SUPREME COURT OF THE UNITED STATES

No. 95–2074

CITY OF BOERNE, PETITIONER *v.* P. F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 1997]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins except as to a portion of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress' power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I

I agree with much of the reasoning set forth in Part III–A of the Court's opinion. Indeed, if I agreed with the Court's standard in *Smith*, I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the "power to decree the *substance* of the Fourteenth Amendment's restrictions on the States." *Ante*, at 9 (emphasis added). Rather, its power under §5 of the Fourteenth Amendment extends only to *enforcing* the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. Accordingly, whether Congress has exceeded its §5 powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Ante*, at 10. This recognition does not, of course, in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning. Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates. But when it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment.

The Court's analysis of whether RFRA is a constitutional exercise of Congress' §5 power, set forth in Part III–B of its opinion, is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. In *Smith*, five Members of this Court– without briefing or argument on the issue– interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated

by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. See *Smith, supra,* at 892–903 (O'CONNOR, J., concurring in judgment). Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith,* our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct— regardless whether it was specifically targeted at religion or applied generally— we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest. See 494 U. S., at 894 (citing *Hernandez* v. *Commissioner,* 490 U. S. 680, 699 (1989); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.,* 480 U. S. 136, 141 (1987); *United States* v. *Lee,* 455 U. S. 252, 257–258 (1982); *McDaniel* v. *Paty,* 435 U. S. 618, 626–629 (1978); *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972); *Gillette* v. *United States,* 401 U. S. 437, 462 (1971); *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963)).

The Court's rejection of this principle in *Smith* is supported neither by precedent nor, as discussed below, by history. The decision has harmed religious liberty. For example, a Federal District Court, in reliance on *Smith,* ruled that the Free Exercise Clause was not implicated where Hmong natives objected on religious grounds to their son's autopsy, conducted pursuant to a generally applicable state law. *Yang* v. *Sturner,* 750 F. Supp. 558, 559 (RI 1990). The Court of Appeals for the Eighth Circuit held that application of a city's zoning laws to prevent a church from conducting services in an area zoned for

commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area. *Cornerstone Bible Church* v. *Hastings*, 948 F. 2d 464 (CA8 1991); see also *Rector of St. Bartholomew's Church* v. *New York*, 914 F. 2d 348, 355 (CA2 1990) (no Free Exercise claim where city's application of facially neutral landmark designation law "drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs"), cert. denied, 499 U. S. 905 (1991); *State* v. *Hershberger*, 462 N. W. 2d 393 (Minn. 1990) (Free Exercise Clause provided no basis for exempting an Amish farmer from displaying a bright orange triangle on his buggy, to which the farmer objected on religious grounds, even though the evidence showed that some other material would have served the State's purpose equally well). These cases demonstrate that lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice.

Stare decisis concerns should not prevent us from revisiting our holding in *Smith*. "'*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 231 (1995) (citing *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940)). This principle is particularly true in constitutional cases, where— as this case so plainly illustrates— "correction through legislative action is practically impossible." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. ___, ___ (1996) (slip op., at 18) (internal quotation marks and citation omitted). I believe that, in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong. Moreover, it is a recent decision. As such, it has not engendered the

kind of reliance on its continued application that would militate against overruling it. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 855–856 (1992).

Accordingly, I believe that we should reexamine our holding in *Smith,* and do so in this very case. In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest.

II

I shall not restate what has been said in other opinions, which have demonstrated that *Smith* is gravely at odds with our earlier free exercise precedents. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520, 570–571 (1993) (SOUTER, J., concurring) (stating that it is "difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law"); *Smith, supra,* at 894–901 (O'CONNOR, J., concurring); see also McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1120–1127 (1990). Rather, I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause— an inquiry the Court in *Smith* did not undertake. We have previously recognized the importance of interpreting the Religion Clauses in light of their history. *Lynch* v. *Donnelly,* 465 U. S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees"); *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 212–214 (1963).

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more

likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.

A

The original Constitution, drafted in 1787 and ratified by the States in 1788, had no provisions safeguarding individual liberties, such as freedom of speech or religion. Federalists, the chief supporters of the new Constitution, took the view that amending the Constitution to explicitly protect individual freedoms was superfluous, since the rights that the amendments would protect were already completely secure. See, *e.g.*, 1 Annals of Congress 440, 443–444, 448–459 (Gales and Seaton ed. 1834) (remarks of James Madison, June 8, 1789). Moreover, they feared that guaranteeing certain civil liberties might backfire, since the express mention of some freedoms might imply that others were not protected. According to Alexander Hamilton, a Bill of Rights would even be dangerous, in that by specifying "various exceptions to powers" not granted, it "would afford a colorable pretext to claim more than were granted." The Federalist No. 84, p. 513 (C. Rossiter ed. 1961). Anti-Federalists, however, insisted on more definite guarantees. Apprehensive that the newly established federal government would overwhelm the rights of States and individuals, they wanted explicit assurances that the federal government had no power in matters of personal liberty. T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 194 (1986). Additionally, Baptists and other Protestant dissenters feared for their religious liberty under the new Federal Government and called for an amendment guaranteeing religious freedom. *Id.*, at 198.

In the end, legislators acceded to these demands. By December 1791, the Bill of Rights had been added to the

Constitution. With respect to religious liberty, the First Amendment provided: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amdt. 1. Neither the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise protection. It would be disingenuous to say that the Framers neglected to define precisely the scope of the Free Exercise Clause because the words "free exercise" had a precise meaning. L. Levy, Essays on American Constitutional History 173 (1972). As is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase signified. *Ibid.* ("[I]t is astonishing to discover that the debate on a Bill of Rights was conducted on a level of abstraction so vague as to convey the impression that Americans of 1787–1788 had only the most nebulous conception of the meanings of the particular rights they sought to insure"). But a variety of sources supplement the legislative history and shed light on the original understanding of the Free Exercise Clause. These materials suggest that— contrary to *Smith*— the Framers did not intend simply to prevent the Government from adopting laws that discriminated against religion. Although the Framers may not have asked precisely the questions about religious liberty that we do today, the historical record indicates that they believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice.

B

The principle of religious "free exercise" and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. To the contrary, these principles were first

articulated in this country in the colonies of Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina, in the mid-1600's. These colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups— although often limited to Christian groups— beyond their own. Thus, they encountered early on the conflicts that may arise in a society made up of a plurality of faiths.

The term "free exercise" appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the "free exercise" of their religion. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1425 (1990) (hereinafter Origins of Free Exercise). Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion: "[N]oe person . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt." Act Concerning Religion of 1649, reprinted in 5 The Founders' Constitution 49, 50 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution). Rhode Island's Charter of 1663 used the analogous term "liberty of conscience." It protected residents from being "in any ways molested, punished, disquieted, or called into question, for any differences in opinion, in matters of religion, and do not actually disturb the civil peace of our said colony." The Charter further provided that residents may "freely, and fully have and enjoy his and their own judgments, and conscience in matters of

religious concernments . . . ; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness; nor to the civil injury, or outward disturbance of others." Charter of Rhode Island and Providence Plantations, 1663, in 8 W. Swindler, Sources and Documents of United States Constitutions 363 (1979). Various agreements between prospective settlers and the proprietors of Carolina, New York, and New Jersey similarly guaranteed religious freedom, using language that paralleled that of the Rhode Island Charter of 1663. See New York Act Declaring Rights & Priviledges (1691); Concession and Agreement of the Lords Proprietors of the Province of New Cæsarea, or New-Jersey (1664); Laws of West New-Jersey, Art. X (1681); Fundamental Constitutions for East New-Jersey, Art. XVI (1683); First Charter of Carolina, Art. XVIII (1663). N. Cogan, The Complete Bill of Rights 23–27 (Galley 1997).

These documents suggest that, early in our country's history, several colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty. Moreover, these colonies appeared to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent "licentiousness." In other words, when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise. Such notions parallel the ideas expressed in our pre-*Smith* cases— that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest.

C

The principles expounded in these early charters reemerged over a century later in state constitutions that were adopted in the flurry of constitution-drafting that followed the American Revolution. By 1789, every State

but Connecticut had incorporated some version of a free exercise clause into its constitution. Origins of Free Exercise 1455. These state provisions, which were typically longer and more detailed than the federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests. For example, the New York Constitution of 1777 provided:

> "[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, *shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.*" N. Y. Const., Art. XXXVIII (1777), in 7 Swindler, *supra*, at 178 (emphasis added).

Similarly, the New Hampshire Constitution of 1784 declared:

> "Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . *provided he doth not disturb the public peace, or disturb others*, in their religious worship." N. H. Const., Art. I, §5 (1784), in 6 Swindler, *supra*, at 345 (emphsis

added).

The Maryland Declaration of Rights of 1776 read:

> "[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, *any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others,* in their natural, civil, or religious rights." Md. Const., Declaration of Rights, Art. XXXIII in 4 Swindler, *supra,* at 374 (emphasis added).

The religious liberty clause of the Georgia Constitution of 1777 stated:

> "All persons whatever shall have the free exercise of their religion; provided *it be not repugnant to the peace and safety of the State.*" Ga. Const., Art. LVI (1777), in 2 Swindler, *supra,* at 449 (emphasis added).

In addition to these state provisions, the Northwest Ordinance of 1787– which was enacted contemporaneously with the drafting of the Constitution and re-enacted by the First Congress– established a bill of rights for a territory that included what is now Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota. Article I of the Ordinance declared:

> "No person, *demeaning himself in a peaceable and orderly manner,* shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." Northwest Territory Ordinance of 1787, Art. I, 1 Stat. 52 (emphasis added).

The language used in these state constitutional provisions and the Northwest Ordinance strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to "free exercise"

required, where possible, accommodation of religious practice. If not— and if the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience— there would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State." Such a proviso would have been superfluous. Instead, these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes.

The Virginia Legislature may have debated the issue most fully. In May 1776, the Virginia Constitutional Convention wrote a constitution containing a Declaration of Rights with a clause on religious liberty. The initial drafter of the clause, George Mason, proposed the following:

> "That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be (directed) only by reason and conviction, not by force or violence; and therefore, *that all men should enjoy the fullest toleration in the exercise of religion,* according to the dictates of conscience, unpunished and unrestrained by the magistrate, *unless, under colour of religion, any man disturb the peace, the happiness, or safety of society.* And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." Committee Draft of the Virginia Declaration of Rights, 1 Papers of George Mason 284–285 (R. Rutland ed. 1970) (emphasis added).

Mason's proposal did not go far enough for a 26-year-old James Madison, who had recently completed his studies

at the Presbyterian College of Princeton. He objected first to Mason's use of the term "toleration," contending that the word implied that the right to practice one's religion was a governmental favor, rather than an inalienable liberty. Second, Madison thought Mason's proposal countenanced too much state interference in religious matters, since the "exercise of religion" would have yielded whenever it was deemed inimical to "the peace, happiness, or safety of society." Madison suggested the provision read instead:

> "That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, *all men are equally entitled to the full and free exercise of it, according to the dictates of conscience;* and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, *unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.*'" G. Hunt, James Madison and Religious Liberty, 1 Annual Report of the American Historical Association 163, 166–167 (1901) (emphasis added).

Thus, Madison wished to shift Mason's language of "toleration" to the language of rights. See S. Cobb, The Rise of Religious Liberty in America 492 (1902) (reprint 1970) (noting that Madison objected to the word "toleration" as belonging to "a system where was an established Church, and where a certain liberty of worship was granted, not of right, but of grace"). Additionally, under Madison's proposal, the State could interfere in a believer's religious exercise only if the State would otherwise "be manifestly endangered." In the end, neither Mason's nor Madison's language regarding the extent to which state interests

could limit religious exercise made it into the Virginia Constitution's religious liberty clause. Like the federal Free Exercise Clause, the Virginia religious liberty clause was simply silent on the subject, providing only that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights, Art. XVI (1776), in 10 Swindler, Sources and Documents of United States Constitutions, at 50. For our purposes, however, it is telling that *both* Mason's and Madison's formulations envisioned that, when there was a conflict, a person's interest in freely practicing his religion was to be balanced against state interests. Although Madison endorsed a more limited state interest exception than did Mason, the debate would have been irrelevant if either had thought the right to free exercise did not include a right to be exempt from certain generally applicable laws. Presumably, the Virginia Legislature intended the scope of its free exercise provision to strike some middle ground between Mason's narrower and Madison's broader notions of the right to religious freedom.

D

The practice of the colonies and early States bears out the conclusion that, at the time the Bill of Rights was ratified, it was accepted that government should, when possible, accommodate religious practice. Unsurprisingly, of course, even in the American colonies inhabited by people of religious persuasions, religious conscience and civil law rarely conflicted. Most 17th and 18th century Americans belonged to denominations of Protestant Christianity whose religious practices were generally harmonious with colonial law. Curry, The First Freedoms, at 219 ("The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality").

Moreover, governments then were far smaller and less intrusive than they are today, which made conflict between civil law and religion unusual.

Nevertheless, tension between religious conscience and generally applicable laws, though rare, was not unknown in pre-Constitutional America. Most commonly, such conflicts arose from oath requirements, military conscription, and religious assessments. Origins of Free Exercise 1466. The ways in which these conflicts were resolved suggest that Americans in the colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage. For example, Quakers and certain other Protestant sects refused on Biblical grounds to subscribe to oaths or "swear" allegiance to civil authority. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses 14 (1990) (hereinafter Adams & Emmerich). Without accommodation, their beliefs would have prevented them from participating in civic activities involving oaths, including testifying in court. Colonial governments created alternatives to the oath requirement for these individuals. In early decisions, for example, the Carolina proprietors applied the religious liberty provision of the Carolina Charter of 1665 to permit Quakers to enter pledges in a book. Curry, The First Freedoms, at 56. Similarly, in 1691, New York enacted a law allowing Quakers to testify by affirmation, and in 1734, it permitted Quakers to qualify to vote by affirmation. *Id.*, at 64. By 1789, virtually all of the States had enacted oath exemptions. See Adams & Emmerich 62.

Early conflicts between religious beliefs and generally applicable laws also occurred because of military conscription requirements. Quakers and Mennonites, as well as a few smaller denominations, refused on religious grounds

to carry arms. Members of these denominations asserted that liberty of conscience should exempt them from military conscription. Obviously, excusing such objectors from military service had a high public cost, given the importance of the military to the defense of society. Nevertheless, Rhode Island, North Carolina, and Maryland exempted Quakers from military service in the late 1600's. New York, Massachusetts, Virginia, and New Hampshire followed suit in the mid-1700's. Origins of Free Exercise 1468. The Continental Congress likewise granted exemption from conscription:

> "As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles." Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress, 1774–1789, pp. 187, 189 (W. Ford ed. 1905).

Again, this practice of excusing religious pacifists from military service demonstrates that, long before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation. Notably, the Continental Congress exempted objectors from conscription to avoid "violence to their consciences," explicitly recognizing that civil laws must sometimes give way to freedom of conscience. Origins of Free Exercise 1468.

States and colonies with established churches encountered a further religious accommodation problem. Typically, these governments required citizens to pay tithes to support either the government-established church or the

church to which the tithepayer belonged. But Baptists and Quakers, as well as others, opposed all government-compelled tithes on religious grounds. *Id.*, at 1469. Massachusetts, Connecticut, New Hampshire, and Virginia responded by exempting such objectors from religious assessments. *Ibid.* There are additional examples of early conflicts between civil laws and religious practice that were similarly settled through accommodation of religious exercise. Both North Carolina and Maryland excused Quakers from the requirement of removing their hats in court; Rhode Island exempted Jews from the requirements of the state marriage laws; and Georgia allowed groups of European immigrants to organize whole towns according to their own faith. *Id.*, at 1471.

To be sure, legislatures, not courts, granted these early accommodations. But these were the days before there *was* a Constitution to protect civil liberties— judicial review did not yet exist. These legislatures apparently believed that the appropriate response to conflicts between civil law and religious scruples was, where possible, accommodation of religious conduct. It is reasonable to presume that the drafters and ratifiers of the First Amendment— many of whom served in state legislatures— assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded.

E

The writings of the early leaders who helped to shape our Nation provide a final source of insight into the original understanding of the Free Exercise Clause. The thoughts of James Madison— one of the principal architects of the Bill of Rights— as revealed by the controversy surrounding Virginia's General Assessment Bill of 1784, are particularly illuminating. Virginia's debate over religious issues did not end with its adoption of a constitutional free exercise provision. Although Virginia had dis-

established the Church of England in 1776, it left open the question whether religion might be supported on a nonpreferential basis by a so-called "general assessment." Levy, Essays on American Constitutional History, at 200. In the years between 1776 and 1784, the issue how to support religion in Virginia– either by general assessment or voluntarily– was widely debated. Curry, The First Freedoms, at 136.

By 1784, supporters of a general assessment, led by Patrick Henry, had gained a slight majority in the Virginia Assembly. M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment 23 (1978); Levy, *supra,* at 200. They introduced "A Bill Establishing a Provision for the Teachers of the Christian Religion," which proposed that citizens be taxed in order to support the Christian denomination of their choice, with those taxes not designated for any specific denomination to go to a public fund to aid seminaries. Levy, *supra,* at 200–201; Curry, *supra,* at 140–141; Malbin, *supra,* at 23. Madison viewed religious assessment as a dangerous infringement of religious liberty and led the opposition to the bill. He took the case against religious assessment to the people of Virginia in his now-famous "Memorial and Remonstrance Against Religious Assessments." Levy, *supra,* at 201. This pamphlet led thousands of Virginians to oppose the bill and to submit petitions expressing their views to the legislature. Malbin, *supra,* at 24. The bill eventually died in committee, and Virginia instead enacted a Bill for Establishing Religious Freedom, which Thomas Jefferson had drafted in 1779. Malbin, *supra,* at 24.

The "Memorial and Remonstrance" begins with the recognition that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 2 Writings of James Madison 184 (G. Hunt ed. 1901). By its very nature, Madison wrote, the right to free ex-

ercise is "unalienable," both because a person's opinion "cannot follow the dictates of other[s]," and because it entails "a duty toward the Creator." *Ibid*. Madison continued:

> "This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . [E]very man who becomes a member of any Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*, at 184–185.

To Madison, then, duties to God were superior to duties to civil authorities– the ultimate loyalty was owed to God above all. Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.

Other early leaders expressed similar views regarding religious liberty. Thomas Jefferson, the drafter of Virginia's Bill for Establishing Religious Freedom, wrote in that document that civil government could interfere in religious exercise only "when principles break out into overt acts against peace and good order." In 1808, he indicated that he considered "'the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.'" 11 The Writings of Thomas Jefferson 428–429 (A. Lipscomb ed. 1904) (quoted in Office of Legal Policy, U. S. Dept. of Justice, Report to the

Attorney General, Religious Liberty under the Free Exercise Clause 7 (1986)). Moreover, Jefferson believed that "[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.'" *Ibid.*

George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers:

> "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in George Washington on Religious Liberty and Mutual Understanding 11 (E. Humphrey ed. 1932).

Oliver Ellsworth, a Framer of the First Amendment and later Chief Justice of the United States, expressed the similar view that government could interfere in religious matters only when necessary "to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment." Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), reprinted in 4 Founders' Constitution, 640. Isaac Backus, a Baptist minister who was a delegate to the Massachusetts ratifying convention of 1788, declared that "'every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.'" Backus, A Declaration of Rights, of the Inhabitants of the State of Massachusetts-Bay, in Isaac Backus on Church, State, and Calvinism 487

(W. McLoughlin ed. 1968).

These are but a few examples of various perspectives regarding the proper relationship between church and government that existed during the time the First Amendment was drafted and ratified. Obviously, since these thinkers approached the issue of religious freedom somewhat differently, see Adams & Emmerich 21–31, it is not possible to distill their thoughts into one tidy formula. Nevertheless, a few general principles may be discerned. Foremost, these early leaders accorded religious exercise a special constitutional status. The right to free exercise was a substantive guarantee of individual liberty, no less important than the right to free speech or the right to just compensation for the taking of property. See P. Kauper, Religion and the Constitution 17 (1964) ("[O]ur whole constitutional history . . . supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances . . . "). As Madison put it in the concluding argument of his "Memorial and Remonstrance":

> "[T]he equal right of every citizen to the free exercise of his Religion according to the dictates of [his] conscience' is held by the same tenure with all our other rights. . . . [I]t is equally the gift of nature; . . . it cannot be less dear to us; . . . it is enumerated with equal solemnity, or rather studied emphasis." 2 Writings of James Madison, at 191.

Second, all agreed that government interference in religious practice was not to be lightly countenanced. Adams & Emmerich at 31. Finally, all shared the conviction that "'true religion and good morals are the only solid foundation of public liberty and happiness.'" Curry, The First Freedoms, at 219 (quoting Continental Congress); see Adams & Emmerich at 72 ("The Founders . . . ac-

knowledged that the republic rested largely on moral principles derived from religion"). To give meaning to these ideas— particularly in a society characterized by religious pluralism and pervasive regulation— there will be times when the Constitution requires government to accommodate the needs of those citizens whose religious practices conflict with generally applicable law.

III

The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law. As the historical sources discussed above show, the Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application. Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech— a right enumerated only a few words after the right to free exercise— has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.

Although it may provide a bright line, the rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution. Accordingly, I believe that it is essential for the Court to reconsider its holding in *Smith*— and to do so in this very case. I would therefore direct the parties to brief this issue and set the case for reargument.

I respectfully dissent from the Court's disposition of this case.