Articles

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Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions

Does the Free Exercise Clause of the U.S. Constitution require judges to exempt religious objectors from the application of nondiscriminatory and otherwise applicable laws? Over the last twenty years, judges and academics have debated fiercely whether the Clause should be interpreted to provide religiously observant citizens with a right to "free exercise exemptions." The debate has led indirectly to a new interest in nineteenth-century views on free exercise jurisprudence. In this Article, I will examine the scholarship on nineteenth-century free

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exercise jurisprudence to date and ask what it adds to our understanding of the Clause and the question of exemptions.

The recent turn to nineteenth-century free exercise history has been led by originalists. Leading originalists have claimed to find in nineteenth-century cases support for their competing interpretations of the Free Exercise Clause's original understanding. Some argue that these cases support the idea that Americans at the time of the Founding agreed that constitutional guarantees of free exercise provided citizens with a right to free exercise exemptions. Ironically, others argue that nineteenth-century texts provide strong evidence that the Founding generation was in consensus that these guarantees did not provide such a right.

I will argue here that the research presented by each group of originalists is selective, and their conclusions are ultimately not convincing. If we look at the full range of texts available, nineteenth-century legal literature demonstrates that free exercise was a contentious subject throughout the country's early history and up through the Reconstruction era. Nineteenth-century texts thus do little to support either of the proposed "originalist" interpretations of the Free Exercise Clause. If anything, they suggest no consensus existed at the time of the Founding about whether constitutional free exercise guarantees provided citizens with a right to exemptions.

Nevertheless, I will argue that a study of these materials may still contribute to contemporary debates over the meaning of the Free Exercise Clause, as they can help us contextualize and better understand the earliest U.S. Supreme Court opinions in the area of free exercise. Today, the earliest Supreme Court precedents are almost universally thought to support an antiexemptions reading of the U.S. Constitution's Free Exercise Clause.[1] Free exercise cases such as *Reynolds v. United States* are cited in support of the Supreme Court's current antiexemption jurisprudence.[2] Those who argue for a more liberal interpretation of the

[1] Among the early precedents are *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890), *overruled in part by* Romer v. Evans, 517 U.S. 620 (1996); and *Reynolds v. United States*, 98 U.S. 145 (1878).

[2] The Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* stated:

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns

Free Exercise Clause have felt constrained to get around these early precedents either by arguing that one should return to a liberal original understanding of the Clause,[3] or by arguing that these precedents have been implicitly overruled by later cases.[4]

In a recent opinion, Justice Souter noted that, notwithstanding the contemporary consensus, judges in the past seem to have considered early Supreme Court cases like *Reynolds*[5] to be consistent with a judicial policy of granting exemptions.[6] Without taking a position on how we should interpret the early cases, Justice Souter called for scholars and judges to return to cases like *Reynolds* and ask whether the conventional wisdom about these cases is correct.[7] This seems wise. However, for a reevaluation

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> of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States* . . . .

494 U.S. 872, 879 (1990) (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting in part) (arguing that the Court rightly "departs from the teaching of *Reynolds v. United States*").

[3] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 544-66 (1997) (O'Connor, J., dissenting); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 575 (1993) (Souter, J., concurring in part and concurring in the judgment). In his concurrence, Justice Souter stated:

> This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause.

Church of the Lukumi Babalu Aye, 508 U.S. at 575.

[4] *Flores*, 521 U.S. at 508 (majority opinion); *Church of the Lukumi Babalu Aye*, 508 U.S. at 570-71 (Souter, J., concurring in part and concurring in the judgment) (stating that it is "difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law"); *Yoder*, 406 U.S. at 247 (Douglas, J., dissenting in part) (approving the Court's decision to grant exemptions but noting that the Court again, as it had done before, was "depart[ing] from the teaching of *Reynolds v. United States*," and thus that the Court had overruled *Reynolds*).

[5] 98 U.S. 145 (1878).

[6] According to Justice Souter:

> As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds v. United States* and *Minersville School District v. Gobitis*, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds* . . . has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order."

Church of the Lukumi Babalu Aye, 508 U.S. at 569 (Souter, J., concurring in part and concurring in the judgment) (citations omitted).

[7] Specifically, Justice Souter stated:

to be trustworthy, the words and ideas in these cases will have to be read in a manner that is sensitive to their context. Among other things, scholars will need to think about the way in which nineteenth-century Americans conceptualized and discussed free exercise exemptions and must ask whether nineteenth-century Americans would have understood the implications of the *Reynolds* opinion differently than we do today. I will suggest some ways that the study of nineteenth-century materials may help us if we wish to reexamine the original understanding of cases like *Reynolds*. This Article will proceed in five parts.

Part I of this Article will define "free exercise exemptions" and describe the appearance over the last twenty years of literature discussing nineteenth-century views on the question of exemptions. It then will describe the way in which debates about the original understanding of the Free Exercise Clause have helped drive the study of nineteenth-century legal history. Originalist scholars have proposed two competing theories about nineteenth-century jurisprudence. One group argues that nineteenth-century judges emphatically denied that free exercise clauses implied an individual right to exemptions. To their mind, this suggests an original understanding of free exercise guarantees that did not allow exemptions. Another originalist group argues that nineteenth-century legal materials were ambiguous and not categorically hostile to exemptions.

Part II of this Article will explain the method that I use to reanalyze the nineteenth-century free exercise tradition, with the hope of supplementing and, in places, reevaluating the conclusions in contemporary originalist literature.

Part III will review the nineteenth-century materials that deal specifically with the subject of exemptions. I will focus on a wide range of cases, including some only recently discovered, and I will also look at academic commentaries that discuss exemptions—a body of material that has been largely untouched by current scholarship. Based on these sources, I will argue that nineteenth-century judges and commentators accepted a com-

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> Exactly what [*Reynolds* and *Davis v. Beason*] took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws; that the Clause never protects religious conduct from the enforcement of generally applicable laws; or that the Clause does not protect religious conduct at all.

Id. at 575 n.6 (citations omitted).

mon framework for analyzing the notion of "free exercise" and determining whether free exercise clauses provide citizens with a right to exemptions. However, from the start, these same judges and commentators diverged widely on the question of whether free exercise clauses required judges to grant exemptions and, if so, under what circumstances. Some early nineteenth-century judges and commentators interpreted free exercise clauses in an antiliberal fashion that precluded any possibility of exemptions—a philosophy that antiexemption originalists attribute to Jefferson and, indeed, to almost all Americans at the end of the eighteenth century.[8] However, from a fairly early period onward, a significant number disagreed. They interpreted free exercise clauses with the type of liberal, exemptions-friendly approach that at least one leading pro-exemption originalist associates with the Founders.[9]

I thus conclude in Part IV that nineteenth-century free exercise jurisprudence does not provide meaningful support for either the antiexemptions originalist position or the pro-exemption originalist position.

Part V argues that if a study of nineteenth-century legal texts is to be useful to us, it will not be because it supports a particular originalist reading of the Federal Free Exercise Clause. Rather,

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[8] *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 922-23 (1992) (associating Jefferson with an extreme antilibertarian position on all questions of religious freedom, including "[i]f a person was not a good and peaceable citizen, he could be penalized on account of his religion"); *cf.* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449-52 (1990) (describing Jefferson's antiexemptions views and arguing that they were rejected in favor of a more liberal position).

[9] Michael McConnell attributes a free exemptions position to Madison and believes that Madison's position is representative. *See, e.g.*, McConnell, *supra* note 8, at 1452-55 (arguing that "Madison, with his more generous vision of religious liberty, more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights"). *But see* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 259 (1991) ("Even so appealing a formulation as Madison's (which McConnell endorses) . . . is inconclusive."); Hamburger, *supra* note 8, at 926 ("[E]ven Madison did not believe that the right of free exercise included a right of religious exemption from civil laws."); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1114-18 (1994) ("Jefferson and Madison were both what I call 'separationist' republicans . . . . 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.").

it will be useful because nineteenth-century writings on free exercise help us to contextualize the earliest Supreme Court cases dealing with free exercise. As I point out, nineteenth-century texts do not just discuss the question of free exercise exemptions generally, but they discuss with surprising regularity the question of whether religiously motivated polygamists could claim a First Amendment right to be exempted from antipolygamy laws. This is, of course, precisely the issue that was addressed in *Reynolds* and its progeny. Most interesting is that courts and commentators who seemed to interpret free exercise guarantees to provide, at least in some circumstances, a right to religious exemption, all agreed that the right did not extend to polygamists. The *Reynolds* opinion in places seems to echo these thinkers as much as it does the opinions of antiliberal thinkers who would deny that citizens ever had a right to exemptions. There is not room here to consider fully whether the *Reynolds* Court, when it denied a Mormon polygamist a right to exemptions, thought it was (or was understood to be) adopting the antiliberal view that courts can never grant free exercise exemptions. A subsequent article will address this question. At this point, I will simply demonstrate that nineteenth-century legal writings not only problematize the leading originalist readings of the Free Exercise Clause, but they also provide evidence that will be essential to any person attempting to fully understand *Reynolds* and its progeny.[10]

I

The Debate About Free Exercise Exemptions: The Turn to Originalism and Competing Interpretations of Nineteenth-Century Free Exercise Jurisprudence

In the 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith*, a bare majority of five Justices decided that the Free Exercise Clause could not be interpreted to provide a right to free exercise exemptions.[11] The majority's reasoning was vigorously attacked in both a concurrence[12] and a dissent.[13] In subsequent cases dealing with

[10] In this Article, I will only be able to highlight the type of information that is available in nineteenth-century texts and explain why it should be relevant to people seeking a more nuanced reading of early cases like *Reynolds*. In a subsequent article, I will take up the challenge of rereading these cases.

[11] 494 U.S. 872, 882-85 (1990).

[12] *Id.* at 891 (O'Connor, J., concurring in the judgment).

[13] *Id.* at 907 (Blackmun, J., dissenting).

religious freedom, a significant minority of Justices has gone out of its way to demand that the issue of exemptions be revisited.[14] Since then, academics have engaged in a spirited debate about whether the *Smith* opinion was correctly decided.[15] The twentieth-century precedents in the area of free exercise are anything but consistent, and the policy issues they implicate are extremely complex. Scholars and jurists have not been able to forge agreement about how twentieth-century cases should be interpreted or about the difficult policy questions that they raise.

A. The Increasing Importance of Originalist Scholarship Addressing the Question of Free Exercise Exemptions

The debate about free exercise exemptions was intensifying in the 1980s, even before *Smith* was decided. As it did, some academics suggested that the Supreme Court might be able to sidestep the difficulty of making sense of precedents and policy. They proposed to look for an "original understanding" of the Free Exercise Clause.[16] After the *Smith* decision and the storm

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[14] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 544-48 (1997) (O'Connor, J., dissenting); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment); *cf. Flores*, 521 U.S. at 537-44 (Scalia, J., concurring in part).

[15] The list is extremely long. For representative examples, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387 (2002); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

[16] For representative articles looking for a general understanding of "free exercise" at the time of the Founding, see Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1630-34 (1989) (arguing that the First Amendment should be read to allow judicially created exemptions from generally applicable law because the first generation of Americans enacted statutes exempting believers from some laws to which they were religiously opposed); Bradley, *supra* note 9, at 307 (concluding that "conduct exemptions cannot be squared with an originalist account of constitutional law"); Hamburger, *supra* note 8; Michael W. McConnell, *supra* note 8 (arguing on the basis of a wide range of evidence that there was consensus among the first generation of Americans that the Free Exercise Clause permitted the judicial grant of free exercise exemptions); Rodney K. Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 635-36 (1984) (arguing that there was consensus among the first generation of

of controversy that it provoked, Justices on the Supreme Court, even some who are not normally associated with originalism, agreed that this might be useful. Noting that the *Smith* Court did not consider the question of original understanding, these Justices urged the Court to take a new free exercise case so that the Court could reconsider the question of free exercise exemptions, taking into account the original understanding of the Free Exercise Clause.[17]

Originalism has not provided the easy answers that some had promised. Eighteenth-century texts, particularly those written at the time of the Founding, fail to demonstrate an unambiguous consensus on the question of exemptions. Some researchers of these texts have made strong arguments that the first generation of Americans interpreted free exercise clauses to provide a right to exemptions. Others, however, have made equally strong arguments that early Americans had an antiexemptions interpretation of free exercise clauses.[18] In the years after *Smith*, Justices who opposed *Smith*'s bar on exemptions were able to cite learned academic articles attributing to the Founders a pro-exemptions position.[19] In response, Justices who wished to retain the exclusion announced in *Smith* have cited equally learned articles attributing to the Founders precisely the opposite position.[20]

It is worth looking closely at originalists' competing interpretations of eighteenth-century literature. Most contemporary analyses of nineteenth-century free exercise jurisprudence have been written against the backdrop of originalist literature, and their authors used the nineteenth-century materials with an eye to sup-

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Americans that the Free Exercise Clause permitted the judicial grant of free exercise exemptions); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 623-33 (1990) (arguing that "it is simply not credible to say that the free exercise clause . . . was intended to give persons or churches the right to disobey laws with impunity provided they had religious reasons for wishing to do so"). The issue also is discussed in Lash, *supra* note 9, at 1111-18 ("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."). There have also been numerous articles looking at the views of particular thinkers who were active around the time that the U.S. Constitution was being drafted and ratified.

[17] *See, e.g.*, *Flores*, 521 U.S. at 548-64 (O'Connor, J., dissenting); *id.* at 565-66 (Souter, J., dissenting); *Church of the Lukumi Babalu Aye*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment).

[18] *See* discussion *infra* Part I.B.

[19] *Id.*

[20] *Compare Flores*, 521 U.S. at 537-44 (Scalia, J., concurring in part), *with id.* at 548-64 (O'Connor, J., dissenting), *and id.* at 565-66 (Souter, J., dissenting).

porting or rejecting one of the competing originalist interpretations of the Founders' views on free exercise exemptions. This has distorted our understanding of these nineteenth-century texts and has obscured their real value.

B. Competing Interpretations of the Original Understanding

At the time the U.S. Constitution was adopted, every state except Connecticut had written guarantees of religious freedom into their constitutions.[21] Six of these used language very similar to that eventually placed in the Federal Constitution, specifically protecting the "exercise" of religion.[22]

Two important articles written in the 1980s argued that the drafters of the Constitution believed "free exercise" implied a right to free exercise exemptions.[23] The arguments put forward in these articles were refined and considerably supplemented in 1990 by Michael McConnell's article, *The Origins and Historical Understanding of Free Exercise of Religion*, which argued that the Federal Free Exercise Clause was originally understood to provide people with a right to exemptions, at least for "peaceable" behavior.[24] For the purposes of this Article, I, like many others, will take McConnell's article as an authoritative statement of the pro-exemptions originalist position.[25]

McConnell began by noting that significant disagreement existed in the American colonies about the nature of religious freedom and, in particular, about whether people had a right to free exercise exemptions.[26] Among them, he admitted, was a view that was derived from the writings of Locke and that was deeply hostile to exemptions and promoted religious "toleration" rather

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[21] McConnell, *supra* note 8, at 1455.

[22] *Id.*

[23] *See* Adams & Emmerich, *supra* note 16; Smith, *supra* note 16.

[24] *See* McConnell, *supra* note 8, at 1511-13; *cf.* Hamburger, *supra* note 8, at 916 ("According to Professor McConnell, the Free Exercise Clause may have originally been understood to exempt individuals from civil laws to which they had religious objections. In qualification, McConnell adds that the First Amendment may have exempted only such noncompliance as was peaceable and did not threaten important government interests.").

[25] *See, e.g.*, Bradley, *supra* note 9, at 264 ("McConnell's is the best originalist case made as yet, and the best likely to be made in the near future . . . . If it is unpersuasive—as I contend that it is—then we may conclude that the conduct exemption cannot be supported historically."); Hamburger, *supra* note 8, at 915-16 (arguing that McConnell has superseded all previous articles advancing the notion that the Founders understood free exercise clauses to provide a right to exemptions).

[26] McConnell, *supra* note 8, at 1421-73.

than "freedom."[27] This view, he asserted, was associated with figures who embraced a "religious republican" political philosophy—one that insisted that a democracy could not survive unless its citizens were imbued with virtue.[28] McConnell argued, however, that by the time of the ratification of the Constitution, most Americans were moving away from this philosophy and its antiexemptions conclusion. Prodded by evangelicals, the majority of Americans had come to embrace a more liberal view on the question of exemptions.[29] To advance his argument, McConnell looked to a number of sources, including the writings of Founders such as James Madison, "free exercise" clauses in state constitutions, and the interpretation of those clauses by state courts in the years before and after the adoption of the Federal Free Exercise Clause.

The writings of Madison suggested to McConnell a strong support for the idea of exemptions, at least for peaceable behavior.[30] McConnell also saw popular support for this position reflected in the state constitutions that were drafted shortly after the Revolution.[31] Some constitutions were drafted with free exercise language that contained explicit caveats providing that the exercise was protected only insofar as it did not permit citizens to violate the welfare of the state.[32] McConnell argued that these all reflected a desire to create a judicially enforceable right that would prevent legislatures and executives from enacting and enforcing laws that prevented people from engaging in peaceful religious practice. Although these provisions did not clearly define what

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[27] *Id.* at 1430-35.

[28] *Id.* at 1441.

[29] *See generally id.* at 1442-73. For the role of evangelicals, see *id.* at 1442-44. McConnell admitted that some leading figures at the time of the Founding, including Thomas Jefferson, continued to agitate against exemptions in Lockean terms. *See id.* at 1449-52. Still, McConnell contended, there was an observable trend away from this position and toward a competing liberal position allegedly promoted by James Madison, which assumed that people's natural right to freedom of religion gave them a right to free exercise exemptions. For McConnell's interpretation of Madison's view, see *id.* at 1452-54.

[30] *See id.* at 1452-55.

[31] *See id.* at 1455-66.

[32] Nine constitutions precluded free exercise protection for behavior that would violate the "peace" or safety of the state. *Id.* at 1456-58 n.242 (discussing GA. CONST. of 1777, art. LVI; N.H. CONST. of 1784, pt. I, art. V; N.Y. CONST. of 1777, art. XXXVIII). McConnell also noted that Delaware, Maryland, Massachusetts, New Jersey, Rhode Island, and South Carolina had prerevolutionary constitutions that contained similar qualifications on their free exercise guarantees. *See id.* at 1461 & n.257.

types of practice were to be considered "religious" or "peaceable," McConnell argued that they were not superfluous but must have carried some meaning and protection.[33] In other words, Americans at the time of the framing must have believed that judges could and should take final responsibility for determining whether a law was too harmful to get an exemption. To provide further support for his reading, McConnell argued that some early nineteenth-century state constitutional opinions implied that free exercise clauses gave citizens a right to exemptions while few precluded them.[34]

McConnell's argument did not go unchallenged. Ellis West, Philip Hamburger, Gerard Bradley, and Kurt Lash have all written important pieces questioning McConnell's analysis and his conclusions.[35] McConnell's critics have attacked nearly every aspect of his argument. To begin, Philip Hamburger, Gerard Bradley, and Kurt Lash all argued that McConnell failed to read Madison's writings on exemptions in their proper context and thus exaggerated the degree to which these writings support the idea of exemptions.[36] They believed that Madison's most famous writings on religious freedom, writings that McConnell characterized as strongly pro-exemption, were in fact ambiguous and could be reconciled with an antiexemptions posture.[37]

Hamburger argued that McConnell also misunderstood the impetus beyond the adoption of state constitutional guarantees of free exercise. According to Hamburger, free exercise clauses were designed to protect, at most, the right to violate laws directed at religion, i.e., laws that explicitly singled out particular religious practices qua religious practices.[38] They were not designed to give citizens any right to violate laws of general applica-

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[33] *See id.* at 1463.

[34] *See id.* at 1503-13.

[35] *See* Bradley, *supra* note 9; Hamburger, *supra* note 8; West, *supra* note 16, at 623-33; *cf.* Lash, *supra* note 9, at 1127.

[36] Bradley, *supra* note 9, at 268-71; Hamburger, *supra* note 8, at 926-29; Lash, *supra* note 9, at 1115-18.

[37] Bradley, *supra* note 9, at 268-71; Hamburger, *supra* note 8, at 926-29; Lash, *supra* note 9, at 1115-18.

[38] *See* Hamburger, *supra* note 8, at 948. In particular, Hamburger stated:

> [E]xamination of religious freedom in late eighteenth-century America reveals that a constitutional right of religious exemption was not even an issue in serious contention among the vast majority of Americans . . . . [T]he politically active and influential dissenters who sought and obtained expanded constitutional guarantees of religious liberty did not seek a general constitutional right of exemption from civil laws. Indeed, they ex-

tion that a legislature, in its sole discretion, had enacted to protect what it believed to be the social welfare.[39] To this end, Hamburger provided an alternate interpretation for the free exercise provisions in state constitutions and the public welfare caveats that they included. Hamburger argued that the drafters of these provisions uniformly equated "peaceableness" with law-abidingness.[40] His argument rests, in part, on his conviction that drafters of state constitutions in the late eighteenth century were hostile to the judicial expansion of ambiguous language. It was unlikely, according to Hamburger, that the Founders would want judges to have the power to determine on an ad hoc basis whether an act was religious or peaceable.[41] Similar to Hamburger, Bradley agreed that those trying to understand the implications of free exercise guarantees need to bear in mind that eighteenth-century notions of acceptable judicial review were very different from our own.[42]

In the face of such disputes,[43] some scholars have asked whether the eighteenth-century materials might be too ambiguous to allow us to understand the original intent with any confidence.[44] Others have suggested that the texts are not ambiguous;

> pressly disavowed such a right and frequently agitated for equal civil rights and an absence of laws respecting religion.

Id.

[39] *See id.*

[40] *Id.* at 922-23 (defining "individuals who disturbed the peace" as those "who actually violated civil law"). Hamburger provides evidence that some Americans explicitly embraced an antiexemptions position, primarily from the writings of Protestant ministers. *Id.* at 918-19. Unfortunately, the proffered evidence does not make clear whether such an interpretation was generally adopted, or even whether influential figures like Madison were among the people adopting this antiexemptions position.

[41] *Id.* at 931 (arguing that the Founders believed "federal judges should not be left with vague rules that might become sources of judicial discretion . . . [t]hus, it is improbable that the framers and ratifiers of the Bill of Rights deliberately adopted a balancing test as the standard of individual religious liberty and federal power").

[42] Bradley, *supra* note 9, at 267-73.

[43] Justices on the Supreme Court who have compared McConnell's originalist interpretation with those of his originalist critics have disagreed about which is more convincing. *Compare* City of Boerne v. Flores, 521 U.S. 507, 537-44 (1997) (Scalia, J., concurring in part), *with id.* at 548-64 (O'Connor, J., dissenting), *and id.* at 565-66 (Souter, J., dissenting).

[44] *See, e.g.*, Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 64 (2004); *cf.* John F. Wilson, *Original Intent and the Quest for Comparable Consensus*, *in* THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 114-15 (James E. Wood ed., 1990).

rather, they represent competing views about free exercise.[45] According to this view, there was no consensus at the time of the Founding regarding the question of exemptions.

Apparently anticipating this argument, originalists who believed there was a single shared understanding of the Free Exercise Clause at the time of the Founding had already turned their attention to nineteenth-century cases.

In his article, Michael McConnell had cited a number of early nineteenth-century state exemption cases that indicated to him a willingness on the part of judges to ask whether a certain type of behavior was truly essential to a petitioner's religious practice, peaceable, and not seriously harmful to other citizens. On the basis of this analysis, he concluded that courts had occasionally provided exemptions and that those that did not were clearly departing from a "Madisonian" position requiring exemptions.[46] McConnell's critics found his claims to be wanting. For example, Gerard Bradley insisted that McConnell's analysis of nineteenth-century history was the weakest part of his argument.[47] Accusing McConnell of cherry-picking cases that support his position and then of mischaracterizing those cases, Bradley argued that the nineteenth-century legal tradition was unremittingly hostile to the idea that citizens could get free exercise exemptions.[48] Kurt Lash agreed, although he treated the issue only briefly. Like Bradley, he saw cases and commentaries through the first half of the century as overwhelmingly hostile to the idea that free exercise clauses empowered judges to grant exemptions.[49] Lash suggested, however, that there was a change in attitudes toward

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[45] Steven D. Smith explained this position by stating:

> [W]hile Americans may have concurred in endorsing the slogan "freedom of conscience," the agreement was largely verbal. . . . [T]o conclude from this practice that consensus prevailed or even that the various antagonists agreed "in principle" would be like concluding that proponents and opponents of abortion rights . . . are actually in essential agreement because they all attempt to deploy the rhetoric of "choice."

STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 40-41 (1995).

[46] McConnell, *supra* note 8, at 1513-17.

[47] *See* Bradley, *supra* note 9, at 272-95.

[48] *See id.*; *see also id.* at 307 ("McConnell's historical methodology is perverse. Within its own terms, his analysis is frequently arbitrary and his conclusions are quite overdrawn. . . . [C]onduct exemptions cannot be squared with an originalist account of constitutional law . . . [or] one hundred seventy years of faithful construction (the period from the Founding to *Sherbert*).").

[49] Lash, *supra* note 9, at 1129-30.

exemptions around the time of the Civil War. He argued that, whatever the Founders or nineteenth-century judges and lawyers thought about the subject of free exercise, most leading Americans at the time of the Fourteenth Amendment thought that the new amendment provided citizens of the United States with some right to free exercise exemptions from state laws.[50]

This is where matters stood until Walter Walsh recently wrote an article trying to resurrect the reputation of the long-neglected nineteenth-century Irish-American lawyer William Sampson. Walsh analyzed Sampson's successful litigation on behalf of a Catholic priest who wished to be exempted from the duty to testify about matters learned in the confessional.[51] In his article, Walsh argued that a case dismissed as insignificant by Bradley and, to some extent by Lash, was actually quite influential. In demonstrating this, he identified some cases not discussed by originalists or by Lash.[52]

In the next section, I will analyze the relevant cases and the largely untapped body of nineteenth-century academic literature discussing free exercise exemptions. I will argue that nineteenth-century texts reveal consistent disagreement about the meaning of the free exercise guarantees found in the eighteenth-century state constitutions and the Federal Constitution. I will suggest that it is hard to see these materials as supporting either the position that late eighteenth-century Americans shared a common, antiliberal interpretation of free exercise clauses or the position that they shared a common liberal interpretation of them.

II

NINETEENTH-CENTURY FREE EXERCISE REVISITED: METHODOLOGY

One reason that historians have reached different conclusions about nineteenth-century free exercise jurisprudence is that they have looked at different materials. Michael McConnell looked at a fairly narrow range of cases, limited both by subject matter and by time (stopping in 1848).[53] He argued that these nineteenth-

[50] *Id.* at 1130-45.

[51] *See* Walsh, *supra* note 44, at 52.

[52] *See id.* at 47 (pointing out that previous writers never disccused or, indeed, seemed to be aware of Farnandis v. Henderson, 1 CAROLINA L.J. 202 (Union Dist. S.C. 1827) or Commonwealth v. Cronin, 1 Q.L.J. 128 (Va. Cir. Ct. 1855)).

[53] *See* McConnell, *supra* note 8, at 1503-13; *see also* Bradley, *supra* note 9, at 286 & n.221.

century cases are "inconclusive" on the question of exemptions and that, even if a number of cases reject the idea of exemptions, these are poor indicators of the original understanding.[54] In a response, Gerard Bradley questioned McConnell's narrow scope of research, as well as McConnell's interpretation of the cases. Looking at a vast range of cases dealing with a wide range of subjects and discussing cases deep into the nineteenth century, Bradley argued that nineteenth-century courts were almost uniformly hostile to the idea that constitutional guarantees of free exercise provided citizens with a right to free exercise.[55] Kurt Lash also looked at a wider range of cases than McConnell. Like Bradley, he found a tradition that was, at least at first, distinctly hostile to any claim that free exercise clauses provided citizens with a right to exemptions, although he saw American views of free exercise exemptions grow more liberal over time.[56]

To some extent, McConnell and his critics have compared apples and oranges. Furthermore, none of these authors systematically reviewed nineteenth-century case law on free exercise exemptions, and none looked systematically at nineteenth-century treatises. In revisiting the nineteenth-century history as presented in the articles of originalists, I see the issue as follows: did nineteenth-century legal thinkers in the years prior to 1878 believe that constitutional provisions guaranteeing citizens the right to free exercise of religion give citizens a right to be exempted from state laws that *directly compelled* them to act in a way they believed God prohibited? To answer this question, I will look only at cases that address the question directly. This will lead me to look at more cases than McConnell, but fewer than Bradley or Lash. I also intend to show that our understanding of these cases can be much enhanced by looking at treatises that directly discuss the question of free exercise exemptions.[57] However, I will narrow my focus to cases or treatises that discuss the question of exemptions where there seemed to be an abso-

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[54] McConnell, *supra* note 8, at 1513.

[55] *See* Bradley, *supra* note 9, at 272-304.

[56] *See* Lash, *supra* note 9, at 1121-24, 1138-40.

[57] My question asks only whether nineteenth-century Americans thought that free exercise clauses allowed citizens whose religion was theistic to get an exemption. I am not sure that protections for "religion" extended merely to theistic religions, and I do not believe that as a normative matter the clauses should be so constrained. Nevertheless, with some misgivings, I am willing to focus on the limited question of how nineteenth-century Americans applied free exercise clauses to holders of theistic religious beliefs.

lute conflict between state command and divine command—cases where the state commands one thing, and the believer thinks that God has commanded the opposite. I understand that this is not the only type of situation in which a citizen might plausibly claim a free exercise exemption. But I think they provide a sample that gives us the most insight into the precise question at issue.[58]

Furthermore, I should note that I am looking only at cases and treatises published before 1878, the year that *Reynolds v. United States* was decided. *Reynolds* is the first Supreme Court case dealing with the issue of free exercise, and is a natural breaking point in the intellectual history of free exercise exemptions. Furthermore, by breaking my study there, it allows me to make an important point: I believe nineteenth-century legal texts do not provide much support for either of the two leading schools of originalist thought, at least on the question of free exercise clauses. However, they do provide us with information that may help us reexamine old assumptions about the meaning of *Reynolds* and other early Supreme Court cases. While I do not have the space here to provide my own interpretation of *Reynolds*, I

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[58] Theoretically, one might also claim an exemption on the grounds of disparate impact. By this reasoning, a person could get an exemption from a generally applicable law that is not designed to be discriminatory but still imposes a burden on her not imposed on people with different religious beliefs. *See, e.g.*, *Ex parte* Newman, 9 Cal. 502 (1858). Exemptions based on disparate impact might be granted on the ground that they constitute unlawful discrimination or an unconstitutional "establishment." *Id.* at 510.

In some cases, one might also argue that the disproportionate burden functions as a "punishment" for holding beliefs different than those of the majority. Some nineteenth-century judges and academics recognized the possibility of free exercise exemptions in the context of disproportionate burden. However, cases of disparate impact do not involve situations where a defendant's religious conduct directly conflicts with state law. Thus, they are imperfect indicators of judges' and academics' views on the specific question of free exercise exemptions in that context. To examine nineteenth-century views on exemptions, I narrow my focus. I look at cases asking, for example, whether a Jewish citizen whose religion recognizes a Saturday Sabbath can be compelled to give testimony on a Saturday. I do not focus on the case in which a merchant who closes a shop for religious reasons on Saturday can be required to close his shop on a Sunday as well—something that he is not religiously forbidden from doing, but which causes him economic harm that is amplified by his religious beliefs. I look at the latter type of case only to the extent that it helps us understand vocabulary or concepts that appear in the former cases.

In short, in choosing materials to answer the question that I pose, I have tried to isolate cases in which judges were faced with explicit demands for exemptions—or at least explicitly discussed, in dicta, the subject—and treatises that explicitly addressed free exercise exemptions where a direct conflict exists between individual religious belief and the requirements of law.

will demonstrate the obvious relevance of nineteenth-century cases and commentary to a study of these important opinions.

In short, by looking at free exercise materials written prior to 1878 that consider whether exemptions are ever appropriate when religious belief conflicts with legally required action, we can solve two goals at once. First, we can determine whether nineteenth-century legal materials support either of the two leading originalist interpretations of the Free Exercise Clause. Second, we can gather material that may eventually help us better understand the seminal, and still crucially important, Supreme Court opinion in *Reynolds v. United States*.

III

Free Exercise Thought in the Nineteenth Century

In the nineteenth century, state courts only occasionally had the opportunity to hear cases involving claims for free exercise exemptions of the precise type that concern us here. Why they heard so few is open to conjecture. Perhaps there was agreement on the proper spheres of church and state and a willingness on the part of both the polity and the pious to respect those spheres.[59] Nevertheless, cases did occasionally appear. There were inevitably times when people disagreed about the boundary between the two. Thus, states threatened religious people with prosecution for failing to abide by what the legislature had declared to be a "civil" obligation, while defendants would claim that the state was unconstitutionally violating their right of free exercise by threatening to punish them for acting as their religion commanded.

Nineteenth-century judges and commentators appear to have universally accepted the general principle that religious citizens could get exemptions from laws that prohibited behavior that was simultaneously "religious," "peaceable" and not harmful, in any meaningful way, to other citizens.[60] This is hardly surprising.

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[59] That answer was generally proposed in the middle of the nineteenth century by the influential commentator Thomas Cooley. He suggested that conflicts between religious obligations and state legislatures were very sensitive to religious freedom and thus tried to avoid imposing unacceptable obligations upon the pious. Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 477-78 (Boston, Little, Brown & Co. 1868).

[60] *See* discussion *infra* Part III.B.

Originalists seem to agree that the Founding generation embraced this broad principle. Originalists disagree, however, about whether this general free exercise principle was understood as a practical matter to imply a right to free exercise exemptions from generally applicable laws. Ironically, each cites nineteenth-century materials to support their argument.[61] Revisiting the nineteenth-century materials, I argue that they do not support either of the leading originalist positions. One might reasonably wonder if nineteenth-century opinions and commentaries can be trusted to accurately reflect the opinions of the Founders. Even assuming that they do, one cannot help but be struck by the early appearance of disagreement about the question of when, if ever, free exercise guarantees implied a right to exemptions. One is also struck by the fact that they continue right up to the era of Reconstruction. If anything, nineteenth-century texts suggest nineteenth-century Americans inherited from the Founders either confusion or disagreement about the meaning of constitutional guarantees of free exercise and whether they implied an individual right to free exercise exemptions.

A. Freedom of Religious Belief and Speech

Nineteenth-century legal thinkers thought that American citizens had a right not to be punished for their religious beliefs. This is not in dispute. It is not clear, however, that nineteenth-century thinkers thought this right was grounded in the right to free exercise. At least one important thinker explicitly said it was not and that free exercise clauses must thus protect something other than belief.

Francis Lieber was one of the most influential of the antebellum legal commentators. A German-trained political theorist, Lieber held several important appointments in the United States over the course of his career, including a professorship of law at Columbia University.[62] Historians have described him as the most important American political scientist of the nineteenth century,[63] but his influence in legal circles was even more signifi-

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[61] For a description of McConnell's position on the one hand, and Hamburger's on the other, see *supra* Part I.B.

[62] For a discussion of Lieber's career, see *infra* note 65.

[63] SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 140 (2002). Even more, Lieber is actually cited in the *Reynolds* opinion itself. 98 U.S. 145, 166 (1878).

cant. His treatise *Manual of Political Ethics* was enormously popular with leading lawyers and judges,[64] including Chancellor Kent, Thomas Cooley, Justice Story, and later Supreme Court justices.[65] His subsequent treatise, *On Civil Liberty and Self-Government*, became one of the leading treatises of the nineteenth century.[66]

In his *Manual of Political Ethics*, Lieber explicitly argued that the right to believe what one chose was *not* a right granted by free exercise clauses. It was simply a fact that governments could not compel people to "think" in a certain way.[67] Thus, he ar-

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[64] For example, Theodore Woolsey wrote a laudatory preface to the 1876 reprinting of Lieber's work, MANUAL OF POLITICAL ETHICS. *See* Theodore D. Woolsey, *Preface* to 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 3, 3-5 (Theodore D. Woolsey ed., 2d ed. rev., Phila., J.B. Lippincott & Co. 1876) (1838).

[65] Although Lieber is not a household name, his influence was enormous. For historical analyses of Lieber's influential career, see, for example, Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107 (1995); M. Russell Thayer, *The Life, Character, and Writings of Francis Lieber*, *in* 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER: REMINISCENCES, ADDRESSES, AND ESSAYS 13-44 (Daniel C. Gilman ed., Phila., J.B. Lippincott & Co. 1880). Lieber's influence on nineteenth-century judges and commentators has been noted. *See, e.g.,* Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMMENT. 297, 304 (1993) ("Lieber was recognized by his contemporaries, including James Kent and Joseph Story, as perhaps the premier legal academic of antebellum times."); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 478 n.66 (1992) (describing Lieber as "one of the most influential nineteenth-century commentators on the Constitution"); *see also* FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 164-65 (1947) (reporting Story's and Kent's praise of Lieber); Woolsey, *supra* note 64 (offering a nineteenth-century account of Lieber's influence); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 519 (1999) (noting Cooley's citing of Lieber).

That Supreme Court justices saw Lieber as trustworthy on certain points is shown by the fact that the Supreme Court, on a crucial point in the *Reynolds* opinion, cited Lieber for support. *See* 98 U.S. at 166 ("Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.").

Lieber's work continues to be appreciated, as recognized by the Cardozo School of Law in its 1995 symposium issue. *See A Symposium on Legal and Political Hermeneutics*, 16 CARDOZO L. REV. 1879 (1995).

For some critical views of Lieber—noting the racist assumptions that are built into his work—see JOHN G. GUNNELL, THE DESCENT OF POLITICAL THEORY: THE GENEALOGY OF AN AMERICAN VOCATION 25-32 (1993); Bruce Burgett, *On the Mormon Question: Race, Sex, and Polygamy in the 1850s and the 1990s*, 57 AM. Q. 75, 82-85 (2005).

[66] FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (Phila., J.B. Lippincott & Co. 1859).

[67] LIEBER, *supra* note 64, at 189-90.

gued, when constitutions are drafted to protect "freedom of conscience," the drafters must have been trying to protect something more than the right to believe what they choose. Instead, they must have been protecting citizens' right to act (or to refrain from acting) in accordance with their beliefs without fear of punishment—subject to the generally accepted caveat that no act could be exempted if it violated the public peace or otherwise harmed other citizens.[68] Lieber expanded this idea in *On Civil Liberty and Self-Government*.[69] Stressing that religious liberty protected religious acts, he argued against the use of the term "liberty of conscience." "Liberty of conscience, or, as it ought to be called more properly, the liberty of worship, is one of the primordial rights of man, and no system of liberty can be considered comprehensive which does not include guarantees for the free exercise of this right."[70]

It is not clear how many nineteenth-century thinkers conceptualized constitutional guarantees of freedom of belief in the same way as Lieber. However, nineteenth-century judges and commentators appear to have agreed with Lieber that free exercise guarantees protected at least *some* types of worshipful action that were regulated by civil legislation.[71] If nothing else, judges and academics seemed to agree that free exercise guarantees protected, among other things, the right to proselytize and to engage in religious disputation.[72]

The right to free exercise exemptions from laws banning religious speech was primarily discussed in the nineteenth century in the context of blasphemy prosecutions. There currently appears to be some question about whether the study of exemptions from

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[68] As Lieber explained:

> [L]iberty of conscience has no meaning. . . . We might as well say liberty of taste. How can the state reach my taste? . . . Facts and outward actions are the only things for which the state has an organ; how, then, can it approach the thoughts and feelings? . . .
>
> It is otherwise with the publicly professed creeds, modes of worship, and churches . . . . These are tangible by the state; they can claim protection if innocuous, or may be interfered with if they interfere with the jural relations of others—for instance, if they should palpably promote immorality.

Id. *See also* LIEBER, *supra* note 66, at 99.

[69] *See* Guyora Binder, 16 CARDOZO L. REV. 2169, 2172 (1995) (describing *On Civil Liberty and Self-Government* as "the leading American political science textbook of the nineteenth century").

[70] LIEBER, *supra* note 66, at 99 (footnotes omitted).

[71] *See* discussion and cases cited *infra* Parts III.B.1-2.

[72] *See* discussion and cases cited *infra* Part III.B.1.

blasphemy laws is relevant to a study of exemptions from civil law. Michael McConnell has argued that blasphemy prosecutions were laws directed at religion by prohibiting religious language on grounds that it was religiously false.[73] Thus, to his mind, they did not raise the question of exemptions. Gerard Bradley has vigorously disputed this point.[74] As Bradley correctly noted, nineteenth-century Americans thought that laws criminalizing the dissemination of false beliefs because they were false were properly characterized as laws against "heresy," and it was agreed that they could not withstand constitutional scrutiny.[75] Blasphemy laws were considered permissible insofar as they were civil regulations restricting speech deemed likely to disturb the peace and welfare of society.[76] The harm prohibited by these laws was not merely the harm of polluting people's morality, sapping their virtue and leading to bad behavior. These laws also sought to avoid the danger of offending people so gravely that they might riot.[77]

Thus far Bradley appears to be correct. However, Bradley is not correct to say that the successful prosecution of blasphemy necessarily suggests that Americans in the early years of the Republic were unwilling to contemplate the possibility of exemptions. Quite to the contrary, if one reads the cases closely, they suggest that Americans believed judges were required to grant exemptions under some circumstances.

As a general rule, nineteenth-century free speech jurisprudence subordinated speech to the concerns of social well-being. That is to say, speech was free so long as it did not cause harm to society.[78] In applying this principle, courts generally deferred to the legislature's definition of what was harmful, even when the

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[73] McConnell, *supra* note 8, at 1503.

[74] Bradley, *supra* note 9, at 274.

[75] *See* discussion *infra* in this Part III.A and *infra* notes 80-87; *cf.* Bradley, *supra* note 9, at 274-75.

[76] *See* discussion *infra* in this Part III.A, particularly the discussion accompanying notes 77-87; *cf.* COOLEY, *supra* note 59, at 471-72; Bradley, *supra* note 9, at 275-77.

[77] *See* State v. Chandler, 2 Del. (2 Harr.) 553, 553 (1837) ("In general, an offence which outrages the feelings of the community so far as to endanger the public peace, may be prohibited by the legislature . . . ."); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 407 (Pa. 1824) ("It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment . . . and not as a restraint upon the liberty of conscience; but licentiousness, endangering the public peace . . . .").

[78] David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 539-40 (1981). For a slightly different analysis, see Michael T. Gibson, *The Su-*

harm was defined in "moral" terms.[79] Blasphemous speech was harmful in the short term in that it could provoke civil disturbances and in the long term because it was liable to sap the public morality and lead to long-term social ills.[80] To avoid a prosecution for criticizing Christian beliefs, therefore, a person had to plead a special constitutional right that prevented him from being punished for this type of otherwise punishable speech. One approach was to ask for a free exercise exemption from antiblasphemy laws.

In all of the reported blasphemy cases prior to the Civil War, judges refused to grant an exemption to the defendants at bar. As we shall see shortly, though, the opinions in these cases made clear that their authors envisioned circumstances in which exemptions would have to be granted.[81]

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preme Court and Freedom of Expression from 1791 to 1917, 55 FORDHAM L. REV. 263 (1986).

[79] Federal courts consistently upheld congressional restrictions of speech, including censorship of the mail. In one of the early cases defining the reach of the Commerce Clause, the Supreme Court held that the post office could refrain from delivering materials "injurious to the public morals." *Ex parte* Jackson, 96 U.S. 727, 736 (1877). The Court justified the exclusion of lottery tickets by what it considered reference to the federal government's unquestioned right to prevent the use of "its facilities for the distribution of matter deemed injurious to the public morals." *Id.* After the Civil War, the Court held that people who attempted to send materials injurious to the public morals through the mail could face criminal liability. *See, e.g.*, Andrews v. United States, 162 U.S. 420, 424 (1896). So too, the Court consistently upheld injunctions against union leaders speaking to further their cause. *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261-62 (1917); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 436-37 (1911).

[80] Concerns about the short- and long-term effects of blasphemous speech on public order are revealed in, inter alia, *Chandler*, 2 Del. (2 Harr.) at 553 ("In general, an offence which outrages the feelings of the community so far as to endanger the public peace, may be prohibited by the legislature. . . ."); and *Updegraph*, 11 Serg. & Rawle at 407 (stating that blasphemy is punished "not as a restraint upon the liberty of conscience; but licentiousness, endangering the public peace"). Also, the court in *Chandler* stated:

> If the violation of decorum here mentioned, be so flagrant as to endanger the peace of society, the principle of law thus limited and expressed is one, which had it been engrafted into the civil institutions of other countries, would have superseded the necessity of revolutionizing their governments with every change or reformation in religion; and rivers of blood which have been poured out in the conflicts of contending factions, might thus have been spared to mankind.

2 Del. (2 Harr.) at 572.

[81] *See* Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 154 (1844); *Chandler*, 2 Del. (2 Harr.) at 560-70; People v. Ruggles, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811); *Updegraph*, 11 Serg. & Rawle at 405. For a discussion of these cases, see discussion *infra* Part III.A, particularly that of *Chandler*, which states that people cannot be

A look at the actual cases and treatises makes clear that legal experts agreed that people who felt religiously compelled to dispute mainstream Christian beliefs could be granted a free exercise exemption from blasphemy laws so long as their words were not "malicious," which apparently meant that they took care to make their (inevitably offensive) words as inoffensive as possible.[82] Thus, while it is true that alleged blasphemers were convicted in the four reported cases in which free exercise exemptions from blasphemy laws were requested, judges carefully explained their refusals to grant exemptions as decisions based on the particular facts of the cases.[83] Stressing the wanton and unnecessarily offensive language that the speakers had used, judges strongly suggested that free exercise exemptions *would* be granted from otherwise valid laws restricting speech if the speech at issue could reasonably be characterized as bona fide, nonincendiary religious disputation or proselytization.

For example, in New York Chancellor Kent presided over a case that explored whether the free exercise provision of the New York State Constitution[84] required the government to exempt citizens from blasphemy laws in certain situations. He concluded that blasphemy prosecutions were prohibited *unless* the speech was uttered, as in the case at bar, "with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion."[85] Similarly, one Pennsylvania state court judge rejected a constitutional challenge to a blasphemy prosecution. But this was only because he understood the law to exempt people from prosecution for good-faith, nonmalicious religious disputation and thus satisfy the constitutional requirement of free exercise. Regarding the right of free exercise itself, the judge stated:

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prosecuted for carrying out acts of disputation or proselytization. In *Constitutional Limitations*, Cooley explains that this is because it imposes on his rights of free exercise. COOLEY, *supra* note 59, at 470. Reviewing the relevant cases, Cooley explained that they were based on the assumption that "[a]n earnest believer usually regards it his duty to propagate his opinions. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation." *Id.*

[82] *See* discussion *infra* Part III.A, particularly the discussions of *Ruggles*, *Updegraph*, and *Chandler* accompanying notes 84-88 and the discussion of treatises accompanying notes 89-91.

[83] *See* discussion *infra* Part III.A, particularly the discussions of *Ruggles*, *Updegraph*, and *Chandler* and accompanying notes 84-88.

[84] N.Y. CONST. of 1777, art. 38.

[85] *Ruggles*, 8 Johns. at 292; *cf. Chandler*, 2 Del. (2 Harr.) at 577-78.

> [N]o author . . . who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal . . . . [A] malicious and mischievous intention is, in such a case, the broad boundary between right and wrong, . . . it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious . . . .[86]

A Delaware court in 1837 characterized the issue as one of acting in a way that breached the peace. It was unequivocal that courts must be prepared to grant constitutional free exercise exemptions in cases where there was no imminent threat of violence:

> We have endeavored to mark down the length, width, height and depth, of the only principle upon which, as we think, blasphemy can be punished under our state constitution. We again repeat, that the only legitimate end of the prosecution is to preserve the public peace. It is sometimes said that our courts are the conservators of morals. This is true just so far as a breach of morals may necessarily tend to a breach of the peace, and no further.[87]

Consistently, then, courts expressed an implicit willingness to grant a judicial exemption if states prohibited religious speech that was best characterized as nonmalicious, nonscurrilous

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[86] *Updegraph*, 11 Serg. & Rawle at 405; *cf. Chandler*, 2 Del. (2 Harr.) at 577-78 (following *Updegraph*).

[87] *Chandler*, 2 Del. (2 Harr.) at 574. Also, the court cited, with approval, the following statement:

> "[A]ny one may profess or oppose any doctrine, provided he inculcates his principles, whether orally or in writing, in such manner as not to commit a flagrant violation of decorum; *what acts or words will constitute such an outrage must evidently depend upon the state of society*." If the violation of decorum here mentioned, be so flagrant as to endanger the peace of society, the principle of law thus limited and expressed is one, which had it been engrafted into the civil institutions of other countries, would have superseded the necessity of revolutionizing their governments with every change or reformation in religion; and rivers of blood which have been poured out in the conflicts of contending factions, might thus have been spared to mankind.

Id. at 572.

Furthermore, the court stressed that the protections afforded for speech naturally applied to any religious undertaking for religious reasons and not threatening imminent harm to others. *Id.* at 577 n.(a) ("It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavorable to society; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty.") (quoting Letter from Dr. Furneaux to Justice Blackstone).

disputation.[88]

Treatise writers affirmed that constitutional guarantees of free exercise provided citizens with the right to engage in religious disputation and proselytize vigorously. In upholding a blasphemy prosecution as a breach of the peace, a Delaware court explicitly cited the 1830 edition of the *Encyclopedia Americana*, edited by Lieber and contributed to by Justice Story.[89] The court interpreted the encyclopedia to state that blasphemy prosecutions were only permitted to prevent speech that was calculated toward or reckless of the incitement of violence.[90] It is a staple of later treatises that people have a right to dispute or proselytize

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[88] A similar position appeared in dictum in a Supreme Court case by Justice Story that did not, strictly speaking, involve a blasphemy claim. In 1844, the Court heard a case arising under Pennsylvania law that challenged a bequest creating a school that banned any cleric or other religious official from its grounds. Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 133 (1844). The bequest was challenged as an insult to Christianity. *Id.* at 143-44. Justice Story, writing for the Court, admitted that under the common law, such a bequest would be prohibited. However, he said, the adoption of a free exercise clause in the Pennsylvania Constitution had created a right to state one's beliefs so long as it was done without malice, stating their objections to Christianity in the most sensitive possible way. *Id.* at 154. The right of free exercise "must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels." *Id.* at 198.

Therefore, according to Justice Story:

> [A]lthough Christianity [was] part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.

Id.

[89] *Chandler*, 2 Del. (2 Harr.) at 572.

[90] In *Chandler*, the court stated:

> In the second volume of the *Encyclopedia Americana*, by Leiber [sic], p. 130, it is remarked by a writer on blasphemy, "viewing this subject in a philosophical, religious, or political view, it would be difficult to lay down any general principles applicable to different states of society; but the prevailing opinion on this subject in the United States, and that to which the laws and opinions of other countries are strongly tending, is, that any one may profess or oppose any doctrine, provided he inculcates his principles, whether orally or in writing, in such manner as not to commit a flagrant violation of decorum; *what acts or words will constitute such an outrage must evidently depend upon the state of society*." If the violation of decorum here mentioned, be so flagrant as to endanger the peace of society, the principle of law thus limited and expressed is one, which had it been engrafted into the civil institutions of other countries, would have superseded the necessity of revolutionizing their governments with every change or reformation in religion; and rivers of blood which have been poured out in the conflicts of contending factions, might thus have been spared to mankind.

Id.

in favor of their religious views so long as they do not do so in a way likely to lead to public disturbance.[91]

In short, nineteenth-century American lawyers seemed to agree that the right to free exercise granted citizens not only the right to believe anything they chose, but also some judicially enforceable right to act on the basis of that belief. If nothing else, it gave them a qualified to right to engage in otherwise illegal religious disputation or proselytization.[92] Religious expression was protected so long as it was not "malicious" and thus the type of speech that would predictably lead to breaches of peace. But did it give them something more than a right to speak about their beliefs?

Justice O'Connor has recently suggested that cases involving

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[91] Edward Mansfield wrote in 1845, "What is called the rights of conscience would be very difficult of definition in words, but the practice in the United States has given it a very clear exposition. It is the right *to believe*, *to utter* what is believed and *to worship according to* that belief." EDWARD D. MANSFIELD, THE LEGAL RIGHTS, LIABILITIES AND DUTIES OF WOMEN 147 (Salem, Mass., John P. Jewett & Co. 1845).

Thomas Cooley, in his influential nineteenth-century treatise on constitutional law, suggested that constitutions limit the state's ability to prosecute blasphemy. COOLEY, *supra* note 59, at 470-71. Cooley suggested that constitutional guarantees of free exercise require exemptions for more than belief. At a minimum, they require exemptions from laws prohibiting people from expressing and propagating one's religious beliefs: "An earnest believer usually regards it his duty to propagate his opinions. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation." *Id.* at 470.

Thus, with respect to blasphemy convictions,

> [a] bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. But outside of such wilful and malicious attempt, there is a broad field for candid investigation and discussion. . . . The constitutional provisions for the protection of religious liberty . . . guarantee to every one a perfect right to form and to promulgate such opinions and doctrines upon religious matters . . . as to himself shall seem just.

Id. at 474-75.

Joseph Thompson's 1873 treatise on church and state jurisprudence cited Cooley for the proposition that "the following things are not lawful in any of the States of the American Union . . . '(4) restraints upon free exercise' [and] '(5) [r]estraints upon the expression of religious belief.'" JOSEPH P. THOMPSON, CHURCH AND STATE IN THE UNITED STATES, WITH AN APPENDIX ON THE GERMAN POPULATION 15 (Boston, James R. Osgood & Co. 1873).

[92] It is open to question whether such a doctrine in fact provided much protection for those who insulted the religious sensibilities of a majority. One would not, of course, wish to be naive. The principle that nonmalicious, "serious," "religious" disputation was protected is not easy to apply in practice, and it is difficult to see how it could be applied in an objective manner. Inquiries into sincerity of belief can easily lapse into a question of "plausibility" of belief. Furthermore, a question about whether a religious point at issue is one "in serious" dispute leaves considerable room for judges' own religious beliefs to influence their decisions.

religious speech were always thought to be sui generis.[93] On its face, it is not implausible to think that this might be so.[94] However, as we shall see, it is not clear that nineteenth-century Americans held this position, or even that most did. As noted above, one court, in describing constitutional limits on blasphemy prosecutions, stressed that these protections stretched not just to the expression of opinions but to all religious "manners and customs."[95] As I will show in the next section, an examination of case law and treatises discussing exemptions for actions other than speech suggests that some American judges and commentators believed exemptions were for all practical purposes unavailable for actions other than religious speech. From an early period, however, other judges and commentators were perfectly willing to contemplate the possibility of exemptions from civil laws that regulated actions other than speech—and in some cases to suggest that they were required.

B. Nineteenth-Century Court Cases Dealing with Exemptions Outside the Area of Speech

Those who seek the American judicial understanding of free exercise in the years prior to 1878 must focus on the opinions of state courts interpreting state constitutional provisions guaranteeing the rights of conscience.[96] In the 1833 opinion *Barron v.*

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[93] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment).

[94] Kurt Lash has suggested that Madison's embrace of exemptions was far less significant than it appeared because he believed that religion and the state were sovereign in separate spheres. Lash, *supra* note 9, at 1114-17. Assuming this were true, blasphemy might conceivably represent an exceedingly unusual area in which laws enacted under the police powers of the state might actually encroach on behavior that everyone accepted as "religious."

[95] The Delaware Supreme Court cited this letter to Justice Blackstone:

> The distinction between the tendency of principles, and the overt acts arising from them is, and cannot but be, observed in many cases of a civil nature, in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavorable to society; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty.

Chandler, 2 Del. (2 Harr.) at 576-77 n.(a) (quoting Letter from Dr. Furneaux to Justice Blackstone).

[96] In several of these cases, state courts discuss not only the proper construction of the state's own free exercise clause, but also the Federal Free Exercise Clause. Such discussions are, however, aberrant. *See* Walsh, *supra* note 44, at 43 (discussing cases including *People v. Philips* and *Commonwealth v. Cronin*).

Baltimore, the United States Supreme Court held that the Fifth Amendment did not limit the power of state governments.[97] Twelve years later, the Court in *Permoli v. Municipality No. 1* declined to hear a claim that the free exercise clause of the U.S. Constitution gave a citizen a right to a free exercise exemption from a state law.[98] Very few federal laws presented a clear question of free exercise exemptions. Indeed, it was not until *Reynolds* in 1878 that the Supreme Court heard and decided a request for a free exercise exemption from a federal statute.

Given the limited number of state court cases dealing with exemptions of the type that we are concerned with in this Article,[99] it is striking that contemporary academics have come to such different conclusions about nineteenth-century judicial attitudes toward exemptions.[100] Some originalists have read the cases as unremittingly antiliberal, with the vast majority of judges categorically unwilling to contemplate free exercise exemptions.[101] Others argue that the tradition is ambiguous and arguably consistent with a liberal view.[102] Kurt Lash has tried to reconcile the competing views by arguing that the tradition moved from unremittingly antiliberal to generally liberal.[103] However, as I read the state law cases, judges appear from the start to have been deeply divided over the question of whether free exercise guarantees permit judges occasionally to grant exemptions, and they remained divided right up to the time that *Reynolds* was decided.[104]

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[97] 32 U.S. (7 Pet.) 242, 250 (1833).

[98] 44 U.S. (3 How.) 589, 609-10 (1845).

[99] *See* discussion *supra* Part III.A, particularly the text accompanying notes 84-88 and *infra* in this Part III.B, particularly the text accompanying notes 110-49.

[100] *See* discussion *infra* Part IV; *cf.* discussion *supra* Part I.B, particularly the text accompanying notes 46-52.

[101] *See* Bradley, *supra* note 9, at 272-95, 307.

[102] *See* McConnell, *supra* note 8, at 1513-17.

[103] *See* Lash, *supra* note 9, at 1129-45.

[104] Only Walter Walsh, in his study of the different reactions to one New York exemptions case, has fully embraced the idea that there might be so many differences among jurists of a single generation that one cannot reduce the tradition to "generally liberal" or "generally antiliberal." *See* Walsh, *supra* note 44, at 67-70. Why he is alone is not clear. One wonders whether the case law has not tempted some to read it to support their preferred view.

Unlike McConnell, Bradley, or to some extent, Lash, Walsh did not come to the material vested in a particular view of nineteenth-century jurisprudence. His article grew out of research into the importance of the influential Irish lawyer and activist William Sampson, who was an advocate in a case where exemptions were granted. In determining whether Sampson's work had any influence, Walsh determined that

In looking at cases dealing with free exercise exemptions, both those dealing with religious speech and those dealing with nonspeech acts, it is helpful to bear in mind T. Alexander Aleinikoff's important insight that the nineteenth century was not an age in which judges liked to engage in balancing tests.[105] In distinguishing between acts that were constitutionally protected or unprotected, judges "generally recognized differences in kind, not degree."[106] A determination might be based on instrumental considerations, but judges still described acts in categorical terms. Their language suggests that, when faced with a claim of constitutional right to engage in activities, society must always be prepared to tolerate certain types of harm and need never tolerate other types. This is certainly true in the blasphemy cases discussed above. When it came to religiously motivated speech acts, judges made clear that all disputation that was not malicious fell into the category of protected activity because it did not tend to provoke breaches of the peace. Malicious disputation was always unprotected because it did tend to do so.[107] The question that must be considered is whether, outside the area of speech, the set of illegal acts that society must tolerate on grounds of religious liberty was, in essence, a null set. On this question, judges, academics, and legislators apparently disagreed.

Rhetorically, jurists continued to assert that free exercise rights must protect action—not just religious acts of speech, but any "religious" acts that were peaceable and not harmful to others. Almost as soon as they were asked to apply this principle to concrete cases, however, they seemed to disagree about what types of nonspeech acts should be considered "religious" and about

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some courts adopted Sampson's view and that Sampson helped define the terms by which jurists, liberal and antiliberal alike, discussed the question of free exercise. *See id.* at 40-49.

[105] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949-63 (1987).

[106] *Id.* at 949.

[107] As seen in the cases cited *supra* Part III.A, nineteenth-century courts hearing blasphemy convictions seemed to agree that challenging Christian scriptures was presumptively harmful but that, on the other hand, it was a burden on pious individuals not to be able to dispute or proselytize in favor of their religious views. Instead of balancing on a case-by-case basis the relative interests of the society and individual in particular cases, courts tried to come up with a rule that challenges to Christian beliefs had to be tolerated so long as it was made in a nonscurrilous or nonmalicious fashion. Scurrilous and malicious criticism of Christianity was presumed always to lead to a breach of the peace. Nonscurrilous, nonmalicious speech was presumed not to.

how courts should understand the caveat that nonpeaceable or socially harmful acts were ineligible for exemptions.[108]

However, as I will show shortly, some courts assumed that behavior that fell within the general police powers of the state was, by definition, nonreligious and thus outside the scope of protected activity. Alternatively, they argued that the act of lawbreaking was, by definition, "nonpeaceable" and socially harmful. I consider both of these approaches to make up the "antiliberal" positions which automatically precluded the grant of exemptions.

Other courts, however, took what I call a "liberal" position. They accepted that behavior violating the civil law could be characterized as both religious and peaceable and thus could be exempted from generally applicable law. They defined "religious" behavior as action that a person sincerely believed formed a part of his duty to honor God and God's law. Once behavior fit into this category, they asked separately whether it was the type of act that should be characterized as peaceable, and thus eligible for exemption. In determining where an act fell into the typology, the analysis, including the factors considered, seemed murky. Courts did not propose an objective principle to distinguish between activity that could and could not be exempted. Rather, they merely gave examples of peaceable activity that was eligible for an exemption and nonpeaceable activity that was not.[109]

1. The Antiliberal Tradition

As we have already seen above, at least one blasphemy opinion suggested the possibility that exemptions could be granted—not just in speech but perhaps in other areas. Furthermore, as I will discuss in the next section, courts as early as 1813 *had*

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[108] Some early cases on free exercise were ambiguous on the question of exemptions. For example, in Massachusetts, the one free exercise case on record before the Civil War is short and ambiguous. In *Commonwealth v. Drake*, the Supreme Judicial Court of Massachusetts was asked to void the conviction of a man who claimed his conscience had compelled him to confess to the members of his church his complicity in a crime. 15 Mass. (Tyng) 161, 161 (1818). Strictly speaking, this case does not count as the type of case I have tried to focus on—one where the state prohibits an act that the conscience requires. Here, the state "punishment" follows indirectly, though inevitably, from the act. In any case the court refused, but did not give its reasons.

[109] Courts frequently included polygamy among the examples of activities that could not be exempted.

granted exemptions outside the area of speech.[110] Disturbed by the reasoning in these cases and by the implications of judges granting exemptions on an ill-defined and ad hoc basis, a group of judges went out of their way to articulate and promote "anti-liberal" approaches to free exercise. Without rejecting outright the principle that exemptions could be granted, they qualified it out of existence. Some defined "religious" behavior so narrowly that it was impossible for any member of a minority religion to receive a judicial exemption.[111] Others defined peaceableness or harmfulness in such a way that most or all illegal activity would have to be deemed nonpeaceable or by its very nature unacceptably harmful and thus preventable on grounds of necessity.[112]

Although South Carolina's courts went back and forth on the question of exemptions, the high court of South Carolina initially embraced an antiliberal application of free exercise exemptions. In *State v. Willson*, the Constitutional Court of South Carolina accepted in principle that people should be permitted to get free exercise exemptions for harmless religious behavior. At the same time, the Court qualified the principle out of existence.[113] Fretting that the principle could be susceptible to abuse, the judge defined "religion" with absurd narrowness as a faith that preached obedience to duly enacted state law.[114] Tautologically precluding anyone from claiming that they wanted to engage in

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[110] *See* discussion *infra* Part III.B.2.

[111] One went to the absurd length of defining "religious" behavior as behavior commanded by any religion that required its adherents to obey the laws of their nation. Fretting that any doctrine of exemptions could be abused by "hypocritical" and "deceitful" members of society who would create bogus religions merely to avoid the operation of the law, a South Carolina judge opined that the drafters of the state's free exercise clause must have wanted judges to grant religious exemptions only to members of a "true religion." How will a court recognize a true religion? Simple—all "true religions" require "a ready obedience to the laws of the country." State v. Willson, 13 S.C.L. (2 McCord) 393, 395-96 (1823) (discussed in the following paragraphs). *See also* Van Metre v. Mitchell, 28 F. Cas. 1036, 1041 (C.C.W.D. Pa. 1853) (No. 16,865). In *Van Metre* the court stated:

> Some men of disordered understanding or perverted conscience may conceive it a religious duty to break the law . . . . [I]f 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 . . . .

Id.

[112] *See* Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160-63 (Pa. 1828) (Gibson, C.J., dissenting) and other cases discussed in this Part III.

[113] *Willson*, 13 S.C.L. (2 McCord) at 395.

[114] *Id.*; *see also* McConnell, *supra* note 8, at 1510-11; Walsh, *supra* note 44, at 264.

an illegal religious act, the court refused to exempt a member of the Christian "Covenanter" sect from his obligation to serve as a grand juror.[115] As we shall see, the court later reversed itself, taking a more expansive view of "religion" and a more skeptical view about the legislature's ability to identify a "harmful" act.[116]

Initially, Pennsylvania constitutional cases involving free exercise were resolved without the Pennsylvania Supreme Court providing any clear explanation of its reasoning.[117] In the 1828 opinion of *Commonwealth v. Lesher*, however, the Pennsylvania Supreme Court revisited the question of free exercise and appears to have flirted with a liberal posture.[118] In response, Justice Gibson dissented and thereafter took every possible opportunity, whether in holding or in dicta, to argue for an anti-exemptions position.[119]

Gibson's assault on liberal approaches to free exercise began with his dissent in *Lesher*, where the Pennsylvania Supreme Court heard a state constitutional challenge to the tradition of striking prospective jurors in capital cases if such jurors were religiously opposed to the death penalty.[120] Although the case did not actually deal with an exemption in the narrow sense as this Article uses it, the majority opinion could be read to suggest that exemptions might in some cases be appropriate. Certainly, this is the way that Justice Gibson read the opinion, and, in an impassioned dissent, he felt compelled to explain that exemptions could never be granted under his interpretation of free exer-

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115 *Willson*, 13 S.C.L. (2 McCord) at 396.

116 *See* Farnandis v. Henderson, 1 CAROLINA L.J. 202, 213 (Union Dist. S.C. 1830). For this case, see discussion *infra* in this Part III.B.1.

117 *See* Commonwealth v. Wolf, 3 Serg. & Rawle 48, 49-51 (Pa. 1817); Stansbury v. Marks, 2 U.S. (2 Dall.) 213, 213 (Pa. 1793). In *Wolf*, a Jewish merchant argued that a law prohibiting him from working on Sunday was contrary to his religious beliefs, which required him to observe Saturday as the Sabbath rather than Sunday. 3 Serg. & Rawle at 48-50. The court rejected his claim on the basis that Jewish law did not require the merchant to work on Sunday, and therefore the law did not cause him to violate his religious duty. *Id.* at 50-51. It is unclear whether the court, in liberal fashion, accepted the "religiousness" of the claim and balanced independently the infringement of the individual right of free exercise against the public's right to welfare. *Cf.* McConnell, *supra* note 8, at 1507.

118 *See* discussion of *Commonwealth v. Lesher*, *infra* in this Part III.B.1 and notes 117-20.

119 *See, e.g.*, Simon's Ex'rs v. Gratz, 2 Pen. & W. 412 (Pa. 1831); *Lesher*, 17 Serg. & Rawle 155, 160-64 (Pa. 1828) (Gibson, C.J., dissenting). These cases are discussed *infra* in this Part III.B.1 and notes 117-23.

120 17 Serg. & Rawle 155, 160-64 (Pa. 1828) (Gibson, C.J., dissenting).

cise.[121] Tellingly, Gibson accepted the principle that the right to free exercise implies a right to receive judicial exemptions from generally applicable laws so long as the act in question could not be presumed harmful to society:

> It is declared in the constitution (Art. ix., sect. 3) that "no human authority can, in any case, control or interfere with *the rights of conscience*." But what are those rights? Simply 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*.[122]

Gibson worried, however, that this generally accepted principle was prone to abuse by unscrupulous people or credulous judges. Thus, in determining whether an act was presumptively harmful and thus ineligible for exemptions, he suggested that: (1) judges should defer to the legislature's judgment and conclude that any act harmful enough to be banned by legislators was too harmful for judges to permit on grounds of conscience; and (2) judges should take care not to accept too quickly the assertion that obedience to a law was inconsistent with a claimant's perceived religious obligations.[123] Accordingly, Gibson thought the court should hold that, notwithstanding the guarantee of a person's right to worship, society's "right to interfere, on principles of self-preservation, is not disputed. And this right is insolvable into the most absolute necessity; for, were the laws dispensed with, wherever they happened to be in collision with some *supposed religious obligation*, government would be perpetually falling short of the exigence."[124]

In short, Justice Gibson was not prepared to challenge outright the basic premise that the right to free exercise implied a right sometimes to be exempted on grounds of conscience from an otherwise applicable, duly enacted law. Nevertheless, he feared deeply that the right to exemptions, if construed too broadly, could lead to a breakdown of order. Thus, he concluded, courts should define the scope of religious exercise exceedingly narrowly and the scope of nonpeaceable behavior extremely broadly.

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121 *Id.*
122 *Id.* at 160.
123 *Id.* at 161-63.
124 *Id.* at 160 (emphasis added).

In dicta in the 1831 case of *Simon's Executors v. Gratz*, Justice Gibson again felt compelled to argue for a highly restrictive definition of religion and a deferential attitude toward the legislature's designation of an act as harmful.[125] *Gratz* involved a Jewish man who had brought a civil action but refused to attend court on Saturday. The court punished him by dismissing his case. In response, he challenged the dismissal for several reasons, including that as an observant Jew, Pennsylvania's constitutional guarantee of free exercise gave him the right to be exempted from an order to appear in court on Saturday. In pressing the petitioner's case, counsel brought to the court's attention a case in which a New York court had taken a liberal interpretation of a free exercise clause and had, indeed, granted an exemption.[126] Justice Gibson overturned the dismissal, but not on the free exercise grounds that had been pled. Indeed, he indulged in a lengthy dictum criticizing the New York decision and all "liberal" interpretations of free exercise rights, stating his belief in the principle

> [t]hat 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 . . . because no citizen can lawfully hold communion with those who have associated on any other terms, and this ought, in all cases of collision, to be accounted a sufficient dispensation to the conscience.[127]

Gibson's positions became the best-known exposition of the antiliberal position. Although much of his reasoning comes in dissent or in dicta, his writing had the intended effect. It was eventually adopted by the Pennsylvania courts.[128] It was also cited by other courts that embraced an antiexemptions interpretation of free exercise. In 1854, the Supreme Judicial Court of Maine looked to Justice Gibson's theories to articulate why a public school should be permitted to expel a girl who refused to take part in a school-sponsored Bible reading.[129] Thereafter, in 1876 the Vermont courts directed readers to the section of the Maine opinion that quoted Gibson when they refused to allow students a right to leave school to attend religious services.[130]

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[125] 2 Pen. & W. 412 (Pa. 1831).
[126] *Id.* at 417.
[127] *Id.*
[128] *See* Specht v. Commonwealth, 8 Pa. 312, 322-23 (1848).
[129] *See* Donahoe v. Richards, 38 Me. 376, 411-12 (1854).
[130] *See* Ferriter v. Tyler, 48 Vt. 444, 470 (1876).

Not citing Gibson, but very much in keeping with his reasoning, a federal judge in Ohio instructed a jury not to accept a defendant's argument that he should be acquitted because the federal law that he had broken violated his rights of conscience.[131] Similarly, in 1853 a federal judge in Pennsylvania gave a jury instruction that left no doubt that, to his mind, the Federal Free Exercise Clause did not recognize a constitutional right to free exercise exemptions.[132]

2. The Liberal Tradition in the State Courts

The antiliberal, categorically antiexemptions position that some have attributed to the Founders is thus very much in evidence in the nineteenth century. It appears early, is noted by commentators, and is continued in some jurisdictions right up to 1878. However, in some of the earliest nineteenth-century cases, judges allied themselves with a competing approach to interpreting and applying free exercise clauses. Judges who took a more liberal view of exemptions outside the area of speech are very much in evidence from the start of the nineteenth century. As I shall discuss in the next section, their position was approved by some influential commentators, and some courts and congressmen also appear to have embraced their position.

Judges who embraced the liberal interpretation of free exercise clauses defined the scope of protected religious activity broadly. They accepted as "religious" any sincerely held belief about God and God's command. These judges were apparently willing to contemplate the possibility that a religion would command people to act in a way that a legislature had determined was dangerous to the health or peace of society. More importantly, they were skeptical that acts falling within the police powers of the state and rendered illegal should always be considered "nonpeaceable" or "harmful" for the purpose of free exercise analysis. Of course, the liberal approach is most obvious in cases where judges actually granted free exercise exemptions. How-

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[131] Jones v. Vanzandt, 13 F. Cas. 1040, 1045 (C.C.D. Ohio 1843) (No. 7501).

[132] The jury instruction stated, in part:

> Some men of disordered understanding or perverted conscience may conceive it a religious duty to break the law . . . . [I]f 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 . . . .

Van Metre v. Mitchell, 28 F. Cas. 1036, 1041 (C.C.W.D. Pa. 1853) (No. 16,865).

ever, the approach is implied in cases where judges stated that, although they were denying exemptions in the case at bar, they might be willing to grant exemptions under different circumstances.

A New York court produced the most influential early case in the liberal tradition—the 1813 case of *People v. Philips*.[133] The case arose out of an attempt to prosecute a Catholic for theft. The prosecution subpoenaed a priest to reveal whether the defendant had admitted the crime during the sacrament of confession. The priest refused to obey the subpoena, and the New York Court of General Sessions agreed that he had a constitutional right to do so, holding, "It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected."[134]

Answering the priest's claim, the prosecutor took precisely the antiliberal position on exemptions that Hamburger, Bradley, and Lash have imputed to the Founding generation. First, the prosecutor argued that this was not an "exercise of religion" of the sort that free exercise clauses sought to protect: "[T]he constitution has granted, religious '*profession and worship*,' to all denominations, . . . but it has not granted exemption from previous legal duties."[135] Second, the prosecutor argued that, even if some behavior outside the area of ritual deserved protection, the New York Constitution did not protect religious activity that was "inconsistent with the peace or safety of this state."[136] And the prosecutor argued, plausibly enough, that the priest's refusal to testify was inconsistent with society's peace and safety:

> To tolerate religious profession and worship is one thing; to allow any person whatever, to conceal matters upon the

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133 This case was decided by the Court of General Sessions, City of New York, on June 14, 1813. Although the case was not officially reported, the arguments and opinion were printed in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 9-114 (photo. reprint 1974) (1813), and they were widely distributed. The case was also the focus of Walter Walsh's exhaustive article, *The First Free Exercise Case*. *See supra* note 44. As Walsh has shown, the case was known and cited in many subsequent free exercise cases. The court's decision is also excerpted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199-209 (1955).

134 *Privileged Communications to Clergymen*, *supra* note 133, at 207.

135 SAMPSON, *supra* note 133, at 51.

136 *See id.* at 44-45 (referring to the provision in the New York Constitution's free exercise clause, which provided that "the liberty of conscience hereby *granted*, shall not be so construed to excuse acts of licentiousness or justify *practices*, inconsistent with the peace or *safety* of this state"). For a longer analysis of the District Attorney's argument, see Walsh, *supra* note 44, at 25-26.

> knowledge of which the public safety may depend, is another, for said he, it is palpable that the pretention here set up, is inconsistent with the safety, and he should say of course therefore, with the rights of society . . . .
>
> . . . [A] tenet, which makes it a religious duty to conceal this knowledge, thus necessary to the public safety, however it may be seriously believed in, by its professors, comes within the spirit of the constitutional proviso; which is in these words, "*Provided* that the liberty of conscience hereby *granted*, shall not be so construed as to excuse acts of licentiousness, or justify *practices*, inconsistent with the peace or *safety* of this state."[137]

The court disagreed on all counts with this antiliberal interpretation of free exercise guarantees. It stressed that the Catholic priest believed the act of confession, and of keeping the confidence placed in him during confession, to be an essential part of his obligation to obey God's commands.[138] This belief, the court said, made it a "religious" obligation. And "[i]t is essential to the free exercise of a religion . . . that its ceremonies as well as its essentials should be protected"[139] and thus the religiously motivated refusal to testify fell under the New York Constitution's protections for free exercise unless it was an act inconsistent with the peace and safety of the state.[140]

The court then turned to the prosecution's argument that the act of keeping silent, even if religiously motivated, was inconsistent with the "peace and safety" of the state. It refused to accept that the mere fact that an act was contrary to law made it presumptively too harmful to tolerate. Admitting that the state would clearly suffer harm, the court stressed that the harm would be indirect, as the refusal to testify did not directly harm the state but only facilitated antisocial activity.[141] This was not enough. Acts, even if they were illegal, should be considered peaceable and eligible for exemptions unless they were "something actually, not negatively injurious . . . acts committed, not . . . acts

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137 SAMPSON, *supra* note 133, at 44-45 (summarizing argument of District Attorney Gardinier).

138 *Id.* at 102-03. While this passage appears to preserve communal ritual, the court also noted at several places that an individual had a right not to be pressed by the state into an action that would cause him to fear for his or her soul. *See, e.g.*, *id.* at 114 ("[Catholic priests] are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize . . . torture to their consciences.").

139 *Id.* at 111.

140 *Id.* at 111-12.

141 *Id.* at 113.

omitted—offences of a deep dye, and of an extensively injurious nature . . . ."[142] Any rule that defined peaceableness so narrowly that the priest's admittedly illegal activity could be considered nonpeaceable and ineligible for exemptions was, the court said, absurd, because it would render the constitution's guarantee of free exercise meaningless. "It would be to destroy the enacting clause of the proviso—and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense."[143]

Four years later in 1817, the New York courts had the opportunity to reconsider the holding in *Philips*.[144] A trial court implicitly reaffirmed the principle announced in *Philips*, although it found this principle did not apply to the case at bar.[145]

Some scholars have unconvincingly tried to argue that *Philips* does not stand for the proposition that free exercise clauses grant judges power to exempt citizens on grounds of conscience from nondiscriminatory, generally applicable laws.[146] More plausible,

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[142] *Id.*

[143] *Id.* at 113. The court went on to state:

> [U]ntil men under pretence 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. If they are in error, or if they are wicked, they are to answer [only] to the *Supreme Being* . . . .

Id. at 114.

Interestingly, the court explicitly suggested that the Federal Constitution's Free Exercise Clause provided this type of behavior with the same protection—albeit from federal intrusion. *Id.*

[144] *See Privileged Communications to Clergymen*, *supra* note 133, at 209 (discussing People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817)). In *Smith*, a Protestant on trial for murder sought to bar from evidence the confession that he had made to a Protestant clergyman. *Id.* The clergyman, however, did not recognize any religious bar to his testimony. *Id.* at 211. In permitting the minister to testify, the court affirmed the reasoning of *Philips*, but argued that the priest-penitent privilege protected an individual's right to engage in a religious practice necessitated by "the canons of the[ir] church." *Id.* Here, however, the court determined that the confession had not been made to satisfy a religious obligation. *Id.* Rather, it was a confession made to a person, "in confidence, merely as friend or adviser." *Id.* Shortly thereafter, the New York legislature enacted a statute barring anyone from testifying about confessions made to him when he was acting in his professional capacity as a priest or minister. *See id.* at 213 (citing N.Y. REV. STAT. 1828, pt. 3, c. 7, tit. 3, § 72).

This case is also discussed by McConnell, *supra* note 8, at 1505-06 and Walsh, *supra* note 44, at 40-41.

[145] *See Privileged Communications to Clergyman*, *supra* note 133, at 212.

[146] *Cf.* Bradley, *supra* note 9, at 290-93. Bradley argues that *Philips* is not properly considered a case supporting the grant of exemptions. First, Bradley argues that *Philips* was not primarily a free exercise case because the court gives several possi-

until recently, was the argument that *Philips* was largely unknown to contemporary courts and unrepresentative of contemporary opinions.[147] Recently, however, Walter Walsh has shown this proposition to be incorrect. The opinion in *Philips* was unofficially reported and influential. One of the counsel in the case made sure that the report was widely distributed, and it became far more influential than might normally be expected from an opinion of a lower state court.[148] Judges with a liberal bent on the question of free exercise exemptions cited *Philips* to support their decisions granting exemptions. Furthermore, as we have seen, the opinion was raised by counsel in a Pennsylvania court, where one antiliberal judge felt compelled to criticize it.[149]

Among courts that found the interpretation proposed in *Philips* persuasive were those of Virginia. In the case of *Commonwealth v. Cronin*, a case uncovered by Walsh and not discussed in any of the originalist works on free exercise, a Virginia court cited *Philips* approvingly in holding that a priest was exempted from answering questions about information learned in confession.[150]

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ble grounds for recognizing a priest-penitent privilege. *Id.* at 290. On this point, it seems hard to agree. As I read the opinion, the court based its holding primarily on free exercise grounds, and the opinion has been cited by later courts as evidence for the principle that courts should be prepared to grant exemptions. Second, Bradley argues that *Philips* was not a conduct exemptions case because the subpoena requirement was rooted in common law rather than statutory law. *Id.* While one might choose to narrow the opinion on these grounds, the court argued that the right to an exemption is rooted in constitutional law, and there is nothing in the opinion that suggests it felt the common law rule could be reinstated by statute. Third, as Bradley suggests, the court noted that the exemption was necessary to protect a sacrament rather than "religiously motivated conduct" and thus its holding is arguably narrower than *Sherbert v. Verner*, 374 U.S. 398 (1963). Bradley, *supra* note 9, at 290-91. While this is true, the court does not suggest any bright line rule for determining what types of behavior are sufficiently central that they deserve protection. While the principle announced in *Philips* may not require the adoption of the principle later adopted in *Sherbert*, neither does it preclude it. Finally, Bradley emphasizes that the court recognized that concerns about the public welfare could override a person's right to an exemption. *Id.* at 291. This is indisputably true. Again, however, courts did not create an objective test for balancing individual rights against the general welfare.

147 *See, e.g.*, Bradley, *supra* note 9, at 290; Lash, *supra* note 9, at 1124 n.77; Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 125. For a useful summary and critique of these authors, see Walsh, *supra* note 44, at 64-70.

148 For a short biography of William Sampson, counsel to Philips, see Walsh, *supra* note 44, at 12-15. For information on publication of the case, see *id.* at 40.

149 Simon's Ex'rs v. Gratz, 2 Pen. & W. 412, 417 (Pa. 1831).

150 *See* Walsh, *supra* note 44, at 40 (discussing Commonwealth v. Cronin, 1 Q. L.J. 128 (Va. Cir. Ct. 1855)).

Courts in South Carolina also embraced the liberal free exercise principles announced in *Philips*. As noted previously, the high court of South Carolina initially embraced an antiliberal application of the exemptions principle.[151] Only four years later, however, the courts of South Carolina reversed course. After a restructuring of the South Carolina court system, the new high court in 1827 revisited the question of exemptions and opted to follow New York's example. In a pair of opinions recently uncovered by Walsh, a trial court cited *Philips* as support for its decision to grant an exemption, and the new high court of South Carolina, the Court of Appeals, unanimously affirmed.[152]

Thus, long before Justice Gibson articulated his influential antiexemptions interpretation of free exercise guarantees, a New York court had articulated an influential, pro-exemptions interpretation. According to this theory, the mere fact that an act was illegal did not render it nonpeaceable and thus, ineligible for exemptions. This position was adopted by other courts in the middle years of the nineteenth century, and as we shall see shortly, a similar position seems implicitly to have been embraced by some commentators.

C. Nineteenth-Century Commentaries Discussing Free Exercise Exemptions Outside the Area of Speech

When considering the evolution of nineteenth-century thinking on the question of free exercise, a source of information that deserves more study is the body of academic commentary that described or commented upon evolving notions of free exercise. In the forty years before George Reynolds sought a free exercise exemption from federal antipolygamy laws, a number of treatises discussed evolving doctrines of free exercise in the United States. Some specifically addressed the question of what types of religious practice, if any, could be exempted. This is a body of literature that has remained largely unexplored. However, the texts

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[151] *See* discussion *supra* Part III.B.1 (discussing State v. Willson, 13 S.C.L. (2 McCord) 393 (S.C. 1823)).

[152] *See* Farnandis v. Henderson, 1 CAROLINA L.J. 202, 213 (Union Dist. S.C. 1827). Walsh points out the intriguing fact that the affirming panel contained two judges from the panel in *Willson*, 13 S.C.L. (2 McCord) at 393, discussed *supra* Part III.B.1. That panel had earlier rejected the very idea that one could have a genuinely "religious" objection to a law. Walsh suggests that the decision, decided in the wake of *Philips*, represents an implicit overruling of the earlier antiliberal case. *See* Walsh, *supra* note 44, at 42.

strongly suggest that both the liberal and antiliberal interpretations of free exercise clauses had academic champions.

The earliest treatises on American law do not provide much insight into the American view of free exercise exemptions for actions other than speech. As discussed above, their discussions of blasphemy implicate the question of exemptions but do not develop a larger exemptions principle, nor do they focus on the question of how to handle exemptions for nonspeech activities.[153] Tucker's early edition of William Blackstone's *Commentaries* does not contain any meaningful discussion of American constitutional guarantees of religious free exercise rights outside the area of speech,[154] nor does James Kent's *Commentaries on American Law*.[155] Joseph Story's *Commentaries on the Constitution of the United States* discusses the adoption of constitutional clauses protecting freedom of religion and discusses the principles animating the adoption of the establishment clause, but it does not provide much insight into the manner in which the clauses were interpreted or the way Story thought they should be applied to cases involving exemptions outside the area of speech.[156]

As free exercise jurisprudence gradually coalesced in the nineteenth century, however, some commentators began to note that free exercise guarantees protected the right of people to engage in nonmalicious religious speech and implied that these guaran-

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[153] *See* discussion *supra* Part III.A.

[154] WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803).

[155] JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., 12th ed., Boston, Little, Brown & Co. 1873).

[156] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray & Co. 1833). Story discusses the First Amendment, but the focus is almost entirely on the Establishment Clause. *Id.* at 722-31 (the discussion of free exercise comes on page 731). A prohibition against establishment of a national church

> would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. at 731. This seems to not answer the question of whether the right to be free of "inquiry into their mode of worship" would give people a right to be exempted from laws prohibiting acts that a believer thinks constitutes "worship."

tees protected the right of people to engage in other religious actions, so long as the actions were peaceable and did not tend to cause unacceptable harm to society. Like judges, commentators were unclear about how to distinguish protected "religious" behavior from nonreligious behavior, nor were they clear about how to determine whether religious behavior was nonpeaceable and inherently threatening.

Some early commentators who focused specifically on the question of exemptions took what I have characterized as a liberal position. They suggested that religious convictions may compel people to behave in a manner that the legislature has seen fit to prohibit. Since the whole point of free exercise clauses is constitutionally to prevent political majorities from imposing on the right to act in accordance with one's conscience, these commentators felt that the right to free exercise implied that judges must have the ability to grant judicial exemptions under at least some circumstances. Thus, for example, Edward Mansfield's 1845 treatise on women contained a vague but implicitly liberal section on individual rights:

> Another absolute right of individuals in the United States, is the right to conscience and its enjoyment, in *religious faith, profession and worship*. This is guarded, so far as the legislation of Congress goes, by the 1st Amendment to the Constitution of the United States, which provides that Congress can make "no law prohibiting the free exercise of religion." By the Constitution of Ohio, and by the Constitutions of nearly all the States of the Union, the utmost freedom and latitude is allowed to every form of religious creed or worship, and even to those who have no belief. . . .
>
> What is called the rights of conscience would be very difficult of definition in words, but the practice in the United States has given it a very clear exposition. It is the right *to believe, to utter* what is believed, and *to worship according to* that belief. It is regarded here as the most sacred of all rights.[157]

Obviously, this passage begs the question of what the term "worship" means. As we shall see shortly, however, some commentators accepted that "worship" included all acts that a religious community, or perhaps a single person, believed must be done to carry out one's obligation to "honor" God.[158] And a

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[157] MANSFIELD, *supra* note 91, at 146-47.

[158] *See* discussion *infra* in this Part III.C. For example, it is implicit in John O'Brien's discussion of what types of "religious" behavior are protected by the First

citizen's right to carry out such an act on grounds of conscience was protected until the act turned out to be nonpeaceable or harmful to important social interests.[159] But for reasons that we have already described, acceptance of this principle did not necessarily imply acceptance of a liberal perspective on the question of free exercise exemptions. The distinction between liberal and antiliberal positions often depended on whether disobedience to the state was automatically presumed to constitute nonpeaceable behavior and thus be harmful.

Mansfield was not clear about his feelings on such crucial issues. However, another treatise written at almost the same time seems cautiously to have proposed that free exercise guarantees give citizens a right to free exercise exemptions. John O'Brien's 1846 *A Treatise on American Military Laws* contains a lengthy discussion on the subject of the military's power to compel soldiers to act in a way that is inconsistent with the soldiers' religious conscience.[160] O'Brien concluded that the First Amendment's guarantee of free exercise gives soldiers a right to be exempted from laws unless exempting them would threaten the ability of the army to fight.[161] Considering the issue of soldiers who wish to abstain from military-sponsored church services, O'Brien argued that such soldiers are protected by the First Amendment:

> The amendment we are considering, also forbids Congress to pass any law prohibiting the free exercise of religion. . . .
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> . . . [I]t is a matter of religious duty with members of some creeds, to abstain from attendance at the divine service of any other than their own church. This abstinence is for them, as much an exercise of religion as any positive act. They are exercising their religion by this, as much as a Jew is doing so, when he abstains from the flesh of unclean animals.
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> . . . .
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> . . . The general principle is fully admitted, that any construction of one part of the constitution which renders another portion of the same instrument a mere nullity, must necessa-

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Amendment. JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL (Phila., Lea & Blanchard 1846). It is explicit in other works, such as Lieber's *On Civil Liberty:* "[M]an has a right, not necessarily a moral right, nor a right in point of judgment, but a civil right, to worship God according to his own conscience, without suffering any hardships at the hands of his neighbors for so doing." LIEBER, *supra* note 66, at 100 n.1.

159 *See* discussion *infra* in this Part III.C.

160 O'BRIEN, *supra* note 158.

161 *Id.* at 59-61.

> rily be erroneous. One clause may limit or modify the effect of another, but it can never destroy it. . . . If it can be shown, that this prohibition [on laws forcing people to violate their conscience] *necessarily* interferes with any power *necessary* for Congress to exercise the prerogative of raising or organizing an army, we will readily admit, that *so far as it does so conflict, and so far as relates to the public force*, it is ineffective.[162]

In short, people have a right to exemptions from legislation unless their disobedience makes it absolutely impossible for the legislature to carry out one of its essential, enumerated responsibilities. Implicitly admitting that some Americans took a less liberal view of free exercise exemptions, the treatise made an impassioned demand that the public recognize at least some right to exemptions. Notwithstanding the theoretical possibility that there were cases where permitting an exemption would interfere with an essential government function such as raising an army, O'Brien insisted that it was generally wrong to interfere with people's attempts to honor and obey God as they understand they are supposed to do:

> It seems scarcely credible, that in this nineteenth century, so vaunted for its enlightenment, individuals can be found so warped by prejudice, as to desire to interfere forcibly with man's relations to his God. . . . No matter how they may disguise themselves under the plausible mask of benevolently advancing the best interests of man, they should be indignantly spurned by every true Christian, by every free American.[163]

One might be tempted to discount Mansfield's and O'Brien's treatises on the grounds that they were not written by experts on constitutional law or that their discussions of religious freedom occur in the context of a larger discussion about an area of law separate from that of constitutional law. In both tone and argument, however, their discussions of free exercise anticipated ones found in some later, highly influential works on constitutional rights. These later works also suggest that religious liberty includes some privilege to fulfill one's perceived religious obligations. While admitting that people cannot be permitted to disobey essential social regulations, these works suggest that not all regulations can be considered essential. Frustratingly, these works never articulate a clear principle that would allow people to distinguish between (i) regulations that ban peaceable behav-

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[162] *Id.* at 60-61 (emphasis added).
[163] *Id.* at 65-66.

ior and can lawfully be disobeyed on grounds of conscience and (ii) regulations that play such an important role in maintaining the public peace that they cannot be subject to religious exemptions. Nevertheless, they give examples of the types of action that fit into the two different categories.[164] (For the purpose of understanding *Reynolds v. United States,* it is important to note that one regularly finds among the regulations that are described as crucial to public order and thus not subject to exemption, the regulations of marriage and, particularly, the laws banning polygamy.)[165]

One influential work that seems to favor at least the qualified grant of exemptions came from the pen of Francis Lieber.[166] As already noted above, Lieber had argued in his work, *Manual of Political Ethics*, that governments were not capable of policing belief.[167] Thus, belief did not need constitutional protection, and the constitutional guarantees of free exercise therefore must protect, to some degree, the right to act on one's beliefs.[168] Expanding on that point in the 1859 edition of his influential work *On Civil Liberty and Self-Government*, Lieber asserted that "liberty of conscience" is a misnomer and that the debate should be about "liberty of worship."[169] He then discussed the types of behavior liberty of worship must protect. Among the protected acts was the act of reading a religious text that the legislature has forbidden.[170]

At the time that Lieber wrote, the question of whether people could publicly read disfavored religious texts was nearly as fraught with controversy as the question of blasphemy. The decision to read a particular religious text clearly constituted an exercise of "religion." Antiliberal courts, however, could argue that where an act had been prohibited by a legislature (not because it *was* an act of worship, but because the legislature deemed it harmful), courts were obliged to consider the act disorderly or harmful, and thus deny requests for a free exercise exemption

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164 *See* discussion of Lieber, Thompson, Sedgwick, and Cooley *infra* in this Part III.C.

165 *See* discussion *infra* Parts III.C and V.

166 For Lieber's background and influence, see text accompanying *supra* notes 62-70.

167 LIEBER, *supra* note 64, at 189-90.

168 *See* text accompanying *supra* notes 67-70.

169 LIEBER, *supra* note 66, at 99.

170 *Id.* at 100 n.1.

from the law. Thus, as we have already seen, one court in Maine allowed a student to be expelled from school simply because she wished to be exempted from the obligation to read one translation of the Bible and instead to be permitted to read from a different translation.[171]

In a telling footnote, Lieber quoted and praised a speech given to a "Society for Protecting the Rights of Conscience."[172] This society agitated for the rights of people in Catholic countries who had been imprisoned for violating generally applicable, nondiscriminatory state laws prohibiting reading the Bible in the vernacular.[173] In a passage that Lieber cited with approval, the speaker seemed to disapprove of antiliberal positions that would permit such a result:

> [W]e understand not necessarily that every one is right in the religion that he adopts, but that his neighbors have no right to interfere with him. . . . [M]an has a right, not necessarily a moral right, nor a right in point of judgment, but a civil right, to worship God according to his own conscience, without suffering any hardships at the hands of his neighbors for so doing. . . . [W]hen attempts are made to compel men to conform to what they do not conscientiously believe . . . a society like this ought to come forward . . . .[174]

Lieber was not an absolutist. He accepted that religious communities might require their adherents to engage in behavior that was so obviously harmful that it should be considered axiomatically nonpeaceable and ineligible for exemptions. Sadly, Lieber did not provide a principle for distinguishing between acts that were so harmful as to preclude them from exemptions and acts that were harmless enough to deserve exemptions. He simply offered the Mormon practice of polygamy as an example of such harmful behavior. He explained at length why the practice was so intrinsically and inevitably harmful that it could not be permitted.[175] It was up to the reader to try and infer a principle that would apply to future cases.

Clearly, Lieber thought majoritarian legislatures could and sometimes were likely to prohibit behavior that fell clearly in the category of peaceable, though illegal, activity that constitution-

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171 *See* Donahoe v. Richards, 38 Me. 379, 379-96 (1854).

172 LIEBER, *supra* note 66, at 100 n.1.

173 *Id.*

174 *Id.*

175 *Id.* at 101-02. For further analysis of Lieber's treatment of polygamy, see text accompanying *infra* notes 238-44.

ally could not be prohibited. In an impassioned conclusion, he reminded his readers that, in numerous sects of Christianity in nineteenth-century America, one found new zeal among believers to conform to religious laws that the majority may find repugnant. Society *must* respect the rights of those believers, and dreadful consequences would befall any society that did not respect rights of people within the minority to conform their behavior to their understanding of religion.[176]

Theodore Sedgwick's 1857 treatise on statutory and constitutional law is extraordinary insofar as it implies that protections of religious exercise provided a very broad right to exemptions.[177] Sedgwick suggested that this right might *not* permit the federal government to ban even so harmful an activity as polygamy in the territories:

> The Constitution contains no more important clause than that prohibiting all laws prescribing religious tests, establishing religion, or interfering with its free exercise; and fortunately, thus far, the wise spirit of our people has come up to the sagacity and foresight of our ancestors. . . . It may be remarked, however, that the recent organization of a distinct territorial government about to claim admission as a State, exclusively occupied by settlers who declare polygamy to be one of their fundamental institutions, presents the problems connected with this matter in a new aspect, and will undoubtedly put our principle of absolute toleration to a very severe test.[178]

While Sedgwick did not explicitly state that Mormons could get an exemption from laws banning polygamy, he nevertheless appeared to believe that the Constitution could plausibly be interpreted to require them—a result that he considered troubling.

While these commentators all seem to tend in a liberal direction, the antiliberal position also had academic champions among nineteenth-century commentators. In the years prior to *Reynolds*, Thomas Cooley's *A Treatise on Constitutional Limitations* came to stand alongside Lieber's as a leading authority on constitutional law.[179] In descriptive terms, Cooley is ambiguous about the extent to which courts felt compelled to grant exemptions.

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176 LIEBER, *supra* note 66, at 101.

177 THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (N.Y., John S. Voorhies 1857).

178 *Id.* at 607-08.

179 COOLEY, *supra* note 59. *See* discussion of Cooley's influence *supra* Part III.C and text accompanying notes 62-66.

However, in normative terms, Cooley stands as a counterweight to the generally liberal bent of mid-nineteenth-century treatises.

Cooley stressed that he did not put much stock in the proposition that there was a natural right to freedom of religion. In his view, religious rights consisted only of the rights granted by legal documents, including constitutions.[180] Governments must be restrained from acting arbitrarily.[181] Nevertheless, if the masses felt strongly that all religious disputation should be banned, then Cooley presumably would have accepted that they could enact a constitution with such a ban. The question for Cooley, then, was whether the American people had done such a thing.

As Cooley saw it, American constitutions may have imposed on a government's ability to restrain a person's worship, but they did not limit it absolutely.[182] He confirmed that there was consensus in state courts that free exercise clauses did not merely protect belief but also protected some types of action, including speech and the ill-defined category of acts that constitute worship. Cooley took a liberal view of "worship," which included all acts that a person believes are necessary if God is to be properly honored. According to Cooley, the rights of free exercise establish a principle that "[n]o external authority is to place itself between the finite being and the Infinite, when the former is seeking to render that homage which is due, and in a mode which commends itself to his belief as suitable for him to render and acceptable to its object."[183]

At the same time, however, Cooley made clear that the right to engage in such behavior has always been limited by the requirement that the act in question not be of a type that is injurious to the public welfare or imposes on the rights of others. Perceptively, he noted that social understandings of welfare or of

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[180] To understand Cooley's thinking, it helps to read his later treatise on torts, in which he explained that he liked to conceptualize "civil liberties" in a way that compromised between a positivist definition of "civil liberty" as the rights granted by the sovereign with a liberal one that saw rights as liberties owned by each human as a privilege of belonging to civilized society—a position he explicitly associated with Lieber. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 9-10 (Chicago, Callaghan & Co. 1880). Cooley thus suggested that "civil liberty" should be defined as the liberties that exist after the state placed "limitations and restraints upon the action of individual members of the political society as are needed to prevent what would be injurious to other individuals or prejudicial to the general welfare." *Id.* at 9.

[181] *Id.*

[182] *Id.* at 33-35.

[183] COOLEY, *supra* note 59, at 469-70.

countervailing rights are socially constructed, and he explored the types of worship that have been seen as sufficiently injurious so that constitutions permit them to be banned.[184]

Cooley noted the disagreement about when, if ever, free exercise guarantees should be understood to require judges to grant free exercise exemptions.[185] According to Cooley, constitutional limitations embodied in free exercise clauses had been construed to require free exercise exemptions from laws that would prevent learned people from disputing questions of religion. They had not been construed to require exemptions for behavior that the public viewed as outrages upon basic moral norms (such as human sacrifices or polygamy) or views as violations of society's ability to worship as they please (including, apparently, the enforcement of a day of rest on Sundays).[186]

In *A Treatise on Constitutional Limitations*, Cooley did not propose a clear principle that would explain the distinction between acts that had received exemptions and acts that had not. He noted simply that the constitution in some cases required mi-

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[184] *Id.* at 471-72; *cf.* COOLEY, *supra* note 180, at 34. In his treatise on tort law, Cooley stated:

> Religious liberty in any country cannot embrace those things which the moral sense or sense of decency of the general public condemns, and which consequently cannot be allowed without injury to the public morals.
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> . . . [T]he standard of immorality and crime must be the general sense of the people embodied in the law.

Cooley, *supra* note 180, at 34.

[185] COOLEY, *supra* note 59, at 477-78. In an intriguing passage, Cooley suggested that the issue may have failed to reach consensus because it often did not arise, as American lawmakers generally felt an obligation to consider the religious sensibilities of people who might be affected by the law:

> Whatever deference the Constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to carefully avoid any compulsion which infringes on the religious scruples of any, however little reason may seem to other persons to underlie them. Even in the important matter of bearing arms for the public defence, those who cannot in conscience do so are excused, and their proportion of this great and sometimes necessary burden is borne by the rest of the community.

Id.

[186] *Id.* at 469-77. Focusing on the example of Sunday closing laws, Cooley noted that they were upheld and that judges were not always clear about why they upheld them. The first possible reason was that Sunday closing is "an enforced deference [to] which one differing from the common belief pays to the public conscience." *Id.* at 477. The second reason was that it was necessary to preserve public health. *Id.* at 475-77. Although he found that some courts felt constrained to argue the latter, he noted that authority exists for the former as well. *Id.*

norities to defer to the religious convictions of the majority.[187] He appeared to be comfortable with this.

Joseph Thompson's *Church and State in the United States with an Appendix on the German Population* is intriguingly ambivalent on the question of exemptions.[188] Its author seemed to be caught between, on the one hand, a desire to advocate a liberal approach in the vein of Lieber, and on the other hand, a fear of Catholicism and Mormonism that drove him in the direction of Cooley's nonjudgmental acceptance of the antiliberal position on the question of exemptions.

Thompson began with a strong statement that constitutional language protecting rights of "religion" or "free exercise" protects not only the right to believe what one chooses about the divine, but also one's right to act in accordance with one's beliefs:

> Liberty of opinion, liberty of worship, liberty in all matters pertaining to religion, is not a privilege created or conceded by the State, but is a right inherent in the personality of the individual conscience; and the State is pledged not to interfere with that right. Such is the theory of the National Constitution.[189]

Thompson quickly made clear, however, that this language had to be read against the backdrop of a separationist philosophy. Thompson argued that boundaries existed between the jurisdiction of religion and of the state. Although he was not clear where exactly the boundaries laid, he appeared to be concerned about the growth of religions like Mormonism and Catholicism—each of which claimed a right to regulate action that Thompson felt was properly within the jurisdiction of civil authority.[190] He thus stressed that his support for absolute rights to engage in religious acts was not an absolute right to engage in *any* activity

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187 *Id.* In normative terms, however, Cooley, unlike Lieber or other liberal commentators on free exercise, seemed to favor an antiliberal position. As he made clear in his later treatise on torts, he thought the legislatures of a democracy should be trusted to define, at its discretion, what type of religious worship was "disorderly" and subject to prohibition, notwithstanding free exercise guarantees. *See, e.g.*, COOLEY, *supra* note 180, at 34-35. Note that, in contrast to other parts of the treatise, such as the chapter on family rights, Cooley does not cite case law that would serve to indicate that his view was more widely accepted than the contrary view. Indeed, he only cites his own treatise, *Constitutional Limitations*, and a work of political science.

188 THOMPSON, *supra* note 91.

189 *Id.* at 13-14.

190 *See id.* at 23-28 (discussing "Mormons, Chinese, and Jesuits"); *id.* at 140-41 (giving a diatribe against the Mormons).

that one felt was mandated by God.[191]

Thompson struggled to draw the distinction between (i) matters of "worship," which were peaceable and could not constitutionally be interfered with and (ii) essential matters of civil administration, which were always subject to governmental regulation.[192] Apparently, the distinction depended, in some ill-defined way, upon the degree to which society's interests were involved. Religious belief could excuse some acts of disobedience to law, but not all and certainly not acts that would inevitably lead to the destruction of society:

> The American people honor the sentiment of Peter, that "it is right to obey God rather than man;" and they applaud the heroic protest of Luther at Worms, "*Hier stehe ich: ich kann nicht anders; Gott helfe mir*." But when the god set higher than man is a foreign potentate, who asserts his supremacy over the State; when the conscience that claims to be inviolate is a church embodied as a political infallibility, and enthroned above all civil laws and institutions,—then the people say, "Society has rights as sacred as the rights of conscience. Government, no less than religion, is from God. Conscience shall not harbor conspiracy; religion shall not foster revolution; your pious devotion shall not plot our destruction."[193]

In short, Thompson believed that some religions, particularly Mormonism and Catholicism, failed to recognize the proper boundary between the religious leader who issued rules in the religious sphere and the "potentate" who issued essential regulations in the civil sphere.[194] He was not clear about how to define the acts that fall within the sphere of religion (the sphere where a Lutheran must be permitted to follow Luther in saying "Hier stehe ich . . ."), but the examples that he offered consisted of activities that nineteenth-century Americans almost universally considered directly and catastrophically harmful (and, interest-

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[191] *See id.* at 139-40. In particular, Thompson stated:

> The State concedes to every citizen the right to carry his religious notions to the extreme of folly, his religious practice to the extravagance of enthusiasm. So long as his actions are harmless, his vagaries are left to the corrective of public discussion. . . . [B]ut if he should fire the library, the treasury, the capitol, he would find that liberty itself has an asylum for the madman, a prison for the incendiary, a gallows for the traitor.

Id.

[192] *Id.* at 29-31.

[193] *Id.* at 138-39.

[194] *Id.* In other sections, he seems, implicitly, to indicate more deference to activities commanded by religions other than Mormonism. *Id.* at 29-31.

ingly enough, ones that were for the most part associated either with foreign cultures or with Mormonism):

> Though no form of religious belief or worship, *simply as such*, can justly be proscribed in a free state, yet for reasons of public morality, or for the safety and order of the Commonwealth, the State may forbid and punish acts done in the name of religion; as, for instance, polygamy as practised by the Mormons, the infanticide of the Chinese, or the self-immolation of Hindoo devotees.[195]

Apparently, then, according to Thompson, whether an act counts as religious or peaceable (and thus the exemptability of that act) depends on the degree that it tends to harm the welfare of others. This is further implied in a later section where Thompson takes great pains to explain why the Mormon practice of polygamy, which might plausibly seem to be private, actually has serious effects on society and why, therefore, polygamy is an activity that can be banned by the state.[196]

In summary, although nineteenth-century case law has been exhaustively scrutinized, treatises seem to be a largely untapped source of research about nineteenth-century views on free exercise. From my review of treatises directly discussing the specific question of exemptions outside the area of speech, it seems that the treatises struggle with the question. They fail to come up with a clear principle distinguishing between "worship" and "civil responsibility," or between nonpeaceable and peaceable acts of worship. That said, they seem often, though not always, to take the "liberal" position that constitutional guarantees of free exercise limit the government's ability to interfere with religious practices outside the area of speech. Under some circumstances, religious believers engaging in activities they believed to be commanded by God must be given an exemption from generally applicable, duly enacted law. Instead of giving clear guidance on the circumstances under which exemptions are appropriate, liberal treatises give examples both of regulations that the author believes citizens have a right to violate on grounds of conscience and of regulations that they do not.

Intriguingly, if there is a trend in the evolution of nineteenth-century treatises on the topic of free exercise, it seems to be away from a liberal position and toward an antiliberal position. Kurt

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[195] *Id.* at 18-19.

[196] *Id.* at 18-21. *See* text accompanying *infra* notes 260-63.

Lash has hypothesized that with the rise of abolitionism, American free exercise thinking became increasingly liberal on the question of exemptions.[197] At least among academic commentators, the opposite seems to have occurred. The rise of Catholic immigration and Mormon power in the West seems to have driven some commentators toward an antiliberal, or at least a more explicitly antiliberal, position.[198]

In any case, an analysis of nineteenth-century treatises seem to confirm the conclusions we drew from the case law. The liberal and antiliberal positions each had early champions and continued to have champions among commentators and judges well into the Reconstruction era, when the Supreme Court would hear and for the first time decide the merits of a claim for a free exercise exemption under the Federal Constitution.

D. Congressional Debates About the Meaning of Free Exercise

In addition to nineteenth-century cases and treatises, other materials may provide further support for the idea that the liberal position in the debates about exemptions remained strong as the nineteenth century progressed. As Kurt Lash has pointed

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197 Kurt Lash, who believes that the Founders did not recognize the rights of free exercise as implying a right to free exercise exemptions, has argued that in the middle of the nineteenth century, the Second Great Awakening, the rise of religiously inspired abolitionism, and the ordeal of the Civil War all combined to force a sea change in American feelings about free exercise. *See generally* Lash, *supra* note 9, at 1111-30, 1147. In his view, Americans in the postwar period came to reject the original antiexemptions position, instead believing that the Fourteenth Amendment gave citizens a right to free exercise exemptions from state laws. It is possible that the Second Great Awakening and the rise of evangelical political agitation on questions such as slavery were events that caused Americans to reflect more deeply upon the exemptions debate and inspired liberal commentators to write in favor of a position that had primarily affected marginal groups such as blasphemers, Jews, and Catholics. It is further possible that as the nineteenth century progressed, the type of authors who felt compelled to discuss religion in unlikely places or to write whole treatises on the subject of rights were drawn more heavily from the evangelical activists favorably inclined to claims of individual liberty in the area of religion.

198 Earlier treatises, including Lieber's, appear to favor an ambiguously liberal view on the question of exemptions. They contemplated that exemptions should be granted without explicitly providing a definition of the types of activity that can and cannot be exempted. Later treatises appeared after the Mormon controversy had fanned fears about the potential social effects of religiously motivated practices, particularly the Mormon practice of polygamy and the Catholic recognition of papal authority. During the period, some treatises seemed to take a more restrictive liberal position, explaining why the right to exemptions could exist without extending the right to Mormon polygamists. Others, such as Cooley, championed the antiliberal position that judges should defer to majoritian conclusions that an act is too morally outrageous or socially harmful to be exempt based on religious grounds.

out, after the Civil War Congress took a serious interest in the question of religious freedom.[199] Relying heavily on congressional debates, Lash argued that many Americans after the Civil War embraced a liberal and pro-exemptions interpretation of "free exercise."[200] Whether or not the majority took this view, some congressmen seemed to do so.

As shown by the debates analyzed by Lash, the states' representatives in Congress disagreed about which types of "religion" were protected and about how harmful a religiously motivated act had to be before Congress could ban it. Some congressmen took an antiliberal position that they had discretion to regulate a broad range of actions inspired by nontraditional religious beliefs.[201] In contrast, however, many senators argued for a liberal interpretation and application of free exercise principles, arguing that the Free Exercise Clause limited Congress and the states' power to prevent citizens from carrying out their perceived religious obligations. To their mind, although legislatures could ban nonpeaceable or socially harmful religious behavior, courts did not have to defer to the legislative conclusion that an activity should be considered nonpeaceable or unacceptably harmful.[202]

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[199] Lash, *supra* note 9, at 1146-56.

[200] *Id.*

[201] Thus, in line with the less liberal courts, some congressmen tried to argue that the First Amendment protected, at most, a narrow range of Christian ritual actions. Some even took the extreme position that no true religion would condone illegal activity and thus, tautologically, no illegal action could conceivably be motivated by "religious" conviction. *See, e.g.*, 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.") (statement of Frederick Frelinghuysen). Others suggested that the rights of religious free exercise did apply to Christian beliefs. "Surely," said Congressman Thomas Nelson of Tennessee, "[the Founding fathers] never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hottentot should be ennobled by [the] honored and sacred name [of religion]." GORDON, *supra* note 63, at 81 & n.53 (quoting Congressman Thomas A.R. Nelson's speech *Polygamy in the Territories of the United States* from 1860).

[202] According to Lash, Senator Henry Wilson had embraced the mainstream position described in the treatises analyzed above when he stated, "Religion, 'consisting in the performance of all known duties to God and our fellow men[.]'" Lash, *supra* note 9, at 1146 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864)). In the postwar Congress, many senators agreed with that assessment and argued that Congress was thus without power to impose laws that restricted people's ability to perform activities that violated their perceived religious duties. This was true even when it came to laws that would hasten the reconstruction of the South. For instance, Senator Henry Anthony argued that Congress could not pass laws that prohibited segregated churches. CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872) ("If

In short, then, congressmen, like judges and commentators, seemed deeply divided over the question of free exercise exemptions.

IV

Nineteenth-Century Discussions of Free Exercise Clauses: Implications for Debates About Original Understanding of the Free Exercise Clause

If we focus on legal texts that deal with the precise issue of free exercise exemptions from generally applicable laws that directly prohibit a person from carrying out a religious obligation, then nineteenth-century case law and commentaries do not support either of the leading originalist claims about the Founders' understanding of the Free Exercise Clause. The ongoing disagreement revealed in both case law and commentary does not support the idea that there was a single consensus view at the time of the Founding about whether free exercise guarantees implied a right to exemptions. If anything, it suggests (though it does not prove) that there was no common "original understanding" of the Clause.

As I have explained above, the earliest free exercise cases, including those on blasphemy, seem to suggest a "liberal" position consistent with the idea that judges could grant exemptions.[203] But in those opinions, judges clearly felt compelled to respond to people who took antiliberal positions of the sort that Hamburger,

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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."). Senator John Bingham argued eloquently that the Fourteenth Amendment invalidated all laws which prevented people from fulfilling what they perceived to be their sacred obligations:

> 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. 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.

App. to the Cong. Globe, 42d Cong., 1st Sess. 84 (1871). At the same session, he also said: "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 . . . ." *Id.*

[203] *See* discussion *supra* Parts III.A–B.

Bradley, and Lash associate with the Founders. This suggests that such antiliberal positions were widely held. From the 1830s through Reconstruction, antiliberal and liberal judicial opinions are both evident. Commentaries also consistently reflected disagreement and sometimes profound ambivalence about the issue.

One cannot rule out the possibility that there *was* a consensus at the time of the Founding that broke down early in the nineteenth century. Kurt Lash suggests that just such a shift occurred later in the century.[204] However, it appears to me that from a very early period, when Americans were actually faced with concrete cases where people asked for exemptions, they understood that there were two plausible readings of constitutional free exercise clauses—one that automatically precluded judges from ever granting exemptions, and another that left open the possibility of exemptions in cases of legislative or executive overreach. It seems unlikely that people would have split so sharply and so early if they had come of age, or had been taught by people who came of age, at a time of consensus about the meaning of "free exercise."

Michael McConnell, Gerald Bradley, and, to a lesser extent, Kurt Lash agree that nineteenth-century consensus about free exercise, if it existed, would suggest an original understanding that anticipated the nineteenth-century position. While that assumption appears reasonable, the disagreement in nineteenth-century literature forces us to ask if the corollary is also true: does an ongoing lack of consensus in the nineteenth century suggest the absence of an original understanding on the subject? If the answer is yes, and I propose it is, then it forces us to consider where scholars and judges should turn if they want to move beyond the acrimonious current debates about free exercise jurisprudence and forge consensus.

V

Can Nineteenth-Century Free Exercise Materials Help Contextualize Early Supreme Court Precedent?

Originalists have long argued that research into nineteenth-century jurisprudence on free exercise exemptions would con-

[204] *See generally* Lash, *supra* note 9, at 1117-18 ("The federalist First Amendment left little room for religious exemptions. . . . The Founding, however, is not the end of the story. . . . By Reconstruction . . . a very different picture had emerged.").

firm an original understanding that courts could rely on as a way to avoid confusing Supreme Court precedents in the area of free exercise. However, nineteenth-century cases and commentaries suggest that there was no original understanding of free exercise clauses that can serve as a focal point for the Supreme Court's contemporary free exercise jurisprudence. If free exercise debates are to move from their current state, scholars and judges must move away from originalism and instead try to articulate compelling new approaches to reading Supreme Court precedents and thinking about policy. Can nineteenth-century history help us interpret early Supreme Court precedents on free exercise? I believe so.

In shaping its current antiexemptions interpretation of the Free Exercise Clause, the Supreme Court has relied heavily on its early opinions. Of them, the most important precedent is the 1878 case of *Reynolds v. United States*, which involved a request to be exempted on grounds of conscience from antipolygamy laws. *Reynolds* is almost universally interpreted today as an opinion that established a categorical, antiexemptions position.[205] A majority of the Court in *Employment Division, Department of Human Resources of Oregon v. Smith* justified its adoption of a categorical antiexemption principle by stating that this principle had been adopted in *Reynolds* and never overruled.[206] However, Justice Souter has recently suggested that those who disapprove of the current jurisprudence might want to revisit the question of *Reynolds*.[207]

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[205] Christopher Eisgruber and Lawrence Sager are typical in saying that "[i]n *Reynolds v. United States*, it should be remembered, the Court rejected not only the claim of the Mormons to a constitutional right to practice polygamy; it also rejected as unthinkable the idea of each religious believer creating a microenvironment of law molded to her separate beliefs." Eisgruber & Sager, *supra* note 15, at 1246.

[206] Such justification is as follows:

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States* . . . .

Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

[207] Justice Souter suggested that "*Reynolds* . . . [is] open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws; that the Clause never protects religious conduct from the enforcement of generally applicable laws; or that the Clause does not protect religious conduct at

Reynolds is not a very clear opinion when one examines it closely. The opinion identifies in the writings of the Founders a series of principles that, taken together, seem to repeat the principle that appears to have existed from the time of the Founding right through the nineteenth century: people have a right to engage in any behavior that (i) constitutes "worship" and (ii) is peaceable and orderly.[208] As we have seen, however, this does not tell us whether the Court believes exemptions can ever be appropriate. And on this question, the case is not explicit.

Justice Souter is the only Justice in recent years to focus on the ambiguities of *Reynolds* and to point out that judges were not always so certain that Justices on the *Reynolds* Court thought they were precluding federal judges from ever granting exemptions.[209] Surely at some point, scholars, judges, and practitioners who wish to revisit *Smith* will accept Souter's invitation to reconsider the conventional wisdom that *Reynolds* is obviously and absolutely inconsistent with an interpretation of the Free Exercise Clause that permits judges to grant exemptions. In evaluating whether the conventional wisdom is correct, the nineteenth-century materials that we have discussed may be of help. Contemporary interpretations of *Reynolds* tend to be highly decontextualized and do not consider how language in the opinion reflects one or another of the competing views of free exercise. Nineteenth-century history of free exercise jurisprudence provides the tools necessary to gain a fuller and more nuanced understanding of this crucial precedent.

Reynolds v. United States involved a Mormon's request for a free exercise exemption from antipolygamy laws. The Supreme Court denied the petitioner George Reynolds an exemption from these laws, stating that if it had been willing to accept Reynolds's

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all." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 575 n.6 (1993) (Souter, J., concurring in part and concurring in the judgment) (citations omitted). Justice Souter goes on to say:

> As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds v. United States* and *Minersville School Dist. v. Gobitis*, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds* . . . has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order."

Id. at 569 (citations omitted).

208 Reynolds v. United States, 98 U.S. 145, 163-65 (1878).

209 *Church of the Lukumi Babalu Aye*, 508 U.S. at 569 (Souter, J., concurring in part and concurring in the judgment).

right to engage in such activity on grounds of conscience, society could "exist only in name."[210] The decision to deny an exemption for something so apparently "private" as marriage and the apocalyptic language that is used led many to assume that the Court was rejecting the idea of exemptions under *any* circumstances.[211]

To determine whether this assumption is warranted, one should at least consider nineteenth-century legal history. The history offers us a view into the interpretations of the Free Exercise Clause that were considered plausible when *Reynolds* was decided. Furthermore, a number of nineteenth-century judges and scholars specifically asked how courts should handle a request for exemptions from antipolygamy laws. Pro- and antiexemption thinkers all agreed that such requests should be denied, but they disagreed on the reasoning. Antiliberals obviously felt that Mormons had no more right to exemptions than anyone else—meaning they had no right at all. But liberal thinkers who vigorously asserted the power of judges to grant free exercise exemptions and urged judges to be sensitive to situations where exemptions might be appropriate also insisted that polygamists could not receive free exercise exemptions. Any rereading of *Reynolds* should consider whether the opinion reflects obvious familiarity or agreement with either (i) a pro-exemption but antipolygamy position or (ii) a general antiexemption position.

A. Mormonism and Polygamy

Before considering the implications of nineteenth-century literature on polygamy, we should first consider why nineteenth-century jurists found themselves discussing polygamy so often and why so many Americans viewed it with particular alarm. Polygamy had been a subject of study and fear among nineteenth-century Americans even before the Mormons began to publicly teach and practice their doctrine of plural marriage.[212] However,

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[210] *Reynolds*, 98 U.S. at 167.

[211] *See, e.g.*, Lupu, *supra* note 15, at 261. In short, the Court had adopted an antiliberal position of the type espoused by Justice Gibson and discussed *supra* Part I.B.

[212] Francis Lieber's 1838 treatise MANUAL OF POLITICAL ETHICS, *supra* note 64, at 389-90, was written before the Mormons began to practice polygamy. Nevertheless, it discussed the harms of polygamy in Muslim societies. Even earlier in 1813, the judge in *People v. Philips*, while exempting a Catholic priest from a subpoena

the revelation that a powerful American religious sect was championing the practice made polygamy an explosive subject. To help explain this reaction, I will briefly recount here the rise of Mormonism and the Mormon practice of polygamy, and I will discuss the reasons for the widespread concern about polygamy among Americans.

Depending on one's point of view, Mormonism was either a new sect of Christianity or a new religion.[213] One of the new religious movements that arose in the aftermath of the Second Great Awakening,[214] Mormonism began with revelations supposedly received by Joseph Smith in upstate New York around 1827.[215] After Smith published his revelations as *The Book of Mormon*,[216] his followers organized themselves into the Church of Jesus Christ of Latter-day Saints, which grew rapidly.[217] Members of the new church, commonly known as Mormons, were distinguished by their new scripture and by their well-organized and hierarchical church structure, with the church hierarchy initially

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that would have required him to break the seal of the confessional, declared that polygamy and human sacrifice was licentious and socially harmful and thus could never be exempted under the New York Constitution, which only protected religious acts that were neither licentious nor socially harmful. *See* SAMPSON, *supra* note 133, at 112-13.

213 On the question of whether Mormonism should be counted a new religion, see Jan Shipps, *Is Mormonism Christian? Reflections on a Complicated Question*, *in* MORMONS AND MORMONISM 76-98 (Eric A. Eliason ed., 2001).

214 For a discussion of the origins of Mormon ideas and their relationship to other ideas current in late eighteenth- and early nineteenth-century America, see JOHN L. BROOKE, THE REFINER'S FIRE: THE MAKING OF MORMON COSMOLOGY, 1644–1844 (1994). For an analysis of how Joseph Smith was directly affected by the revivals that accompanied the Second Great Awakening, see KLAUS J. HANSEN, MORMONISM AND THE AMERICAN EXPERIENCE 45-83 (1981).

215 The early history of Joseph Smith's visions is not entirely clear because Smith's own recollections were recorded long after the actual occurrence of these visions. In 1827, Joseph Smith astounded his family by revealing that for almost five years, he had been the recipient of visits from an angel who had shown him the resting place of a new scripture and had given him a miraculous device that allowed him to translate the book. LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 8-16 (1979). For a list of Mormon accounts of these early experiences, see the bibliographic essay in RONALD WALKER ET AL., MORMON HISTORY 5-9 (2001). For summaries of the traditional Mormon history of this time, see HANSEN, *supra* note 214, at 4-10.

216 *See* ARRINGTON & BITTON, *supra* note 215, at 12-14; EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 48-51 (1988); HANSEN, *supra* note 214, at 5-6.

217 ARRINGTON & BITTON, *supra* note 215, at 20-21; RICHARD L. BUSHMAN, JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM 143-59 (1984); HANSEN, *supra* note 214, at 37-38.

headed by the prophet Joseph Smith himself. Smith organized the Mormons into economically self-sufficient, politically well-organized communities.

To the minds of many Americans, Mormon beliefs were dangerously heterodox. Latent tensions were often exacerbated by the fact that Mormon communities were carefully and efficiently structured in a way to maximize the political and economic power of the community, and Mormons sometimes used their power to prosper at the expense of other citizens.[218] In constant conflict with their neighbors, the Mormons moved en masse from New York to Ohio, to Missouri, and then to Nauvoo, Illinois, where they established what was in essence a city-state which was guarded by its own Mormon militia.[219] In Nauvoo, the Mormon

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[218] Joseph Smith and other Mormon leaders maintained tight control over their communities. These leaders not only coordinated the economic activities of the believers, but they had Mormons vote in blocks. Mormons thus had disproportionate economic and political power in the areas where they settled. R. Kent Fielding, *The Mormon Economy in Kirtland, Ohio*, 27 UTAH HIST. Q. 331, 343 (1959); *see generally* Marvin S. Hill et al., *The Kirtland Economy Revisited: A Market Critique of Sectarian Economics*, 17 BYU STUD. 391 (1977). Wherever the Mormons went, however, the practice of pooling resources and squeezing out economic competitors, and their tendency to vote in blocks, gave Mormon leaders unusual power in the communities where they settled and led to great resentment on the part of non-Mormons. BUSHMAN, *supra* note 217, at 143-78. For general studies of Mormon economic history and its development in the nineteenth century, see generally LEONARD J. ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830–1900 (1958); LOWRY NELSON, THE MORMON VILLAGE: A PATTERN AND TECHNIQUE OF LAND SETTLEMENT (1952). Among the developments was the beginning of the "law of consecration," which placed much of the disposable wealth of the Mormon community into the control of the church leaders. As one historian describes it:

> The system was intended to work as follows: those entering the order were asked to "consecrate" their property and belongings to the church "with a covenant and a deed which cannot be broken." Every member, in return, would then be made "a steward over his own property, or that which he has received by consecration, as much as is sufficient for himself and his family." Any surplus would then "be kept to administer to those who have not, from time to time, that every man who has need may be amply supplied and receive according to his wants . . . ."

HANSEN, *supra* note 214, at 124. *See also* BUSHMAN, *supra* note 217, at 175-76; FIRMAGE & MANGRUM, *supra* note 216, at 223. On consecration specifically, see generally Leonard J. Arrington, *Early Mormon Communitarianism: The Law of Consecration and Stewardship,* 7 W. HUMAN. REV. 341 (1953). These tensions came to be exacerbated by rumors of unusual sexual practices among the Mormons—a possible sign that the practice of polygamy had already begun in this period. B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 60 (1992); RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 6-12 (1989).

[219] FIRMAGE & MANGRUM, *supra* note 216, at 73-74.

community experienced a crisis brought about by the newly established Mormon practice of polygamy.

In 1844, a dissident Mormon leader in Nauvoo published an editorial disclosing that Smith had revealed to a handful of Mormon leaders the secret doctrine of "celestial marriage" that, among other things, required many Mormon men to engage in polygamy.[220] It soon became clear that Smith, along with other Mormon leaders, secretly had taken multiple wives.[221] Outraged by the unauthorized disclosure of the officially secret practice, Joseph Smith ordered his militia to destroy the dissident Mormon press. Shortly thereafter, state authorities indicted Smith and his brother Hyrum for incitement to riot. Taken from Nauvoo, the two were imprisoned and subsequently lynched by an anti-Mormon mob.[222]

After a split in the community, a faction led by Brigham Young attracted the majority of Mormons.[223] Convinced that his community would get no peace in any of the existing states of the union, Young led this group on a mass exodus westward to the deserts of what would become Utah.[224] In their new home, Young's branch of the Mormons established a distinctive theocratic society, marked by strong church control, the practice of polygamy, and what some non-Mormons took to be a pattern of discrimination against non-Mormons.[225]

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220 *See* HARDY, *supra* note 218, at 6-12; VAN WAGONER, *supra* note 218, at 27-35, 47-59.

221 In the 1840s, Smith informed a small circle of Mormon leaders of a divine revelation that required some Mormon men to take plural wives. HARDY, *supra* note 218, at 9. Those in the know feared, with good reason, that many Mormons would resist the doctrine. *Id.* Indeed, while the doctrine was secret, Mormon women, unaware that Smith had formally established the practice, protested the actions of some married men—going so far as to establish a "Female Relief Society" as an instrument for "suppressing bigamy and adultery." *Id.* at 8-9.

222 *See* ARRINGTON & BITTON, *supra* note 215, at 77-82; HANSEN, *supra* note 214, at 1-11. For a useful timeline, situating this event in the larger context of Mormon history, see JAN SHIPPS, MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION 161-67 (1985).

223 *See* ARRINGTON & BITTON, *supra* note 215, at 83-85.

224 *Id.* at 95-117; *see also* SHIPPS, *supra* note 222, at 161-63.

225 The church in Utah controlled a cooperative of Mormon merchants and prohibited Mormons from trading with gentiles. *See* FIRMAGE & MANGRUM, *supra* note 216, at 222. The Mormon Church also controlled the administration of justice in Mormon society. It adjudicated disputes between Mormons in Mormon courts, which did not follow traditional common law rules of procedure and pleading and, more strikingly, abandoned the traditional system of adversarial justice. *Id.* at 216-19.

Notwithstanding the many other sources of tension, it was the Mormon practice of polygamy more than any other that was used as justification for the federal attempt to break the Mormon Church and limit its control over Utah. Just prior to the Civil War, the U.S. government decided to stamp out the practice of polygamy in its Western territories and to break the power of the Mormon Church that sanctioned the practice.[226] Mormons resisted the U.S. government's attempts to enforce its antipolygamy legislation in the territories.[227] Thus began a twenty-year struggle that came to be known as the Mormon controversy. The controversy would provoke discussion in cases and commentaries over precisely the question of how courts should respond to a Mormon request for free exercise exemptions from antipolygamy laws. Ultimately, it would give rise to seminal Supreme Court litigation over the nature of federal free exercise guarantees and, in particular, over the question of free exercise exemptions.

B. Nineteenth-Century Fears About the Physical and Social Effects of Mormon Polygamy

Why did the American public and the U.S. government care so much about the Mormon practice of polygamy? Some have argued that antipolygamy legislation was simply a convenient tool for anti-Mormon constituencies.[228] Others have argued that antipolygamists were engaged in an early human rights campaign designed to liberate women in the same way that abolitionists wanted to liberate the slaves.[229] However, these arguments do not adequately consider the discussions of polygamy, particularly

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[226] *See generally* the discussion in GORDON, *supra* note 63, at 57-65, 81-83.

[227] *See generally* ARRINGTON & BITTON, *supra* note 215, at 170-84.

[228] *See, e.g.*, FIRMAGE & MANGRUM, *supra* note 216, at 246.

[229] *See* GORDON, *supra* note 63 at 49, 55-83; Sarah Barringer Gordon, *"Our National Hearthstone": Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 YALE J.L. & HUMAN. 295, 305 (1996). Mary Campbell has pointed out, however, that these explanations appear reductive and do not adequately explain the behavior of some major antipolygamy actors. Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29, 51-61 (2001). To some extent, Campbell may have oversimplified the political and "feminist" explanations for the polygamy controversy, but her main point is worth bearing in mind. The Mormons antagonized all sorts of special interest groups in America. However, it is hard to imagine either the political debates about polygamy or the legal discussions about polygamy taking the form that they did, if polygamy had not been seen as an almost uniquely threatening practice.

Mormon polygamy, that one finds in judicial opinions and legal treatises.

Nineteenth-century opinions and treatises, some written before Mormons began to practice polygamy, make clear that Americans believed polygamy harmed the health and psyche of polygamists, their wives, and their children. Drug addiction is often viewed today as a "private" problem that must be regulated because of its immediate and massive social consequences. So it was with polygamy in the nineteenth century. This belief helped shape the attitude of judges and commentators toward the question of free exercise exemptions for polygamists, as well as the different tacks that liberal and antiliberal writers took when the subject came up.

Antiliberal writers simply did not think the issue worth discussing in any detail. Because judges could never exempt people on grounds of conscience from generally applicable, duly enacted laws outside the area of speech, they obviously could not exempt Mormons from antipolygamy laws. It was *liberal* writers who needed to justify their belief that, notwithstanding Mormon belief in the mandatory nature of polygamy, Mormons could not be exempted from state laws banning the practice. Ironically, then, it was liberal rather than antiliberal commentators who wrote in the most detail about the intrinsically harmful nature of polygamy.

Among the problems that nineteenth-century Americans associated with polygamy was the spread of poverty, disease, and crime. During the Victorian era, self-styled medical "experts" developed medical theories that jibed neatly with contemporary notions of sexual morality. They argued that self-indulgence, particularly sexual self-indulgence, led to "lassitude" and thus to illness and destitution.[230] Furthermore, American doctors presented "evidence" that polygamists might pass some of their lassitude to their children.[231] A presentation at the New Orleans

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[230] "The common belief in a generative biology of fixed capacities held that an inverse relationship existed between spermatic depletion and man's health and energy." HARDY, *supra* note 218, at 88. Indulgence with one's seed would inevitably lead to lassitude in both mind and body. *Id.* These theories were common in Europe as well as the United States. *See id.* at 108 n.29. For an example of an American work espousing this theory, see RUSSELL THACHER TRALL, HOME TREATMENT FOR SEXUAL ABUSES: A PRACTICAL TREATISE (N.Y., Fowler & Wells 1853). *See generally* JOHN S. HALLER, JR. & ROBIN M. HALLER, THE PHYSICIAN AND SEXUALITY IN VICTORIAN AMERICA 91-113, 134-41 (1974).

[231] Some doctors argued that excessive sexual activity among polygamous men in

Academy of Sciences in 1861, for instance, catalogued the physical abnormalities that a doctor had reported in the offspring of Mormon polygamists.[232]

The practice of polygamy was also thought to affect the psyche of those who engaged in it. The historian Philip Gibbs describes the nineteenth-century view of a man as "an animal whose dangerous instincts were ready to surface at every opportunity. Once man succumbed to these instincts he was forever lost in a morass of passions and impulses."[233] Among the most dangerous instincts was lust, which led men to collect women, often violently, for sexual service. Such a practice, once begun, was addictive and, in a very real sense, contagious.[234] As one well-known social and prison reformer wrote in 1845, "[t]he sight of evil, as by contagion, awakens the desire to commit evil."[235] And the danger of immoral behavior spreading was particularly acute if the behavior disempowered women who would otherwise check men's worst impulses.[236] In short, many nineteenth-century

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Utah would lead to the evolution of a "new race" of inferior people. *See generally* Gary L. Bunker & Davis Bitton, *Polygamous Eyes: A Note on Mormon Physiognomy*, DIALOGUE, Fall 1979, at 114, 114; Lester E. Bush, Jr., *Mormon 'Physiology,' 1850–1875*, 56 BULL. HIST. MED. 218, 226 (1982).

232 Stanley S. Ivins, *Notes on Mormon Polygamy*, 10 W. HUMAN. REV. 229, 238 (1956) (citing Samuel A. Cartwright & C.G. Forshey, *Hereditary Descent; or, Depravity of the Offspring of Polygamy Among the Mormons*, 30 DE BOW'S REV. 206, 209-10 (1861)).

233 Phillip A. Gibbs, *Self Control and Male Sexuality in the Advice Literature of Nineteenth Century America, 1830–1860*, J. AM. CULTURE, Summer 1986, at 37, 39.

234 Indeed, this belief in the contagiousness of vice powerfully influenced the constitutional jurisprudence in the nineteenth century. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 26-42 (1996). It is also worth noting that some segments of antebellum-American legal philosophy had come to embrace the seemingly "postmodern" notion that legal concepts can only be understood in the context of a larger culture. Thus, all the "rights" that Americans were guaranteed could only be realized if American society itself preserved its core values. For example, in 1861 the Chief Justice of Maryland defended the practice of allowing mayors discretion to imprison "lewd women" whenever they saw fit. "[U]nder the police power . . . persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportions the administration of the judicial power." *Id.* at 169 (quoting Shafer v. Mumma, 17 Md. 331, 336 (1861)). As the case above illustrates, sexual immorality was among the "like offenses" that the Maryland Constitution did not protect. *Id.* at 162-71.

235 THE PRISON ASSOCIATION OF NEW YORK, FIRST REPORT 34-35 (1844) (quoting William H. Channing).

236 *See generally* BETTY A. DEBERG, UNGODLY WOMEN: GENDER AND THE FIRST WAVE OF AMERICAN FUNDAMENTALISM (1990) (discussing the unique role of women in American Protestant theology); Michael Les Benedict, *Victorian Moral-*

Americans believed that polygamy led to immoral, unhealthy, and ultimately vicious behavior. If unchecked, it would lead indirectly but inevitably to widespread unemployment, poverty, disease, and crime.[237]

These fears were complicated and reinforced as they became wrapped up in arguments about the nature of European culture and its relative superiority vis-à-vis the cultures of Africa and Asia. Francis Lieber, who articulated a position for free exercise exemptions, argued long before the public learned of the Mormon practice of polygamy that polygamy had the inevitable effect of retarding a society's ability to develop.[238] Lieber's work was inevitably affected by nineteenth-century assumptions about gender, race, and culture—many of which would be seen as deeply offensive today.[239] Building on these prejudices, Lieber harnessed a hodgepodge of evidence, mostly from European secondary sources, that tied the apparent weakness of Muslim society to the sexual excesses he associated with Muslim polygamy. The practice resulted, wrote Lieber, in enervation that is passed on to offspring, thus leading to a weaker race.[240] Furthermore, he argued that a comparative study of history and of other cultures reveals that family structure helps determine the characteristics of a society. According to Lieber, liberal society cannot survive unless family structures support liberal attitudes, and only monogamous structures can support liberty.[241] Drawing upon academic works printed in Germany and in Oxford, En-

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ism and Civil Liberty in the Nineteenth-Century United States, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 99, 106-07 (Donald G. Nieman ed., 1992). Interestingly, foreign observers as well as Americans took this position. Tocqueville asserted that America was prosperous and successful because "of all countries in the world America is the one in which the marriage tie is most respected." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 268 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).

[237] *See* Benedict, *supra* note 236, at 93.

[238] *See* discussion *supra* Part III.C (discussing Lieber's view on polygamy). His 1838 treatise MANUAL ON POLITICAL ETHICS, *supra* note 64, was written before the Mormons began to practice polygamy and was focused on polygamy in Muslim societies.

[239] For works highlighting Lieber's prejudices, see GUNNELL, *supra* note 65, at 25-32; Burgett, *supra* note 65.

[240] LIEBER, *supra* note 64, at 140 ("[Roman history reveals that] marriage, viewed with regard to the merest political utility, is of essential importance; as likewise late statistical accounts seem satisfactorily to prove that concubinage extends its enervation to the offspring.").

[241] *Id.* at 137-38.

gland, Lieber argued that the poverty, tyranny, and violence of barbaric "Eastern" civilizations reflect something called "the patriarchal principle." Societies can only break from this principle and advance if they are monogamous.[242] Lieber stated, "[T]he patriarchal principle . . . if family relations are made the fundamental principle of the state, fetters the people in stationary despotism,—a species of government to which, it seems to me, polygamy must almost irresistibly lead . . . ."[243]

Confirming people's worst fears about polygamy, Lieber's ideas helped provide a larger sociological and anthropological paradigm in which educated nineteenth-century Americans could place their personal repugnance for polygamy (and their fears about its social consequences).[244] As the historian B. Carmon Hardy has noted:

> The polemics mounted against Mormon plural marriage were so strident and, in many cases, distant from the views of our time that it is easy to dismiss them as hysterical or, in any case, unpersuasive. We must not forget, however, that nineteenth-century value constructions were as crucially felt as any of our own. . . . [Polygamy], it was widely believed, directly threatened those structures that had won for Western civilization predominance abroad and civility at home.[245]

Even people sensitive to the religious rights of Mormons could be terrified of Mormon polygamy. For evidence, one need look no further than the Mormon community itself and the reactions of some Mormons to rumors and eventual confirmation that their religion approved the practice of polygamy. When Joseph Smith first began initiating church elders into the secret polygamy doctrine, a number of Mormons appear to have broken from his church, at least temporarily.[246] Rumors about the doctrine ap-

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[242] *Id.* at 389 (relying on the works of the eminent German classicist Arnold Herman Ludwig Heeren).

[243] *Id.* at 390.

[244] Lieber's writings were polemical, arguing that Utah could not be accepted as a state in the Union until the power of the Mormon Church was broken and the practice of polygamy eradicated. Francis Lieber, *Shall Utah Be Admitted into the Union?*, PUTNAM'S MONTHLY, Mar. 1855, at 225, 228, 233-36.

[245] HARDY, *supra* note 218, at 60.

[246] *See id.* at 8-12. In 1838, Oliver Cowdery, one of Smith's first disciples, was initiated into Smith's still-secret doctrine that polygamy was to be practiced by Church leaders. He seems to have broken with Smith over this issue. Later he wrote bitterly of polygamy:

> Such may do for the followers of Mohamet, it may have done some thousands of years ago, but no people professing to be governed by the

parently shocked some in the community.[247] When a disenfranchised elder confirmed the rumors, he warned in Lieberesque terms that Smith and other church leaders were engaging in a practice that,

> if exposed in its naked deformity, would make the virtuous mind revolt with horror; a system in the exercise of which lays prostrate all the dearest ties in our social relations—the glorious fabric upon which human happiness is based—ministers to the worst passions of our nature and throws us back into the benighted regions of the dark ages.[248]

After Smith was killed by an angry mob, some Mormons became convinced that Smith must have been duped by a satanic, false revelation regarding polygamy. One of them wrote after Smith's death:

> [I]t would seem almost impossible that there could be found a set of men and women, in this age of the world, with the revelations of God in their hands, who could invent and propagate doctrines so ruinous to society, so debasing and demoralising as the doctrine of a man having a plurality of wives.[249]

After the majority of Mormons, however, followed the pro-polygamy leader Brigham Young to Utah and established the polygamous community that would attract national attention,[250] a disgruntled minority organized an antipolygamous Mormon sect.[251]

> pure and holy principles of the Lord Jesus, can hold up their heads before the world at this distance of time, and be guilty of such folly—such wrong—such abomination.

VAN WAGONER, *supra* note 218, at 12. Another leader of the church, once a member of its First Presidency, also broke with Smith over the issue of polygamy. *Id.* at 54.

247 In 1841, while the practice was still secret, Smith tested Mormon attitudes toward polygamy by suggesting in a public sermon that Muslim converts to Mormonism should be permitted to keep multiple wives. The test was not a success. His wife publicly upbraided him, saying, "[I]t will never do it is all but Blassphemy [sic] you must take back what you have said to day it is outragious [sic] it would ruin us as a people." *Id.* at 51 (citing Joseph Lee Robinson, Journal 23-24 (unpublished and on file with BYU Library)). At roughly the same time, Smith's brother Hyrum (similarly uninitiated) denounced the practice in the strongest of terms: "If an angel from heaven should come and preach such doctrine [you] would be sure to see his cloven foot and [a] cloud of blackness over his head." *Id.* at 54 (citing Levi Richards, Journal (May 14, 1843) (unpublished and on file with LDS Archives)).

248 *Id.* at 67 (quoting Sylvester Emmons, Introductory, *The Nauvoo Expositor* (June 7, 1844)).

249 *Id.* at 72 (quoting Sidney Rigdon, *Latter Day Saints' Messenger and Advocate* (Oct. 15, 1844)).

250 *Id.*

251 *Id.* at 72-79.

C. Nineteenth-Century Legal Thinkers on Whether Free Exercise Guarantees Allowed Mormon Polygamists to Violate Antipolygamy Laws

Given the widespread social harms attributed to Mormon polygamy, the practice was naturally viewed by non-Mormons as one that could legitimately be regulated under the police powers of government. But the Mormons' insistence that polygamy was a sacred duty raised the issue of free exercise exemptions. Should Mormons be exempted on grounds of conscience from the otherwise valid laws banning polygamy? Both antiliberals and liberals responded in the negative. But the reasoning seemed different.

If one took an antiliberal, antiexemptions interpretation of free exercise clauses, no American could plead a constitutional right to be released on the grounds of conscience from the obligation to obey such laws. Thus, antiliberals would dismiss the claim without much discussion. Since no one can receive an exemption, Mormons cannot either. This analysis is implicit in the opinion of the Maine court in *Donahoe v. Richards*.[252] Citing Gibson's antiliberal opinions in *Lesher* and *Gratz*, the court allowed a school to expel a schoolgirl who demanded that she be permitted to do reading exercises from a different translation of the Bible on the following grounds:

> The State is governed by its own views of duty. The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mahomedan cannot claim an exemption from their operation, or freedom from punishment imposed upon their violation. . . . It may establish a day of rest as a civil institution, though the effect of it may be to deprive the Jew of one sixth of his time for purposes of labor or of business.[253]

Strikingly, however, judges and commentators who embraced the idea of exemptions were also universally opposed to the idea of granting religious exemptions from antipolygamy laws. They emphasized, however, that this opposition was because the practice fell squarely into (and arguably epitomized) the class of "nonpeaceable" behavior that was axiomatically deeply harmful

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[252] *See* 38 Me. 379 (1854).
[253] *Id.* at 410.

and for that reason fell outside the scope of protected constitutional behavior.

In the case of *People v. Philips*, which was written before the Mormons had begun to practice polygamy, the court granted an exemption for a refusal to provide testimony essential to resolving a serious crime. The court admitted that this had negative social repercussions. The *Philips* court stressed, however, that there were limits to its willingness to exempt. It could not provide exemptions for acts that were "licentious" or were more directly and direly harmful to society ("something actively not negatively injurious . . . of a deep dye and of an extensively injurious nature").[254] Among the acts it listed as intolerable and unexemptable were, in Walsh's paraphrase, "engaging in incest, polygamy, wife-burning, bacchanalian orgies, or human sacrifices, or by establishing the inquisition, or by fanatically attempting to pull up the pillars of society."[255]

After the public became aware that Mormons were practicing polygamy, liberal commentators regularly considered whether exemptions should be made available to Mormon polygamists. Sedgwick seemed unsure whether free exercise guarantees might plausibly be invoked as a ground to give Mormons a right to exemptions from antipolygamy laws. If they could, he suggested such exemptions would force Americans to back away from their commitment to absolute religious freedom.[256] Other liberal thinkers, however, made a point to stress that their liberal approach to exemptions would not protect an act that caused the kind of harms associated with polygamy.

In his liberal treatise *On Civil Liberty and Self-Government*, Lieber rejected the easy antiliberal justifications for denying Mormons free exercise exemptions. He stressed that religious freedom prevented the U.S. government from dismissing Mormon beliefs or banning them on the grounds that they were not truly "religious" beliefs that deserved protection under the First Amendment:

> As to that unhappy and most remarkable sect called the Mormons . . . [w]hether they have fallen back into Buddhism,

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254 Opinion of the court in *People v. Philips*, printed in SAMPSON, *supra* note 133, at 113.

255 Walsh, *supra* note 44, at 89 (paraphrasing *People v. Philips*, printed in SAMPSON, *supra* note 133, at 113-14).

256 *See* SEDGWICK, *supra* note 177, at 607-08; *see generally* discussion *supra* Part III.C.

> making their god a perfectible being, with parts and local dwelling, cannot become a direct political question, however it may indirectly affect society in all its parts.[257]

As shown earlier in this Article, Lieber made clear that in at least some contexts, government should be obliged to tolerate practices commanded by religion unless it could show that these practices *directly* harmed others in society.[258] Consistent with this, he appears to have assumed that to deny Mormons an exemption, one would have to demonstrate that their practices, by causing such direct harm, could be characterized as nonpeaceable behavior and thus ineligible for exemption. But, given his previous discussion of polygamy's harms in *Manual of Political Ethics*, Lieber found it easy to argue that polygamy was directly harmful and could thus legitimately be banned on grounds of social necessity:

> The other difficulty will arise out of the question which every honest man will put to himself, can we admit as a state a society of men who deny the very first principle, not of our common law, not of christian politics, not of modern progress, but of our whole western civilization, as contradistinguished from oriental life—of that whole civilization in which we have our being, and which is the precious joint product of christianity and antiquity—who disavow monogamy.[259]

In his 1873 treatise on church and state, Joseph Thompson was also ambivalent on the question of exemptions—apparently willing to grant them in some circumstances, but unclear about when exactly they were appropriate.[260] He made a special point to explain to his readers that even under the most liberal application of nineteenth-century free exercise doctrines, political branches would be able to enforce a ban on polygamy on the grounds of

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257 LIEBER, *supra* note 66, at 101-02.

258 *See* discussion *supra* Part III.C (citing LIEBER, *supra* note 66, at 100 n.1).

259 LIEBER, *supra* note 66, at 102.

260 THOMPSON, *supra* note 91, at 12-13. Thompson described the text of the First Amendment and concluded:

> [B]rief as they are, they proclaim religious liberty, in the broadest sense, as a fundamental right of citizens of the United States. This means much more than the toleration by law of differences of religious belief and of different modes of worship. . . . Toleration is a concession, in part, of that control over religion which the State assumes to exercise, but which it so far allows to fall into abeyance. Religious liberty, on the other hand, is absolute freedom of religious opinion and worship, a vested right of conscience, not derived through any grant of the civil power.

Id. at 11-13.

necessity. While believers have a right to exemptions on grounds of conscience, this right certainly falls away if the challenged law is necessary for society's very survival.[261] After this statement of general principles, he moved to a discussion of how they apply in the case of Mormons. First, according to Thompson, a society is inevitably shaped by the nature of family structure in that society. Thus, to permit polygamy would indirectly but inevitably eat at the foundations of the state:

> Though no form of religious belief or worship, *simply as such*, can justly be proscribed in a free state, yet for reasons of public morality, or for the safety and order of the Commonwealth, the State may forbid and punish acts done in the name of religion; as, for instance, polygamy as practiced by the Mormons, the infanticide of the Chinese, or the self-immolation of Hindoo devotees. . . . Thus, for example, the basis of the State is the family,—the true *norm* of society; and in Western civilization, as contrasted with the Oriental, society is based upon monogamy.[262]

Thompson additionally believed that antipolygamy laws were necessary because the practice of polygamy led to the birth of children who were liable to be impoverished—directly creating intolerable social costs:

> [With polygamy,] the State steps in, and says, "Marriage has consequences that affect the welfare of the whole community. It implies parentage and offspring; and the State cannot permit relations between the sexes which may throw upon the community the care of children whose parents make no provision for the family and the home." And so, by that law of self-protection which inheres in society, as well as by that moral sense which justifies monogamy, the State can legislate against polygamy and fornication, though practised in the name of religion.[263]

In sum, when Mormonism began to champion polygamy, legal commentators anticipated that Mormons would claim a right to exemptions from antipolygamy laws. Polygamy was, in fact, a test case for how far liberals were committed to free exercise exemptions. Almost all liberals seem to have agreed that polygamy fell far beyond the pale of peaceable activity that was eligible for free exercise exemptions. In order to reconcile this view with their broader commitment to religious freedom, they made an

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[261] *Id.* at 15.

[262] *Id.* at 18-19.

[263] *Id.* at 21.

effort carefully to articulate the harms that rendered it ineligible for exemptions.

Almost all contemporary judges and commentators attribute to the *Reynolds* Court an antiliberal position that follows in most respects the categorical, antiexemptions position articulated by Justice Gibson of the Pennsylvania Supreme Court. In thinking about whether *Reynolds* really did adopt such a categorical position, one must keep in mind that the nineteenth-century judges and academics who were generally liberal on the question of free exercise exemptions recoiled in horror from the thought that polygamists might get exemptions. They constructed arguments for why, notwithstanding the need to grant exemptions for some illegal actions, society could not survive if exemptions were granted to polygamists. In explaining why it was denying exemptions, the *Reynolds* court employed arguments that were most fully articulated in the works of more liberal writers, and it resembles the writings of some of these thinkers both in substance and tone.

This is not to say definitively that the *Reynolds* Court meant to preclude exemptions in the case at bar but, at the same time, to preserve the possibility of granting them in other circumstances. If in places the opinion seems to echo the writings of Lieber, in other places it recalls the antiliberal opinions of Justice Gibson. More research needs to be done before we can confidently describe the principle that the Justices on the *Reynolds* Court thought they were laying down on the question of exemptions. I am currently working on another article in which I will attempt to disentangle the mixed messages of *Reynolds* and to provide a convincing, contextualized interpretation of the opinion.

Conclusion

With a few notable exceptions, people to date have looked at nineteenth-century free exercise jurisprudence as a tool to help us understand the view of eighteenth-century Americans toward the complex question of exemptions. As helpful as the nineteenth-century legal materials may be in clarifying an original understanding of the Constitution, I suggest that their primary practical value lies elsewhere. Nineteenth-century free exercise jurisprudence provides evidence that there was, in fact, no consensus at the time of the Founding with respect to free exercise clauses and the availability of free exercise exemptions. While

this information may be unwelcome to many seeking an original understanding of the Free Exercise Clause, it comes with a silver lining. Nineteenth-century cases and commentaries may help us understand the Supreme Court's earliest free exercise opinions, particularly in the seminal cases arising out of the Mormon controversy such as *Reynolds v. United States*,[264] *Murphy v. Ramsey*,[265] and *United States v. Late Corp. of the Church of Latter-day Saints*.[266]

Justice Souter has already suggested that Americans reconsider *Reynolds* to determine whether it is really inconsistent with the idea of exemptions as so many assume. Those who accept his invitation will need to consider the nineteenth-century legal materials that we have discussed in this Article. These materials suggest that, in the years before *Reynolds*, American legal thinkers articulated both antiliberal and liberal positions on the question of free exercise exemptions. More interestingly, antiliberals and liberals alike agreed that constitutional free exercise clauses should not be interpreted to provide Mormon polygamists with a right to exemptions from antipolygamy legislation. Thus, the justices who denied George Reynolds an exemption from antipolygamy laws could plausibly have held either antiliberal positions or liberal, pro-exemption positions. More research is necessary to determine whether the opinion draws rhetorically or substantively from either of the competing strains of free exercise thinking, and whether the conventional wisdom about its categorically antiexemptions philosophy should be rethought.

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[264] 98 U.S. 145 (1878).
[265] 114 U.S. 15 (1885).
[266] 150 U.S. 145 (1893).