainly overlook that element in human nature, stronger than all others, which will take men to the dungeon or to the cross for their religious convictions.[178]

Nor was the issue one of mere political expediency. According to Thaddeus Stevens, "*independent of policy* . . . justice requires [exemption of the religiously scrupulous.]"[179] In the end, not only was the amendment modified to include non-Christian denominations that conscientiously opposed bearing arms, but the discretionary wording "may" was replaced with "shall" to make the exemption mandatory.[180]

This was something new under the sun. For the first time, the national government mandated a religious exemption from a generally applicable secular law. Moreover, the law was not based on considerations of political expediency, but on the demands of higher law: the rights of conscience.

V. The Second Adoption of the Free Exercise Clause

The framers of the Fourteenth Amendment wrote against a specific historical background: (1) Jeffersonian notions of "separate spheres" had become wholly untenable in light of the clash between religion and government over slavery; (2) Congress had recently recognized the threat to the rights of conscience arising from the overlapping interests of church and state; (3) Congress also had recognized that these overlapping interests may require a religious exemption from an otherwise generally applicable law.

However, even if the general conception of religious liberty had broadened since the Founding, *Barron* was still the law of the land. The

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177 *See id.* (remarks of Mr. Conness).

178 *Id.* at 208 (remarks of Mr. Doolittle).

179 Cong. Globe, 37th Cong., 3d Sess. 1262 (1863). Stevens made this statement while calling (unsuccessfully) for religious exemptions in the previous Congress.

180 Cong. Globe, 38th Cong., 1st Sess. 208 (1864). The amendment in its final form read as follows:

> That members of religious denominations, who shall, by oath or affirmation, declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers; *Provided*, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration.

Id. at 141 app.

amendment that would overturn *Barron* and reconstruct the federalist structure of the Bill of Rights had yet to be drafted and adopted. When it was, it incorporated a new declaration of the religious liberty of United States citizens.

A. Drafting the Fourteenth Amendment

The architects of the Fourteenth Amendment were well aware of how slavery had resulted in the suppression of religious exercise. John Bingham, author of Section One of the Fourteenth Amendment, believed slavery violated basic principles of the Constitution, including the right "to utter, according to conscience."[181] James Wilson, Chair of the House Judiciary Committee and sponsor of the Civil Rights Act of 1866, the provisions of which Section One was designed to embrace, noted slavery's "incessant, unrelenting, aggressive warfare upon . . . the purity of religion."[182] Lyman Trumbull, Wilson's cosponsor of the Civil Rights Act, reminded the Congress of the oppressive laws that existed under slavery, including provisions which prohibited blacks from "exercising the function of a minister" and made it "a highly penal offense for any person . . . to teach slaves."[183] Congressman James Ashley noted that "[slavery] has silenced every free pulpit within its control."[184] According to Senator Henry Wilson, "[r]eligion, 'consisting in the performance of all known duties to God and our fellow men,' never has been and never will be allowed free exercise in any community where slavery dwarfs the consciences of men."[185] Senator James Nye believed that, with the fall of slavery, Congress now had the power to protect "freedom in the exercise of religion."[186] Finally, Congressman Roswell Hart believed that the rebel states should not be readmitted until they set up a government where "no law shall be made prohibiting the free exercise of religion."[187]

The vehicle through which the free exercise of religion would be

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181 CONG. GLOBE, 35th Cong., 2d Sess. 985 (speaking against the admission of Oregon until that state recognized the equality of blacks); *see also* CONG. GLOBE, 39th Cong., 1st Sess. (1865), *excerpted in* THE RECONSTRUCTION AMENDMENTS' DEBATES 100 (Va. Comm'n on Constitutional Gov't ed., 1967) [hereinafter RECONSTRUCTION DEBATES] ("The President, therefore, might well say, as he does say in his message, 'that the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all his faculties.' I propose then, sir, . . . enforcement, by law, of these 'equal rights of everyman,' and upon the assertion of which, we are told by the President, the American system rests.").

182 CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).

183 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1865).

184 CONG. GLOBE, 38th Cong., 1st Sess. (1864), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 81.

185 *Id.* at 1202.

186 CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866).

187 *Id.* at 1629.

"incorporated" was the Privileges or Immunities Clause.[188] Citing Arti-

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[188] Although the historical grounds for general incorporation of the Bill of Rights have been debated for years, scholars such as Michael Kent Curtis and Akhil Reed Amar have produced significant evidence that the framers of the Fourteenth Amendment intended to incorporate some or all of the first eight amendments into the Privileges or Immunities Clause. *See* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE (1986); Amar, *supra* note 23. *But cf.* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) (arguing that the Fourteenth Amendment was meant to be narrow in scope). The reader is referred to these authors for more detailed arguments—both for and against—a general theory of incorporation.

One argument, however, deserves attention here. Some scholars have maintained that the so-called Blaine Amendment, which sought to add a provision to the Constitution that would prohibit the states from an "establishment of religion or prohibition of the free exercise thereof," cuts against the view that the Fourteenth Amendment incorporates the First Amendment (or any other provision in the Bill of Rights for that matter). *See* Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 346-47 (1979); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 464-65 (1981); Alfred N. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The Blaine Amendment 1875-76*, 41 U. DET. L.J. 137 (1963).

As debated in the Senate, the Blaine Amendment read as follows:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by any such revenue or loan of credit. . . . This article shall not be construed to prohibit the reading of the Bible in any school or institution.

4 CONG. REC. 5580 (1875).

According to the amendment's sponsor in the Senate, Fredrick Frelinghuysen, its provisions were animated by two concerns: protecting religious rights in the states and preventing the use of public funds for sectarian purposes. 4 CONG. REC. 5561 (1876). According to Senator Morton, the United States was "a Protestant country," and warned of a "large and growing class of people in this country who are utterly opposed to our present system of common schools, and who are opposed to any school that zdoes not teach their religion." *Id.* at 5585. The Blaine Amendment was, in fact, a partisan attack on Catholics who had complained about having to pay taxes for schools that taught out of the Protestant King James Bible. *Id.* at 5590 (remarks of Senator Bogy). Just to drive this point home, the amendment contained a caveat preventing it from being interpreted to prohibit the reading of the (Protestant) Bible in the public schools. *Id.* at 5580.

In fact, the proposition that states could not establish a religion or prohibit free exercise apparently was uncontroversial. According to the House report, there was considerable disagreement as to the necessity for any amendment at all. 4 CONG. REC. 5189 (1875). In the Senate debates, states' rights Democrats loudly proclaimed it was already the case that "no State can pass any law respecting religion or prohibiting the free exercise thereof." *Id.* at 5592 (remarks of Senator Eaton). This is an extraordinary statement when compared with the Founders' concern that the states be left free to establish religions. Given the assumed status of "the rights of conscience" that pervades the Blaine Amendment debates, it appears the Republicans were attempting to use an uncontroversial call to religious liberty as a means to "bootstrap" in a very sectarian amendment. The demagoguery was not lost on the Democrats who ridiculed this partisan appeal to Protestant fears of the "Pope of Rome." *Id.* at 5589 (remarks of Mr. Stevenson).

There was a telling moment during these debates. Protesting the need for any amendment that

cle IV, Section 2, of the Constitution,[189] Henry Wilson listed the free exercise of religion as one of the "privileges and immunities" violated by slavery.[190] Senator Jacob Howard, discussing the content of the Privileges or Immunities Clause of the Fourteenth Amendment, listed, among other rights, "the personal rights guaranteed and secured by the first eight amendments to the Constitution."[191] As noted previously, Congressman Hart believed that the rebel states should not be readmitted until they set up a government whose " 'citizens shall be entitled to all privileges and immunities of other citizens;' where 'no law shall be made prohibiting the free exercise of religion.' "[192] In the Forty-second Congress, Henry L. Dawes declared that the Privileges or Immunities Clause

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would force the states to comply with the religion clauses of the First Amendment, Senator Bogy stood and made the following challenge:

> For one hundred years the States have existed; and for all this time they have had the power of legislation on this subject; and who can rise in this Chamber and say that within that long period of time any one of them has in any way whatsoever attempted in the most distant manner to trample upon the rights of conscience?

Id. at 5591.

His challenge was met with silence. How was this possible? Frelinghuysen himself had witnessed the Reconstruction debates and heard many in the chamber cite the violations of religious liberty in the states as one of the reasons for passing the Fourteenth Amendment. Indeed, the silence is doubly surprising: not only were state violations of religious liberty within the lived memory of every member of Congress, but pointing out such violations would be in the interest of anyone seeking to pass the amendment on the floor. Of course, given the sectarian motivations for the amendment on the floor, it would have been ironic for a Republican to rise and remind Senator Bogy that some states had recently allowed prejudice and fear to justify trampling upon the religious conscience of a minority faith.

By appealing to fears about foreigners subverting religious freedom in order to pass a provision that would have, in effect, constitutionalized the standing of the Protestant Bible, one is reminded of the Alien and Sedition Acts. There too, appeals were made to fears about foreigners subverting civil rights in order to pass laws in violation of those very liberties. *See* Madison, *supra* note 22, at 139. The resemblance to the Blaine Amendment increases when one reflects that the Alien and Sedition Acts, to which Madison was referring, were inspired, at least partly, by anti-Catholicism. *See* 2 STOKES, *supra* note 47, at 671. The religious parochialism animating the Blaine Amendment and the Alien and Sedition Acts (accusations of subversion, refusal to pay taxes, and allegiance to a foreign King) actually has an ancient and less-than-distinguished heritage. *See Luke* 23: 1-2.

In short, the episode of the proposed Blaine Amendment is less a refutation of incorporation than it is an unfortunate instance of religious bigotry.

189 U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

190 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 65. According to Wilson, "[t]he bitter cruel relentless persecutions of the Methodists in the South, almost as void of pity as those which were visited upon the Huguenots in France, tell how utterly slavery disregards the right to free exercise of religion. . . . Sir, I might enumerate many other constitutional rights of the citizen which slavery has disregarded and practically destroyed, but I have enough to illustrate my proposition: that slavery disregards the Supremacy of the Constitution and denies to the citizen in each State the privileges and immunities of citizens in the several States." *Id.*

191 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865).

192 *Id.* at 1629.

had "secured the free exercise of . . . religious belief."[193] John Sherman declared that the "right to worship God according to the dictates of one's own conscience is not only a right, but a privilege which in a Christian country a man ought to enjoy," and that under the Fourteenth Amendment, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[194] Finally, the author of the Privileges or Immunities Clause, John Bingham, declared that the free exercise of religion was within the "scope and meaning" of the first section of the Fourteenth Amendment.[195]

But securing free exercise through the Privileges or Immunities Clause may not be as simple as it looks. As we saw with the Establishment Clause, the very act of incorporation may presuppose a new interpretation of the words. In the case of the Free Exercise Clause, the manifestly overlapping concerns of religion and government called for a more sophisticated approach to religious liberty than could be provided by either separationism or religious republicanism.

B. The Scope of the Second Free Exercise Clause

The framers of the Fourteenth Amendment not only signaled their intent to incorporate the rights of conscience into the Privileges or Immunities Clause, but they also provided clues as to the intended scope of those rights. Specifically, religious exercise was to be protected from majoritarian hostility or indifference; it was to be a substantive right affording more than simply "equal protection"; and its protection created a zone of autonomy within which both mandatory and discretionary aspects of religious exercise were protected from government interference. Most importantly, by explicitly targeting "religiously neutral" laws as examples of what would become unconstitutional with the passage of the Fourteenth Amendment, men like John Bingham and Lyman Trumbull gave notice that in the future, generally applicable laws might sometimes impermissibly violate an individual's religious liberty.

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193 CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871).

194 CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 615; *see also* CONG. GLOBE, 42d Cong., 1st Sess. (1871), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 503 (Congressman Maynard noting that "privileges and immunities" includes the "personal right" of "freedom . . . in religion"). The idea that the Fourteenth Amendment incorporated the religion clauses against the states was not unique to Republicans. In the Forty-second Congress, Democrat John Stockton declared his belief that the Fourteenth Amendment "prohibits the states from doing what the Congress was always prohibited from doing," and cited the First Amendment religion clauses as an example. *Id.* at 548. In the Forty-third Congress, Democrat Thomas Norwood expressed his belief that *before* the adoption of the Fourteenth Amendment "any State may have established a particular religion." *Id.* at 676. Neither man was contradicted by his colleagues at the time the statements were made.

195 CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871).

1. From Federalism to Libertarianism.—At the time of the Founding, "liberty" was largely understood as the "public liberty" of democratic self-government; majoritarian liberty rather than liberty against popular majorities. In terms of the First Amendment, the freedoms of speech and press had been linked to religious freedoms for reasons of federalism.[196] However, by the 1860s, libertarianism had replaced federalism as the unifying theme of the First Amendment freedoms.[197] Accordingly, Jacob Howard described the privileges and immunities to be incorporated into the Fourteenth Amendment as including "the *personal* rights guaranteed and secured by the first eight amendments to the Constitution."[198]

The implications for free exercise were significant. It was perfectly appropriate to expand or contract free exercise under a regime that believed (1) religion existed to serve the government (religious republicanism), and (2) the "liberty" of the Constitution was the "liberty" of representative government. However, the new Free Exercise Clause belonged to the individual, not the majority. As such, no longer was a law restricting the free exercise of religion prima facie constitutional merely because it served the needs of the majority. The suppression of religious exercise by the slaveholding states had forever eliminated that interpretation of the Free Exercise Clause. But this is simply to assert that the original prohibitions of the Free Exercise Clause now apply against the states: no law may be passed that prohibits religion *qua* religion. There is evidence that the framers of the Fourteenth Amendment had a broader view of the rights of conscience.

2. Protecting Religiously Motivated Conduct.—

> Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can . . . ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament . . . .[199]

The framers of the Fourteenth Amendment understood that the free exercise of religion includes more than the freedom to obey specific doctrinal tenets. For example, although John Bingham, Henry Wilson, and others believed free exercise of religion included freedom to read the Bible, that activity was not itself held essential to the practice of Christianity. To believe otherwise would disqualify as practicing members the illiterate and, presumably, the first generation of Christians including the twelve disciples who had no Bible to read. Certainly, reading the scriptures was understood to be a spiritual activity, and a deeply precious one

196 *See supra* text accompanying note 16 (discussing the original link between the Tenth and First Amendments).

197 *See* Amar, *supra* note 23, at 1215.

198 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865) (emphasis added).

199 CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of John Bingham).

at that. Nevertheless, if the Free Exercise Clause protects only "conduct mandated by religious belief,"[200] then reading the Bible falls outside the scope of the Clause.[201] That this activity *was* considered one of the rights of conscience suggests a broader conception of religious freedom.[202]

In fact, the activities intended to be protected under the incorporated Free Exercise Clause were vastly different from those anticipated at the Founding. Although some persisted in limiting the free exercise of religion to worship,[203] others declared that religion "consist[s] in the per-

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200 Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 392 (1990) (citations omitted).

201 Put another way, limiting free exercise to actions required or forbidden by one's belief presumably means there are extra-temporal consequences for engaging, or not engaging, in that activity. In Christian theology, it makes no difference whether one hears or reads the good news. *See Romans* 10:9-10, 14 (New International Version) ("[I]f you confess with your mouth, 'Jesus is Lord,' and believe in your heart that God raised Him from the dead, you will be saved. . . . And how can they believe in the one of whom they have not heard? And how can they hear without someone preaching to them?").

202 Another example of this broader view of religious freedom occurred in the debates over Charles Sumner's civil rights bill, which would have desegregated southern churches. *See infra* note 213 and accompanying text. Although opponents of Sumner's bill assumed that many white churches were conscientiously opposed to worshiping with blacks, *see* CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 612 (remarks of Matthew Carpenter), others pointed out that the proposed law would interfere with the newly emancipated black church. Joshua Hill reminded Congress of the "habitual restraint imposed upon [blacks] by the presence of white people," and noted that "wherever they have been able by the aid of white persons, they have established their separate churches, where they hold their separate service and have their separate minister." *Id.* at 478. The concern was that Sumner's law could be used by hostile whites to interfere with black religious worship. According to Matthew Carpenter, the bill

> may be made the means of breaking up religious services among the colored people in some portions of the South where there is an unfriendly feeling towards them. They may have their churches open only to colored people, and as long as they preserve the peace they are protected by law in that exclusive worship; but if any white man, no matter what may be his mischievous purposes and intentions, may go into such churches, I can understand how that would furnish an opportunity for evil-disposed persons to break up the religious services of the colored people, and thus inflict upon them a great injury.

Id. at 600; *see also id.* at 585 (remarks of Frederick Frelinghuysen) ("There is in almost every town in the land a church where the real estate has been purchased and the building erected from the hard earnings of colored people, the congregation being composed entirely of colored people, and the church their property. We do not seek to pass a law that shall divest them of such churches."). Desegregating the black churches would not have forced an act contrary to faith, nor would it have prevented an act mandated by religious doctrine. The problem was that the law would have unjustifiably interfered with the right of both black and white congregations to define and pursue their own religious mission. *But see* Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (upholding on grounds of public policy IRS denial of tax-exempt status to racially discriminatory religious private school) ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.").

203 Frederick Frelinghuysen, for instance, interpreted the Free Exercise Clause to protect only worship, not "external conduct." CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) ("The words of the constitutional amendment do not mean that Congress shall pass no law regulating man's external conduct, for that is morality. The 'exercise of religion' means worship. It can mean nothing else."). Frelinghuysen based this reading on the Founders' original intentions, thus indicating his belief that nothing had changed with the passage of the Fourteenth Amendment. *Id.* In fact, Frelinghuysen

formance of all known duties to God *and our fellow men.*"[204] The rights of conscience were repeatedly linked with such activities as assisting runaway slaves, teaching literacy, and engaging in religiously motivated political discourse.[205] To the framers of the Fourteenth Amendment, freedom of belief included the freedom to act *publicly* upon that belief.

Reconstructing the rights of conscience to embrace religiously motivated conduct does more than simply expand the definition of legitimate religious exercise. It evidences a change in the purpose of the Free Exercise Clause. As originally conceived, the religion clauses focused on discriminatory federal legislation; Congress could not pick out one religious belief for special benefits or particular burdens. Nondiscriminatory laws which regulated conduct in the public square were a different matter—this was, after all, the government's turf and no legitimate place for religion. This view made no sense, however, to those who had witnessed the intrusive regulation of the southern states and whose own religion was anything but a private affair. Moved by the events of recent history and guided by their own interpretation of true religion, the framers of the Fourteenth Amendment turned the focus of the Free Exercise Clause away from belief[206] and towards the believer and the impact of generally applicable law.

3. Beyond Direct Regulation of Religious Exercise.—Southern laws preventing blacks from reading and writing, as well as those regulating

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apparently rejected the idea of incorporation altogether. *See* 4 CONG. REC. 5561 (1876) (declaring that the Blaine Amendment "for the first time" made applicable against the states the protections of the First Amendment religion clauses). In this, Frelinghuysen's views are out of step with the major players in the passage of the Fourteenth Amendment, as well as the majority of contemporary legal commentators. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (marshalling the historical evidence of agreement with John Bingham's view that the Privileges or Immunities Clause incorporated the first eight amendments to the Constitution).

204 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (remarks of Henry Wilson) (emphasis added).

205 Thus calling into question Chief Justice Waite's original distinction between religious belief and religious practice, Reynolds v. United States, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."), and Justice Scalia's recent revival of that distinction, *see* Employment Div. v. Smith, 494 U.S. 872, 879 (1990). The fact that the Fourteenth Amendment was intended to protect religiously based political discourse has particular relevance in the face of modern calls for the marginalization of religion in the public square. *See* STEPHEN CARTER, THE CULTURE OF DISBELIEF 55 (1993).

206 On the other hand, the incorporation of the Establishment Clause turns the focus of that Clause *towards* belief, as the Supreme Court has long recognized. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Roberts, J.) ("The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. *On the other hand, it safeguards the free exercise of religion.* Thus the Amendment embraces two concepts, —freedom to believe and freedom to act.") (emphasis added).

black assembly, were all "religiously neutral."[207] Generally applicable laws in the North were targeted as well; for example, laws preventing anyone from assisting runaway slaves were seen as restrictions on the rights of conscience that would not be permitted under the Fourteenth Amendment:

> Before [the Fourteenth Amendment,] a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread.[208]

An obvious objection here might be that even though religion-neutral laws were cited as violations of free exercise, the Free Exercise Clause itself need not have been expanded to prevent these kinds of abridgments. For example, laws attempting to regulate black education or assembly could presumably have been struck down under the Fourteenth Amendment's Equal Protection Clause or by way of an incorporated Free Speech Clause. Put another way, could not all the violations by the South have been cured by requiring government to remain "scrupulously" neutral in regard to religion and trust that other constitutional provisions would sufficiently guard against indirect burdens without needing to expand the reach of the Free Exercise Clause?[209]

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207 Recall that poor Mrs. Douglas, imprisoned for teaching blacks how to read, was convicted for unlawful *assembly*. *See supra* note 138 and accompanying text.

208 CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of John Bingham). Bingham goes on: "The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution." *Id.* Aiders and abettors of fugitives were often exonerated by juries when prosecuted in federal courts. *See, e.g.*, Vaughn v. Williams, 28 F. Cas. 1115 (D. Ind. 1845) (No. 16,903); *see also* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33. In fact, federal judges were careful to admonish juries that defendants could not be acquitted simply on the ground that their actions were justified by the "rights of conscience." *See* Van Metre v. Mitchell, 28 F. Cas. 1036, 1041 (W.D. Pa. 1853) (No. 16,865) (Justice Grier instructing jury that "[s]ome men of disordered understanding or perverted conscience may conceive it a religious duty to break the law, but the law will not tolerate their excuse. . . . He is on trial for his acts: and if his opinions, ceasing to be speculative, have ended in conduct, let no morbid sympathy—no false respect for pretended 'rights of conscience'—prevent either court or jury from judging him justly, without favour as without fear."); Jones v. Vanzandt, 13 F. Cas. 1040, 1045 (D. Ohio 1843) (No. 7501) (charging jury that "much has been said of the laws of nature, of conscience, and of the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law."). The cases are doubly significant in that they both indicate the claim was being made and that the claim, by Bingham at least, was expected to be vindicated with the passage of the Fourteenth Amendment. *But see* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991) (upholding convictions of defendants involved in religious sanctuary movement).

209 *See* Philip Kurland, *Of Church State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (interpreting the religion clauses as "prohibit[ing] classification in terms of religion either to confer a benefit or to impose a burden"); *see also* Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373. Professor Laycock calls this "formal neutrality." *See*

Undoubtedly, such laws are prohibited by other clauses in the Constitution. The question is whether the framers of the Fourteenth Amendment believed that the Free Exercise Clause would independently protect future United States citizens from similar invasions of their "privileges or immunities." Did Wilson, Bingham, Trumbull, and Nye talk the talk of free speech and equal protection, or the "rights of conscience?"

Even the most cursory review of the debates criticizing southern prohibitions of assembly and education of blacks reveals that the concerns were at least as spiritual as they were political. To Henry Wilson, withholding the Bible violated Free Exercise in that it forced Christianity to surrender "the choicest jewel of its faith."[210] These laws were not mere political handicaps, but prevented the proclamation of the "new evangel, 'The pure in heart shall see God,' "[211] and forced those under their rule to "die without hope."[212] The problem with a law preventing someone from learning to read was not that others *were* allowed to read, nor was it simply a matter of violating the individual's right to "utter, according to conscience." The problem was that Christians could not preach, and slaves could not hear, the Good News—to the endangerment of the slaves' eternal souls.

In fact, when Reconstruction legislation attempting to effect the goal of equality came into conflict with free exercise principles, free exercise won the day. In 1870, Charles Sumner introduced a Civil Rights Bill that provided:

> That no citizen of the United States shall, by any reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers, . . . by trustees and officers of *church organizations*, cemetery associations, and benevolent institutions incorporated by national or State authority.[213]

Although some decried the potential for "mixing the races,"[214] others challenged the proposed amendment as an indirect abridgment of the rights of conscience. Matthew Carpenter, for example, cited the religion clauses of the First Amendment and noted that "[w]ithout discussing very minutely whether it does or does not violate the letter of the Constitution, I think it is in violation of the spirit of the Constitution in that it disregards the opinions and the motives of those who framed the

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Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

210 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1859) (remarks of Henry Wilson).

211 CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (remarks of John Bingham).

212 CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1865) (remarks of John Bingham).

213 CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 600 (emphasis added) (ellipsis in original). After it had been buried for more than a year by the Judiciary Committee, Sumner attempted to add the bill as an amendment to the proposed amnesty bill. *See id.* at 575.

214 *See id.* at 608 (remarks of Thomas Norwood).

Constitution, and is in conflict with what they believed they had secured. . . . [I]t cannot be doubted that they . . . intended to, and thought they had, carefully excluded the whole subject of religion from federal control or interference."[215]

Carpenter was concerned with the law's *effect*: interference with the rights of conscience. As we have seen, however, the original Free Exercise Clause served only as a statement of nonenumeration—Congress had no power over religion *qua* religion, but had significant power to interfere with religious exercise *indirectly* through other enumerated powers. Sumner, holding to the Tenth Amendment reading of the Free Exercise Clause, saw his advantage and pressed it:

> The Constitution forbids all interference with religion. It does not forbid all effort to carry out the primal principles of republican institutions. Now, sir, here is no interference with religion. . . . There is simply the assertion of a political rule, or, if you please, a rule of political conduct.[216]

To those who believed in the rights of conscience, however, the fact that it was a *political* law which interfered with the rights of conscience was irrelevant. According to Senator Henry Anthony:

> I am very anxious indeed to vote to give to the colored people all their legal rights, but I shall not vote to give any person any religious rights, or to take from any person any religious rights. If there are white men so foolish as to believe that it is not right for negroes to worship with them, I pity them, but I shall not vote to deprive them of their undoubted right to worship so. . . . I shall not vote for any bill that contains any provision which interferes with religious worship, even if it compels me to vote against the amnesty bill, which I should regret very much.[217]

In the end, the church provision was removed and the remainder of Sumner's bill was passed.[218]

The church-regulation debate, as well as the debates surrounding

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215 *Id.* at 600.

216 *Id.* at 611; *see also* LOCKE, *supra* note 32, at 86-87 (laws may not regulate religion as religion, but the state may make laws affecting religious conduct as a "political matter"). Interestingly, Sumner's arguments presage many of the modern free exercise issues. For example, Sumner states:

> [W]e have no right to enter the church and interfere in any way with its religious ordinances, as with the raising of the Host . . . but when a church organization asks the benefit of the law by an act of incorporation, it must submit to the great primal law of the Union—the Constitution of the United States interpreted by the Declaration of Independence. . . . Whenever a church organization seeks incorporation it must submit to the great political law of the land. It can have the aid it seeks only by submitting to this political law, . . . the law of justice, the law of equal rights.

CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 611. The modern counterpart would be conditioning aid or tax exemptions on the relinquishment of a religious belief. *See* Michael McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

217 CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 610. It was Anthony who believed that the rights of conscience required an exemption from the Union Army. *See supra* text accompanying note 168.

218 *See* ERIC FONER, RECONSTRUCTION 1863-1877: AMERICA'S UNFINISHED REVOLUTION 533 (1988).

the passage of the Fourteenth Amendment, indicate that many in Congress believed there existed a higher authority that constrained the legitimate reach of secular law. Although the laws passed by the southern states could today be struck down on a variety of grounds, to deny the modern Free Exercise Clause independent "bite" is to ignore the priorities of the framers of the Fourteenth Amendment and place a secular reading on what was for many, after all, the culmination of a religious movement.[219]

CONCLUSION: RELIGIOUS EXEMPTIONS UNDER THE FOURTEENTH AMENDMENT

> Whatever distinctions were drawn before the adoption of the recent amendments, here is the last voice of the public will, which we are bound to obey, which declares that every man shall have the protection of this immunity and privilege.[220]

The First Amendment *does not* read today as it did when it was ratified in 1791. A jurisprudence of religious liberty that relies solely on the intentions of the Founders may correctly interpret *their* Free Exercise Clause, but not *our* Free Exercise Clause. It gets the wrong history right.

The historical record indicates that the framers of the Fourteenth Amendment believed that the free exercise of religion was a privilege or immunity of citizens of the United States. However, the mid-nineteenth-century interpretation of free exercise was radically different from that of the Founders. Contrary to the expectations of the separationists, by the time of Reconstruction the nation had experienced decades of clashes resulting from the overlapping concerns of religion and government. Although religion was once expected to defer to the majority, the suppression of slave religion called into question the government's power to interfere, even indirectly, with legitimate religious exercise. Accordingly, the Privileges or Immunities Clause incorporated a broader conception of religious liberty than that intended in 1791. The Clause thus effected a modification of the original "rights of conscience."

To those who would give effect to the constitutional movements of the People since the Founding, the religion clauses must be read according to the intentions of those who fought a war over slavery and amended their Constitution to incorporate the lessons of that conflict. Under the amended Free Exercise Clause, religious minorities can invoke the original intent of the framers of the Fourteenth Amendment and claim a religious liberty that requires exemption from the unjustified impact of generally applicable law.

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219 *See* Smith, *supra* note 34 (noting the paradoxes that arise when the religiously justified religion clauses are interpreted according to a secular world view).

220 CONG. GLOBE, 42d Cong., 2d Sess. (1872), *excerpted in* RECONSTRUCTION DEBATES, *supra* note 181, at 615 (remarks of John Sherman).