THE ORIGINAL MEANING AND SIGNIFICANCE OF EARLY STATE PROVISOS TO THE FREE EXERCISE OF RELIGION

INTRODUCTION

The Supreme Court held in *Employment Division v. Smith* that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability.[1] But the Supreme Court has never determined whether this holding reflects the original meaning of the Free Exercise Clause. Justice Scalia's *City of Boerne* concurrence provides the strongest argument issued by any member of the Court defending *Smith* on historical grounds.[2] He defends *Smith*'s historical foundation by relying in part upon the provisos to the free exercise guarantees found in the early state constitutions.[3] These provisos withheld protection from, *inter alia*, conduct that violated the "public peace" or "safety" of the state.[4] Justice Scalia's argument supporting *Smith* on the basis of these state provisos is twofold. First, he argues that these provisos generally withheld protection from conduct that violated any neutral, generally applicable law that a legislature might enact. That is because any violation of law would necessarily be understood to constitute a violation of the "peace" or "safety" of the state.[5] Second, he concludes that this

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1. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

2. *See* City of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring). *But see id.* at 548–64 (O'Connor, J., dissenting) (arguing that the original understanding of the Free Exercise Clause requires some religious-based exemptions). For the primary academic sources relied upon by Justices Scalia and O'Connor, see Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that religious-based exemptions were not constitutionally required under the Free Exercise Clause's original meaning); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990) (arguing that the historical record suggests that the Free Exercise Clause's original meaning required at least some religious-based exemptions).

3. *See City of Boerne*, 521 U.S. at 539–40 (Scalia, J., concurring).

4. *Id.*

5. *Id.*

limited understanding of the free exercise of religion was the one that the federal Free Exercise Clause adopted.[6] In short, Justice Scalia concludes the state free exercise provisos suggest that *Smith*'s rule is on firm historical footing.

This Note offers a different conclusion. It focuses on the provisos to the state free exercise guarantees to advance a two-step argument against Justice Scalia's historical argument for *Smith*. First, the state free exercise provisos did not withhold protection from all religiously motivated conduct that violated any neutral, generally applicable law that a legislature might enact. Instead, these state provisos represented specifically enumerated, compelling state interests that were narrow exceptions to an otherwise broad free exercise right. And second, the Free Exercise Clause—which *lacks* any express proviso—should be read to protect religious exercise at least as broadly as the proviso-laden state constitutions. To present its argument, this Note proceeds in three parts. Part I contextualizes this Note within both the broader historical tradition of American protections for religious liberty and the academic debate over the scope of the Free Exercise Clause. Part II focuses on the most important types of free exercise provisos—those relating to peace and safety, morality and licentiousness, and injury to others' rights—to argue that the provisos had narrow, bounded scopes. Part III then turns to the federal Free Exercise Clause. It suggests that the Free Exercise Clause should be read to protect religious exercise at least as broadly as the state constitutions—and likely with even fewer qualifications.[7]

I. CONTEXTUALIZING THE PROVISOS: HISTORY AND DEBATE OVER THE FREE EXERCISE OF RELIGION

The Religion Clauses provide that "Congress shall make no law respecting an establishment of religion or prohibiting the

6. *Id.*

7. This Note has important limitations. It does not address what religiously motivated conduct fell within the "free exercise [of religion]." Nor does it analyze whether the free exercise of religion in the state constitutions was enforceable or merely precatory. Nevertheless, its discussion of the three types of provisos addressed here should still aid understanding of the Free Exercise Clause and the soundness of *Smith*'s core holding.

free exercise thereof."[8] One tool for determining the scope of the "free exercise [of religion]" is the term's historical meaning. That historical meaning is relevant for originalists and non-originalists alike. For originalists, history may identify, fix, and constrain the semantic and legal meaning of the Constitution's text.[9] But even for non-originalists, history may still remain important, whether because it informs textual meaning[10] or provides persuasive evidence of how the people of the past applied constitutional norms to the pressing issues of their day. Assuming history's ecumenical importance,[11] this Part contextualizes this Note's later discussion of the state free exercise provisos by providing an overview of the colonial and early statehood protections for religious liberty and the key contemporary debates over the federal Free Exercise Clause.

A. Evolving Colonial and Early Statehood Protections

The Free Exercise Clause did not emerge *ex nihilo*. Rather, it evolved from the longstanding protections for religious liberty found in the early colonial charters and state constitutions—which, in turn, reflected the states' complex relationships with their Old World heritage.[12]

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8. U.S. CONST. amend. I (emphasis added).

9. *See, e.g.*, Antonin G. Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015). *But see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION—THE DEBATE OVER ORIGINAL INTENT 23, 25 (Jack N. Rakove ed., 1990) (describing originalism as "little more than arrogance cloaked as humility").

10. *See Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

11. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1117 n.32 (1990) (finding that originalists and non-originalists have acknowledged history's significance).

12. *See* McConnell, *supra* note 2, at 1421–24 (discussing religious strife and accommodation in English history, with particular focus on the English Civil War, the Test Act of 1672, the Toleration Act of 1688, and targeting of Catholics); *see also* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 777 (2013) (discussing the narrow "toleration" of the Toleration Act and the Framers'

Religious liberty enjoyed deep and longstanding protection in the early colonial charters and state constitutions. Professor McConnell describes the purposes animating the Framers' protection for religious liberty in the following way:

> [The Framers maintained] that coercion in matters of conscience could breed only hypocrisy and not sincere belief, that civil magistrates are unreliable judges of religious truth, that religious repression causes discord and civil dissension and makes enemies of peaceful citizens, that coercion impedes the search for truth, that it is contrary to the example of Jesus Christ, that it weakens religion by encouraging indolence in the clergy, and that religious intolerance impedes trade and industry . . . . [But] by far the most common argument, especially in America, and the argument most pointedly establishing religious freedom as a special case, was based on the inviolability of conscience. Most natural rights were surrendered to the polity in exchange for civil rights and protection, but inalienable rights—of which liberty of conscience was the clearest and universal example—were not.[13]

Taken as true, the view that liberty of conscience was fundamental and inalienable—and that duty to God necessarily superseded obligations to Caesar[14]—suggests that any potential provisos to the free exercise right would likely present narrow and reluctant (albeit necessary) exceptions.

Nearly all of the colonial charters protected religious liberty as a fundamental, inviolable right.[15] These protections took the form of broad, open-ended guarantees of liberty of conscience, freedom of worship, free exercise of religion, or immunity from discrimination on account of creed. These colonial-era protections are reproduced in Table I.[16] The colonial charters also included more specific protections against expected areas

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rejection of the term "toleration" because the term "impl[ied] an act of legislative grace").

13. *See* Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 823 (1997).

14. *See generally* James Madison, *Memorial and Remonstrance* (1785), *in* 8 THE PAPERS OF JAMES MADISON 295 (Robert A. Rutland et al. eds., 1973).

15. *See* McConnell, *supra* note 11, at 1118; McConnell, *supra* note 2, at 1421–30.

16. *See* app. tbl. I, https://perma.cc/8V74-DK8D.

of conflict between religious liberty and state power, most importantly through providing religious-based exemptions against conscription and sworn oaths.[17] To be sure, there were limits to the charters' protections. For example, among other things, protections were often limited to particular groups.[18] However, viewed in context and at an appropriate level of generality, these protections were fairly expansive for the time—and would be significantly expanded over the early statehood period.

Nearly every state constitution that preceded the federal Constitution similarly contained protections for liberty of conscience or the free exercise of religion.[19] These protections

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17. *See id.* New Jersey and Pennsylvania are two examples. *See* FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, *reprinted in* 5 THE FEDERAL AND STATE COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2574, 2576–78 (Francis N. Thorpe ed., 1909) [hereinafter THORPE] ("[N]o man that declares he cannot for conscience sake bear arms, whether Proprietor or planter, shall be at any time put upon so doing in his own person, nor yet upon sending any to serve in his stead."); PA. FRAME OF GOVERNMENT OF 1696, *reprinted in* 5 THORPE, *supra*, at 3070–71 (protecting liberty of "conscience" by permitting affirmations instead of sworn oaths for those who, "cannot, for conscience sake, take an oath").

18. There were significant differences in which groups received protection from these charters. For charters protecting all persons, see MA. BAY CHARTER OF 1691, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 942, 950, 952 (Benjamin P. Poore ed., 2d ed. 1878) [hereinafter POORE]; WEST N.J. CHARTER, OR FUNDAMENTAL LAWS, OF 1676, *reprinted in* 5 THORPE, *supra*, at 2548–49; CHARTER OF R.I. AND PROVIDENCE PLANTATIONS OF 1663, *reprinted in* 6 THORPE, *supra*, at 3211–13. For charters protecting all deists, see FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, *reprinted in* 5 THORPE, *supra*, at 2574, 2579–80 ("[a]ll persons living in the Province who confess and acknowledge the one Almighty and Eternal God"); FUNDAMENTAL CONSTITUTIONS OF N.C. OF 1669, *reprinted in* 5 THORPE, *supra*, at 2722, 2783–84 (extending protection to "Jews, heathens, and other dissenters"); DEL. CHARTER OF 1701, *reprinted in* 1 POORE, *supra*, at 270–71 (extending protection to those "who shall confess and acknowledge One almighty God"). Other charters extended religious liberty to Christians in particular. *See, e.g.*, MD. TOLERATION ACT OF 1649, *reprinted in* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 376 (1986) (extending protection to those "professing to believe in Jesus Christ"). Some excluded Catholics. *See, e.g.*, GA. CHARTER OF 1732, *reprinted in* 1 POORE, *supra*, at 369, 375 (excluding "papists").

19. McConnell, *supra* note 2, at 1455 ("With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789, although two states confined their protections to Christians and five other states confined their protections to theists.").

are reproduced in Table II.[20] These state constitutional protections for religious liberty took the form of broad clauses protecting religious liberty, as well as express exemptions for anticipated areas of conflict between the state and religious liberty (such as oaths and conscription).[21] While state protections for religious liberty were not absolute (religious tests and compulsory oaths, for example, persisted in some states),[22] the overarching protections for religious liberty continued to broaden the protection afforded by the colonial charters—confirming the fundamental, longstanding, and ubiquitous nature of religious protections at the Framing.

B. Debate over Scope and Enforceability

Two fundamental questions are essential for fully determining the meaning of the Free Exercise Clause but are left aside for purposes of this Note. One question relates to what the "free exercise" of religion encompassed. The possible scope of protection could be either narrow (purely ceremonial conduct) or broad (all religiously motivated conduct).[23] A second question relates to whether the state free exercise

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20. *See* app. tbl. II, https://perma.cc/8V74-DK8D.

21. *See, e.g.*, DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 10, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 70 (Phillip B. Kurland & Ralph Lerner eds., 1987) [hereinafter KURLAND] (conscription exemption); DEL. CONST. OF 1776, art. XXII, 1 POORE, *supra* note 18, at 273, 276 (oath exemption); GA. CONST. OF 1777, art. LVI, *reprinted in* 1 POORE, *supra* note 18, at 383 (oath exemption); MD. CONST. OF 1776, art. XXXVI, *reprinted in* 1 POORE, *supra* note 18, at 820 (oath exemption); MASS. CONST. OF 1780, ch. 6, *reprinted in* 1 POORE, *supra* note 18, at 971 (oath exemption); N.H. CONST. OF 1784, pt. 1, art. XIII, *reprinted in* 2 POORE, *supra* note 18, at 1281 (conscription exemption); N.J. CONST. OF 1776, art. XXIII, *reprinted in* 2 POORE, *supra* note 18, at 1313 (oath exemption); N.Y. Const. of 1777, art. VIII, XL, *reprinted in* 2 POORE, *supra* note 18, at 1334, 1339 (conscription and oath exemptions); PA. CONST. OF 1776, art. VIII, X, *reprinted in* 2 POORE, *supra* note 18, at 1540–42 (limited conscription exemption and implied oath exemption).

22. *See* DEL. CONST. OF 1776, art. XXII, *reprinted in* 1 POORE, *supra* note 18, at 276 (religious test); GA. CONST. OF 1777, art. VI, *reprinted in* 1 POORE, *supra* note 18, at 379 (religious test); N.C. CONST. OF 1776, art. XXXI–II, *reprinted in* 2 POORE, *supra* note 18, at 1413 (religious test and barring clergy from office); PA. CONST. OF 1776, § 10, *reprinted in* 2 POORE, *supra* note 18, at 1543 (limiting religious test to require deism); S.C. CONST. OF 1778, art. III, XXI, XXII–XXIII, XXXVI, *reprinted in* 2 POORE, *supra* note 18, at 1621–24, 1626 (religious test and barring clergy from office).

23. *Compare* McConnell, *supra* note 2, *with* Hamburger, *supra* note 2.

guarantees were judicially enforceable or merely precatory.[24] These questions are relevant for this Note's focus on the state free exercise provisos because the provisos' practical impact and doctrinal scope become most apparent once the base free exercise right itself—and its enforceability—are understood.[25] Nonetheless, this Note's limited focus requires leaving aside, as far as possible, extended discussion of these questions to prioritize directly focusing on the state provisos themselves.

II. FREE EXERCISE PROVISOS IN THE STATE CONSTITUTIONS

The early state constitutions drew from the colonial charters to broadly protect the free exercise of religion. But the right was not unlimited. Most early state constitutional free exercise guarantees also contained express provisos. These provisos took several forms: they denied protection for conduct that was not "peaceable" or that violated the "peace or safety of the state" (nine states), that was "licentious[]" or "immoral[]" (four states), that resulted in "civil injury or outward disturbance of others" (one state), that violated "good order" (one state), or that violated the "happiness," as well as the peace and safety,

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24. *Compare* McConnell, *supra* note 2, *with* Vincent P. Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387 (2016).

25. These questions are not completely isolated from determining what the state free exercise provisos excepted. At a conceptual level, the Free Exercise Clause might be described in terms of its reach ("free exercise") or its limits (provisos, whether express or implied and whether inherent or imposed). *Cf.* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 593 (2009). At a practical level, finding that the provisos were relatively narrow might (or might not) suggest that the free exercise right itself protected a relatively limited range of conduct. *See* McConnell, *supra* note 11, at 1116. Moreover, once the question of what the "free exercise" of religion protects has been answered, disagreements between opposing sides of the proviso debate may disappear. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012) (unanimous Court finding "ministerial exception" against neutral, generally applicable law); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (holding that Free Exercise Clause protects against religious-based discrimination). Nonetheless, this Note's decision to focus on the provisos while leaving aside (as far as possible) questions of "scope" and "enforceability" is justified by considering the extent to which this Note's core analysis should remain largely applicable regardless of how one answers the "scope" and "enforceability" questions.

of society (one state).[26] Table II displays the state free exercise guarantees and their provisos.[27] This Part argues, contrary to Justice Scalia's view in *City of Boerne*, that these provisos did not withhold protection from the free exercise of religion whenever religiously motivated conduct violated any neutral, generally applicable law that a legislature might enact. Instead, these provisos constituted limited exceptions to an otherwise broad free exercise right and only withheld protection from religious exercise that violated expressly and narrowly enumerated compelling state interests. This Part analyzes the three most common free exercise provisos in the state constitutions to support this conclusion: provisos against violating the peace and safety of the state, provisos against licentiousness and immorality, and provisos against civil injury to others.

A. Peace and Safety

Nine state constitutions or declarations of rights contained provisos that the free exercise of religion would not excuse acts that violated the "peace" or "safety" of the state. These states included Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, South Carolina, and Virginia.[28] These provisos generated extensive debate and used nearly identical language ("peace or safety" or "peace and safety"), suggesting that the framers of the state constitutions picked their language carefully and shared a common conception of what the "peace and safety" provisos meant.[29]

The debate over the meaning and scope of the peace and safety provisos is well-traveled ground. Indeed, Justice Scalia's discussion of the state free exercise provisos in his *City of Boerne* concurrence and Professor McConnell's response focus primarily on these peace and safety provisos. Restating Justice Scalia's view here may be helpful. As discussed above, Justice

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26. *See* app. tbl. II, https://perma.cc/8V74-DK8D; *see also* McConnell, *supra* note 2, at 1462–63.

27. *See* app. tbl. II, https://perma.cc/8V74-DK8D.

28. *See id.*

29. *See* Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2168–69 (2003); McConnell, *supra* note 2, at 1462–63.

Scalia argues in *City of Boerne* that the free exercise of religion did not generally protect conduct that violated any neutral law of general applicability that a legislature might enact. That was because the state free exercise provisos withheld protection from violations of the peace, and any violation of the law was considered a breach of the peace.[30] Professor Hamburger takes a similarly broad view of the peace and safety provisos. He argues that any breach of law would be a violation of the public peace because, *inter alia*, "the criminal offenses over which common law courts had jurisdiction were said to be '*contra pacem*.'"[31] Founding-era lawyers and judges generally agreed that "every breach of law is against the peace,"[32] and "eighteenth-century lawyers could distinguish 'actual' breaches of the peace when they wanted to."[33] Thus, he concludes, "the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."[34]

This Section will build on Professor McConnell's arguments to suggest that the view shared by Justice Scalia and Professor Hamburger is likely against the weight of the evidence.[35] Not every violation of law would have been considered a violation of the peace and safety of the state. Rather, the peace and safety provisos likely constituted narrow, compelling state interests that were narrow exceptions to an otherwise broad free exercise right.

1. Limited Scope of Government

The first challenge to Justice Scalia's broad view of the "peace and safety" provisos rests on the extent to which the government's power to pursue "peace and safety" was

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30. *See* City of Boerne v. Flores, 521 U.S. 507, 539–40 (1997) (Scalia, J., concurring).

31. Hamburger, *supra* note 2, at 917.

32. *Id.* at 918 (relying on Queen v. Lane, 6 Mod. 128, 87 Eng. Rep. 884 (Q.B. 1704), and 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 8, § 38, at 40 (1726)).

33. Hamburger, *supra* note 2, at 918 n.15.

34. *Id.* at 918–19.

35. *See generally* McConnell, *supra* note 2.

necessarily qualified by the Lockean-influenced, limited scope of government presupposed by the framers of the state constitutions.[36] As Table III demonstrates, essentially every state constitution expressly adopted Locke's core thesis that government derives all its power from the consent of the people and necessarily enjoys only a limited mandate.[37]

The meaning of the "peace and safety" provisos was a function of the states' limited mandate. Under the prevailing Lockean view of government, that mandate was primarily to secure the physical security of society and to protect negative liberty and property interests.[38] The people retained all rights not surrendered to the state—including certain rights, like the free exercise of religion, that were "by their nature inalienable."[39] Even should "natural rights have natural limits,"[40] the state could only infringe religious liberty pursuant to the "peace and safety" of the state when religiously motivated conduct violated the physical security of society or harmed the negative liberty or property rights of others. Any statute that exceeded the state's legitimate sphere of action was no law at all.[41] Moreover, the state's limited mandate to pursue

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36. McConnell, *supra* note 2, at 1465 ("Obvious connections exist between the scope of the free exercise right defined by these provisions and the wider liberal political theory of which they are an expression. The central conception of liberalism, as summarized in the Declaration of Independence, is that government is instituted by the people in order to secure their rights to life, liberty, and the pursuit of happiness. Governmental powers are limited to those needed to secure these legitimate ends . . . . Even in the absence of a free exercise clause, liberal theory would find the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others."); *see also* McConnell, *supra* note 13, at 828–830, 836; *cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (emphasizing relevance of legal backdrops for legal construction); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

37. *See* app. tbl. III, https://perma.cc/8V74-DK8D.

38. *See id.*; *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT chs. 8–9 (Mark Goldie ed., 2016) (1698).

39. *See* app. tbl. III, https://perma.cc/8V74-DK8D; *see also* LOCKE, *supra* note 38.

40. *See* Muñoz, *supra* note 24, at 1407.

41. *See* McConnell, *supra* note 2, at 1447–48 (noting that "[William] Penn went on to deny that the Quakers had violated any laws, properly so called, even though '[i]f the enacting any Thing can make it lawful,' it was true that the Quakers had violated the 'law' against unlawful assemblies."). The idea of *lex*

the common good necessarily presupposed individual liberty as an element of that good. Thus, "[m]ore limited interpretations of 'public peace or safety' are consistent . . . with the Lockean origin of these ideas."[42] For the Lockean-dominated Framing period, "the principal protection for religious conscience [was] the restriction of government to certain limited objectives."[43]

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iniusta non est lex is a common theme that must be kept in mind to properly contextualize the state provisos against their natural law and Lockean backdrops.

42. McConnell, *supra* note 13, at 836.

43. *Id.* Locke's view on religious exemptions warrants brief attention here. Taken at face value, Locke's view likely disfavors religious-based accommodations—or at least places their viability in doubt. Under a reading of Locke that disfavors religious liberty, "the government's perception of public need defines the boundaries of freedom of conscience" because liberal theory requires "render[ing] unto Caesar whatever Caesar demands and to God whatever Caesar permits." *See* McConnell, *supra* note 2, at 1434–35 (internal quotations omitted). But Locke's historically situated views on religious liberty do not defeat the case for exemptions for four reasons. First, Locke conceived of limitations on government primarily in terms of the limited scope of government's authority, rather than in terms of individual rights. Government was instituted to secure life, liberty, and property. The limited scope of government, rather than express, individually held exemptions from its power, provided the means for securing individual liberty from state coercion. *See* McConnell, *supra* note 13, at 826, 828–30. Second, Locke would view clashes between conscience and state power as exceedingly rare because laws reflected the Judeo-Christian moral framework shared by the citizenry and its legislators. *See id.* at 829–30. Lockean theory and Christian theology shared remarkably similar views of the resulting relationship that should exist between religious liberty and state power (despite important differences in many of their theoretical underpinnings). *See* McConnell, *supra* note 2, at 1466. It is unclear how Locke would respond to contemporary clashes between religious liberty and state power. Indeed, a state bringing a discrimination claim on behalf of homosexual couples against religious business owners would have been unimaginable both because people in Locke's day did not imagine private religion and state morality ever conflicting, nor would they have anticipated the state's adoption of a moral framework at such odds with the traditional Judeo-Christian one. Third, the Founding generation seems to have accepted Locke's views of limited government but not his specific views on religion. American treatment of religious liberty (save, perhaps, the early North Carolina Fundamental Constitution) was far more generous—and it only expanded during the Revolutionary period. *See* McConnell, *supra* note 2, at 1435–43. And fourth, Locke's views on religious liberty, assuming parliamentary supremacy and legislative responsibility for protecting rights, did not anticipate the revolutions of judicial review or written constitutionalism as they developed in the American context. For a discussion of these arguments, *see, e.g.*, McConnell, *supra* note 2, at 1434–35, 1466; McConnell, *supra* note 13, at 826, 828–30.

2. Historical Definitions and Practices

A second problem with Justice Scalia's view of the "peace and safety" provisos is that the terms "peace" and "safety" were historically defined by colonial charters and Founding-era dictionaries and commentaries to fall short of encompassing "all laws." The peace and safety provisos thus likely had at least some boundaries short of including *any* violation of law.

a. Charter "Peace and Safety" Provisos

State charters provide one source of support for a limited understanding of the "peace and safety" provisos. As Professor McConnell has argued, the Rhode Island charter provides a particularly probative illustration of this point. In *The Origins and Historical Understanding of Free Exercise of Religion*, Professor McConnell compares a 1641 Rhode Island statute providing that "none be accounted a delinquent for doctrine, provided that it be not directly repugnant to the government or laws established" [44] with a 1662 Rhode Island charter proviso withholding protection from conduct that was licentious, profane, injured others, or violated the "civill peace."[45] Based on the narrowed scope of the 1662 proviso (compared to the broader proviso in 1641), Professor McConnell argues that "believers were not required to obey all 'laws established,' but only those directed to maintaining the 'civill peace' and preventing licentiousness and profaneness, or the injury of others."[46] In short, violation of the "peace" did not encompass violation of any law.

Professor Hamburger contests McConnell's reliance upon the Rhode Island Charter. He argues that "the precise words of . . . the Rhode Island Charter, were that—notwithstanding any law to the contrary—persons may enjoy 'theire own judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceablie.'"[47] In

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44. McConnell, *supra* note 2, at 1426.

45. R.I. CHARTER OF 1663, *supra* note 18, at 3211–23.

46. McConnell, *supra* note 2, at 1426. Rhode Island's approach did not command immediate respect. *See id.* It would, however, become the dominant approach later on. *See id.* at 1427.

47. *See* Hamburger, *supra* note 2, at 817 n.8 (quoting 6 NATHAN O. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3213 (1990)).

his view, given that England had various laws prohibiting certain religious meetings and otherwise penalizing dissenters, provisions like the Rhode Island Charter merely freed colonists from complying with laws that restrained individuals "*in matters of religious concernments*."[48] But this interpretation is potentially problematic. As an initial matter, it is not clear that "matters of religious concernment" would necessarily represent a narrow category limited to religious meetings or ceremonial worship. Given the broad description of religious conscience in Part I and the integration between religious belief and temporal conduct in Christian theology, there may be good reasons to conclude that a broader set of religiously motivated conduct would be of "religious concernment[]," barring some reason to presume otherwise. Moreover, the state's power to infringe on religiously motivated conduct still remained limited by the relatively narrow, Lockean scope of government. At the very least, McConnell's point regarding the limited scope of the peace and safety provisos likely remains standing, regardless of one's view of the precise scope of the base free exercise right itself (assuming that the resulting arrangement does not lead to absurd results).

Despite its initial rejection by many other colonies, the Rhode Island charter's protection for religious liberty and its narrow proviso would eventually be mirrored in several other colonies and become "the most common pattern in the constitutions adopted by the states after the Revolution."[49] As Professor McConnell observes in regards to the general tenor of these protections:

> Three features of these early provisions warrant attention. First, the free exercise provisions expressly overrode any "Law, Statute or clause, usage or custom of this realm of England to the contrary." Second, they extended to all "judgments and contiences in matters of religion"; they were not limited to opinion, speech and profession, or acts of worship. Third, they limited the free exercise of religion only as necessary for the prevention of "Lycentiousnesse" or the

48. *See id.*; *see also* McConnell, *supra* note 2, at 1426–27.

49. *See* McConnell, *supra* note 2, at 1426.

> injury or "outward disturbance of others," rather than by reference to all generally applicable laws.[50]

The speeches of religious freedom advocates of the day similarly support a limited understanding of the peace and safety provisos. In contrast to Professor Hamburger's reliance upon these religious liberty advocates to argue that any violation of law would constitute a violation of the public peace (and therefore that the free exercise of religion did not require religious exemptions from neutral, generally applicable laws), Professor McConnell argues that these advocates do not undermine the view that exemptions were sometimes required for at least four reasons.[51] First, the types of offenses that they discussed as not being protected by the free exercise of religion—robbery, theft, and other acts of violence or violations of the negative liberty or property interests of others—reflect a limited category of violations of the public peace which largely mirrored the categories of offenses that were described as "against the public peace" in Blackstone's *Commentaries*. [52] Second, these advocates for religious liberty presupposed limits not only for religion but also for government. [53] Government was restrained in its authority to secure the public peace; in the Lockean framework, the public peace the government was empowered to pursue primarily focused upon protection for physical safety, negative liberty, and private property. [54] Third, many proponents of exemptions, such as William Penn and John Leland, may have assumed that at least some religiously motivated conduct would enjoy exemptions even from many neutral laws of general applicability that Lockean-influenced governments might promulgate.[55] And fourth, religious conduct was anticipated to

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50. *Id.*

51. *See* McConnell, *supra* note 13, at 825–26, 828–30 (citing Leland, Penn, Madison, and Williams).

52. *Id.* at 825–26; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *142–153.

53. *See* McConnell, *supra* note 2, at 1465.

54. McConnell, *supra* note 13, at 828–29 (citing John Locke, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 5, 5–9 (photo. reprint 1963) (London 1823) ("[The] business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person.")); *see also id.* at 826 (citing Williams for similar proposition).

55. *See* McConnell, *supra* note 2, at 1447–48.

conflict only rarely with neutral, generally applicable laws because legislators and citizens shared a similar view of religion, morality, and the limited role of government—and in cases of anticipated conflicts, including in areas as important as military conscription, the colonial charters and later state constitutions generally actively extended specific accommodations.[56] The extent to which civil society and even dissenting religious traditions shared the same overarching political and moral convictions—and the resulting infrequency of conflicts between religious liberty and legitimate state interests—is critical for understanding the practical scope of the peace and safety provisos.[57]

b. Founding-era Dictionaries

Founding-era dictionaries also support a limited understanding of the "peace and safety" provisos.[58] The definitions of "peace" generally included freedom from foreign war, domestic commotion or civil war;[59] harmony, accommodation, and healing of differences in society;[60] or, protection from physical violence or unnatural harm.[61] These definitions suggest that, provided religiously motivated conduct did not further foreign conflict, civil war, tumultuous

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56. *See* McConnell, *supra* note 13, at 825–26.

57. *See* McConnell, *supra* note 11, at 1118; McConnell, *supra* note 2, at 1466.

58. The use of Founding-era dictionaries has come under increasing attack in recent years. *See, e.g.*, Thomas R. Lee, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Solum, *supra* note 9, at 1638–43. This Note utilizes Founding-era dictionaries because their relevance is widely accepted; however, this Note also acknowledges their potential limits and the benefits that could flow from utilizing other research sources and methodologies. *See generally* Lee, *supra*.

59. *See* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "peace" to mean "freedom from war with a foreign nation," "freedom from internal commotion or civil war, "public tranquility; that quiet, order, and security . . . guaranteed by the laws"); JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("free from war," "free from tumult"); JAMES BARCLAY, UNIVERSAL ENGLISH DICTIONARY 426 (1792) ("a respite from war"; "rest from any commotion or disturbance"; "reconciliation").

60 . *See* ASH, *supra* note 59 ("accommodation of differences," "quiet," "reconciliation"); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781) ("composing or healing of differences"); WEBSTER, *supra* note 59 ("harmony"); BARCLAY, *supra* note 59 ("inclined to peace," "mild," "undisturbed").

61. *See* WEBSTER, *supra* note 59 ("[n]ot violent, bloody or unnatural").

social disharmony, or physical violence, the conduct would not be in violation of the "peace."[62] If anything, suppression of religiously motivated conduct would be more likely to cause the violence, civil strife, and public tumult that would upset the public peace. Turning to "safety," Founding-era dictionaries generally defined it to mean "freedom from danger or hazard."[63] "Hurt" and "harm" were generally defined to refer primarily to physical injury, such as "hurt to [the] person," "a wound or bruise";[64] a "wound, maim[ing], or damage [to] a man's person or reputation";[65] "harm, mischief, injury [or a] wound";[66] and "a contusion, pressure, or any violence to the body."[67] But, as suggested by one of the above definitions, hurt could also extend to include damage to a man's "reputation" or "property."[68] Thus, while the primary definition of "safety" most naturally lent itself to mean protection from physical injury, it also likely protected the rights to property and reputation long enshrined at common law. While injury to the traditional rights that the Lockean state protected might violate the public peace or safety based on these definitions, not every violation of law would necessarily do so.

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62. Professor McConnell critiques Justice Scalia's use of dictionaries on this point. *See* McConnell, *supra* note 13, at 833–35 (noting that Scalia relies upon "Noah Webster's 1828 dictionary, which gave as the eighth (eighth!) definition of 'peace': 'Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the peace; to break the peace.'").

63. WEBSTER, *supra* note 59 (defining "safety" as "freedom from danger or hazard").

64. BARCLAY, *supra* note 59 (defining "hurt" as "damage, mischief, or harm . . . [or a] wound or bruise, applied to the body" and defining "harm" as "an action by which . . . [a] person may receive damage in his goods or hurt to his person; mischief; hurt; or injury; . . . a degree of hurt without justice . . . to either character or property.").

65. DYCHE & PARDON, *supra* note 60 (defining "hurt" as "to wound, maim, or damage a man's person or reputation").

66. ASH, *supra* note 59 (defining "hurt" as "harm, mischief, injury, [or] a wound" and defining "injury" as "hurt, injustice, annoyance, [or] contumely").

67. WEBSTER, *supra* note 59 (defining "hurt" as "[t]o bruise; to give pain by a contusion, pressure, or any violence to the body").

68. *See id.* (defining "hurt" to mean "[t]o harm; to damage; to injure by occasioning loss[;] . . . [to] hurt a man by destroying his property"); *see also* DYCHE & PARDON, *supra* note 60 (defining "hurt" to include "damage [to] a man's person or reputation").

c. Legal Commentators and Contemporary Legal Practice

Legal commentators around the time of the Founding—presumptively reflecting standard legal practices—provide further evidence that "peace" and "safety" represented well-understood, limited categories that did not necessarily encompass all violations of law. The peace and safety provisos most likely reflected the ancient concept of "breach of the peace" rooted in the history and common law practices of the Founding. Critically, "breach of the peace" was a limited concept—it only included certain violations of law. As Professor McConnell notes, Blackstone's *Commentaries* provides thirteen specific offenses that constituted breaches of the peace at common law. These included "riotous assembly of twelve or more," "unlawful hunting," "letter[s] without name demanding money or threatening," "break[ing] lock[s or] floodgate[s] on [a] river erected by authority of parliament," "affray[s]," "riots, routs, and unlawful assemblies of three or more," "tumultuous petitioning," "forcible entry," "riding or going armed with dangerous or unusual weaponry (terrifying the people of the land)," "spreading false news," "false and pretended prophesies," "anything that incites someone else to break the public peace" (incitement and fighting words), and "libels." [69] Thus, breach of the peace constituted a distinct category of unlawful conduct; it did not include all violations of law.[70] Justice Story's *Commentaries on the Constitution of the United States* reinforce the view that violations of the public peace included only a subset of conduct in violation of general laws. Justice Story juxtaposed "public peace" with "foreign or domestic violence," and under his broadest definition he considered breach of the public peace to include acts of "violence" and other acts prohibited at common law, such as libel, which were "constructive breaches of the peace of the government, inasmuch as they violate[d] its good order." [71] Critically, Justice Story's conception of "good order" was tied to his Lockean conception of government's role (protection of

69. BLACKSTONE, *supra* note 52. Professor McConnell utilizes this argument in McConnell, *supra* note 13, at 835.

70. *See* BLACKSTONE, *supra* note 52.

71 . IOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 308–09, 332, 335 (Carolina Academic Press 1987) (1833).

property and negative liberties).[72] Moreover, common law offenses such as libel were generally considered breaches of the peace both because they directly injured one's reputation (a form of personal injury) and tended to incite violent responses.[73] The violation of the public "peace" was therefore a likely a bounded concept.

Similarly for public "safety," legal commentators maintained a bounded conception of what harms the state had an interest in protecting individuals from suffering. Blackstone identified three types of wrongs: injuries to the personal security of individuals (including threats, assaults, batteries, wounding, mayhem, injuries to health, and injuries to reputation), injuries to personal liberty (involving false imprisonment), and injuries to private property.[74] Similarly, Justice Story understood the

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72. *Id.* at 704 (noting that the First Amendment's protections are limited such that no one may "injure any other person in his *rights, person, property, or reputation*; and so always, that [one] does not thereby disturb the public peace, or attempt to subvert the government" (emphasis added)). This constitutes Story's acceptance of Blackstone's framework in this area. Story also embraced a Lockean-influenced conception of limited government. *See id.* at 501.

73. Some legal historians have contended that any violation of law constituted a violation of the public peace. Professor Wilgus contends that "every indictable offense was constructively a breach of the peace" and that "disobeying any act of parliament was a breach of the peace." *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 574 (1924). The Queen's Bench opinion relied upon by Justice Scalia in *City of Boerne* for this conclusion is similarly broadly worded. *See* City of Boerne v. Flores, 521 U.S. 507, 539 (1997) ("Every breach of law is against the peace.") (Scalia, J., concurring) (quoting Queen v. Lane, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704)). But there are at least two alternative reasons why the public peace provisos should not be viewed to withhold protection from religiously-motivated conduct that violated any law that a legislature might enact. First, the extent to which the broad language captured in a Queen's Bench opinion nearly a century before the Framing actually influenced or reflected the Framers can be contested. It likely swept too broadly. Blackstone's narrower, enumerated list of what constituted a "breach of the peace," which presumably better reflected the Framers' understanding of the English common law tradition, did not extend the concept to include any violation of law. *Compare* 4 BLACKSTONE, *supra* note 52, at *142–53, *with* Locke, *supra* note 54, at 5–9. And second, laws enacted by Parliament (and state legislatures) were focused on preserving the Lockean "peace"—that is, the safety, security, and harmony of the state. This limited conception of state power necessarily contextualizes the sweeping language of the oft-cited Queen's Bench opinion.

74. *See* 4 BLACKSTONE, *supra* note 52, at *115–43. This limited category of injuries is consistent with Blackstone's understanding "rights." *See* 1 BLACKSTONE, *supra*, at *129 ("[T]he rights of the people of England . . . may be reduced to three principal or primary articles; the right of personal security, the right of personal

First Amendment to be limited to prevent any man from "injur[ing] any other person in his rights, person, property, or reputation." [75] And even the Baptist preachers Professor Hamburger relies upon for his argument against constitutionally compelled exemptions confirm this limited scope of harm insofar as they understood injuries to include injuries to "[one's] neighbor, either in person, name, or estate." [76] Consequently, violation of the public "safety" was similarly a limited concept as well.

3. Backdrop Principles

A third problem with Justice Scalia's view of the "peace and safety" provisos is the extent to which denying religious protection for violation of any law would undermine three deeply rooted core principles that animated the American relationship with religion: (1) broadly protecting religious liberty,[77] (2) avoiding the religious persecution and strife that

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liberty, and the right of private property."). It also reflects Blackstone's general embrace of a Lockean vision of government:

> For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) then they become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies . . . .

Id. at *124–25.

75. STORY, *supra* note 71, at 704.

76. Hamburger, *supra* note 2, at 918 n.15 (quoting Caleb Blood, *A Sermon 35* (Vt. election sermon [1792]) (Evans 24126)).

77. *See, e.g.*, app. tbls. I–II, https://perma.cc/8V74-DK8D. To avoid the question-begging problem of assuming its own conclusion, this Note's point here is simply that American practice tended to reflect a general tendency to protect religious conscience through both broad, open-ended guarantees and specific guarantees

had splintered the pre-Westphalian Old World,[78] and (3) crafting societies designed to spread the voluntary acceptance of the Gospel.[79] All three principles—which provide a potentially helpful backdrop for analyzing the state constitutions[80]—caution against a broad reading of the provisos that would withhold free exercise protection from religiously motivated conduct any time it violated any law that a legislature might enact. First, withholding exemptions from violation of any law would problematically subordinate religious conscience to the power of the state, even where the law does not pertain to the safety, negative liberty, or property rights of others. That result conflicts with the broad rationales

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targeted to expected areas of conflict between the state and religion, and these protections support a default presumption favoring a narrow view of the provisos in cases of doubt over their construction.

78. *See* Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 691–92 (1990) ("The religion clauses had two great defining controversies. One was the long history of religious persecution and civil and international religious wars in Western societies . . . . Religious conflicts were carried to the English colonies in America, and took new form with the growth of new denominations . . . . The history of post-Reformation religious conflict was more recent to the founders than the history of slavery is to us. It is surely reasonable to infer that the founders intended the religion clauses of state and federal constitutions to prevent a renewal of these conflicts . . . . The second great defining controversy for the religion clauses was the fight over disestablishment in the states."); McConnell, *supra* note 2, at 1421–24 (emphasizing the extent to which the English Civil War, English persecution, and limited accommodations by Parliament, along with the early colonial approaches, influenced the state constitutions' free exercise guarantees).

79 . Nearly every colonial charter stated that the colony's purpose was furthering Christianity. *See, e.g.*, NEW ENGLAND CHARTER OF 1620, *reprinted in* 3 THORPE, *supra* note 17, at 1827–41 (expressing "Hope . . . to advance the inlargement of Christian Religion"); COMMISSION OF JOHN CUTT OF 1680, *reprinted in* 4 THORPE, *supra* note 17, at 2446 (expressing hope that the "infidel may be invited & desire to partake of ye Christian Religion"); MD. CHARTER OF 1632, *reprinted in* 4 THORPE, *supra* note 17, at 1669–86 (expressing "pious Zeal for extending the Christian Religion"); CHARTER OF CAROLINA OF 1663, *reprinted in* 5 THORPE, *supra* note 17, at 2743–55 (expressing "laudable and pious zeal for the propagation of the Christian faith"); FIRST CHARTER OF VIRGINIA OF 1606, *reprinted in* 7 THORPE, *supra* note 17, at 3783–89 (aiming for the "propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God"). Professor McConnell writes elsewhere about the powerful influence of evangelism in catalyzing and shaping the American conception of religious liberty and the free exercise protections in the early state constitutions. *See* McConnell, *supra* note 2, at 1437–43.

80. *See* Laycock, *supra* note 78, at 690, 696–97 ("It is nearly always helpful to ask what problem the founders were trying to solve.").

for religious conscience discussed above and is potentially in tension with the general impulses animating the ubiquitous and longstanding accommodations encapsulated in American legislative, executive, and constitutional practice.[81] Second, construing the peace and safety provisos to deny free exercise so broadly would potentially contribute to religious strife by fueling violent dissent and creating a competition between sects for power to define the public peace in a way that suppresses rival sects while avoiding being burdened by others. Significantly, inter-sect competition for power would disproportionately harm minority religious groups, the very groups that religious liberty protections were primarily designed to protect.[82] And third, while Americans' missionary zeal led them to seek to construct their societies in accord with Biblical norms, many colonial charters and state constitutions noted that subjugating opponents' religious liberty would actually hinder the process of converting unbelievers and fail to comport with the example of Jesus Christ.[83] In any event, the

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81. *See* McConnell, *supra* note 2, at 1466–73 (noting that conflict between religious belief and state power was rare but that in the few areas of conflict—oaths, conscription, and religious assessments—religious belief was usually accommodated).

82. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 136 (1992) ("Those groups most vocal in demanding protection for religious freedom—the Quakers, the Presbyterians, and above all the Baptists—were precisely those groups whose practices were out of keeping with the majoritarian culture and who had borne the brunt of governmental hostility and indifference.").

83. The relationship between religious liberty and evangelization is reflected in the early charters, the Framers' philosophy, and the early state constitutions. The most explicit support for this is found in the Fundamental Constitutions of North Carolina of 1669. *See* FUNDAMENTAL CONSTITUTIONS OF N.C. OF 1669, *reprinted in* 5 THORPE, *supra* note 17, at 2783–85 (protecting the "liberty of conscience" and providing that "[n]o man shall use any reproachful, reviling, or abusive language against any religion of any church or profession; that being the certain way of disturbing the peace, and of *hindering the conversion* of any to the truth") (emphasis added). Less explicit but nonetheless powerful support is offered in many charters' structural practice of stating one of the government's guiding purposes as the propagation of Christianity and then proximately granting religious liberty rights. *See* COMMISSION OF JOHN CUTT OF 1680, *reprinted in* 4 THORPE, *supra* note 17, at 2446; FIRST CHARTER OF VIRGINIA OF 1606, *supra* note 79, at 3783–89. Similar sentiments emerged in the later state constitutions. *See, e.g.*, S.C. CONST. OF 1778, art. XXXVIII, *reprinted in* 2 POORE, *supra* note 21, at 1626–27. The Founders' philosophical commitments to the relationship between religious

generally shared political and moral commitments between legislators and citizens—viewed at an appropriate level of generality—meant that conflicts between religiously minded citizens and state power would arise only rarely.[84] But when they did, policies favoring religious liberty, opposing strife, and furthering evangelization resulted in a broad impulse to extend accommodations.

4. State Constitutional Structure

A fourth problem with Justice Scalia's view of the peace and safety provisos derives from state constitutional structure. Three distinct problems arise for Justice Scalia's view.

a. Scope of State Power and Proviso "Gap"

One structural problem with Scalia's view of the "peace and safety" provisos is that the scope of early state governments' constitutional powers extended beyond securing the "peace and safety" of the state.[85] As McConnell argues, because the states were empowered to enact laws beyond securing public peace and safety, not every violation of law would be a violation of the "peace and safety" of the state.[86] Table III illustrates this point by reproducing the scope of each state's constitutional powers alongside its respective peace and safety proviso.[87] Comparing the constitutional power grants with the provisos suggests that "peace and safety" occupied a relatively limited scope of the states' plenary power to pursue societal "happiness," "goodness," and "blessings."[88] Because the constitutional power grants expressed other enumerated

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liberty and conversion are reflected in the works of James Madison. *See* Madison, *supra* note 14.

84. *See* McConnell, *supra* note 11, at 1118 ("[T[he need for exemptions did not often arise. Because the vast majority of the inhabitants were Protestant Christians and the laws tended to reflect the Protestant viewpoint, clashes between conscience and law were rare. It is significant, however, that exemptions were seen as a solution to the conflict when it occurred.").

85. *See* McConnell, *supra* note 13, at 835–36 ("If the intention of the framers of the state free exercise provisions had been to subordinate the rights of conscience to 'every law,' then they would have used familiar language of this sort.").

86. *See id.*

87. *See* app. tbl. III, https://perma.cc/8V74-DK8D.

88. *See id.*

purposes in addition to securing the "peace and safety," there is a powerful argument that the "peace and safety" provisos should be read to represent a limited category that did not, as a matter of text and structure, extend to include all laws.[89]

b. Differing Proviso Formulations

Another structural problem for the Scalia view is that states "formulated their provisos in different ways, some including acts of 'licentiousness' or infringements upon the laws of morality, some including disturbance of the religious practice of others, and one including acts contrary to the '[h]appiness of society.'" [90] That many states added additional categories to their provisos in addition to violations of the "peace and safety" suggests that they did not understand "peace and safety" to encompass all laws.[91] Any other reading renders the additional formulations accompanying the "peace and safety" provisos superfluous in violation of the well-accepted canons relating to the construction of disjunctive phrases, the presumption against superfluity, and the presumption of consistency across the *corpus juris*. As the heated debates over the wording of the provisos in Virginia and New York demonstrate, the state framers drafted their free exercise provisos very carefully—and the meaning of their carefully chosen language should be taken seriously.

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89. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (discussing *expressio unius* canon). Two potential counterarguments may be raised. First, perhaps the *expressio unius* cannon is unreliable or inapplicable here. But given that the "peace and safety" provisos are frequently listed alongside other types of provisos, the *expressio unius* canon likely has particularly likely application here. And second, while not all state laws were intended to secure the public peace, perhaps *violation* of those laws would necessarily unsettle the peace and safety of the state. But that counterargument is unavailing for the reasons that will be discussed in this section below. Most problematically, it fails to explain the pairing of "peace and safety" provisos with other types of provisos.

90. *See* McConnell, *supra* note 13, at 837.

91. *See* app. tbl. II, https://perma.cc/8V74-DK8D. South Carolina and New York also included prohibitions against licentiousness. Massachusetts and New Hampshire added prohibitions against violating the rights of others. Maryland added both of these formulations. South Carolina also included a requirement that the citizen live "faithfully" (in obedience to law). *Id.*

c. Structural Use of "Peace" and "Safety"

A final structural problem for Scalia's view is that the way state constitutions use the words "peace" and "safety" supports interpreting the "peace and safety" provisos as primarily focused on acts of violence or injury to the physical person—not to encompass any violation of law.

Start with the term "peace." Within the constitutions that had peace and safety provisos, the term "peace" was used in five different ways. On the whole, though with some complications and ambiguities, these uses support the view that not all violations of law were violations of the public peace. The first two types of uses strongly favor a narrow reading of the term "peace." The first type of use juxtaposes "peace" with war and violence from a foreign enemy. At least eight states use "peace" in this way.[92] "Peace" was also used to refer to peaceable petition for redress, peaceful elections, and the peaceful transition of power. These uses suggest a juxtaposition with riotous petition, violence at the ballot box, and succession through physical force. At least five states use "peace" in this way.[93]

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92. *See* DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 21, *reprinted in* 5 KURLAND, *supra* note 21, at 71 (quartering of soldiers); MD. DECLARATION OF RIGHTS OF 1776, art. XXVIII, *reprinted in* 1 POORE, *supra* note 18, at 819 (quartering of soldiers); MASS. CONST. OF 1780, art. XVII, XXVII, *reprinted in* 1 POORE, *supra* note 18, at 959 (quartering of soldiers and right to bear arms); N.H. CONST. OF 1784, pt. 1, art. XXVII, *reprinted in* 2 POORE, *supra* note 18, at 1283 (quartering of soldiers); N.Y. CONST. OF 1777, pmbl., art. XXXVII, XL *reprinted in* 2 POORE, *supra* note 18, at 1328, 1338–39 (state of war with Britain, foreign relations, and militia conscription); N.C. CONST. OF 1776, art. XVII, *reprinted in* 2 POORE, *supra* note 18, at 1410 (arms); S.C. CONST. OF 1778, pmbl., art. XII, XIII, XXXIII, *reprinted in* 2 POORE, *supra* note 18, at 1622-23, 1625–26 (war and wartime powers); VA. BILL OF RIGHTS. OF 1776, § 13, *reprinted in* 2 POORE, *supra*, at 1909 (wartime).

93. *See* DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 9, *reprinted in* 5 KURLAND, *supra* note 21, at 71 (right of redress); DEL. CONST. OF 1776, art. XXVIII, *reprinted in* 1 POORE, *supra* note 18, at 277 (elections and juxtaposed with having military force present at ballot box); GA. CONST. OF 1777, art. XXIV, *reprinted in* 1 POORE, *supra* note 18, at 380–81 (governor's oath and promise to peaceably and quietly resign when his term expired); MD. DECLARATION OF RIGHTS OF 1776, art. XI, *reprinted in* 1 POORE, *supra* note 18, at 818 (right of petition for redress); MD. CONST. OF 1776, art. XIV, XLII, *reprinted in* 1 POORE, *supra* note 18, at 822, 826 (election provisions); MASS. CONST. OF 1780, art. XIX, *reprinted in* 1 POORE, *supra* note 18, at 959 (right to peaceably assemble and petition for redress of grievances); N.H. CONST. OF 1784, pt. 1, art. XXXII, *reprinted in* 2 POORE, *supra* note 18, at 1283 (right to peaceably assemble and petition representatives).

The third use of the term—discussing "peace" as a foundational principal for government—provides limited support for a narrow reading of the term in the free exercise provisos.[94] The probative value of this use is limited because while it highlights the compelling state interest in peace, the term "peace" is never defined in these contexts. However, the listing of "peace" alongside other *raisons d'être* for the state is probative evidence that "peace" did not include everything that the state was empowered to do.

The fourth use of the term—in the context of the titles "justice of the peace" and "clerks" or "conservators" "of the peace"[95]—does not clearly support either the narrower or broader readings of the peace provisos. Whether the title was a mere formality or a probative portion of the text that substantively informed the public meaning of "peace" in the provisos is unclear.[96] And even if the titles provide support for the broader reading (for reasons similar to those relating to Hamburger's reliance on the ceremonial "*contra pacem*" phrasing discussed above),[97] the meaning of "peace" was still limited by the extent to which government occupied only a limited scope at the Framing—a particularly powerful manifestation of the influences of Locke's *Second Treatise* and Blackstone's *Commentaries* and the natural coherence of these

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94. *See* MASS. CONST. OF 1780, pmbl., *reprinted in* 1 POORE, *supra* note 18, at 956–57; N.H. CONST. OF 1776, pmbl., *reprinted in* 2 POORE, *supra* note 18, at 1279–80.

95. *See* DEL. CONST. OF 1776, art. XII, XVIII, *reprinted in* 1 POORE, *supra* note 18, at 275–76; GA. CONST. OF 1777, art. XIII, XVII, LIII, *reprinted in* 1 POORE, *supra* note 18, at 380, 383; MD. CONST. OF 1776, art. XLIV, *reprinted in* 1 POORE, *supra* note 18, at 826–27; MASS. CONST. OF 1780, ch. 3, art. III, ch. 6, art. II, *reprinted in* 1 POORE, *supra* note 18, at 968–69, 971–72; N.J. CONST. OF 1776, art. XII, XX, *reprinted in* 2 POORE, *supra* note 18, at 1312–13; N.Y. CONST. OF 1777, art. XXVIII, *reprinted in* 2 POORE, *supra* note 18, at 1328, 1337. *Cf.* N.C. CONST. OF 1776, art. XXXIII, XXXV, *reprinted in* 2 POORE, *supra* note 18, at 1413–14; S.C. CONST. OF 1778, art. XXVI, *reprinted in* 2 POORE, *supra* note 18, at 1625; VA. CONSTITUTION OF 1776, *reprinted in* 2 POORE, *supra* note 18, at 1909–11.

96. These titles may also have nuclear relevance for the provisos. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes"). But they still may be probative.

97. *See* Hamburger, *supra* note 2, at 917.

works with the religiously grounded, anti-strife policies that animated the early states.[98]

The fifth use of the term "peace"—to refer to at least some violations of law—provides the strongest structural hook for Justice Scalia's view. But, read properly, it should still favor a reading of the peace provisos that does not encompass all violations of law. Some of these uses associated violations of the public peace with serious, largely violent, offenses.[99] This use supports a limited reading of the term "peace." More complex is the use in five constitutions (Delaware, Maryland, New Jersey, North Carolina, and Virginia) of the term "peace" in the context of indictments (a usage briefly discussed above). In these five states, all indictments were to "conclude" with some variation of the phrase "[a]gainst the peace and dignity of the state."[100] This ceremonial phrasing may be taken to support Justice Scalia's view that every indictable offense was a violation of the peace for purposes of the provisos. But there are two arguments that marshal against relying too heavily on these indictment clauses to embrace a broad reading of the "peace and safety" provisos.

First, the indictment clauses themselves suggest limits to what offenses were indictable.[101] As an initial matter, not all

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98. *See supra* Part II.A.3.

99. *See* GA. CONST. OF 1777, art. XXXIX, *reprinted in* 1 POORE, *supra* note 18, at 382 ("breach[es] of the peace, felon[ies], murder[s], and treason against the state"); S.C. CONST. OF 1790, art. I, § 1, *reprinted in* 2 POORE, *supra* note 18, at 1628, 1632–33 (absence of parliamentary privilege for "treason, felony, or breach of the peace").

100. *See* DEL. CONST. OF 1776, art. XX, *reprinted in* 1 POORE, *supra* note 18, at 276; MD. CONST. OF 1776, art. LVII, *reprinted in* 1 POORE, *supra* note 18, at 828; N.J. CONST. OF 1776, art. XV, *reprinted in* 2 POORE, *supra* note 18, at 1313; N.C. CONST. OF 1776, art. XXXVI, *reprinted in* 2 POORE, *supra* note 18, at 1414; VA. CONSTITUTION OF 1776, *reprinted in* 2 POORE, *supra* note 18, at 1910–12.

101. An indictment was "a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury." 4 BLACKSTONE, *supra* note 52, at *302; WEBSTER, *supra* note 59 (defining "indictment" as "a written accusation or formal charge of a crime or misdemeanor, preferred by a grand jury under oath to a court."). The limited scope of the indictment clauses is particularly probative support for this Note's thesis to the extent that the indictment clauses represent a floor rather than a ceiling for what offenses constituted a violation of the peace (perhaps by way of *expressio unius*). That assumption is certainly contestable. But even if it is rejected, the indictment clauses still do not necessarily require a broad reading of the peace and safety provisos for the reasons set forth below in the following discussion—perhaps

violations of law were indictable.[102] Presumably, pettier offenses entitled to summary proceedings (and therefore not subject to indictment) would not violate the peace of the state based on these indictment clauses. Moreover, the expense, effort, and time required to gather a grand jury comprised of twenty-four peers also suggest that crimes required sufficient gravity in practice in order to warrant indictment. And even when gathered, the practical protections afforded by grand juries to defendants from overzealous prosecution were quite important, particularly during the Revolutionary Era. It should also be noted that laws setting out felonies and misdemeanors drew heavily from the prevailing Lockean conception of government when defining the types of conduct that were prohibited. These prohibitions focused on conduct that violated the negative liberties, personal security, reputation, and property of others.[103] And, finally, the indictable felonies and misdemeanors that were presented to grand juries necessarily constituted only public offenses. Private, civil actions would not be indictable. If the meaning of "peace" is informed at least in part by the indictment clauses, then this suggests that conduct giving rise merely to merely civil, private

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most importantly, government's limited scope was an important backdrop principle contemplated by the early state free exercise provisos.

102. *See* STORY, *supra* note 71, at 660 ("[It was] regularly true at the common law of all offences, above the grade of common misdemeanors . . . [that there be] the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime, charged against him."); HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 231 (1877) (noting that "[t]reason, felonies, and misdemeanors are all indictable offences—every indictable offense falls under one of these three heads," but that "below these indictable offenses there was springing up a class of pettier offences, . . . which could be punished without trial by jury by justices of the peace"). But indictments at the federal level were reserved for "capital, or otherwise infamous crime[s]." U.S. CONST. amend. V.

103. To the extent that the state also criminalized immoral conduct in the context of securing the peace, the regulations criminalized conduct that the major religious tradition at the Founding (including dissenters) condemned, and these prohibitions focused extensively on combatting the secondary effects of, for example, public drunkenness and bawdyhouses. *See infra* Part II.B (noting practical limits on legislation that were imposed by Lockean theory, Blackstonian common law concepts, and shared moral consensus); *see also* 1 BLACKSTONE, *supra* note 52, at *124 (noting the extent to which some practices could harm others if they were made "public" because they became, "by the bad example they set, of pernicious effect[] to society").

actions would not constitute breaches of the peace for purposes of the indictment clauses.

Second, even if "peace" in the context of the indictment clauses encompassed any breach of law, there are several reasons why this definition should not necessarily be transported into the peace and safety provisos (let alone the proviso-free federal Free Exercise Clause). First, relying on the indictment clauses alone without incorporating in the external definitions of peace ignores the political and legal context in which the indictment clauses and the state provisos were enacted. The works of Blackstone and Locke discussed above—which deeply influenced the state and federal Framers[104]—support relatively limited definitions of the concept of "public peace."[105] That any indictable offense might be a violation of the public peace simply reflects the extent to which the state Framers presumed the backdrop of a relatively limited system of government. Second, less than half of the states had these indictment formulations.[106] The extent to which these indictment clauses influenced the other states' constitutions—or the proviso-free federal Free Exercise Clause—is therefore subject to challenge. And third, these indictment provisions may be insufficiently probative for purposes of interpreting the "peace and safety" provisos. As an initial matter, the indictment formulations may have been largely symbolic, traditional language inherited from historical practice that did not reflect the practical conception of the public peace.[107] Moreover, the linguistic formulations of the provisos and the indictment clauses diverge in ways that are potentially significant if the terms are taken to represent distinct, legal terms of art. While the indictment clauses often instruct that indictable offenses (felonies and indictable misdemeanors) are "*against* the public peace," many of the free exercise provisos

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104. *See, e.g.*, MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23–24 (1991); Jeffrey D. Jackson, *Blackstone's Ninth Amendment*, 62 OKLA. L. REV. 167, 202 (2010).

105. *See* 4 BLACKSTONE, *supra* note 52, at *142–53 (discussing "offenses against the public peace" as representing thirteen types of offenses, rather than any violation of law).

106. *See supra* note 100 (listing state constitutions of Delaware, Maryland, New Jersey, North Carolina, and Virginia).

107. *Cf.* Lee, *supra* note 58, at 89 (discussing linguistic drift).

(though not all) withhold protection from conduct that "*disturbs*" the public peace. This third point does not necessarily resolve whether or not the indictment provisions support a broad or narrow reading of the "peace and safety" provisos. Instead, it merely suggests that more research into the original linguistic meaning of the indictment clauses may be required before relying on them too heavily.[108]

Briefly considering the use of the term "safety" may be helpful as well. The use of the term "safety" throughout the state constitutions focuses on security from physical injury. "Safety" appears in two general contexts throughout these texts. The first, announcing "safety" as a foundational interest of government, does not define the meaning of the term and is therefore of limited probative value for purposes here.[109] The second, however, utilizes "safety" in juxtaposition to war, civil unsettlement, violence, and blights to public health (primarily disease).[110] This second reading favors a definition of safety as security from actual or threatened physical injury.

B. Licentiousness and Immorality

Three state constitutions—less than a third of the original states—provided that the free exercise of religion would not excuse "acts of licentiousness" or infringements of "the laws of morality."[111] This Section will argue that these "licentiousness and immorality" provisos did not necessarily empower states to prohibit (religious) conduct that violated any standard of morality that the legislature might adopt. Instead, the "licentiousness and immorality" provisos drew their meaning from ecumenically defined, historically rooted standards that enjoyed widespread acceptance by the major religious

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108. *Cf.* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (proposing one potential approach for conducting this type of analysis).

109. *See* GA. CONST. OF 1777, pmbl., *reprinted in* 1 POORE, *supra* note 18, at 377–78; N.Y. CONST. OF 1777, pmbl., *reprinted in* 2 POORE, *supra* note 18, at 1328, 1338.

110. *See* DEL. CONST. OF 1776, art. XXIII, *reprinted in* 1 POORE, *supra* note 18, at 273–78; MD. DECLARATION OF RIGHTS OF 1776, art. XIV, *reprinted in* 1 POORE, *supra* note 18, at 818 (sanguinary laws); N.Y. CONST. OF 1777, pmbl., art. VI, XL, XXXVII, *reprinted in* 2 POORE, *supra* note 18, at 1328–1338 (elections, Indian relations, defense).

111. *See* McConnell, *supra* note 2, at 1465.

denominations and dissenters of which the state framers were cognizant—resulting in few (if any significant) clashes between free exercise and the "licentiousness and immorality" provisos. Notwithstanding the potential for moral standards to evolve over time, the "licentiousness and immorality" provisos did not originally have the meaning, understanding, or effect of granting the state blanket authority to announce morality and compel obedience in all cases.[112]

1. Limited Scope of Government

The first reason for considering a limited reading of the "licentiousness and immorality" provisos relates to the extent that the state governments primarily conceived of themselves as Lockean in nature.[113] Under this model, power derived from the people, the people retained all rights not expressly surrendered to the state (with certain rights being by their nature inalienable), and the state only enjoyed a limited mandate.[114] As a result, any limitation on individual liberty—including the free exercise of religion—from prohibitions on licentious and immoral conduct must at least take account of the dominant conception of limited government that prevailed at the time. To be sure, the licentiousness and morality provisos present the potential to raise significant tensions with the Lockean conception of the state's mandate as limited to protecting property and negative liberties. But the tension can be mitigated (if not completely resolved). First, morality legislation can be seen as serving the Lockean mandate in the same way that traditional nuisance law did. By targeting the secondary effects of vices such as public drunkenness, prostitution, and adultery, for example, morality legislation protected society from tangible harms associated with the

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112. *Id.* ("As Jefferson wrote to the Reverend Samuel Miller, 'The government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.' That their internal practices may seem unjust or repugnant to the majority should be of no moment." (quoting Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808))).

113. *See* LOCKE, *supra* note 38, chs. 8–9.

114. *See id.*; McConnell, *supra* note 13, at 828–830, 836; McConnell, *supra* note 2, at 1464.

prohibited conduct.[115] Second, morality legislation was rooted in the shared moral framework embraced by the major religious traditions of the day; consequently, clashes between Lockean theory and morality legislation, though perhaps theoretically problematic, would have only limited practical significance for purposes of religious liberty.[116] This moral consensus would later unravel, of course (consider, *inter alia*, the ban on polygamy at stake in *Reynolds v. United States*[117]). But at the Framing, the widespread moral consensus generally resulted in few conflicts between religious exercise and the state's interest in morality.[118] And finally, the licentiousness and morality provisos can be viewed as limited, historically grounded exceptions to the prevailing Lockean model—failing to amount to a *carte blanche* grant of authority to government over morality and liberty in all cases.

2. Historical Definitions and Practices

The second reason for considering a limited reading of the "licentiousness and immorality provisos" is that the types of "licentiousness" and "immorality" that could be proscribed by state power represented an historically grounded set of conduct that was limited in terms of both its scope and why it was proscribed.

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115. *Compare* 1 BLACKSTONE, *supra* note 52, at *124 (discussing regulation of, *inter alia*, public morality as relating to the secondary effects vices posed to the productivity, security, or general welfare of society), *with* Renton v. Playtime Theatres, 475 U.S. 41 (1986) (discussing "secondary effects" targeted by regulations of pornography). For a general discussion of the links between morality and liberty and why morality regulations could further liberty, see generally NORTHWEST ORDINANCE OF 1787, *reprinted in* 1 UNITED STATES CODE, at LVLVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve ed., 2000); John Adams, Letter from John Adams to Massachusetts Militia (Oct. 11, 1798), *in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-3102 [https://perma.cc/9LL4-C5RL] ("Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.").

116. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003).

117. 98 U.S. 145 (1878).

118. *See* McConnell, *supra* note 2, at 1465. *But see* Muñoz, *supra* note 24, at 1408.

a. Colonial "Licentiousness and Immorality" Provisos

One probative source suggesting that the morality provisos in the state constitutions covered only a limited domain comes from the morality provisos in the early colonial charters. New Jersey and Pennsylvania provide two helpful examples of colonial morality provisions. In New Jersey, the Fundamental Constitution for the Province of East New Jersey in America (1683) contained a morality proviso that permitted the government to "preserv[e] . . . the people in diligence and . . . good order" by prohibiting the people from "practic[ing] cursing, swearing, drunkenness, prophaness, whoring, adultery, murdering or any kind of violence, or indulging themselves in stage plays, masks, revells or such like abuses."[119] Similarly, the Pennsylvania Frame of Government provided a similar set of morality regulations:

> [T]hat as a careless and corrupt administration of justice draws the wrath of God upon magistrates, so the wildness and looseness of the people provoke the indignation of God against a country: therefore, that *all such offences against God*, as swearing, cursing, lying, prophane talking, drunkenness, drinking of healths, obscene words, incest, sodomy, rapes, whoredom, fornication, and other uncleanness (not to be repeated); all treasons, misprisions, murders, duels, felony, seditions, maims, forcible entries, and other violences, to the persons and estates of the inhabitants within this province; all prizes, stage-plays, cards, dice, May-games, gamesters, masques, revels, bull-baitings, cock-fightings, bear-baitings, and the like, which excite the people to rudeness, cruelty, looseness, and irreligion, shall be respectively discouraged, and severely punished, according to the appointment of the Governor and freemen in provincial Council and General Assembly; as also all proceedings contrary to these laws, that are not here made expressly penal.[120]

These charter morality provisos—which focused on morality legislation as a means of encouraging religion, conforming community morality to the laws of God, and fostering the

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119. FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, *reprinted in* 5 THORPE, *supra* note 17, at 3052–36.

120. PA. FRAME OF GOVERNMENT OF 1682, art. XXXVII, *reprinted in* 2 THORPE, *supra* note 17, at 1518–20 (emphasis added).

necessary moral preconditions for securing God's blessings over the colony (and avoiding His indignation)—were thus limited both in terms of both what conduct was prohibited and what purposes undergirded those prohibitions. That the early state charters could express robust commitment to religious liberty while affirming their deep interest in morality suggests that, for the early colonies and states, moral legislation and religious belief went hand-in-hand.

b. Founding-Era Dictionaries and Religious Dissenters

Another source suggesting a limited reading of the state morality provisos comes from Founding-era dictionaries and religious dissenters. These sources suggest that "licentiousness" and "immorality," rather than referring to any conduct that the legislature might find objectionable, referred to a set of conduct that was historically proscribed, contrary to the law of God, and rejected by the widespread consensus of the major religious denominations and dissenters of the day. Founding-era dictionaries defined licentiousness as referring broadly to freedom "unrestrained" by just limits of "law or morality," followed by an elaboration on what the standards of justice, morality, and law required.[121] These limits were defined as conduct that was "lewd, wild, extravagant, [and] disorderly,"[122] "loose,"[123] and contrary to what was "honest, virtuous, innocent, and [e.g.,] pure."[124] The definitions' focus on personal vices found resonance with legal commentators of the day, who tended to focus their discussions of licentiousness on prostitution, drunkenness, and sexual impropriety.[125]

121. WEBSTER, *supra* note 59.

122. DYCHE & PARDON, *supra* note 60.

123. WEBSTER, *supra* note 59.

124. ASH, *supra* note 59.

125. *See* RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 71 (1792); JACOB GILES, A NEW LAW DICTIONARY 178 (6th ed., 1750). Hamburger disagrees that the definition of "licentious" should be as limited as this section proposes. He suggests that "licentiousness" referred "to immoral and, sometimes, merely prohibited behavior." *See* Hamburger, *supra* note 2, at 917 n.8 (drawing from WILLIAM ROBERTSON, PHRASEOLOGICIA GENERALIS 823–24 (1681)). But this would not mean that anything could be considered "licentious." Understandings of licentious behavior (and what the state could prohibit) were rooted in the laws of God, historical practice, the limited scope of government, and the understandings of the day reflected by leading dictionaries and legal commentators.

Definitions of morality tended to reach further, but they were by no means broad enough to encompass all legislation. Morality was always defined by reference to the static and objective moral law of God enshrined in the shared, predominantly Judeo-Christian doctrine of the day. Webster's dictionary provides the leading definition of morality, defining "moral" to mean:

> Relating to the practice, manners or conduct of men as social beings in relation to each other, and with reference to right and wrong. The word *moral* is applicable to actions that are good or evil, virtuous or vicious, and has reference to *the law of God as the standard* by which their character is to be determined. The word however may be applied to actions which affect only, or primarily and principally, a person's own happiness.[126]

He elaborated that the "[m]oral law, the law of God . . . prescribes the moral or social duties, and prohibits the transgression of them."[127] Even the Baptist dissenters upon whom Professor Hamburger relies to argue that the free exercise of religion did not protect religious dissenters from punishment for violating the laws of morality establish this point. Caleb Blood, a leading proponent of religious liberty, observed:

> [The free exercise of religion] by no means prohibits the civil magistrate from enacting those laws that shall enforce the observance of those precepts in the christian religion, the violation of which is a breach of the civil peace . . . ; viz. such as forbid murder, theft, adultery, false witness, and injuring our neighbor**,** either in person, name, or estate. And among others, that of observing the Sabbath, should be enforced by the civil power.[128]

Thus, the laws of morality—and the scope of the provisos against "licentiousness and immorality"—was coextensive

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126. WEBSTER, *supra* note 59 (second emphasis added).

127. *Id.* Ash similarly defined morality to mean "the doctrine or system of duties respecting the conduct of life; uprightness, sobriety; that which renders an action subject to reward or punishment." ASH, *supra* note 59.

128. *See* Hamburger, *supra* note 2, at 918 n.15 (quoting Caleb Blood, *A Sermon* 35 (Vt. election sermon [1792]) (Evans 24126)).

with the law of God which the state framers assumed was accepted by the larger society.

c. Legal Commentators and Contemporary Legal Practice

A third probative source suggesting a limited reading of the morality provisos is the body of law inherited and promulgated by the state framers. At English common law, Blackstone's *Commentaries* (which had a significant influence on the American legal regime) suggests that morality legislation covered a fixed set of conduct—including swearing, sabbath breaking, public drunkenness and lewdness, and fornication, prostitution, and adultery. Such conduct was both contrary to the laws of God and detrimental to the larger social order. To the extent that American legislators who were influenced by Blackstone's *Commentaries* continued to proscribe a similar set of immoral conduct, there are powerful reasons to conclude that the "licentiousness and morality" provisos would likely have been understood to only withhold protection from a limited set of conduct that was both historically prohibited and contrary to the laws of God.

3. Backdrop Principles

A third reason for adopting a limited reading of the "licentiousness and immorality" provisos relates to the background principles undergirding morality policy and the relationship between morality policy and religion at the Framing.

One principle that may have limited the scope of these provisos is the extent to which the states' interest in harmoniously ordering society and avoiding inter-sectarian strife qualified the states' interest in morality. As Professor McConnell has argued, the state framers were about as proximate to the inter-sectarian Thirty Years War and religious persecution under the English Uniformity and Test Acts as Americans today are to slavery.[129] Notwithstanding many colonies' early efforts to form commonwealths centered on a particular religious denomination and to persecute religious dissenters, religious liberty continually expanded during the

129. *See* McConnell, *supra* note 2, at 1421–24.

colonial period and the post-Independence state framers were animated to at least some extent by a desire to reduce intersectarian strife.[130] The states' interest in avoiding this strife informed their pursuit of public morality. As a result, the types of moral legislation that were enacted reflected widespread areas of consensus generally accepted by the majority of faiths and dissenters at the time, rather than moral commands particular to a given majoritarian denomination in a state (e.g., liturgical customs). The mainstream moral legislation that resulted found deep resonance with Quakers and Jews, Baptists and Congregationalists, and Anglicans and Catholics alike—resulting in little (if any) strife between sects or tensions between religious exercise and public morality enforced by law.[131]

A second principle that potentially limited the scope of the "licentiousness and immorality" provisos was, paradoxically, the states' interest in evangelism. The colonial charters consistently expressed the colonies' mission to further the Christian religion and order society in conformity with Christian doctrine.[132] This evangelizing impulse carried over

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130. *See id.* at 1421, 1515–16.

131. *See id.* at 1466–69, 1471–73; McConnell, *supra* note 11, at 1118. It may also be worth noting that, even if conflicts had arisen, religious liberty may have been considered a critical part of the desired harmonious ordering that the state existed to secure.

132. For Connecticut, see CHARTER OF CONNECTICUT OF 1662, *reprinted in* 1 THORPE, *supra* note 17, at 534 (stating that government existed so that "People Inhabitants there, may be so religiously, peaceably and civilly governed, as their good Life and orderly Conversation may win and invite the Natives of the Country to the Knowledge and Obedience of the only true GOD, and the Savior of Mankind, and the Christian Faith"). For Marvland, see CHARTER OF MARYLAND OF 1632, *reprinted in* 3 THORPE, *supra* note 17, at 1677 (exerting its "pious Zeal for extending the Christian Religion"). For Massachusetts, see CHARTER OF NEW ENGLAND OF 1620, *reprinted in* 3 THORPE, *supra* note 17, at 1839 (seeking the "principal [] Effect [of] . . . the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion"); CHARTER OF MASSACHUSETTS BAY OF 1629, *reprinted in* 5 THORPE, *supra* note 17, at 1846–60 (setting up government "whereby our said People, Inhabitants there, may be so religiously, peaceably, and civilly governed, as their good Life and orderly Conversation, may win and invite the Natives of Country, to the Knowledge and Obedience of the only true God and Savior of Mankind, and the Christian Faith, which . . . is the principal End of this Plantation"). For New Hampshire, see AGREEMENT OF THE SETTLERS AT EXETER IN NEW HAMPSHIRE OF 1639, *reprinted in* 4 THORPE, *supra* note 17, at 2445 (constituting "Laws and Civil Government" in

into the early state context in a manner that lent itself to prioritizing religious liberty.[133] Notwithstanding early colonial efforts to compel religious belief, the impulse to protect religious conscience and exercise was viewed as important for catalyzing the Gospel's spread and preventing the intersectarian strife that threatened the social harmony that virtuous government ought to build. The permissible scope of the state's interest in morality—and the scope of the morality provisos—

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accord with "the holy Will of God" and "in the name of Christ and in the sight of God" to order society "agreeable[y] to the Will of God" and binding its citizens "by the Grace and Help of Christ and in His Name and fear to submit [] to such Godly and Christian Lawes" which shall be enacted "according to God that [they] may live quietly and peaceably together in all godliness and honesty"). For New Jersey, see FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF WEST N.J. OF 1681, *reprinted in* 5 THORPE, *supra* note 17, at 2565–67 ("Forasmuch as it hath pleased God, to bring us into this Province of West New Jersey, and settle us here in safety, that we may be a people to the praise and honor of his name, who hath so dealt with us, and for the good and welfare of our posterity to come, we . . . do make and constitute these our agreements to be as fundamentals to us and our posterity."). For the Carolinas, see FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *reprinted in* 5 THORPE, *supra* note 17, at 2772–86 (constituting government such that "the natives of that place, who will be concerned in our plantation, [whom] are utterly strangers to Christianity . . . and also that Jews, heathens, and other dissenters from the purity of Christian religion may not be scared and kept at a distance from it, but, by having an opportunity of acquainting themselves with the truth and reasonableness of its doctrines, and the peaceableness and inoffensiveness of its professors, may, by good usage and persuasion, and all those convincing methods of gentleness and meekness, suitable to the rules and design of the gospel, be won over to embrace and unfeignedly receive the truth."). For Pennsylvania, see CHARTER FOR THE PROVINCE OF PENNSYLVANIA OF 1681, *reprinted in* 5 THORPE, *supra* note 17, at 3035–44 ("to reduce the savage Natives by gentle and just manners to the Love of Civil Societie and Christian Religion"); CHARTER OF PRIVILEGES OF 1701, *reprinted in* 5 THORPE, *supra* note 17, at 3076–81 ("But because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences as aforesaid, I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever."). For Virginia, see FIRST CHARTER OF VIRGINIA OF 1606, *supra* note 79, at 3783–90 ("We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government: do, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires.").

133. *See* McConnell, *supra* note 2, at 1437–43.

should therefore be understood in reference to the key policies of American evangelism that religious belief ought not (and could not) be compelled and that moral legislation could best facilitate conversion and virtuous societies by respecting religious liberty (within bounds).

4. Shared Moral Consensus

A fourth reason for considering a limited understanding of the "licentiousness and immorality" provisos is that states' moral legislation generally reflected widespread and near-universal consensus.

Contemporary morality enactments—which centered on violations of God's law—reflected a shared moral framework that was generally shared by and accessible to both majority denominations and dissenting denominations alike. Essentially all of the states' founding charters explicitly premised both the legitimacy of the state and its reason for being on religious conceptions of God's will.[134] Religion continued to permeate the early Republic during Ratification. Anti-establishment principles served to prevent sectarian exclusivity, while shared conceptions of God stemming from a shared Judeo-Christian religious framework continued to saturate the writings, speeches, and laws of the Framing generation. Congressional chaplains, national days of prayers, consistent government support for religion generally, and intentional blending of religion and rhetoric all served to underscore the relatively ecumenical and religiously inspired moral framework that operated in the Founding period.

Moral legislation during this period—enshrined in early charters and contemporary legislation—drew from the shared moral framework embraced by society generally across sectarian lines. For that reason, morality legislation did not generally conflict with the religious traditions of which the Framers were cognizant. Notwithstanding the potential for some conflicts between the state's conception of morality and religion, the most salient feature of moral legislation during this period is the extent to which these prohibitions enjoyed relatively robust consensus amongst the major religious

134. *See supra* notes 132–133.

majorities and dissenters of the day.[135] This consensus is likely relevant for understanding the pragmatic context and practical operation of the provisos against licentiousness and immorality.

C. Civil Injury or Outward Disturbance of Others' Rights

The provisos against civil injury or outward disturbance of others were fairly rare—suggesting that they had little to no impact on the federal Free Exercise Clause.[136] Only one state had a proviso that denied protection to religiously motivated conduct that "injur[ed] others, in their natural, civil, or religious rights."[137] And only two other states explicitly provided that the free exercise of religion would not permit religious conduct to "obstruct" or "disturb others in their religious worship."[138] But even on their own terms, these provisos against injuring others were relatively limited in their scope.

1. Limited Scope of Government

The first and most important limit on the provisos against causing civil injuries must make reference to the politico-philosophical context in which the provisos were written. As

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135. The potential for some conflict between religiously motivated conduct and the state's conception of morality is not fatal to this Note's argument. As an initial matter, such conflicts do not establish that the concept of licentiousness and immorality were boundless concepts—they still were conceived to apply to a set of historically prohibited practices. Moreover, despite the potential for some conflict between religious conduct and the state's conception of morality (consider, *inter alia*, the potential for a diverging set of marital practices violating laws against incest or polygamy or the hypothetical but analytically helpful potential for a Bacchanalian cult), it remains significant that, as a general matter, the conception of licentiousness and immorality embraced by the early states included practices that both majority denominations and (often unpopular) dissenting religious groups united in condemning. This consensus is particularly salient when viewed against the dominant Founding-era interest in avoiding inter-sectarian strife, see *supra* note 78, and in providing generous exemptions in anticipated areas of conflict between the state and religious conscience, see *supra* Part I.A.

136. *See* app. tbl. II, https://perma.cc/8V74-DK8D.

137. MD. DECLARATION OF RIGHTS OF 1776, art. XXXIII, *reprinted in* 1 Poore, *supra* note 18, at 817, 819.

138. MASS. CONST. OF 1780, art. II, *reprinted in* 1 POORE, *supra* note 17, at 1647; N.H. CONST. OF 1784, art. V, *reprinted in* 2 Poore, *supra* note 18, at 1280–81.

explained above, at the time these "rights" provisos were written, Lockean[139] sentiments dominated political thought.[140] Government was largely conceived of as existing to maximize protections for property and negative liberty.[141] Individual liberty was therefore ideally only to be limited insofar as necessary to preserve the negative liberties of others.[142] As such, civil injuries were generally limited to direct interference with other individuals' negative liberties (including their free exercise rights) and directly injuring others in their persons, reputations, or property.[143] The types of injuries covered by the provisos were therefore likely limited, deeply entrenched, and well-understood—they were not simply for the legislature to define at-will (even in a neutral, generally applicable law).[144]

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139. *See* LOCKE, *supra* note 38, chs. 8–9.

140. *See* McConnell, *supra* note 13, at 828, 830, 836. *But see* Vincent P. Muñoz, *George Washington on Religious Liberty*, 65 REV. OF POL. 11, 23–25, 32, 33 (2013) (arguing that republican ideology motivated at least some Founders).

141. *See* LOCKE, *supra* note 38, chs. 8–9.

142. *See* McConnell, *supra* note 2, at 1464, 1447–48.

143. *See* LOCKE, *supra* note 38, chs. 8–9.

144. Some of the rights and duties owed under the common law may initially seem to conflict with the Lockean model. For example, in the context of public accommodations law, innkeepers at common law were prohibited from refusing any individual's effort to stay at the inn (save for sufficient cause, such as vices like drunkenness) because doing so would be disorderly and defeat the purpose of the inn-keeping institution: to provide shelter to strangers traveling long distances in unfamiliar regions who might have no other option for shelter. *See* 4 BLACKSTONE, *supra* note 52, at *167–68. But the potential for such common law duties—which arguably vested positive "rights" in others—does not necessarily mean that the legislature could override free exercise rights in all cases. Several considerations limit the relevance of the common law duties that existed alongside the state free exercise guarantees. First, these common law duties may have represented fixed, static exceptions to the otherwise dominant Lockean conception of good government. Defined at an appropriately specific level of generality, their expansion to further limit negative liberty (whether related to religion or not) may therefore raise new constitutional questions. Second, these common law duties did not cause any significant conflict between religious liberty and state power at the time. Their extension to new, more contentious contexts might present difficult translation problems. Third, these common law duties may be consistent with the Lockean framework. On the one hand, innkeepers who held themselves out to the public may have undertaken an implied contractual obligation to serve travelers whose reliance the innkeepers' operations had presumably induced. Alternatively, if Locke's framework is re-conceptualized as a framework for weighing both negative and positive liberty interests, it may be possible that the "positive liberty" benefits accruing to travelers may outweigh the "negative liberty" costs experienced by innkeepers.

2. Historical Definitions and Practices

A second reason for favoring a limited reading of the provisos against injuring others considers the historically limited scope of what constituted "harms" to private "rights." Put simply, there is substantial evidence that the concepts of both individual "rights" and "wrongs" were bounded concepts limited to the common law rights of security, liberty, and property.

a. Founding-Era Legal Definitions

Founding-era legal commentators provide probative evidence supporting a limited construction of "rights" and "wrongs." Perhaps most critical for informing our understanding of Founding-era practice is Blackstone's *Commentaries*, which was "the law book" for the Founding generation and the main source of Americans' understanding of their inherited English legal traditions. [145] Blackstone reflected the prevailing, bounded conception of "rights" and "wrongs" through his division of wrongs into three categories: harms to personal security (involving physical security, health, and reputation), personal liberty (involving, e.g., false imprisonment), and to private property (involving, e.g., trespass, nuisance, and disturbance).[146] This tripartite schema reflected a fixed conception of both the categorization and

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And fourth, these common law duties may have simply represented an instance in which the state's interest was sufficiently compelling (and its means sufficiently narrowly tailored) to permit it to override individual liberty. Regardless, for purposes of this Note, it suffices to conclude that such common law duties did not necessarily always override free exercise claims. For a general discussion of the ordinary agreement between Lockean theory, political practice, and religious liberty, see McConnell, *supra* note 2, at 1465. *But see* Hamburger, *supra* note 2, at 917 n.8 (suggesting that civil injury "could refer to any injury under civil law"). Ultimately, the debate may devolve into a question of how to translate the Framing-era terms and expectations to the present. That translation requires, *inter alia*, defining the level of generality to assess "rights" and "wrongs," determining whether those categories or static or dynamic, and determining how to account for Framing-era expectations (particularly the Lockean nature of government and the English common law tradition described by Blackstone's *Commentaries*) into the present.

145. *See supra* note 104. *Cf.* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

146. *See* 1 BLACKSTONE, *supra* note 52, at *121–45 ("rights"); 4 BLACKSTONE, *supra*, at *115–43 ("wrongs").

nature of what constituted a "right" and an "injury" or "harm" to that right.

b. Founding-Era State Practice

Blackstone's tripartite, bounded conception of "rights" and "wrongs" was also reflected by Lockean-influenced, Framing-era state practices.[147] As an initial matter, state law causes of actions and remedies enforceable at common law closely followed the tripartite Blackstonian conception of the rights of security, liberty, and property.[148] Indeed, the Supreme Court in *Marbury v. Madison* (perhaps reflecting wider judicial practice) immediately elaborated upon its claim that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" by turning to consider the framework of "rights," "wrongs," and "remedies" proposed by Blackstone's *Commentaries*. [149] This tripartite framework of "rights" and "wrongs" found expression in other areas of state action as well. For example, early state constitutions guaranteed rights to redress for violations of the rights of persons, liberty, and property.[150] Similarly, many state conventions responsible for ratifying the federal Constitution urged the federal government to acknowledge an individual right to bring suit to seek redress for civil injuries that were defined along Blackstonian lines.[151] To be sure, "rights" and "privileges" were not necessarily

147. See John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 YALE L.J. 531–49, 559–68 (2005).

148. *Compare id.* (discussing state law causes of action), *with* 4 BLACKSTONE, *supra* note 52, at *115–43 (discussing types of "wrongs").

149. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also supra* note 104 (discussing deep influence of Blackstone's *Commentaries* on the Framing-era generation of lawyers and judges).

150. *See* Goldberg, *supra* note 147, at 560–64 (noting that "[f]ive early state constitutions included explicit guarantees of redress" and observing that Maryland's 1776 Declaration of Rights provided a right to redress to "every freeman, for any injury done him in his *person or property*" (emphasis added)).

151. *See id.* (noting that several states—including Virginia and North Carolina—urged for the Constitution to protect the right to bring suit and that Virginia's proposal included a declaration of the "essential and unalienable Right that every freeman ought to find a certain remedy by recourse to the laws for *all injuries and wrongs he may receive in his person, property or character*" (emphasis added)).

always negative liberties found in a state of nature—they could be (and often were) vested in individuals by state legislatures (or the common law, as the example of innkeepers' duties discussed above illustrates).[152] But there were likely limits presumed to govern the legislature's attempt to significantly expand the scope of the "rights" provisos by creating "new rights." First, from a political perspective, the creation of certain rights imposing duties or restrictions on others were likely limited by the Lockean conception of the legitimate role of good government.[153] And second, from a legal perspective, Blackstone's tripartite rights/wrongs framework suggests historically based, qualitative limits on what those "rights" and "wrongs" could (or should) be.[154] While determining the relevance of these expectations requires analyzing what to make of settled expectations[155] and whether those common law backdrops were static or mutable,[156] at the very least it suggests that there were originally important historical limits on the conception of the scope of these "rights" provisos and that these provisos were not therefore necessarily amenable to unlimited expansion by the legislature.[157]

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152. *See supra* note 144; 1 BLACKSTONE, *supra* note 52, at *124–25 (observing extent to which "rights" could include both negative "[and primary] absolute rights" and positive "[but secondary] social and relative rights").

153. *See infra* Part III.C.1; *see also* Sachs, *supra* note 145.

154. *See supra* note 146; *see also* Sachs, *supra* note 145.

155. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

156. *See* Sachs, *supra* note 145, at 1828–34.

157. For a related and relevant debate on the extent to which Congress can confer standing by creating "rights," see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556, 578 (1992) (arguing that there must a be a prior "de facto," concrete injury before Congress can create standing); *id.* at 580 (Kennedy, J., concurring) (advancing view that Congress must merely identify the injury it seeks to prevent and identify the class it wishes to protect); *see also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550–54 (2016) (Thomas, J., concurring) (proposing an originalist position that is centered on distinguishing public rights from private rights). On the subject of personal rights compared to private rights, Justice Thomas asserts, "'Private rights' are rights 'belonging to individuals, considered as individuals.'" "Private rights" have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2). This distinction between public and private rights may also be helpful for understanding the "rights" provisos.

c. Founding-Era Dictionaries

Founding-era dictionaries provide further evidence that the concepts of "rights" and "wrongs" were bounded concepts that constrained the scope of the "rights" provisos—though their probative value is potentially significantly weaker than the legal definitions provided by legal commentaries (such as Blackstone's *Commentaries*). Definitions of "injury" and "harm" provide probative evidence for what types of rights the state framers understood people to enjoy when they wrote the provisos against violating others' rights. Dictionaries defining "injury" and "harm" tended to restrict their definitions to refer to damage to property, physical damage to the person, and damage to reputation. Burn's legal dictionary defined "injury" to refer to "a wrong or damage to [a] man's person or goods," and he listed as an example of civil injury common law torts such as libel.[158] Similarly, Barclay defined "harm" as "an action by which . . . [one] may receive damage in his goods or hurt to his person; mischief; hurt; or injury; . . . a degree of hurt without justice, and refer[ring] to either character or property."[159] And the leading non-legal dictionary definition provided by Webster primarily defined "hurt" as a physical wound or injury, but it also extended it to encompass the "hurt [enacted upon] a man by destroying his property."[160] These dictionary definitions are limited (as is the general probative value of relying on Founding-era dictionaries), but they provide modest evidence supporting the conclusion that the scope of civil rights that could be injured included the well-understood, historically rooted rights to person, reputation, and property. In other words, these "rights" were not boundless.

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To summarize Part II, the state free exercise provisos did not likely withhold protection from religious exercise whenever it violated any neutral, generally applicable law that a legislature might enact. Instead, the provisos communicated a bounded

158. BURN & BURN, *supra* note 125.
159. BARCLAY, *supra* note 59, at 529.
160. WEBSTER, *supra* note 59.

rather than an unlimited exception to the free exercise of religion. Part III now turns to consider the relevance of these state free exercise provisos to the federal Free Exercise Clause.

III. FEDERAL FREE EXERCISE CLAUSE

The free exercise provisos in the early state constitutions strengthen the case for interpreting the Free Exercise Clause to require religious-based exemptions for at least some religiously motivated conduct for two reasons.[161] First, the absence of an express proviso in the Free Exercise Clause suggests that no limitation external to the right itself existed. Second, even if a proviso were implied, its scope would necessarily remain at least as limited as the state constitutional provisos that provided the models for the federal Constitution—and the scope of this federal proviso was probably even more limited.

A. Free Exercise Clause Lacks a Clear Proviso

There is no express proviso to the federal Free Exercise Clause. The absence of such a proviso supports the conclusion that no proviso operated on the federal Free Exercise Clause.

Several textual, structural, historical, and philosophical considerations support this intuition. First, the text of the Free Exercise Clause itself is broad and unqualified. The absence of a proviso means that the right conferred is bounded only by

161. That the state constitutions—including their free exercise provisos—have at least some relevance for interpreting the original meaning of the federal Free Exercise Clause is assumed by many of the scholars and judges within the debate engaged in by this Note. *See, e.g.*, Scalia, *supra* note 9, at 851, 860 (noting validity of relying on state constitutions and English background norms to construe federal Constitution); McConnell, *supra* note 2 (relying in part on state constitutions); Hamburger, *supra* note 2 (same). To be sure, there is some difference of opinion over the use of state constitutions to interpret the federal Constitution. Some scholars debate which state constitutions matter most. *See* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L. J. 929, 982 (2002). And some scholars, such as Professor Muñoz, argue that state declarations of rights were often not judicially enforceable and were intended primarily as precatory, educational provisions. *See* Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1, 3–4 (2015). But the generally accepted wisdom in contemporary scholarship favors turning to state constitutions to interpret the federal Constitution. *See, e.g.*, McConnell, *supra* note 2; Hamburger, *supra* note 2.

the terms of the right itself.[162] The right would not be boundless by its own terms, but limited to the types of religiously motivated conduct that were deeply rooted and well-accepted at the Founding.

Second, the structure of the Constitution also supports interpreting the absence of an express proviso as the omission of any implied proviso external to the right itself. The federal Free Exercise Clause adopted broad, unqualified language in stark contrast to the provisos found in other parts of the First Amendment: the Assembly and Petition Clauses of the First Amendment (which provided that the rights must be exercised "peaceably").[163] The Framers' decision to attach provisos to the Assembly and Petition Clauses, but not to the Free Exercise Clause found in the very same amendment, suggests that no such proviso was originally understood to exist.[164] The lack of any conditional clause (or other qualification) also makes the Free Exercise Clause distinct from other provisions in the Bill of Rights outside of the First Amendment. [165] The Third

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162. It might be argued that Congress can abridge the free exercise of religion as long as it does not "prohibit" it and that the term "prohibit" incorporates in the state proviso limitations. But this is unpersuasive. As an initial matter, incorporating such limits by using the term "prohibit" would be a textually odd and relatively unclear means of doing so. Had the Framers wanted a proviso, they could have simply borrowed the express language of the state constitutions. Moreover, implicitly incorporating a proviso through the term "prohibit" would be a poor way to do so because it would lack the careful textual tailoring of the state provisos. And finally, the term "prohibit" denotes and connotes robust limits on state power. Any limiting of the "free exercise" of religion would amount to a prohibition on the "freeness" of the exercise. *Cf.* Laycock, *supra* note 78, at 687–88 ("The primacy of text is relevant to the meaning of the religion clauses. First, the word 'exercise' is powerful textual evidence that the protection extends beyond mere belief and reaches religious conduct. Second, the text of the religion clauses is absolute. It says 'no law,' not 'no unreasonable law,' or 'no badly motivated law.' We have learned that we cannot literally enforce the absolutism of the first amendment, but neither should we ignore it. Implied exceptions to a textually absolute constitutional right should be an extraordinary thing; the Supreme Court's recent free exercise jurisprudence implies exceptions far too readily and gives insufficient weight to the absoluteness of the text.").

163. *See* U.S. CONST. amend. I.

164. For a contrasting discussion of just what the "free exercise" right included, see generally McConnell, *supra* note 2; Hamburger, *supra* note 2; Muñoz, *supra* note 24, at 1387.

165. *See* McConnell, *supra* note 11, at 1116 (comparing the "absolute terms" of the First Amendment to the "unreasonable" standard of the Fourth Amendment and the "due process" standard of the Fifth Amendment to conclude that "[a]ny

Amendment modifies the absolute nature of its guarantee to provide that it may be limited, "in time of war . . . in a manner to be prescribed by law."[166] The Fourth Amendment "limits itself to prohibitions that are 'unreasonable.'"[167] And the Fifth Amendment permits "deprivations of liberty" with "due process of law" and provides an exception to the grand jury indictment requirement "in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."[168] The absence of any such conditional qualification to the Free Exercise Clause suggests that no proviso to the federal free exercise guarantee was entailed.[169]

Third, the history of the Constitution supports the argument against an implied proviso as well. Nearly all of the state constitutions had free exercise provisos. Had the Framers intended to create such a proviso in the federal Free Exercise Clause, they could have simply drawn from the readily available state constitutional models. Yet, they chose not to do so.[170]

And fourth, the philosophical underpinnings of the Constitution that informed the public meaning and understanding of its text marshal against finding an implied proviso to the federal free exercise guarantee. The free exercise of religion was considered inalienable and precedent to the state's power.[171] Moreover, because the Constitution operates

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limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text.").

166. U.S. CONST. amend. III.

167. *See* McConnell, *supra* note 11, at 1116.

168. U.S. CONST. amend. V.

169. *See* McConnell, *supra* note 11, at 1116.

170. See app. tbl. II, https://perma.cc/8V74-DK8D, for the relevant state models. The Framers' omission of a proviso should not be dismissed as a legal drafting error. First, the Convention records—which reflect numerous different drafts and modifications of the First Amendment's text—suggest that Congress drafted the First Amendment's language carefully. *See generally* Vincent P. Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083. Second, the short, resulting text appears unlikely to implicate either the mistake canon (typographical) or absurdity canon (substantive). And third, the Bill of Rights—the promise of which arguably constituted an important means of ensuring Ratification—had sufficiently high stakes to warrant presuming both a careful drafter and an attentive ratifying public (significantly, the proviso-free text was uncontroversial).

171. *See* Madison, *supra* note 83.

as a social contract between the people of the several states and the federal government, any natural liberties (or powers) not surrendered remain in the people (and the states).[172] The Constitution's structure—to the extent it creates a presumption of liberty—cuts against finding an unwritten proviso.

B. Any Implied Proviso Constitutes a Narrow Exception

Even if the federal Free Exercise Clause—which lacks any express proviso—is interpreted to have an implied proviso, any implied limitation on the federal free exercise right constitutes a narrow, bounded exception. It should not sweep as far as *Smith* and withhold protection from violation of *any* neutral, generally applicable law that legislature might enact.

At its broadest, any implied proviso to the Free Exercise Clause likely reaches no further than the state free exercise provisos. As discussed in Part I, these provisos were not boundless—instead, they represented narrowly enumerated, compelling state interests that were specific exceptions to an otherwise broad free exercise right. Assuming that the implied proviso in the federal Free Exercise Clause drew from the state constitutional provisos, the only religious-based conduct that would be denied free exercise protection would be conduct that fell within the original meaning of the major provisos: (1) violation of the "peace or safety," (2) licentious conduct against the laws of morality, or (3) conduct causing civil injury or outward disturbance of others. The limited scope of these state provisos suggests that any implied proviso to the federal Free Exercise Clause should be construed similarly narrowly.

Furthermore, any implied proviso to the Free Exercise Clause should be construed even more narrowly for at least two reasons. First, only the "peace and safety" provisos commanded approval from a majority of states.[173] For the reasons discussed above, these provisos did not withhold protection from conduct that violated any law that a legislature might enact—the provisos' scope was more limited. Second, an

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173. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (proposing presumption in favor of liberty). *But see* Edward Whelan, *The Presumption of Constitutionality*, 42 HARV. J.L. & PUB. POL'Y 17 (2018) (discussing Thayer's presumption of constitutionality).

173. *See* app. tbl. II, https://perma.cc/8V74-DK8D.

implied exception should not swallow the expressed rule against "prohibit[ing] the free exercise [of religion]."[174] Perhaps the best understanding of any "implied" proviso rests upon the doctrine of "necessity." As Professor McConnell has observed,

> Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from *necessity*, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary. It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule.[175]

The scope of the "necessity" exception would potentially be narrower than the scope of the provisos embodied in the state constitutions but left unexpressed in the federal Constitution. That narrowness might be expressed by further restricting the types of state interests that count, heightening the required strength of those interests, and demanding some form of "least-restrictive" narrow tailoring. Regardless, the important conclusion for purposes here is that any limitation on the Free Exercise Clause—whether express or implied—would be relatively limited.[176] The *Smith* decision likely sweeps too far.

C. Problems of Relevance, Absurdity, and Superfluity

There are several potential counterarguments to this Part's conclusion that the state free exercise provisos favor the conclusion that the Free Exercise Clause provided at least some exemptions for religiously motivated conduct. This Note concludes by addressing three of the most important critiques.

One argument against this Part's conclusion is that the state free exercise guarantees may not be relevant for informing our reading of the Free Exercise Clause insofar as they articulated precatory, nonjusticiable aspirations rather than "precise rules of constitutional law" enforced by judicial review.[177] But that argument presents several problems. First, the state free

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174. *See* McConnell, *supra* note 11, at 1116.

175. *Id.* (emphasis added).

176. The limited scope of the proviso, however, may suggest a limited free exercise right. *See id.*

177. *See* Muñoz, *supra* note 24, at 1390–92.

exercise guarantees were likely not merely precatory. Unlike the provisions in the state constitutional preambles (guaranteeing, e.g., "free government"),[178] the free exercise guarantees represented fundamental, individual natural liberties. Moreover, each department had an obligation to enforce them in its sphere. As Professor McConnell observes,

> When constitutional principles are enforced through legislatures rather than judicial review, it is usually impossible to distinguish between legislative policy and legislative constitutionalism. [That religious exemptions were obligatory] is enhanced by the fact that the appeals for exemption were often framed in terms of natural or constitutional rights.[179]

Although early records leave the precise contours of judicial review unclear, the free exercise guarantees had important, substantive meaning. Second, even if the state free exercise guarantees were judicially unenforceable, they still provided an important, probative model for the drafting of the binding, proviso-free federal Free Exercise Clause.[180] And third, refusing to consider the relevance for the state constitutional free exercise provisos because of their judicially unenforceable nature risks proving too much—particularly because the ability of state constitutional guarantees of, *inter alia*, speech, association, and property to inform our reading of the federal Constitution would be subject to similar limitations. In short, the free exercise guarantees in the early state constitutions remain relevant for the federal Free Exercise Clause.

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178. *See id.* at 1391.

179. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 714 n.127 (1992); McConnell, *supra* note 13, at 830 ("Each such provision affirms the rights of conscience or free exercise of religion subject to the fundamental peacekeeping functions of the state. The difference is that, as constitutional provisions, they entrust the boundary-keeping function to an institution of government other than the legislature. The existence of these peace and safety provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience." (relying on THE FEDERALIST NO. 78, at 438–39 (Alexander Hamilton) (Isaac Kramnick ed., 1987))).

180. *But see* Muñoz, *supra* note 24, at 1415 (suggesting that the state provisos' "presence and absence" in some state constitutions but not others can be explained by their function of "communicat[ing] the natural law limits on the natural right of religious free exercise").

A second argument against this Part's conclusion may suggest that interpreting the Free Exercise Clause to have either no proviso or an overly narrow one risks creating absurd results.[181] But that problem is overstated (leaving aside the level of negative liberty that would be "absurd" to the founding generation).[182] As an initial matter, given that the federal government occupied a relatively limited station and states retained primary plenary power over most affairs, the Free Exercise Clause's further limitation of the federal government's power was relatively modest (particularly given the rarity of conflicts between religion and governmental power). Moreover, the federal government would still retain power to override religious exercise given sufficiently important need to do so. If the Free Exercise Clause lacked any proviso, the federal government could override religious exercise under the doctrine of necessity. But if the Free Exercise Clause incorporated an implied proviso of similar scope to the state provisos, the federal government could simply override religious exercise in those important, enumerated areas.[183] Finally, were religious practices to become sufficiently harmful but not subject to federal override, the state governments could preserve good order by changing their constitutional structures to permit greater restrictions on the free exercise right, subject to some natural law limits. Of course, the practical operation of state action in this way would be limited both by states'

181. *See id.* at 1411.

182. *See supra* Parts II.A.1, .B.1, .C.1.

183. This comports with the contemporary treatment of other, absolutely phrased constitutional guarantees. For example, although the federal Free Speech and Free Press guarantees contained no express limits within the text of the Constitution, they had limits rooted in the history and nature of the rights themselves. *Cf.* Thomas G. West, *Free Speech in the American Founding and in Modern Liberalism* 310, 325 n.33, *in* FREEDOM OF SPEECH (Ellen Paul, Fred Miller, and Jeffrey Paul eds., 2004) (citing PA. CONST. OF 1790, art. IX, § VII, *reprinted in* KURLAND, *supra* note 21, at 71, which provided that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*") (emphasis added)). Fighting words, libel, and incitement are notable examples in the speech context. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement). *But see* McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (questioning *New York Times v. Sullivan*).

political incentives to resist enlarging federal power and the changes brought by the Fourteenth Amendment.

A third argument against this Part's conclusion may point to the debate over religious exemptions in the Second Amendment. As Professor Muñoz argues,

> [T]he drafting of the Free Exercise Clause sheds almost no light on the text's original meaning. In drafting what would become the Second Amendment, however, the First Congress directly considered and rejected a constitutional right to religious-based exemption from militia service. When it considered conscientious exemption, moreover, no member of Congress suggested that such an exemption might be part of the right to religious free exercise. The records of the First Congress therefore provide strong evidence against the exemption interpretation of the Free Exercise Clause.[184]

But this argument encounters a series of potential problems. First, the debate record may be insufficiently clear to shed much light on the Free Exercise Clause. That possibility is heightened by considering that recorded speakers' views may not be representative of the larger Congress or ratifying public, that the record is ultimately inconclusive on the question of why the Framers rejected an express, religious-based exemption to conscription, and that the congressional debate over the Second Amendment (which, in the House, immediately followed its adoption of the Free Exercise Clause) both lacked knowledge of what the eventual Bill of Rights would include and which provisions would eventually be ratified.[185] Second, the debate also fails to demonstrate that an express religious exemption would be superfluous or redundant if the Free Exercise Clause already afforded general exemptions. Instead, the power over military conscription may have been understood—by virtue of either its historical pedigree or the compelling government interests it represented—to override general religious exemptions

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184. *See* Muñoz, *supra* note 170, at 1086.

185. *Compare* Muñoz, *supra* note 24, *with* Brief for Center for Constitutional Jurisprudence and National Organization for Marriage as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005665.

afforded by the Free Exercise Clause in the absence of an additional, express exemption. And third, even if an express religious exemption to conscription would overlap with the scope of the religious exemptions under the Free Exercise Clause, legislatures often enact legal provisions *ex abundanti cautela* to make "doubly sure" that the legislature's purpose is accomplished (here, protecting religious liberty).[186]

IV. CONCLUSION

This Note has deployed a two-step argument to suggest that, contrary to Justice Scalia's concurrence in *City of Boerne*, the state free exercise provisos do not support *Smith*'s holding that the Free Exercise Clause provides no protection for religiously motivated conduct against neutral laws of general applicability.[187] First, these state provisos did not withhold protection from religiously motivated conduct any time it violated a neutral, generally applicable law that a legislature might enact. Instead, these provisos merely represented narrowly enumerated, historically grounded areas in which the free exercise of religion could be overridden by sufficiently important state interests. And second, the Free Exercise Clause—which *lacks* any express proviso—should be read to protect religious freedom at least as broadly as the state constitutions. In sum, rather than vindicating *Smith*, the early state free exercise provisos undermine its historical foundations.[188]

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186. *See* U.S. CONST. amend. IX; THE FEDERALIST NO. 84, at 531–33 (Alexander Hamilton) (B. Wright ed., 1961) ("I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."); Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–35 (2013) (suggesting that the canon against superfluity is "known, but rejected"). *Cf.* WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1 (Alan Durband ed., Stanley Thorns, Ltd. 1984) (1623) (modern English translation) ("I have no reason to fear [Macduff]. But even so, I'll make doubly sure. I'll guarantee my own fate by having you killed, Macduff.").

187. City of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring).

188. This Note has left aside the implications of its conclusions for *Smith*'s *stare decisis* value. But to the extent that *Smith*'s holding is in tension with the historical

meaning of the Free Exercise Clause, those implications could be significant—particularly given *Smith*'s failure to offer a comprehensive historical defense of its holding. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2478–86 (2018).