REYNOLDS REVISITED: THE ORIGINAL MEANING OF *REYNOLDS V. UNITED STATES* AND FREE EXERCISE AFTER *FULTON*

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This Article calls for a profound reevaluation of the stories that are being told today about the Supreme Court's free exercise jurisprudence starting with the Court's seminal 1879 decision in Reynolds v. United States *and proceeding up to the present day. Scholars and judges today agree that the Supreme Court in* Reynolds *interpreted the Free Exercise Clause of the First Amendment to protect only religious belief and not religiously motivated action. All casebooks today embrace this interpretation of the case, and the Supreme Court has regularly endorsed it over the past twenty years, most recently in 2022. However, this Article shows that this reading of* Reynolds *appeared recently and is wrong. It shows, as well, that restoring the proper understanding of* Reynolds *could have profound consequences, both for our understanding of the history of American free exercise jurisprudence up until the Court's notorious 1990 decision in* Employment Division v. Smith *and for our imagination as we think about directions in which free exercise jurisprudence could move in the future when, as is increasingly likely,* Smith *is overruled.*

The Justices who signed the Reynolds *opinion understood themselves to be adopting a position very different from the one today ascribed to them. To them, the Clause protects not only belief, but also the natural right to act in accordance with the dictates of one's religion, and it thus required judges to subject religiously neutral, generally applicable laws to a form of independent review to ensure that the government was not interfering with religious practice in a manner that those judges found to be objectively unreasonable. Adopted before the classic tiers of scrutiny analysis had emerged, it functioned in practice like what would be today a mild form of heightened scrutiny more demanding than rational basis but less demanding than strict scrutiny. For roughly a century thereafter, the Supreme Court appears consistently to have recognized that* Reynolds *had protected religiously motivated actions as well as beliefs, although they were unclear and occasionally inconsistent about the level of protection each should receive as the Court moved towards its contemporary tiers of scrutiny framework.*

Unfortunately, during the 1960s and 70s, academics began to misread Reynolds *as a case holding that the Free Exercise Clause leaves religious action entirely unprotected. Inexplicably, this reading became orthodox, and in 1990, in* Employment Division v. Smith*, the Supreme Court imported this misreading into the Court's jurisprudence, citing* Reynolds *as a reason to stop applying any form of heightened review to neutral, generally applicable laws which interfere with religious obligations. Restoring the original meaning of* Reynolds *and its progeny will help us reframe our understanding of the history of U.S. free exercise jurisprudence up until* Smith*, and it will provide a roadmap for the current Court as its Justices consider ways that they can overcome the deep divisions laid bare recently in* Fulton v. City of Philadelphia*—disagreements about whether to overrule* Smith *and, if so, about what standard of scrutiny to apply to laws interfering with a person's religious obligations.*

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> *As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.*
>
> *Yet what should replace* Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping* Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if* Smith *were overruled. . . . What forms of scrutiny should apply?*[1]

INTRODUCTION

This Article calls for a profound reevaluation of the stories that are being told today about the Supreme Court's free exercise jurisprudence starting with the Court's seminal 1879 decision in *Reynolds v. United States*[2] and proceeding up to the present day. It argues that over the past fifty years, the Supreme Court has come to embrace an incorrect interpretation of *Reynolds*—one that ascribes to the opinion a holding very different from the holding the Justices thought they were announcing. This Article shows, too, that one who correctly understands what the *Reynolds* opinion was actually trying to communicate will be forced also to rethink subtly the accepted meaning of later Supreme Court opinions and is likely to recognize new possibilities for free exercise jurisprudence going forward as the Court prepares to overrule *Employment Division v. Smith*.[3]

The degree to which *Reynolds* is misunderstood and the advantages that can be gained from restoring its original meaning are revealed in the multiple opinions which arose two years ago in the case of *Fulton v. City of Philadelphia*. In *Fulton*, six Justices declared that they were ready to overrule the Court's 1990 decision *Employment Division v. Smith*.[4] In *Smith*, the Court departed from a long line of twentieth-century cases in which the Court embraced an expansive understanding of the U.S. Constitution's protections for religious conduct.[5] More specifically, in that line of cases the Court applied heightened scrutiny to laws which interfered with an individual's ability to satisfy her religious obligations, and in some of those cases the Court struck down the challenged law.[6] In *Smith*, the Court claimed that language in those twentieth-century cases was in tension with the Court's first opinion dealing with a request for a religious exemption from otherwise applicable law—the 1879 case of *Reynolds v. United States*. According to the *Smith* Court, the Reynolds opinion had categorically rejected the idea that the Free Exercise Clause protected people's

1. Fulton v. City of Philadelphia, 593 U.S. 522, 543–44 (2021) (Barrett, J., concurring).
2. Reynolds v. United States, 98 U.S. 145 (1878).
3. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).
4. *See generally Fulton*, 593 U.S. 522.
5. *Smith*, 494 U.S. at 872, 879.
6. *Id.*

right to disobey neutral laws of general application which prevented them from fulfilling their religious obligations.[7] In order to harmonize this principle with the line of twentieth-century cases which had interpreted the Free Exercise Clause to require courts to strike down some laws that imposed upon a person's religious obligations, the *Smith* Court reinterpreted those later cases and narrowed their holdings. It held that those twentieth-century cases stood for the proposition that the Court should apply heightened scrutiny only in those rare situations where a law was enacted specifically for the purpose of preventing members of an unpopular religious minority from acting in accordance with their unpopular beliefs.[8] In cases where a law is neutral and generally applicable but has the incidental effect of preventing a person from satisfying religious obligations, the *Smith* Court held that the right to free exercise was not implicated and, thus, the Court must allow enforcement of that law so long as it satisfied the exceedingly easy rational basis test.[9]

Smith was, from its inception, extremely controversial.[10] Two years ago, in *Fulton,* a supermajority of Justices made clear that, in the near future, they expected to overrule it.[11] Those six expressly said that they wanted to revive the practice of applying some form of heightened scrutiny to neutral, generally applicable laws impeding religious practice.[12] Nonetheless, these six disagreed on the level of scrutiny that the Court should apply to such laws.[13] To understand the nature of their disagreement and the importance of this Article, one must look a little more closely at the three opinions that were produced.

In *Fulton*, the Court considered the case of a faith-based institution that had suffered under a municipal regulation which prohibited actions that this institution believed to be religiously mandated.[14] The trial court had concluded that the regulation being challenged was a neutral rule of general applicability.[15] Under *Smith*, this type of law was subject to nothing more than rational basis review, even in circumstances where it burdened an individual's ability to follow the teachings of her religion.[16] Applying rational basis review and finding that

7. *Id.*

8. *Id.* at 879–80.

9. *Id.* at 881–82.

10. *The* Smith *Decision: The Court Returns to the Belief-Action Distinction*, PEW RSCH. CTR. (Oct. 24, 2007), https://www.pewresearch.org/religion/2007/10/24/a-delicate-balance6/ [https://perma.cc/82GQ-EVDP].

11. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 543 (2021) (Barrett, J., concurring); *id.* at 545 (Alito, J., concurring); *id.* at 618 (Gorsuch, J., concurring).

12. *See id.* at 543–44 (Barrett, J., concurring); *id.* at 617–18 (Alito, J., concurring); *id.* at 627 (Gorsuch, J., concurring).

13. *See id.*

14. *Id.* at 530 (majority opinion).

15. *Id.* at 531.

16. *Id.*

the regulation easily satisfied it, the trial court refused to enjoin application of the law, and the intermediate appeals court upheld that decision.[17]

On appeal to the U.S. Supreme Court, the Justices unanimously agreed that the judgment of the lower courts should be reversed, but they disagreed sharply in their reasoning, breaking into three camps. Writing for the Court, Chief Justice Roberts, joined by Justices Kagan and Sotomayor, pointed out that the Philadelphia regulation at issue gave the city discretion to exempt some individuals from the operation of the law.[18] As a result, the law was not, in fact, a "generally applicable" law.[19] *Smith* had held only that generally applicable laws would be subject to rational basis when they were neutrally applied.[20] But laws that were not generally applicable (or were enforced in a targeted fashion) were still subjected to strict scrutiny.[21] Thus, Justices Roberts, Kagan and Sotomayor concluded the case must be remanded to the trial court with instructions to decide whether the law satisfied strict scrutiny.[22] They did not express any opinion as to whether *Smith* should be overruled.[23]

In impassioned concurrences, Justices Alito, Thomas, and Gorsuch agreed with the decision to remand with instructions to analyze the law under strict scrutiny but insisted that the Court should have reasoned differently.[24] According to Justice Alito's lengthy concurrence, which was joined by Justices Thomas and Gorsuch, the *Smith* opinion was a mess from start to finish and should be overruled immediately.[25] *Smith* could not be squared either with the original understanding of the Free Exercise Clause nor with important Supreme Court free exercise precedents announced in the decades before *Smith*.[26] According to Justice Alito, from 1879, when the Court decided *Reynolds v. United States*, until the Second World War, the Court had mistakenly interpreted the Free Exercise Clause to say that the Free Exercise Clause protected only belief and not the right to act in accordance with one's religious beliefs.[27] According to Alito, post-war cases had fortunately corrected that misreading.[28] After 1943, he said, the Court had interpreted the Free Exercise Clause to require that all laws be subjected to some form of heightened scrutiny when they prevent a person from following the teachings of her religion, and in *Sherbert v. Verner*, it

17. *Id.* at 532.
18. *Id.* at 537.
19. *Id.* at 540.
20. *See id.* at 541.
21. *Id.*
22. *Id.* at 542–43.
23. *Id.*; *see also id.* at 541.
24. *Id.* at 543–44 (Barrett, J., concurring); *id.* at 545–618 (Alito, J., concurring); *id.* at 618–27 (Gorsuch, J., concurring).
25. *See id.* at 545 (Alito, J., concurring).
26. *See id.* at 555–63.
27. *Id.* at 596.
28. *Id.* at 596–98.

had clarified that such laws should be subjected to the highest level of scrutiny, strict scrutiny.[29] According to Justices Alito, Thomas, and Gorsuch, *Employment Division v. Smith* had been wrong to revive *Reynolds*'s anti-accommodationist misunderstanding of the Free Exercise Clause.[30] To their mind, *Smith* had erred in holding that when evaluating requests for a religious exemption from prosecution under a law, courts must begin by asking whether the law at issue was a neutral law of general application, and it had been wrong to hold that courts should apply only rational basis scrutiny to neutral, generally applicable laws.[31] According to Justice Alito and his brethren, the Court should here take the opportunity to hold that *Smith* was no longer good law and that strict scrutiny was required in this case not because the ordinance failed to be generally applicable, but rather because *all* laws which burden religious practice must be subjected to strict scrutiny.[32]

Against the backdrop of this serious disagreement between Justices Roberts, Kagan, and Sotomayor on the one hand and Alito, Thomas, and Gorsuch on the other, a third opinion is striking. An opinion by Justice Barrett, joined by Justices Breyer and Kavanaugh, stakes out a middle position.[33] It argues that Justices Alito, Thomas, and Gorsuch are correct that *Smith* was wrongly decided and must be overruled.[34] At the same time, it insists that the doctrine of constitutional avoidance requires the Court in this particular case to accept the approach laid out in Chief Justice Roberts's opinion for the Court.[35] According to Justice Barrett, the Free Exercise Clause surely recognizes *some* right to put one's religious beliefs into practice and thus requires courts to apply some form of heightened scrutiny to any law which interferes with religious obligations—including neutral laws that only incidentally do so.[36] Nevertheless, her concurrence asserts, it is not obvious that the Court must apply strict scrutiny to such laws.[37] First, she claims, the founding generation appears to have disagreed about the degree of protection that the Free Exercise Clause provided to people whose religious practice was burdened by a neutral law of general application.[38] Thus, on this question, the Court should be guided not

29. *Id.* at 597; Sherbert v. Verner, 374 U.S. 398, 406–10 (1963), *abrogation recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

30. *See Fulton*, 593 U.S. at 617–18 (Alito, J., concurring).

31. *See id.*

32. *See id.*; *id.* at 627 (Gorsuch, J., concurring).

33. *See id.* at 543–44 (Barrett, J., concurring).

34. *Id.* at 543.

35. *Id.* at 543–44.

36. *Id.*

37. *Id.* at 543 ("The prevailing assumption seems to be that strict scrutiny would apply . . . . But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.").

38. *Id.* at 543.

by original understanding, but rather by precedent.[39] Second, the Barrett concurrence suggests, if one looks closely at Court precedents, it is not at all clear that free exercise opinions between *Sherbert* in 1962 and *Smith* in 1990 consistently applied strict scrutiny to neutral, generally applicable laws with an incidental impact on religious practice.[40] Indeed, in some cases, the Justices seem to have reviewed such laws according to a less draconian standard of review.[41] Working from these intuitions, Justice Barrett's concurrence concludes that the question of what standard of review to apply in such cases is an unresolved, difficult question of constitutional law.[42] In order to avoid this question, the Court was correct to hold that irrespective of what standard the Court applies to a generally applicable law which interferes with religion, this law must be subjected to strict scrutiny because it is *not* a neutral, generally applicable law.[43] Such an approach wisely allowed the Court to postpone to a later date the unresolved question of whether strict scrutiny was also required in cases where a person's religious activities were burdened by a law that *was* neutral or generally applicable or whether, instead, in such circumstances, the law should be subject to some less exacting standard of review.[44]

In the wake of *Fulton* and its three opinions, legislators, litigants, and judges on lower courts find themselves in an almost impossible place. It is unclear when, as a constitutional matter, a neutral law of general application must carve out exemptions for people whose religious practice is burdened by the requirements of the law. Six Justices (five of whom remain on the Court today) have made it perfectly clear that they are unwilling to follow *Smith* insofar as it fails to require that courts apply *some* form of heightened scrutiny to every neutral, generally applicable law that prevents an individual from following religious teachings.[45] However, there are not yet five who agree on the level of heightened scrutiny to apply. Should it be strict scrutiny, as Justices Alito, Thomas, and Gorsuch believe? Or should it be some milder form of heightened scrutiny, which Justices Barrett, Breyer, and Kavanaugh seemed to be willing, at the very least, to consider?

The Court is not likely to allow this question to remain unanswered for long.[46] As Justice Gorsuch, writing separately but joined by Justices Thomas and Alito, warned: "Dodging the question today guarantees it will recur

39. *Id.* ("I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances.").

40. *Id.* at 544.

41. *Id.* (first citing Sherbert v. Verner, 374 U.S. 398, 403 (1963); and then citing Gillette v. United States, 401 U.S. 437, 462 (1971)).

42. *Id.*

43. *Id.*

44. *See id.* at 543–44.

45. *Id.* at 543; *id.* at 617–18 (Alito, J., concurring); *id.* at 626–27 (Gorsuch, J., concurring).

46. *See id.* at 627 (Gorsuch, J., concurring).

tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer."[47] Justice Gorsuch is correct that the Court must soon resolve the question of what standard of review to apply to neutral laws of general application which burden a person's religious practice. It is unfair, however, to suggest that the only obstacle to resolution of this question is a willingness to embrace the clear dictates of original understanding and the Supreme Court's own precedents. This Article argues that Justices Alito, Thomas, Gorsuch, Barrett, Breyer, and Kavanaugh are correct to insist upon the overruling of *Smith* and upon a policy going forward of heightened scrutiny even to neutral laws of general application which interfere with a person's ability to fulfill religious obligations. It suggests that Justices Barrett, Breyer, and Kavanaugh are correct to counsel hesitation before concluding that the Supreme Court must apply strict scrutiny to such laws.

It is beyond the scope of this Article to address the questions that Justices Barrett, Breyer, and Kavanaugh raise about the views of the founding generation on questions of free exercise. Justice Barrett's opinion argues that the writings of the Founding Fathers contain considerable disagreement on the question of whether courts should step in to block the enforcement of generally applicable laws in circumstances where enforcement of the law would interfere with a person's ability to follow the teachings of her religion.[48] I will leave it to historians of the founding generation to decide whether this is correct.[49] This Article focuses on the second point that Justice Barrett and her colleagues make as they counsel hesitation: that Supreme Court precedents do not unequivocally indicate that courts should apply strict scrutiny to such laws.[50]

Justices Alito, Thomas, and Gorsuch follow conventional wisdom today in asserting that (i) from *Reynolds* in 1879 until *West Virginia State Board of Education v. Barnette*[51] in 1943, the Court never applied heightened scrutiny to generally applicable laws which burdened religious practice, but (ii) after *Barnette* the Court began to do so, and (iii) in 1963 in *Sherbert v. Verner*[52] the Court clarified that the scrutiny to be applied to such laws was strict scrutiny. Justice Barrett's concurrence agrees with much of this.[53] It differs only insofar as it argues that, after *Barnette*, the Court never established a clear and consistent pattern of

47. *Id.*

48. *Id.* at 543 (Barrett, J., concurring).

49. I have elsewhere suggested that I, like Justice Barrett, interpret the writings of the founding generation to show considerable disagreement about the degree to which unpopular religious practices are to be insulated from legislative control. *See* Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 370 (2006). There are, however, good arguments on both sides.

50. *Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring).

51. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

52. Sherbert v. Verner, 374 U.S. 398 (1963).

53. *Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring).

applying strict scrutiny to such cases.[54] While *Sherbert v. Verner* clearly said that strict scrutiny is appropriate, Justice Barrett points out that subsequent cases appear sometimes to apply something less draconian.[55] Thus, she argues, Supreme Court cases seen in their totality suggest that after *Smith* is overruled, the Court could—and maybe should—subject such laws to some form of intermediate scrutiny.[56]

Justices Barrett, Breyer, and Kavanaugh are on to something here, albeit too tentative. At the heart of this Article is the argument that the academy and judiciary today misread *Reynolds*, the first Supreme Court opinion ever to resolve the claim of a plaintiff who challenged the enforcement of a neutral, generally applicable law which prevented him from following the teachings of his religion. The Article argues, as well, that this misinterpretation of *Reynolds* has subtly distorted the academic and judicial understanding of subsequent cases, their understanding of the general thrust of the Court's free exercise precedents as a whole, and ultimately, their view as to the test that the Court in the future should apply to such laws.

Conventional wisdom today states that the 1879 opinion in *Reynolds* held that the Free Exercise Clause protects only a person's right to embrace whatever religious teachings she chooses and not her right to act in accordance with those teachings.[57] As this Article shows, however, this reading of the case developed relatively recently and is almost surely wrong. If we recognize the true meaning of the *Reynolds* opinion and understand how courts until relatively recently appreciated its holding (and tried to translate its holding to suit modern developments), then we will realize that *Reynolds* does *not* need to be overruled. Furthermore, we will find that the long line of free exercise precedents from *Reynolds* until *Smith* supports Justice Barrett's tentative suggestion that free exercise precedents *in toto* suggest that free exercise may most appropriately be protected today by a standard of review for neutral, generally applicable laws which is less searching than strict scrutiny.

The rest of this Article will elaborate systematically on the points made in this introduction. It will challenge the contemporary orthodoxy about *Reynolds* and will describe how correcting our understanding of that case and subsequent case law can help the Court both to recognize (at least as a matter of precedent) the strength of the argument in favor of overruling *Smith*, and more controversially, of replacing it with a rule that requires the Court to apply to generally applicable laws that impose upon religious practice an intermediate form of heightened scrutiny.

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54. *Id.* at 544.

55. *Id.*

56. *Id.*

57. Lombardi, *supra* note 49, at 425 n.206 (quoting Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990)).

Part I describes the facts which led to the seminal case of *Reynolds v. United States*, the first Supreme Court case to examine whether the Free Exercise Clause gives people a right to violate generally applicable law.

Part II explores long-ignored context which helps us to reevaluate the language in that opinion and to recognize its true holding.

Part III demonstrates that, read in its proper nineteenth-century context, a majority of Justices on the Court would have understood the words in that opinion to embrace the idea that the First Amendment's Free Exercise Clause guaranteed the right not only to believe but also to act in accordance with those beliefs. They would have understood the opinion also to hold that courts must protect this right by independently subjecting generally applicable laws which impose upon religious practice to a test designed to ensure that the law bears some objectively reasonable relation to a legitimate social interest: that this interest is, in fact, the end aimed at "and that [the law] is appropriate and adapted to that end."[58] In other words, they felt that the First Amendment required them to evaluate the law to ensure that the legislature's policy judgment was objectively reasonable.[59] (This is a standard which does not map neatly onto contemporary tiers of scrutiny; the test is harder than contemporary rational basis scrutiny and significantly easier than contemporary strict scrutiny.) Finally, the Justices would have understood their opinion to hold that the plaintiff George Reynolds must be denied an exemption from a generally applicable law because that law as applied to him easily satisfied the test of objective reasonability, and because notwithstanding the arguments that Reynolds made in his briefs and oral argument, contemporary criminal law provided him no additional right to exemption from the operation of otherwise constitutional laws.

Having described what the Justices on the *Reynolds* Court thought their opinion meant, Part IV demonstrates that, for almost a century, the Supreme Court and many state courts remained consistent with the true holding in *Reynolds* and struggled in good faith to apply that holding to new circumstances. Next, Part IV explains how in the 1960s and 70s a mistaken alternative reading of *Reynolds* came to hold sway in the academy and paved the way for the Court's misguided (and soon-to-be-overturned) decision in *Smith*.

Part V explores the ramifications of rereading *Reynolds* and its progeny. The new orthodoxy about *Reynolds* and its progeny has worked profound mischief. For one, it allowed the Justices in the *Smith* majority to argue, incorrectly, that important Supreme Court precedents supported its view that in many circumstances the Supreme Court should not apply any form of heightened

58. Powell v. Pennsylvania, 127 U.S. 678, 696 (1888) (Field, J., dissenting). For an analysis of the standard, see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 253 (1997); *cf.* CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 224–27 (1930).

59. See discussion below *infra* Part II.C.

scrutiny to laws imposing upon religious obligations. More important, the unquestioning acceptance by later Courts of this misinterpretation complicates the task of determining what standard of heightened scrutiny to apply going forward to generally applicable laws which impose upon religiously motivated practice. Properly understood, *Reynolds* and its progeny provide the Court with a long and consistent (if not uniform) body of precedents in which the Court has interpreted the Free Exercise Clause to require that courts apply an intermediate standard of scrutiny to any generally applicable law which, as applied, interferes with a person's ability to follow the teachings of her religion.

Lastly, this Article offers a brief review and conclusion. The Court needs to restore the original understanding of *Reynolds* and of a long line of subsequent cases which strive to apply the *Reynolds* holding to new circumstances. Once it does, the Justices may realize that the future of free exercise jurisprudence is already hiding in its past.

I. *REYNOLDS V. UNITED STATES*

Although the First Amendment to the U.S. Constitution was ratified in 1791, it took nearly ninety years for the Supreme Court to explore the scope of the Free Exercise Clause and, in particular, whether the Clause gave people a right to accommodation of their religious obligations in the form of exemptions from laws that interfered with those obligations.[60]

During the nineteenth century, laws impacting religious practice were generally enacted by state governments rather than the federal government.[61] Because the Court did not incorporate the Free Exercise Clause against the states until 1940,[62] pious nineteenth-century litigants who sought religious accommodations from state laws were forced to file suit in state courts seeking a declaration that the *state* constitution prohibited the state government from interfering in religious practice.[63] Up until the Civil War, discussions about the meaning of constitutional guarantees of free exercise took place almost entirely in academic treatises and in state courts.[64]

Prior to the Civil War, however, the federal government began to enact laws in the western territories which imposed upon some Americans' religious obligations.[65] Challenges to the enforcement of those laws finally gave the Supreme Court an opportunity to interpret the Free Exercise Clause of the First

60. *See* Reynolds v. United States, 98 U.S. 145 (1878).

61. *See* Lombardi, *supra* note 49, at 377–78.

62. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

63. *See* Permoli v. Mun. No. 1 of City of New Orleans, 44 U.S. 589, 609 (1845) (refusing to overturn a Louisiana law that prohibited traditional Catholic burials because the federal Constitution did not limit state legislation). In *Cantwell*, the Court finally held that the First Amendment had been "incorporated" against the states by the Fourteenth Amendment. *Cantwell*, 310 U.S. at 303–04.

64. *See* Lombardi, *supra* note 49, at 395, 408.

65. *Id.* at 431.

Amendment and to decide when, if ever, the Clause provides pious individuals the right to violate laws which interfere with their religious obligations.

The laws in question were federal laws which criminalized the practice of polygamy.[66] During the nineteenth century, most Americans believed that polygamy was literally "vicious" behavior.[67] That is to say, it was behavior that involved an indulgence in a vice—namely the sin of lust.[68] Vicious behaviors were thought to be addictive, contagious, and inevitably destructive of family and community.[69] Reflecting these assumptions, well-credentialed historians and social scientists of the time argued that polygamy threatened the welfare of society. For example, some historians claimed that polygamy had weakened the formerly great Muslim empires.[70] Meanwhile, other (pseudo-)scientific scholars claimed that polygamy destabilized contemporary communities and turned healthy, productive people into weak and dependent wards of the state.[71] In short, polygamy was to nineteenth-century Americans what the consumption of highly addictive drugs was to twentieth-century Americans. Both behaviors went beyond the private realm and threatened the very fabric of society.[72] As such, modern legal scholars cannot overstate the genuine fear that polygamy inspired or the lengths to which most Americans were willing to go to ensure the elimination of the practice if it were ever to take place in the new United States.[73] Therefore, when the practice did emerge in the United States, it provoked a fierce response.

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66. *Id.*

67. *Id.* at 433–34.

68. *Id.* at 433.

69. Historian Phillip Gibbs describes the nineteenth-century view of a human as "an animal whose dangerous instincts were ready to surface at every opportunity. Once man succumbed to these instincts he was forever lost in a morass of passions and impulses." Phillip A. Gibbs, *Self Control and Male Sexuality in the Advice Literature of Nineteenth Century America, 1830–1860*, 9 J. AM. CULTURE 37, 39 (1986).

70. *See* Lombardi, *supra* note 49, at 434 and the sources cited therein.

71. *See, e.g.*, FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 155 (Charles C. Little & James Brown eds., 1838). For an analysis of this section in the larger context of Lieber's work, see Lombardi, *supra* note 49, at 434–35 and the sources cited therein; CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 60 (1992) ("[Polygamy], it was widely believed, directly threatened those structures that had won for Western civilization predominance abroad and civility at home."). The Supreme Court itself in the *Reynolds* case paraphrased passages in which Lieber outlined his bizarre views on the ways in which polygamy led to the corruption of Muslim societies. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.").

72. HARDY, *supra* note 71, at 60; Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/.

73. A number of historians, most notably Sarah Barringer Gordon, have chronicled in detail the extraordinary popular movement that rose up to stamp out the "barbaric" practice of polygamy. They have also described the political response and, ultimately, the development of a legal regime that would punish polygamists. *Compare* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 27–58 (2002), *with* Bruce Burgett, *On the Mormon Question: Race, Sex, and Polygamy in the 1850s and 1990s*, 57 AM. Q. 75, 82–94 (2005).

In the decades before the Civil War, Mormons established a significant presence in the Utah territory and over time came to dominate it.[74] At that time, the Mormon Church was teaching that polygamy was a religious obligation, and many Mormon men in Utah took multiple wives.[75] This practice shocked Americans outside of Utah.[76] And the reaction was dramatic.

In 1856, the platform of the newly established Republican Party called to extinguish in the territories the "twin relics of barbarism"—slavery and polygamy.[77] With Republican dominance during and after the Civil War, the federal government enacted ever harsher antipolygamy laws, and Mormon resistance became increasingly bitter.[78] As the conflict escalated, the Mormon Church in 1874 decided to bring a test case challenging the federal government's power to punish Mormons criminally for engaging in a practice that they sincerely believed to be mandated by God. To that end, they funded the defense of a Mormon, George Reynolds, who had been criminally convicted under federal antipolygamy laws.[79] Losing in the territorial courts,[80] Reynolds eventually appealed to the U.S. Supreme Court.

Reynolds v. United States was argued in 1878 and decided in 1879.[81] In its famous opinion, the Supreme Court upheld George Reynolds's conviction.[82] The Justices unanimously agreed that the Constitution did not contain any principle of religious freedom that would prevent enforcement of antipolygamy laws.[83] (One Justice would have overturned the conviction on the ground that inadmissible evidence had been introduced at trial.)[84]

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74. GORDON, *supra* note 73, at 27.

75. *See* HARDY, *supra* note 71, at xviii; RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 105 (1989).

76. See Lombardi, *supra* note 49, at 427–31 and the sources cited therein.

77. *See* KIRK H. PORTER & DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS, 1840–1956, at 27 (1956).

78. Federal antipolygamy legislation was enacted in the 1860s. Preoccupied with a brutal civil war over slavery, the federal government chose not to vigorously enforce the antipolygamy laws. Even when the federal government *did* try to enforce these laws, it discovered that several procedural flaws in the legislation allowed Mormon officials to stymie enforcement of the laws. *See, e.g.*, Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIGION 281, 287 n.39 (1989) (citing Morril Act of 1862, Pub. L. 37-108, ch. 126, 12 Stat. 501, 501–02 (outlawing polygamy in United States territories)). Thus, it was not until 1874 that a Mormon polygamist finally brought a case in federal court challenging the federal antipolygamy laws on federal constitutional grounds.

79. For a biography of Reynolds and an account of his ordeal, see BRUCE A. VAN ORDEN, PRISONER FOR CONSCIENCE' SAKE: THE LIFE OF GEORGE REYNOLDS (1992), and compare with GORDON, *supra* note 73, at 113–15.

80. The case was reported at 1 Utah 319 (1876). For an account of the trials leading to this conviction and the decision to appeal, see GORDON, *supra* note 73, at 115, 267 & nn.58–59.

81. Reynolds v. United States, 98 U.S. 145, 145 (1878).

82. *Id.* at 168.

83. *Id.*

84. *Id.* (Field, J., concurring) ("I concur with the majority of the court on the several points decided except one,—that which relates to the admission of the testimony of Amelia Jane Schofield given on a former trial upon a different indictment. I do not think that a sufficient foundation was laid for its introduction.").

But why did the Justices conclude that George Reynolds had no constitutional right to violate the antipolygamy statutes? Was it because they read the Free Exercise Clause to protect only a person's right to believe whatever they choose and not to protect their right to act in accordance with their religious beliefs? Or was it instead because they believed that although the Free Exercise Clause protected people's right to perform their religious obligations, and thus required them to subject the antipolygamy laws to some form of judicial scrutiny, the antipolygamy laws survived that scrutiny? And if the latter, what type of judicial scrutiny did they apply?

The academy and the judiciary today each read the words of the *Reynolds* opinion in a decontextualized fashion, and as a result, they misread the opinion to hold that the Free Exercise Clause gives people a right to believe what they choose and to argue in favor of their beliefs, but it gives them no constitutional right to act in accordance with those beliefs. This Article will show that this contemporary reading of *Reynolds* is demonstrably wrong, that it appears to have materialized in the academy only in the 1960s, and that it was first adopted by the Supreme Court in 1990.

II. THE HIDDEN HISTORY OF THE *REYNOLDS* OPINION

The *Reynolds* opinion is the product of a particular group of Justices operating at a particular point in time. To read the opinion properly, one should bear in mind the following points. First, the *Reynolds* case gave the justices on the Waite Court an opportunity to address legal questions about religious freedom that had been widely debated in the nineteenth-century American legal community and which were of great personal interest to them.[85] Second, when the Justice who authored the opinion referred to passages from the writings of the founding generation, his understanding of those passages was shaped by his reading of histories that characterized the founding generation as one that embraced an accommodationist view of free exercise guarantees.[86] Furthermore, some passages in the opinion that are today thought to refute the idea that the Free Exercise Clause protects religious action were, in fact, not doing any such thing. Those passages were instead refuting the defendant's claim that even if the Constitution permitted Congress to criminalize his behavior, emerging principles of criminal law barred the state from applying that punishment to him in cases where he acted for religious reasons.[87]

If we read the words of the *Reynolds* opinion in their proper nineteenth-century context, it becomes clear that the Justices who signed that opinion would not (and did not) hold that the government has unfettered discretion to

85. Lombardi, *supra* note 49, at 386–87.

86. *Id.* at 386–88.

87. *See infra* Part II.B.

enforce laws of general application, even where they interfere with religious obligations. Quite to the contrary, the Justices understood themselves to be saying that the Free Exercise Clause protects people's right to engage for religious reasons in activity that, though illegal, cannot reasonably be considered harmful. Thus, the Justices believed that the Free Exercise Clause required them to apply a mild form of heightened scrutiny to laws which impose upon a person's religious obligations.

A. Nineteenth-Century Debates About the Meaning of Constitutional Free Exercise Clauses

Although *Reynolds* provided the Supreme Court with its first opportunity to issue an opinion interpreting the scope of the Free Exercise Clause of the U.S. Constitution, the case was not decided in a vacuum. Instead, *Reynolds* must be read in light of early nineteenth-century state court cases and commentaries.

While nineteenth-century jurists agreed on a number of free exercise principles, there was disagreement regarding the practical ramifications of these principles.[88] By the time of *Reynolds*, rival legal thinkers had already staked out competing positions about whether constitutional free exercise guarantees provided citizens with a right to exemptions from at least some neutral, generally applicable laws.[89] All agreed, however, that if there *were* a qualified right to exemptions, this right would not extend to people who wished to engage in polygamy on religious grounds.[90]

During the early nineteenth century, some courts and commentators staked out an "anti-accommodationist" position on the question of free exercise exemptions.[91] If the legislature wanted to prohibit a particular practice without exemptions for conscientious objectors, courts could not interfere with the enforcement of those laws.[92]

Paradoxically, anti-accommodationists accepted, in theory, the basic premise that free exercise guarantees give people a right to follow the dictates of their religion unless the activities that they want to practice cause undue harm to other citizens.[93] Nonetheless, they developed ancillary principles which dramatically limited the circumstances under which a court could grant

88. *See generally* Lombardi, *supra* note 49. The next four pages build upon evidence and arguments made in that article.

89. *See id.* at 398.

90. *See id.* at 413.

91. *Id.* at 398.

92. *See id.* at 398–403.

93. *See id.* at 399.

exemptions.[94] Indeed, some judges adopted principles that made it impossible, as a practical matter, for courts to ever grant such an exemption to anyone.[95]

For example, some early nineteenth-century, anti-accommodationist judges limited the exemptions principle by suggesting that constitutional protections for free exercise did not protect members of *all* religions.[96] However, as the century progressed, jurists came almost universally to reject the idea that constitutional guarantees of religious freedom favored some faiths over others.[97] In light of this trend, anti-accommodationists developed new tactics. For example, Justice Gibson of the Pennsylvania Supreme Court, a rigid anti-accommodationist, argued in *Simon's Executors v. Gratz* and again in *Commonwealth v. Lesher* that judges were required to accept the legislature's judgment that something was "harmful."[98] This principle left any action that the legislature had prohibited constitutionally unprotected.[99] The oppressive implications of the principle are apparent in *Donahoe v. Richards,* an 1854 anti-accommodationist opinion from Maine.[100] Citing with approval *Gibson*'s anti-accommodationist opinions, the *Donahoe* court permitted public schools to expel Catholic schoolchildren who refused to do daily Bible reading exercises from the King James Bible.[101] In explaining its rationale, the court explicitly noted the implications for Mormons whose practice of polygamy had recently come to light:

> The State is governed by its own views of duty. The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mahomedan cannot claim an exemption from their operation, or freedom from punishment imposed upon their violation . . . .[102]

As anti-accommodationists elaborated their views, a powerful rival group of accommodationists appeared in both the academy and judiciary.[103] These judges and commentators asserted that American traditions of free exercise may require judges to grant exemptions.[104] Thus, when faced with a request for an exemption, the judge must independently examine the illegal act that the

94. *See id.*

95. *Id.*

96. *See id.*

97. Steven Green has exhaustively chronicled the demise of the idea that the Constitution provided protection to only some believers. For the acceptance of this philosophy by Americans, including evangelicals, see generally Steven K. Green, The Rhetoric and Reality of the "Christian Nation" Maxim in American Law, 1810–1920 (1997) (Ph.D. dissertation, Univ. of North Carolina) (ProQuest).

98. *See* Philips v. Gratz, 2 Pen. & W. 412, 417 (Pa. 1831); Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160–63 (Pa. 1828) (Gibson, C.J., dissenting).

99. *Philips*, 2 Pen. & W. at 417; *Lesher*, 17 Serg. & Rawle at 160–63.

100. Donahoe v. Richards, 38 Me. 379, 410–12 (1854).

101. *Id.* at 380.

102. *Id.* at 410.

103. *See* Lombardi, *supra* note 49, at 403–08.

104. *See id.*

believer was seeking permission to perform.[105] If the act would not constitute a nuisance at common law and would not create risks to health or public safety, then the judge must bar the state from punishing the person who engages in it on grounds of conscience.[106]

Nevertheless, accommodationists did *not* believe that society should accommodate Mormon sensibilities by exempting them from antipolygamy laws.[107] Instead, they accepted the common belief, allegedly supported by social science, that polygamy caused grave harm to an individual's health and was socially corrosive.[108] Thus, because society had no duty to accommodate religious activities that an objectively reasonable person would consider to be a serious threat to the public welfare, society had no duty to permit polygamy or to exempt religious polygamists from prosecution under antipolygamy laws.[109] Therefore, as the furor about Mormon polygamy swelled in America, accommodationist scholars publicly clarified that the qualified right to free exercise accommodations did *not* give polygamists a right to defy antipolygamy laws.[110]

Francis Lieber, one of the most influential accommodationist scholars, argued that the right of free exercise protected *more* than belief.[111] In *Manual of Political Ethics*, Lieber claimed that people had a natural right to engage in any religiously inspired action that was "innocuous" and did not harm or violate the rights of others.[112] In *On Civil Liberty and Self-Government*, "the leading American political science textbook of the nineteenth century,"[113] Lieber insisted that American religious freedom protects not only "[l]iberty of conscience" but also "liberty of worship"[114]—which includes a natural right to engage in actions required by the Creator:

> [W]e understand not necessarily that every one [sic] is right in the religion that he adopts, but that his neighbors have no right to interfere with him. . . . [M]an has a right, not necessarily a moral right, nor a right in point of judgment, but a civil right, to worship God according to his own conscience, without suffering any hardships at the hands of his neighbors for so doing.[115]

105. *See id.* at 403.

106. *See id.* at 403–08.

107. *See id.* at 398 n.109.

108. *See id.* at 431–41 and the sources cited therein.

109. *See id.*

110. *See id.* at 437–41 and the sources cited therein.

111. LIEBER, *supra* note 71, at 202 ("[L]iberty of conscience has no meaning. . . . We might as well say liberty of taste. How can the state reach my taste? . . . [M]odes of worship . . . can claim protection if innocuous, or may be interfered with, if they interfere with the jural relations of others; for instance, if they should palpably promote immorality.").

112. *Id.*

113. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 47 (2000).

114. FRANCIS LIEBER, ON LIBERTY AND SELF-GOVERNMENT 99 (1859).

115. *Id.* at 98 n.1 (quoting Archbishop Richard Whately, Remarks at the Inaugural Meeting of the Society for Protecting the Rights of Conscience (July 1857)).

However, Lieber stressed that a pious person's right to exemptions was not absolute.[116] To begin, his use of the term "worship" is not without its ambiguities.[117] It is unclear whether he would have accepted every act that is done because it is required (or recommended) by a person's religion as "worship."[118] More important for the purpose of understanding the views of religious libertarians who favored polygamy bans, Lieber felt that whether or not an act constituted "worship," no person could claim an absolute right to perform grossly immoral actions that weaken essential social bonds and destroy society.[119] And significantly, Lieber specifically cited polygamy in his writings as an example of a religiously motivated action that could nevertheless be banned.[120]

Lieber was not alone. Other accommodationist scholars explicitly supported the validity and enforceability of antipolygamy legislation. Theodore Sedgwick's 1857 treatise on statutory and constitutional law implied that individuals had an absolute right to act in accordance with their conscience.[121] Like Lieber, however, Sedgwick believed that egregiously harmful practices like polygamy could probably be regulated, even in Utah where some people felt that they were religiously obliged to engage in the practice.[122]

Similarly, in his 1873 treatise on church and state, Joseph Thompson championed an accommodationist interpretation of the Free Exercise Clause of the U.S. Constitution.[123] Nonetheless, he also stressed that the government could enforce a ban on polygamy even under the most accommodationist application of free exercise doctrines.[124] Thompson's discussion is notable because, in structure and in substance, the argument closely anticipates those

116. *Id.* at 97–100.

117. *See id.*

118. *Id.*

119. LIEBER, *supra* note 71, at 217 ("[Religious practices] can claim protection if innocuous, or may be interfered with if they interfere with the jural relations of others; for instance, if they should palpably promote immorality.").

120. In the process, he also argued specifically that Utah should not be admitted as a state until the practice of polygamy was eradicated there. *See* LIEBER, *supra* note 114, at 99–102.

121. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 570–71 (1874) ("The Constitution contains no more important clause than that prohibiting all laws prescribing religious tests, establishing religion, or interfering with its free exercise; and fortunately, thus far, the wise spirit of our people has come up to the sagacity and foresight of our ancestors.").

122. *See id.* at 571 ("It may be remarked, however, that the recent organization of a distinct territorial Government about to claim admission as a State, exclusively occupied by settlers who declare polygamy to be one of their fundamental institutions, presents the problems connected with this matter in a new aspect, and will undoubtedly put our principle of absolute toleration to a very severe test.").

123. JOSEPH P. THOMPSON, CHURCH AND STATE IN THE UNITED STATES 11–12 (1873). In a section entitled "Religious Liberty more than Toleration," Thompson argues that free exercise clauses, including the First Amendment, "proclaim religious liberty, in the broadest sense, as a fundamental right of citizens of the United States. This means much more than the toleration by law of differences of religious belief and of different modes of worship." *Id.* at 11–12.

124. *See id.* at 18–21.

of the *Reynolds* opinion. Thompson stressed that the Free Exercise Clause protected more than belief and covered the right to engage in religious disputation, proselytization, and other acts of worship, unless enforcement of the challenged law could be shown to be necessary for society's very survival.[125] Like Lieber and Sedgwick, Thompson insisted that polygamists lacked the right to exemptions.[126] Following a trope of antipolygamy literature, Thompson suggested that polygamy led to the birth of large numbers of children, many of whom were destined for poverty and dependency.[127] Thus, polygamy was sufficiently immoral to threaten liberal society and could be banned on police-powers grounds.[128] In sum, Thompson argued that these factors gave the state the authority to act:

> Though no form of religious belief or worship, *simply as such*, can justly be proscribed in a free state, yet for reasons of public morality, or for the safety and order of the Commonwealth, the State may forbid and punish acts done in the name of religion; as, for instance, polygamy as practised by the Mormons, the infanticide of the Chinese, or the self-immolation of Hindoo devotees.[129]

Thompson concluded that "by that law of self-protection which inheres in society, as well as by that moral sense which justifies monogamy, the State can legislate against polygamy and fornication, though practised in the name of religion."[130] Like the accommodationist commentators, accommodationist judges consistently stated that free exercise exemptions would never extend to antipolygamy laws. Polygamy epitomized the type of act so grievously harmful to others that even the most liberal society could not be expected to tolerate it.

An 1813 case from New York makes it abundantly clear that the limits of accommodation stopped at polygamy. In *People v. Philips*,[131] the New York Court of General Sessions enjoined the enforcement of a law that would have required a Catholic to violate Church teachings.[132] According to the court, a religiously motivated act must be accommodated unless the act is inconsistent with the

125. *Id.* at 15 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 469 (1868)).

126. *Id.* at 18–19.

127. *See id.* at 20–21.

128. *Id.*

129. *Id.* at 18–19.

130. *Id.* at 21.

131. The Court of General Sessions, City of New York, decided this case on June 14, 1813. Although the case was not officially reported, the arguments and opinion were printed in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 5–114 (photo. rep. 1974) (1813) [hereinafter *Philips* in SAMPSON], and they were widely distributed. The case was also the focus of Walter Walsh's exhaustive article, *The First Free Exercise Case*. *See* Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004). As Walsh has shown, it was known and cited in many subsequent free exercise cases. *Id.* The court's decision is also excerpted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199–209 (1955).

132. *Philips* in SAMPSON, *supra* note 131, at 111–14; *see* Walsh, *supra* note 131, at 37–38.

peace and safety of the state.[133] And unlike anti-accommodationists who simply deferred to a legislative determination that a particular act threatened the public weal, the *Philips* court stressed that it had an independent duty to question the reasonability of the legislature's decision.[134] According to the court, however, the risk of harm was not sufficiently direct or grave that it could override a person's presumptive right to exemption.[135]

Consistent with contemporaneous accommodationist principles, the judge in *Philips* identified polygamy as an intolerable activity.[136] He stressed that free exercise exemptions were unavailable for those who wished to act in a way that was "actually . . . injurious. . . . of a deep dye, and of an extensively injurious nature."[137] Among the acts listed as too catastrophically harmful to be tolerated were polygamy, human sacrifice, and wife-burning.[138] *Philips* was implicitly reaffirmed in New York state courts.[139] It was also unofficially reported and influential outside the borders of New York State.[140]

In sum, nineteenth-century jurists agreed that the right to free exercise included not only a right to believe whatever one chose but also to act in accordance with one's religious beliefs *so long as the religious acts were not socially harmful*. However, anti-accommodationist jurists disagreed with accommodationist jurists about whether courts could question a legislature's implicit judgment that prohibited actions were ipso facto harmful. Anti-accommodationist judges adopted narrow definitions of the term "religion" or, more commonly, held that courts were required to defer to legislative judgment about "harm."[141] As such, they precluded the possibility of free exercise exemptions. By contrast, accommodationist commentators and judges argued

133. *Philips* in SAMPSON, *supra* note 131, at 111 ("It is essential to the free exercise of a religion . . . that its ceremonies as well as its essentials should be protected.").

134. *Id.* at 111–13. See also the detailed parsing of this passage in Lombardi, *supra* note 49, at 405–06.

135. The conclusion of *Philips* captured the nineteenth-century accommodationist position:

> [U]ntil men under pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion. If they are in error, or if they are wicked, they are to answer [only] to the *Supreme Being* . . . .

Philips in SAMPSON, *supra* note 131, at 114.

136. *See* discussion *infra* note 138.

137. *Philips* in SAMPSON, *supra* note 131, at 113.

138. *Id.* at 113–14. The list of activities to which polygamy is equated includes, in Walsh's paraphrase, "engaging in incest, polygamy, wife-burning, bacchanalian orgies, or human sacrifices, . . . establishing the inquisition, or . . . fanatically attempting to pull up the pillars of society." Walsh, *supra* note 131, at 89.

139. *See Privileged Communications to Clergymen*, *supra* note 131, at 209–13 (discussing People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817)). This case is also discussed in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1505–06 (1990), and Walsh, *supra* note 131, at 40–41.

140. *See* Walsh, *supra* note 131, at 40. Judges elsewhere cited *Philips* to support their decisions exempting Catholic priests from the obligation. Conversely, the leading anti-accommodationist justice of the nineteenth century, Chief Justice Gibson of Pennsylvania, singled *Philips* out for criticism in one of his own cases. *See* Philips v. Gratz, 2 Pen. & W. 412, 416–18 (Pa. 1831).

141. *See supra* notes 137–40 and accompanying text.

that judges must be prepared to grant exemptions.[142] Notably, however, neither anti-accommodationists nor accommodationists were willing to grant Mormons any exemptions from antipolygamy laws.[143] Anti-accommodationists would defer to the legislative judgment that polygamy was harmful and would enforce the law without subjecting it to any judicial scrutiny.[144] Accommodationists felt that they were required to take an extra step before (inevitably) permitting a prosecution for polygamy.[145] Judges must independently examine the legislative judgment that polygamy was harmful to determine whether it was reasonable.[146] Nonetheless, based on nineteenth-century societal norms, they always concluded that it was.[147]

Modern commentators and judges generally forget that George Reynolds argued his case against this jurisprudential backdrop. And they thus fail to see the significance of the Supreme Court's extensive discussion of polygamy's harms and of the reasonableness of antipolygamy legislation.[148] That the Court felt compelled to include such a discussion suggests by itself that the Court embraced an accommodationist understanding of the Free Exercise Clause.

Modern commentators also fail to recognize that George Reynolds's lawyers knew that, given the widespread assumptions about the harmfulness of polygamy, their client had no realistic chance of overturning his conviction on constitutional grounds.[149] Any request for accommodation of polygamy on free exercise grounds was doomed to fail. Judges of an anti-accommodationist persuasion, such as Gibson, would simply deny *any* request for exemptions without bothering to check its reasonability.[150] And even those judges inclined to grant accommodations would deny exemptions for any action that they found to be socially corrosive or immoral, and the vast majority of Americans at that time emphatically considered polygamy to be both.[151] Confronting this reality, Reynolds's briefs never claimed that the Free Exercise Clause gave him a right to be exempted from antipolygamy laws; he argued instead that, under a doctrine of criminal law that had (allegedly) appeared recently in England, a court should find that he lacked the criminal intent necessary to sustain a criminal conviction.[152]

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142. *See, e.g.*, LIEBER, *supra* note 71, at 217.

143. *See* Lombardi, *supra* note 49, at 431–41.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Reynolds v. United States, 98 U.S. 145, 163–68 (1878).

149. Lombardi, *supra* note 49, at 437–41.

150. *Id.* at 400–02.

151. *Id.* at 398–403.

152. *See generally* Nathan B. Oman, *Natural Law and the Rhetoric of Empire:* Reynolds v. United States*, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 671 (2010) (recounting the historical background of the *Reynolds* case).

B. George Reynolds's Characterization of his Case as Something Other than a Constitutional Free Exercise Case

After George Reynolds lost in the territorial courts,[153] the Mormon Church hired one of America's leading appellate lawyers, George Biddle, to handle his appeal to the U.S. Supreme Court.[154] As the former attorney general in the Buchanan administration,[155] Biddle knew that notwithstanding the strong accommodationist tendencies among many nineteenth-century judges and commentators (including, as we shall see shortly, several Justices on the Supreme Court), the Court was primed to reject any argument that the Free Exercise Clause prevented the federal government from enforcing its antipolygamy laws.[156]

Recognizing this problem, Reynolds's lawyers decided not to present a free exercise argument. Instead, they presented a more audacious one.[157] Reynolds asserted that emerging principles of criminal law in common law jurisdictions precluded courts from establishing any intentional wrongdoing in cases where religious beliefs motivated illegal activity.[158] Citing the British case of *Regina v. Wagstaffe*,[159] Reynolds argued that a person who commits an illegal act on religious grounds should be treated like a person who is acting in an involuntary fashion.[160] Thus, Reynolds and his lawyers argued that religiously motivated people generally do not have the *mens rea* sufficient to sustain a conviction and

153. For an account of the trials leading to this conviction and the decision to appeal, see GORDON, *supra* note 73, at 114, 267 & nn. 58–59. The *Reynolds* case had a complex history, including a trip up to the Supreme Court and back to the territorial courts before finally ending up again before the Supreme Court. *See, e.g.*, United States v. Reynolds, 1 Utah 319, 319 (1876); United States v. Reynolds, 1 Utah 226, 226 (1875); *see also* C. Peter Magrath, *Chief Justice Waite and the "Twin Relic":* Reynolds v. United States, 18 VAND. L. REV. 507, 520–21 (1965). The judges of the territorial courts upheld Reynolds's conviction without even addressing his quasi-free exercise claim.

154. *See* Oman, *supra* note 152, at 671.

155. *See id.*

156. *See id.*

157. *See* Brief of Plaintiff in Error at 52, Reynolds v. United States, 98 U.S. 145 (1878) (No. 180). For an exhaustive discussion of the argument and an exploration of where it came from, see Oman, *supra* note 152, at 671–79.

158. *See* Oman, *supra* note 152, at 673–74.

159. Both the briefs and the opinion refer to it as *Regina v. Wagstaff*. But the citation takes one, in fact, to Regina v. Wagstaffe, 10 Cox Crim. Cases 530 (Eng. 1868). *Wagstaffe* involved a British couple belonging to a Christian sect that believed God commanded people to cure illness only through prayer. After they refused to bring medical help to assist their sick child, the child died. A jury acquitted them of manslaughter. *See Wagstaffe*, 10 Cox Crim. Cases at 533–34. Reynolds's lawyers characterized the jury as concluding that, believing they were following a divine command, they lacked criminal intent.

160. *See* Brief of Plaintiff in Error, *supra* note 157, at 55–57 ("One who does the act involuntarily, is free from criminality. . . . [So too,] one who contracts the relation forbidden by statute [i.e. a second marriage], in the belief that it is not only pleasing to the Almighty, but that it is positively commanded, cannot have the guilty mind which is essential to the commission of a crime. He may make himself CIVILLY responsible for the results of his act, because its effect upon others is altogether independent of motive. But he cannot be CRIMINALLY responsible, since guilty intent is not only consciously absent, but there is present a positive belief that the act complained of is lawful, and even acceptable to the Deity.").

thus cannot be held criminally liable for their actions unless the act is *malum in se* because they have no criminal intent.[161] On those grounds, Reynolds argued that the Court should overturn his criminal conviction.[162]

This *mens rea* argument was a long-shot bid to avoid the pitfalls of a constitutional argument that was bound to fail, by rooting a claim to absolute accommodation in criminal law. Indeed, the Solicitor General found Reynolds's reasoning so far-fetched that he refused to dignify it with any serious response.[163] Nevertheless, given that it was his only path to victory, Reynolds continued to press the *mens rea* argument in his oral arguments before the Supreme Court. In oral arguments, Biddle insisted that a Mormon's decision to engage in polygamy involved no evil intent and thus, irrespective of its social effects, it could not, under principles of *criminal law*, be considered a crime.[164] In response, the Solicitor General, drawing upon the reasoning of accommodationist commentators, argued that it would be ridiculous for the Court to accept any principle of law that would allow "a sect of East Indian Thugs [to] settle in the Territories [who] might commit murder with impunity, on the ground that it was sanctioned and enjoined by their system of religious belief."[165]

Unsurprisingly, Biddle's attempt to reframe Reynolds's request for exemption as one rooted only in principles of criminal (rather than constitutional) law fell short. Instead, the *Reynolds* court decided *sua sponte* to analyze two unbriefed constitutional questions: whether the Free Exercise Clause ever requires the government to accommodate religious action and, if so, why its protections do not extend to religiously motivated polygamists.[166] After answering those questions the Court proceeded to address (and dismiss) Reynolds's claim that principles of criminal law protected behavior that the Constitution did not.[167]

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161. *Id.* at 54–57. For a detailed analysis of this argument, see generally Oman, *supra* note 152, at 671–79.

162. *See* Brief of Plaintiff in Error, *supra* note 157, at 55–57. Actually, *Wagstaffe* probably does not establish any such principle in British law, but neither the Solicitor General nor the Court seems to have checked the case itself. *See* Judith I. Scheiderer, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429, 1429–30 (1990) (suggesting that the *Wagstaffe* jury concluded not that the *Wagstaffe* defendants had merely subjectively believed they were commanded to do something, but rather found that the defendants were objectively *reasonable* in believing that prayer was effective treatment for illness).

163. Brief for the United States at 8, Reynolds v. United States, 98 U.S. 145 (1878) (No. 180) (criminal *mens rea* argument did not "call for any remark").

164. *See Is Polygamy a Crime?*, N.Y. TIMES, Nov. 15, 1878, at 4. *But see Current Topics*, 18 ALB. L.J. 401, 402 (1878) (suggesting that Reynolds's counsel also raised before the Court some First Amendment claim—although whether it was an establishment or free exercise claim was not clear—and noting that "[t]he decision of these cases will be awaited with much interest.").

165. *See Is Polygamy a Crime?*, *supra* note 164.

166. Reynolds v. United States, 98 U.S. 145, 162 (1878) ("Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. . . . The question to be determined is, whether the law now under consideration comes within this prohibition.").

167. *Id.*

To understand why the Justices felt compelled to address a constitutional issue that had not been briefed and thus was not properly before the Court, it is important to understand that four Justices on the Court had strong evangelical commitments and were passionately interested in questions of free exercise.[168]

C. The Free Exercise Pre-Commitments of the Evangelical Judges on the Reynolds *Opinion*

Many Chief Justices have worked hard to promote unanimity in decisions, but Chief Justice Waite's biographers all stress that he was particularly anxious to ensure strong majorities.[169] Justice Waite assigned opinions carefully with an eye to securing the broadest majorities possible.[170] His commitment to the principle was such that he was known to switch votes to control the assignment of the opinion, and thereby to steer it to a judge who could command the broadest majority.[171] And, in fact, he did this in *Reynolds*. Justice Waite's biographer reports that he initially voted to acquit, probably on grounds that the jury was improperly formed.[172] Finding himself in the minority and thus unable to control the assignment of the case, he changed his vote so that he could assign to himself the task of writing what he hoped would be a unanimous majority opinion.[173] To get his unanimous opinion, Justice Waite knew that he needed to win the votes of several evangelical Justices who had publicly championed an accommodationist understanding of the constitutional free exercise guarantee—albeit one that would not require the government to accommodate polygamy.

At least four Justices on the Waite Court—Strong, Bradley, Harlan and Field—were profoundly influenced by evangelicalism.[174] Harlan and Bradley were active in evangelical Christian organizations.[175] In fact, Justice Strong was

168. *See, e.g.*, Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 385–94 (1998); Mark Warren Bailey, *Moral Philosophy, the United States Supreme Court, and the Nation's Character, 1860–1910*, 10 CAN. J.L. & JURIS. 249, 258 (1997).

169. *See, e.g.*, DONALD GRIER STEPHENSON JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 240–41 (2003); C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 299 (1st ed. 1963).

170. *See* MAGRATH, *supra* note 169, at 272; *cf. id.* at 274–75.

171. *See* STEPHENSON, *supra* note 169, at 50–51. For Justice Waite's willingness to do this, see Magrath, *supra* note 153, at 510.

172. *See* Magrath, *supra* note 153, at 523. He may have agreed with Justice Field, who argued tartly that the lower court erred in admitting some of the crucial testimony in the case. *See Reynolds*, 98 U.S. at 168 (Field, J., concurring in part and dissenting in part).

173. *See* Magrath, *supra* note 153, at 524–27.

174. *See, e.g.*, Berg & Ross, *supra* note 168, at 385–94; Bailey, *supra* note 168, at 258.

175. *See* James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 323 (2001); LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 47–48 (1999); TINSLEY YARBROUGH, JUDICIAL ENIGMA: THE

one of the most visible public evangelicals of his day.[176] While Field was not active in evangelical organizations, he was the son of a famous evangelical minister and shared the core beliefs of his evangelical brethren.[177] Their evangelical principles inspired a profound commitment to the protection of natural rights generally and a particular interest in the enforcement of constitutional free exercise guarantees—which they interpreted in the same manner as nineteenth-century accommodationist commentators and judges.[178]

Legal scholars have traced the rise of judicial-rights activism in the late nineteenth century to judges who shared evangelical Christian beliefs in natural law and evangelical commitments to ensuring that society respected natural rights.[179] Thus, the four evangelical Justices on the *Reynolds* Court believed that the federal and state constitutions empowered judges to protect natural rights from the passions of democratic majorities.[180]

However, this libertarianism was qualified by the fact that the evangelical Justices assumed God wanted societies to flourish materially.[181] Under their philosophy, judges must void any law which imposes on fundamental rights, *unless, after searching independent review, the judge concludes that the law at issue is a reasonable measure which is actually likely to advance the public health, safety, or welfare*.[182] The four evangelical Justices thus developed a test to determine whether it was appropriate to void a law that imposed on natural rights.[183] Justice Field described that test in 1888 as one in which judges may not simply accept a legislature's judgment that a law should be enacted, but must scrutinize that law in order to ensure that it bears some objectively reasonable relation to a legitimate social interest: that this interest is, in fact, the end aimed at "and that

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FIRST JUSTICE HARLAN 209–10 (1995); LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 170–71 (1992).

176. *See* Jon C. Teaford, *Toward a Christian Nation: Religion, Law and Justice Strong*, 54 J. PRESBYTERIAN HIST. 422, 426 (1976); *see also* Daniel G. Strong, Supreme Court Justice William Strong, 1808–1895: Jurisprudence, Christianity and Reform (1985) (Ph.D. dissertation, Kent State University) (ProQuest).

177. *See* STEPHENSON, *supra* note 169, at 81, 83; SWISHER, *supra* note 58, at 8–16.

178. *See* Bailey, *supra* note 168, at 270–71; Berg & Ross, *supra* note 168, at 385–94.

179. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525–28 (1974).

180. Mark Bailey specifically describes Field and Bradley as two Justices who "believed themselves practitioners of a moral science and possessors of a public role in guiding the nation in accordance with fundamental moral principles and in promoting the general welfare of society by conforming municipal laws to their dictates." *See* Bailey, *supra* note 168, at 258. Emblematic of their philosophy is Field's dissent in *The Slaughter-House Cases*, joined by Bradley, which declared: "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained." Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 756 (1884) (Field, J., dissenting).

181. *See* Bailey, *supra* note 168, at 259.

182. For the growing acceptance of this philosophy by Americans, including evangelicals, see Green, *supra* note 97, at 204–332. Even Justice William Strong gave lectures insisting that non-Christians should not be forced to act in accordance with a law unless that law could be justified on health or safety grounds. *See* WILLIAM STRONG, TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE AND PROPERTY 30–32 (1875).

183. *See* Powell v. Pennsylvania, 127 U.S. 678, 696 (1888) (Field, J., dissenting).

[the law] is appropriate and adapted to that end."[184] Obviously, this test does not fit neatly into today's "tiers of scrutiny"—it was more severe than rational basis but far more forgiving than strict scrutiny.

Furthermore, the evangelical Justices subscribed to the belief described above that immoral behavior was socially corrosive, and that immorality unchecked would lead inevitably to social collapse.[185] Thus, laws that directly or indirectly discouraged immoral behavior were reasonable as tools to promote the health, safety, and welfare of society.[186] This paradox is key to understanding the true meaning of *Reynolds*. The evangelical Justices genuinely believed that judges had a duty independently to review any law which allegedly interfered with constitutionally protected rights and to enjoin enforcement of any law whose impositions on rights were not objectively reasonable in light of the goals that society was trying to promote.[187] At the same time, though, given their religious convictions, these Justices were likely to hold that laws which promoted traditional Christian norms survived that heightened scrutiny. In their view, Christian morality was both reasonable and necessary for the welfare of society.[188]

Thus, two years before *Reynolds*, the evangelical Justices declared that freedom of speech was a fundamental right and insisted that courts had a duty independently to scrutinize laws that regulated the mail.[189] Nevertheless, in that same case those Justices upheld legislation prohibiting the use of federal mail to send lewd material.[190] Similarly, the evangelical Justices were famously protective of property rights, contract rights, and the right to pursue a calling.[191] However, they upheld laws that prohibited people from selling alcohol because that prohibition was reasonably designed to protect the public health, safety, and welfare.[192] Sadly, this pattern also explains one of Justice Bradley's most

184. *Id.* For an analysis of the standard, see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 253 (1997); *cf.* SWISHER, *supra* note 58, at 224–27.

185. *See* Gordon, *supra* note 175, at 348.

186. Mark Graber has referred to this view as "conservative accommodationism." MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 17–49 (1991).

187. *See* Berg & Ross, *supra* note 168, at 385–94.

188. *See* Bailey, *supra* note 168, at 270–71.

189. *See Ex parte* Jackson, 96 U.S 727, 735 (1877). They were particularly concerned about mail regulations because these had been used before the Civil War to restrict the ability of evangelical abolitionists to proselytize for their cause. *See* Nelson, *supra* note 179, at 532–35.

190. *See Jackson*, 96 U.S. at 736–37.

191. *See* Linda Przybyszewski, *Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer*, 91 J. AM. HIST. 471, 475 (2004).

192. *See* Mugler v. Kansas, 123 U.S. 623, 673–75 (1887) (upholding a sweeping state liquor regulation on the grounds that, despite its imposition on the rights of property and the right to pursue an occupation, it was a reasonable regulation calculated to prevent immoral drunkenness); *see also id.* at 678 (Field, J., dissenting) (arguing that the regulation was unconstitutional because (and only because) it went further than necessary to achieve the desired and admittedly important moral end). Three years later, Field wrote the majority opinion in *Crowley v. Christensen*, a case that upheld less sweeping laws regulating the sale of alcoholic beverages with the comment, "By the general concurrence of opinion of every civilized and Christian community, there

notorious decisions. In the *Slaughter-House Cases*, Justice Bradley had insisted that the right to pursue one's chosen profession was a liberty protected by the Fourteenth Amendment.[193] Nonetheless, that same year, he wrote his infamous concurrence in *Bradwell v. Illinois* where the Court upheld a law that barred women from entering the legal profession on the ground that this rule represented a reasonable imposition on that right.[194] Why could the state impose this restraint upon a person's right to pursue a legal calling? According to Bradley, "the law of the Creator" had decreed that women be homemakers, and society was likely to suffer if that "law of the Creator" was violated.[195]

Modern readers should not forget this backdrop when interpreting the free exercise discussion in *Reynolds*. The evangelical Justices believed the right to *act* in accordance with one's religious beliefs was a natural right worthy of protection. Like all natural rights, however, the right to perform one's religious obligations was a qualified one. It did not permit people to act in ways that a reasonable judge (like themselves) would find immoral and socially corrosive.

Two points are worth stressing here. First, the evangelical Justices' commitment to free exercise (subject to the caveats above) was non-preferentialist. The religious freedoms enjoyed by the Protestant majority should be enjoyed by the members of minority faiths, including unpopular fringe faiths.[196] Second, the evangelical Justices, like other nineteenth-century accommodationist judges and commentators, understood "free exercise" guarantees to protect both religious belief and the right to act in accordance with those beliefs because salvation depended not only on faith, but on *acting* in accordance with that faith.[197]

John Marshall Harlan, a major figure in the American Presbyterian Church, urged the Church to revise its official Confession of the Faith to emphasize that

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are few sources of crime and misery to society equal to the dram-shop." Crowley v. Christensen, 137 U.S. 86, 91 (1890).

193. The Slaughter-House Cases, 83 U.S. 36, 113–14 (1872).

194. Bradwell v. Illinois, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring).

195. *See id.* at 141.

196. *See* Steven K. Green, *The "Second Disestablishment": The Evolution of Nineteenth-Century Understandings of Separation of Church and State*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 280–306 (T. Jeremy Gunn & John Witte eds., 2012). In particular, see *id.* at 301 (describing how Field in one case argued that Christian morality can and should be promoted not through formal legal favoritism, but by pointing out that most things deemed immoral were also, in fact, harmful to society and could be upheld on this latter ground). Note, too, that Harlan regularly taught both Sunday school and a law school class in which he stressed that "all religions were to be alike under the [C]onstitution." Gordon, *supra* note 175, at 414 (alteration in original) (quoting John Marshall Harlan Law Lectures (April 16, 1898), *in* JOHN MARSHALL HARLAN PAPERS, LIBRARY OF CONGRESS). In prestigious lectures at Union Theological Seminary a few years before George Reynolds appeared before the Court, Justice Strong, one of the most famous evangelicals of his day and President of the American Bible Society, wrote that the Constitution's protections apply to members of all churches, *including Mormons*. *See* STRONG, *supra* note 182, at 33–36.

197. *See, e.g.*, *Ex parte* Newman, 9 Cal. 502, 518–29 (1858) (Field, J., dissenting).

Christians must not only believe, but must act upon their beliefs.[198] In an interview widely published in numerous outlets, he insisted, "I fully believe in both the Bible and the Constitution. . . . I believe that the Bible is the inspired Word of God. Nothing which it commands can be safely or properly disregarded . . . ."[199] As noted already, Justice Bradley was a devout evangelical, and his notorious opinion in *Bradwell* by itself demonstrates that to his mind, Christianity required not only belief, but a commitment to acting in accordance with its teachings.[200] Opinions and lectures penned by Justices Strong and Field also reveal a strong commitment to the idea that religion requires not just belief, but action.[201]

Justice Strong was among the most famous evangelicals in mid-nineteenth-century America.[202] He insisted on following God's teachings (as he understood them) in his own life, and he publicly called on all Americans to do the same.[203] Several times prior to the *Reynolds* case, he publicly stated that it was the duty of judges to protect citizens when state laws unreasonably interfered with their religious actions. For example, in an opinion issued early in his career as a state court judge, Strong enjoined a state act on the grounds that it unreasonably and dangerously prevented Christians from observing the Sabbath.[204] Here, Strong reasoned that the right to free exercise included a right to "worship of God, according to the dictates of their own consciences."[205] Given this natural right, he enjoined the state from licensing a railroad whose operations would prevent a Christian church from holding services on Sunday in the manner that they thought necessary.[206] There were a number of flaws in Strong's reasoning, and the case was overruled by an appellate court.[207] However, Strong never

198. He proposed to change it to include the words: "[B]y commandment of God, binding upon all peoples, the Sabbath Day must be kept holy unto the Lord for purposes of religious worship and contemplation, free from unnecessary labor, and from mere worldly employments." Gordon, *supra* note 175, at 348 (quoting Letter from John Marshall Harlan to Henry Van Dyke (Feb. 4, 1902), *in* HENRY VAN DYKE COLLECTION 3 (Presbyterian Historical Society, Philadelphia, PA)).

199. Gordon, *supra* note 175, at 341–42.

200. *See* Berg & Ross, *supra* note 168, at 391. Bradley's notorious concurrence in *Bradwell v. Illinois* talks about a "law of the Creator" and suggests that obeying this law promotes the public welfare. *See supra* note 194 and accompanying text.

201. *See infra* text accompanying notes 202–20.

202. *See* Berg & Ross, *supra* note 168, at 385.

203. *See, e.g.*, STRONG, *supra* note 182.

204. *See* Sparhawk v. Union Passenger Ry. Co., 54 Pa. 401, 406–07 (1867). Before joining the U.S. Supreme Court, Strong was a leader of the National Reform Association, a mass organization which pushed for the amendment of the preamble to the U.S. Constitution to acknowledge "the Lord Jesus Christ as the Governor among the nations, and His revealed will as of supreme authority." *See* NAT'L REFORM ASS'N, PROCEEDINGS OF THE FIFTH NATIONAL REFORM CONVENTION, TO AID IN MAINTAINING THE CHRISTIAN FEATURES OF THE AMERICAN GOVERNMENT 10 (1874). Even after appointment to the Court in 1870, he maintained ties to the Association, serving as its president until 1873 and remaining active thereafter. *See* Strong, *supra* note 176, at 329–30.

205. *See Sparhawk*, 54 Pa. at 407.

206. *Id.* at 417.

207. *Id.* at 454.

disavowed his belief that it was the duty of judges to overturn state laws that unreasonably prevented people from fulfilling their religious obligations.[208]

After his appointment to the Supreme Court, Strong continued to insist that people had a constitutional right to reasonably follow the teachings of their faith. Indeed, in public lectures given a few years prior to the *Reynolds* case, which were subsequently published as a book, Justice Strong specifically stressed that Mormons had a qualified constitutional right to act in accordance with their beliefs.[209] Thus, if they asked for an exemption from antipolygamy laws, the request must be granted unless the evidence showed that polygamy was manifestly harmful to society as an act inconsistent with "good order" or "good morals."[210]

Justice Field also demonstrated a consistent commitment to the principle that judges were required to protect religious action from unreasonable state interference. Early in his career, when Field sat on the California Supreme Court, the court decided *Ex parte Newman*.[211] Writing separately in that case, Field made clear that he believed people had a right not just to believe, but to act in accordance with their religious beliefs.[212] However, Field reasoned that the law at issue should be upheld because it did not actually interfere with the shopkeeper's religious obligations, and if it did, it could be reasonably justified on health grounds.[213]

Field's opinion in *Ah Kow v. Nunan* is also illuminating. *Ah Kow* was decided the year after *Reynolds* while Field was sitting as a circuit judge in California.[214] *Ah Kow* involved a challenge to a San Francisco ordinance which required jailers to crop the hair of prisoners in city jails.[215] This regulation was intolerable to

208. *See infra* text accompanying notes 209–10.

209. *See* STRONG, *supra* note 182, at 35–36.

210. *See id.* at 30–32. In the years after he signed the *Reynolds* opinion, Strong made clear that he had never abandoned his qualifiedly accommodationist understanding of free exercise and, by implication, of constitutional free exercise guarantees. Notably, even in the 1880s, after he had left the Supreme Court, Strong joined with the American Bible Society to protest a federal policy prohibiting schoolteachers on Native American reservations from instructing students in any language other than English. For a general discussion, see Strong, *supra* note 176, at 370–72. For Strong, it was "not within the providence of the government to enter any private institution and say that any Indian children shall not be taught to read the Ten Commandments and the Lord's Prayer in their own tongue." *Id.* at 371.

211. *Newman*, 9 Cal. 502 (1858). In *Ex parte Newman*, a Jewish shopkeeper seems to have pled both that the Sunday closing laws interfered with his ability to follow his religious beliefs and that the laws forced him to engage in a Christian practice. *Id.* at 506–07. Unusually, the Court, unlike most nineteenth-century courts, granted the shopkeeper an exemption from the law. *Id.* at 510.

212. *See id.* at 519–20 (Field, J., dissenting).

213. *Id.* at 519 (Field, J., dissenting) ("The law . . . leaves to all the privilege of worshipping God, or of denying His existence, according to the conclusions of their own judgments, or the dictates of their own consciences."). In essence, Field argued that the identification of Sunday as a day of rest, as opposed to some other day, did not force non-Christians to engage in a Christian practice and did not prevent them from resting on their own Sabbath. *See also* SWISHER, *supra* note 58, at 79.

214. Ho Ah Kow v. Nunan, 12 F. Cas. 252 (1879); Reynolds v. United States, 98 U.S. 145 (1878).

215. *Ho Ah Kow*, 12 F. Cas. at 253.

Chinese residents because their long-braided hair had spiritual meaning.[216] After he was arrested, jailed, and shorn, Ah Kow, a Chinese man, sued the jailer on grounds that the shearing interfered with his ability to practice his faith.[217] Although the case might have been analyzed as a free exercise claim, Field noted that the law was developed with the specific goal of terrorizing Chinese prisoners, and he struck down the law on equal protection grounds.[218] Nonetheless, in dicta, Justice Field made clear that people *should* feel a duty to perform their religious obligations, and that they have a natural right to do so:

> [N]o doubt the Chinaman would prefer either of these modes of torture [the bastinado or thumbscrew] to that [violating the religious command not to cut his hair] which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.[219]

Justice Field added: "Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation."[220] These are not the words of a Justice who would favor a categorical anti-exemption position barring judges from reviewing, even for reasonability, legislation that prevents people from carrying out their religious responsibilities.

D. Chief Justice Waite's Understanding of the Founders' Views on Free Exercise

To achieve unanimity on the question of religious accommodation in *Reynolds*, Chief Justice Waite not only needed to affirm the principles to which his evangelical colleagues were so strongly committed, but he also had to justify the adoption of those principles in a manner that would be convincing to the other Justices and, indeed, to a public that was eagerly following the case around the country. Justice Waite's biographer, Donald Drakeman, has demonstrated that, rightly or wrongly, Justice Waite believed the Framers of the U.S. Constitution had understood the Bill of Rights to protect people from unreasonable interference with their religious practices.[221] Originalism provided

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216. See the scan of Ah Kow's complaint on the website of the National Archives. *Ho Ah Kow Petition,* NAT'L ARCHIVES, http://recordsofrights.org/records/277/ho-ah-kow-petition [https://perma.cc/JA6C-8LUA].

217. His complaint alleged that "the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith; yet, in disregard of his rights, inflicted the injury complained of; and that the plaintiff has, in consequence of it, suffered great mental anguish." *Ho Ah Kow*, 12 F. Cas. at 253; *see also* SWISHER, *supra* note 58, at 217.

218. *Ho Ah Kow*, 12 F. Cas. at 256–57.

219. *Id.* at 255.

220. *Id.* at 257.

221. *See* Donald L. Drakeman, Reynolds v. United States*: The Historical Construction of Constitutional Reality*, 21 CONST. COMMENT. 697, 702–07 (2004).

Justice Waite with a neutral justification for the embrace of the position to which his evangelical brethren were pre-committed.

Drakeman has described in great detail Justice Waite's struggle to research and write an opinion that would be acceptable to all the members of his Court.[222] Working without clerks or easy access to the type of historical information that judges have today at their fingertips,[223] Justice Waite decided to reach out to a friend, the eminent historian George Bancroft, to learn more about the Founders' views on free exercise.[224] On Bancroft's advice, Justice Waite examined the *Virginia Statute on Religious Freedom*, drafted by Thomas Jefferson and adopted in 1785.[225] Impressed, Justice Waite decided to do further research into the views of the founding generation on questions of freedom of religion, with a particular focus on the leading citizens of Virginia. Along with a copy of Kent's *Commentaries*,[226] Justice Waite looked at a volume of the collected works of Thomas Jefferson[227] and two books on the history of Virginia.[228] According to Drakeman, these two books, Robert Reid Howison's *History of Virginia*[229] and Robert Semple's *A History of the Rise and Progress of the Baptists in Virginia*,[230] strongly shaped Justice Waite's understanding of the Free Exercise Clause's meaning.[231] Importantly, both of these works strongly suggested that the founders in Virginia favored a broad view of religious liberty, including a right to exemption from at least some democratically enacted laws.[232] Madison's *Memorial and Remonstrance* and the Virginia Statute for Religious Freedom (which was itself a model for the religion clauses of the First

222. *See id.*

223. The Justices had not yet taken on clerks to assist them. *See* STEPHENSON, *supra* note 169, at 51. The first clerk was hired by Justice Gray in 1882 and was paid for privately. *Id.*

224. Magrath, *supra* note 153, at 525–26 (citing Letter from George Bancroft to Morrison Waite (Dec. 2, 1878)).

225. *Id.*; *see* Comm. of the Va. Assembly, *82. A Bill for Establishing Religious Freedom, 18 June 1779*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 [https://perma.cc/H8MN-FSM7].

226. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (7th ed. 1851).

227. THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON: PUBLISHED BY ORDER OF CONGRESS FROM THE ORIGINAL MANUSCRIPTS DEPOSITED IN THE DEPARTMENT OF STATE (H.A. Washington ed., 1884).

228. Drakeman, *supra* note 221, at 704–08.

229. 2 ROBERT REID HOWISON, A HISTORY OF VIRGINIA: FROM ITS DISCOVERY AND SETTLEMENT BY EUROPEANS TO THE PRESENT TIME (1848).

230. ROBERT SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA (1810).

231. Drakeman, *supra* note 221, at 723.

232. Semple began his book with a long discussion of the prosecution for breach of the peace by Baptists preaching publicly in Virginia. He argued that Virginians' views about the role of church and state were shaped by their distaste for these prosecutions and their admiration for the imprisoned preachers. *See* SEMPLE, *supra* note 230, at 56. Howison similarly argued that the Virginia Bill reflects anger about laws that required people to perform actions inconsistent with their religious beliefs. It reflects, he suggested, Virginians' fury about a law that would have required them to pay an assessment to support established churches. 2 HOWISON, *supra* note 229, at 294–98.

Amendment)[233] were thus portrayed as texts which stood for the proposition that people had a natural right not only to believe what they chose but also to act in accordance with those beliefs.[234]

Thus, when Justice Waite cited those two texts and Jefferson's letter to the Danbury Baptists, he did not read them in the same way that originalist scholars do today. Rather, influenced by Howison and Semple, he read them as texts which anticipated and confirmed the nineteenth-century accommodationist understanding of free exercise to which the evangelical Justices on his Court were firmly committed. Drakeman argues persuasively that Justice Waite believed these texts stood for the proposition that antipolygamy laws could be enforced because (and only because) the Founders believed (and science had subsequently confirmed) that polygamy was threatening to the public welfare. Drakeman concludes:

> For the Chief Justice to reach a decision in the *Reynolds* case—bearing in mind that his assignment was to craft an opinion for the majority who voted to sustain the conviction—he needed to work around the odes to religious liberty that he found in the words of Jefferson and Madison as well as in the writings of the Baptists and Presbyterians. Only by drawing on Jefferson's final qualifying phrases (e.g., when religious actions "break out into overt acts against peace and good order") in the Virginia Bill for Establishing Religious Freedom, and by citing Virginia's subsequent action making bigamy a capital offense, does Waite in effect rescue his opinion from the torrent of Virginia writings and history that could easily have pushed the decision in the opposite direction.[235]

III. THE ORIGINAL UNDERSTANDING OF *REYNOLDS*

As Chief Justice Waite set out to write what he hoped would be a unanimous opinion addressing the scope of people's constitutional rights to act in accordance with their sincere religious beliefs, he was faced with four fellow Justices pre-committed to a qualifiedly accommodationist nineteenth-century interpretation of the Free Exercise Clause.[236] He was also armed with historical texts which suggested that this interpretation was consistent with Madison and Jefferson's understanding.[237] Finally, he was compelled to refute George Reynolds's argument that evolving principles of criminal law provided pious citizens with a greater degree of immunity than either the Founders or his

233. John A. Ragosta, *Virginia Statute for Religious Freedom*, MONTICELLO (Feb. 21, 2018), https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/virginia-statute-religious-freedom/ [https://perma.cc/J54R-JE4F].

234. *See id.*; *see also* Patrick Henry & James Madison, *Memorial and Remonstrance (1785)*, BILL OF RIGHTS INST., https://billofrightsinstitute.org/primary-sources/memorial-andremonstrance [https://perma.cc/QY69-NGQ9].

235. Drakeman, *supra* note 221, at 720.

236. *Id.* at 723.

237. *Id.*

colleagues were prepared to contemplate. If we read the free exercise portion of the *Reynolds* opinion in light of this hidden history, we find that the opinion makes an argument very different than the one that scholars and judges today attribute to it.

In its discussion of Reynolds's request to be exempted from criminal punishment, Waite's opinion for the Court famously engages in an "originalist" reading of the Free Exercise Clause.[238] It asks whether the founding generation would have understood Reynolds to have a natural right to knowingly violate a law which prevented him from satisfying his religious obligation to marry more than one woman.[239] Looking to three texts from James Madison and Thomas Jefferson, the Court concluded they would not.[240]

Justice Waite began by citing Madison's *Memorial and Remonstrance* for one principle that had become axiomatic in nineteenth-century American free exercise jurisprudence: religious liberty requires protection of Americans' right to carry out religiously motivated duties.[241] He cited the Virginia Bill for Establishing Religious Freedom for another: the Founders understood that the right to hold an opinion and to proselytize was protected.[242] To address activities other than proselytization, Justice Waite cited Jefferson's *Remonstrance* for the proposition that laws can interfere with religious actions only insofar as they respect man's "natural rights, convinced he has no natural right in opposition to his social duties."[243]

By the time they heard the *Reynolds* case, a number of Justices on the Court had publicly championed an accommodationist understanding of the Free Exercise Clause.[244] Justice Waite believed that the founding generation had also adopted this position, and his *Reynolds* opinion appealed to his evangelical brethren's pre-commitments by applying these principles in a manner that unmistakably echoed nineteenth-century accommodationist treatises, accommodationist judicial opinions, and, perhaps most significantly, Justice Strong's accommodationist lectures at Union Theological Seminary.[245] To justify its denial of an exemption from prosecution under antipolygamy laws, the *Reynolds* opinion highlighted evidence that, in the Justices' minds, conclusively proved that polygamy was a socially dangerous practice. Justice Waite began with a protracted discussion of the traditional consensus in Britain and America that polygamy was harmful and then turned to the contemporary

238. *See* Reynolds v. United States, 98 U.S. 145, 162–64 (1878).

239. *Id.* at 162.

240. *Id.* at 163–64.

241. *Id.* at 163 (citing Madison's *Memorial and Remonstrance* for the proposition that "'religion, *or the duty we owe the Creator*,' was not within the cognizance of civil government") (emphasis added).

242. *Id.* at 163 (citing Jefferson's *A Bill for Establishing Religious Freedom* for the proposition that religious liberty can be restricted when necessary to avoid "overt acts against peace and good order").

243. *Id.* at 164 (citing Jefferson's letter).

244. *See* discussion *supra* Part II.C.

245. *See id.*

scientific (now understood to be pseudoscientific)[246] evidence that the practice of polygamy did indeed threaten social order.[247] Then, as a matter of common sense, the Court suggested that polygamy threatened to create chaos by disrupting the normal application of laws, such as the laws of inheritance, which assume a monogamous society.[248] More dramatically, relying on the writings of Francis Lieber, the Court found that it was reasonable to believe that polygamy destroyed the social structures on which orderly society was based.[249] As noted already, Lieber was a champion of religious accommodation, and it was only because polygamy was so harmful that he believed antipolygamy laws could be enforced against Mormons.[250] Thus, the Court concluded that the federal antipolygamy laws were enforceable because they were laws reasonably designed to protect the public welfare.[251]

Of course, the opinion also had to address George Reynolds's extraordinary argument that British courts were coming to accept, as a matter of criminal law, that (with very rare exceptions not present in the case at bar) no person who acts with the goal of satisfying religious obligations can be held to have criminal intent.[252] Even if the government was constitutionally permitted to prohibit religious people from engaging in a particular action (such as polygamy), it could impose only civil penalties upon the religious violator.[253] And thus, the Court was required to overturn George Reynolds's criminal conviction.[254]

A person reading only the printed version of the opinion without awareness of its hidden history can be forgiven for misunderstanding some of these passages addressed to Reynolds's criminal law argument. This explains why those passages are today regularly cited as evidence that the Court had embraced, as a matter of *constitutional* law, a strong version of the belief–action principle holding that the Free Exercise Clause protects only religious beliefs and not religiously motivated action. Without familiarity with the briefs to the Court, it is easy to miss the fact that these passages are located in a part of the opinion that is not actually addressed to questions of what the Free Exercise Clause protects. They are instead located in a part of the opinion that is directed

246. *See* Reynolds v. United States, 98 U.S. 145, 165–66 (1878); *see also Pseudoscience*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pseudoscience [https://perma.cc/2H9K-ZKN4].

247. *Reynolds*, 98 U.S. at 165–66.

248. *Id.* at 165.

249. *Id.* at 166 ("Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.").

250. *See supra* notes 111–18 and accompanying text.

251. *Reynolds*, 98 U.S. at 166.

252. *See supra* notes 156–61 and accompanying text.

253. *Id.*

254. *Id.*

at an argument which said that, *irrespective of what the Free Exercise Clause protects*, people who act out of religious motivations lack the *mens rea* to be found guilty of an intentional violation of the law.[255]

To recognize that these passages, so often characterized as statements about the scope of free exercise rights, are actually directed at a question of criminal intent, one must remember that at oral argument, the Solicitor General had mocked Reynolds's *mens rea* argument by saying that such a rule was absurd and would prevent the state from prohibiting Americans from engaging in human sacrifice.[256] The Court clearly accepted the Solicitor General's concerns about the implications of Reynolds's radical argument that a religiously motivated person cannot be found to have the *mens rea* sufficient to sustain a conviction for *any* crime—even a crime that the Free Exercise Clause permits the state to enact.[257] It is for this reason that towards the end of his opinion for the Court, Waite includes a passage addressed specifically to the argument about criminal law that Reynolds made in his brief, and he explicitly embraces some of the points made by the Solicitor General at oral argument.

> [T]he only question which remains [after disposing of the constitutional question] is, whether [as a matter of criminal law] those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. *This would be introducing a new element into criminal law.* Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.[258]

Referencing the parade of horribles that the Solicitor General had invoked when he described the consequences of accepting Reynolds's *mens rea* argument, the Court continued:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . .
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[259]

255. *See Reynolds*, 98 U.S. at 164–67.
256. *See Is Polygamy a Crime?*, *supra* note 164.
257. *See Reynolds*, 98 U.S. at 166–67.
258. *Id.* at 166 (emphasis added).
259. *Id.* at 166–67.

Waite then added a sentence which confirms that this section is actually addressed to a question of *mens rea* under criminal law rather than a question of religious freedom under constitutional law: "A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does."[260]

Finally, the opinion ended its discussion by questioning whether the *Wagstaff* case, which George Reynolds referenced as part of his *mens rea* argument, was entirely relevant to the situation at bar:

> The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.
>
> In *Regina v. Wagstaff* (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made.[261]

It is understandable that contemporary scholars and judges who are unfamiliar with the lost history of *Reynolds v. United States* misunderstand the point that the Court is making in all of these passages. They read them as attempts to identify the types of religious activity that legislatures are constitutionally permitted to regulate.[262] And they suggest that they announce the following principle: as a constitutional matter, legislatures are prohibited from regulating religious belief, but they are entirely free to regulate any religiously motivated activity whenever and however they think best.[263] In fact, however, the Justice who wrote this passage and the Justices who signed on to it had already rejected the idea that the Free Exercise Clause leaves legislatures entirely free to interfere with a person's religious obligations.[264] They believed that laws interfering with religious practice *should* be subject to independent judicial scrutiny—one that would today be most analogous to a mild form of intermediate scrutiny.[265] The passage here simply states that they believe criminal law does not provide any *more* protection than the significant, but not absolute, protection that the Free Exercise Clause grants to people who want to act in accordance with their religious beliefs.

260. *Id.* at 167.
261. *Id.*
262. *See* discussion *infra* Part IV.D.
263. *Id.*
264. *See* discussion *supra* Part II.C.
265. *See id.*

As the next Part will show, for the better part of a century, many federal and state judges, including Justices on the Supreme Court, wrote opinions which seem to recognize, explicitly or implicitly, that *Reynolds* stood for the proposition that the right to free exercise gives people a qualified right to violate neutral generally applicable laws—a right that gives way if, and only if, the law satisfies a test that, if translated into the language of modern tiers of scrutiny, seems to be an analogue of some mild form of heightened scrutiny. In short, the orthodox reading of *Reynolds* today as a case which adopts a strong form of the belief–action doctrine is not only wrong, it is also of recent provenance. We have, to date, only ambiguous evidence about the process by which this misreading appeared and spread—first in the academy and then in the judiciary. But its consequences are clear, and they are very significant.

IV. LOSING THE ORIGINAL UNDERSTANDING OF *REYNOLDS*

The *Reynolds* opinion was widely reported in the press.[266] None of these accounts suggested that the decision announced a broad principle that people have only a constitutional right to believe but not to act in accordance with those beliefs or that courts are powerless to require governments to accommodate religious practices. For example, *The Daily Constitution* was typical in describing the decision merely as a ruling specifically on the constitutionality of antipolygamy legislation, sometimes adding that the Court had correctly found this legislation essential to maintain "the fundamental principles of society."[267]

Supreme Court opinions over the next decade similarly described *Reynolds* as a case which suggested that, although the Free Exercise Clause generally protects the right to perform the obligations of one's religion, it emphatically does not require the state to tolerate severely harmful behaviors like polygamy.

266. *See, e.g.*, *United States Supreme Court.: The Decision in the Case of Sonneborn Against A.T. Stewart & Co. Reversed—Dismissal of the Credit Mobilier Suit—The Constitutionality of the Anti-Polygamy Laws Affirmed.*, N.Y. TIMES, Jan. 7, 1879, at 3 ("[The *Reynolds* decision] holds that polygamy is not under the protection of the clause of the Federal Constitution which prohibits interference with religious belief . . . ."); *By Telegraph*, WKLY. ARIZ. MINER, Jan. 10, 1879, at 3 (stating that the *Reynolds* Court held that "Congress had the power to pass laws prohibiting polygamous marriages in Utah, and that such laws are constitutional"); *Polygamy*, THE DAILY CONST. (Atlanta), Jan. 10, 1879 (pronouncing that the *Reynolds* Court held that "the right of [C]ongress to legislate for the protection of public morals and for the protection of *the fundamental principles of society* cannot be abridged by the Mormon claim of religious belief . . .") (emphasis added); *Polygamy in the Territories Decision in the* Reynolds *Case*, IDAHO STATESMAN, Jan. 14, 1879 (stressing that the Court's decision was directed at preserving the "fundamental principles of society" from "the Mormon claim of religious belief.").

267. *Polygamy*, *supra* note 266.

A. Supreme Court's Understanding of Reynolds *as Evidenced in the Later Polygamy Cases: 1879–1890*

In the decade after *Reynolds* was decided, Mormons in Utah continued to practice polygamy, and the federal government responded by enacting increasingly draconian laws.[268] The Mormon Church continued to fund challenges to these antipolygamy laws, many of which were ultimately resolved in the Supreme Court by panels that included many of the Justices who had signed the *Reynolds* opinion.[269]

In *Miles v. United States*, the Supreme Court noted simply that *Reynolds* had held "that on an indictment for bigamy it was no defence that the doctrines and practice of polygamy were a part of the religion of the accused."[270] In the century that followed *Reynolds*, courts implicitly recognized that the Justices who signed that opinion would never have held (and, of course, *did* not hold) that constitutional guarantees of free exercise protect belief absolutely and provide zero protection for religious practices.[271] Instead, they appear generally, correctly, to have concluded that *Reynolds* had interpreted the Free Exercise Clause to provide meaningful but not absolute protections for people who wish to act in accordance with their religious beliefs.[272]

In *Davis v. Beason*, the Court upheld an Idaho territorial law disenfranchising any member of any church which believed that God had ordered some men to engage in polygamy.[273] *Reynolds* had already held that governments are permitted to prohibit the religiously motivated practice of polygamy (on the grounds that it is a uniquely immoral and socially corrosive practice which fell outside the normal constitutional protections for less harmful practices).[274] The only new question in *Davis* was whether the religiously motivated *advocacy* of polygamy was protected in a way that the religiously motivated *practice* of polygamy was not.[275] According to the Court, the answer is "no": the First Amendment does not protect *any* speech which advocates crime—notwithstanding the Constitution's protections for speech and for religion.

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268. *See* Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & REL. 281, 290–98 (1989).

269. *See id.*

270. Miles v. United States, 103 U.S. 304, 310 (1880).

271. *Id.* at 310–11.

272. *Id.* at 309.

273. Davis v. Beason, 133 U.S. 333, 347–48 (1890).

274. Reynolds v. United States, 98 U.S. 145, 168 (1878). *Davis* also cites *Reynolds* and *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), for the following proposition: "It is assumed by counsel of the petitioner, that . . . any form of worship may be followed . . . however destructive of society . . . if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth." *Davis,* 133 U.S. at 345.

275. *Davis,* 133 U.S. at 341–42.

> To call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.[276]

The case is interesting for *obiter dicta* that is often misunderstood. Justice Field's majority opinion makes a point to confirm that the Free Exercise Clause protects more than just belief:

> The [F]irst [A]mendment . . . was intended to allow every one [sic] under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, *and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others* . . . . It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.[277]

Nonetheless, in one much remarked-upon passage, the Court asserts: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[278] As we have seen, many today read *Reynolds* without reference to its deeper background, and draw from passages taken out of context the conclusion that the Justices who signed the *Reynolds* opinion intended to hold that the Free Exercise Clause did not protect religiously motivated actions.[279] Similarly here, some misread this passage with the assumption that the "general consent" referred to here is simply the opinion of a numerical majority of the public speaking through its legislators.[280] If this were true, *Davis* would stand for the proposition that although the right to hold unpopular religious beliefs is judicially protected from democratically enacted laws, the right to act in accordance with one's religious beliefs is not. But this was antithetical to Field's understanding of religious freedom. Field's evangelically inflected views on this subject have been described above.[281] The "general consent" to which he is referring here, is, instead, the consent of all Christian societies over time which judges will see enshrined in traditional Christian morality—which the evangelical Justices believed had to be preserved if a society was to survive.[282] This becomes clear in the sentences which follow:

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276. *Id.*
277. *Id.* at 342 (emphasis added).
278. *Id.* at 342–43.
279. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990).
280. *See id.* at 343.
281. *See supra* Part II.C.
282. *See Davis*, 133 U.S. at 343.

> There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the [C]onstitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, *recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation*, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[283]

In short, consistent with the opinion in *Reynolds*, the Court in *Davis* held that the Free Exercise Clause does not protect acts that are prohibited by legislation which a judge, after independent review, concludes are reasonably designed to promote a significant public interest. And applying this test it reiterates that, as it had already decided in *Reynolds*, laws which punish acts repugnant to traditional Christian sexual ethics are absolutely essential to ensure social cohesion, meaning that, to the minds of the Justices on the Court, they easily survive the requisite level of independent judicial scrutiny.[284]

In *Late Corporation of the Church of Latter Day Saints v. United States*, the Court upheld the seizure of Mormon Church assets.[285] The opinion was written by Justice Bradley, who, as we have seen, agreed strongly with Field, first, that judges must independently scrutinize any law that violated constitutionally protected rights and, second, that laws which enforced traditional Christian moral norms easily passed the required level of scrutiny.[286] Bradley's majority opinion cited *Davis v. Beason* for the proposition that the state has a right to prevent a person from engaging in religiously motivated practices when (and presumably only when) these practices are "open offenses against the enlightened sentiment of mankind."[287] Bradley then went on, as had *Reynolds* and *Davis*, to give as examples: human sacrifice, suttee, and polygamy.[288]

283. *Id.* at 342–343 (emphasis added).

284. *See id.* at 344–48.

285. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 65–66 (1890).

286. *See supra* notes 262–65 and accompanying text.

287. *Late Corp. of Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 50.

288. *Id.* at 49–50.

B. References to Reynolds *in Federal and State Free Exercise Cases 1890–1940*

After *Late Corporation* was decided in 1890, the Mormon Church stopped teaching polygamy.[289] Since few federal laws other than antipolygamy legislation were, at that time, interfering with religiously motivated activity, Free Exercise Clause litigation largely disappeared from the federal courts, and for decades, federal courts rarely had cause to engage with *Reynolds*, even indirectly.[290] In one Establishment Clause case, the D.C. Circuit noted that *Reynolds* seemed to recognize the "absolute" religious liberty of individuals without explaining what exactly that meant.[291] In *Bland v. United States*, the Second Circuit opaquely cited *Reynolds* for the proposition that "[a]uthoritative decisions have given full protection to the religious freedom granted by the First Amendment to the Constitution."[292] Outside of these cases, one only finds federal courts mentioning *Reynolds* primarily in cases that did not involve requests for religious accommodation and citing it for propositions that do not involve freedom of religion.[293]

Between 1890 and 1940, while Free Exercise Clause litigation had largely disappeared from federal courts, *Reynolds* was occasionally cited in state court opinions dealing with requests for accommodation from state laws interfering

289. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 148 (2002).

290. FRANK S. RAVITCH, LAW AND RELIGION, A READER: CASES, CONCEPTS, AND THEORY 525 (2004).

291. Roberts v. Bradfield, 12 App. D.C. 453, 466–67 (D.C. Cir. 1898), ("The history of the origin of the First Amendment is given by Chief Justice Waite, in the case of *Reynolds v. United States*, 98 U. S. 145, 162, 164. . . . [T]he declaration was intended to secure nothing more than complete religious liberty to all persons, and the absolute separation of the Church from the State . . . ."), *aff'd*, 175 U.S. 291 (1899).

292. Bland v. United States, 42 F.2d 842, 844 (2d Cir. 1930), *rev'd*, 283 U.S. 636 (1931). Between 1890 and 1940, when the First Amendment was first held to be incorporated against the states, the Supreme Court issued no opinions that dealt explicitly with the question of religious exemptions. *See generally* NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW 963 (6th ed. 1959). A discussion of free exercise exemptions and of the Court's precedents in that area appeared only as an aside in a concurrence in one Supreme Court case, *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265–68 (1934). There, Justice Cardozo said he "assumed" the Free Exercise Clause had already been incorporated into the Fourteenth Amendment. *Id.* He also suggested that the Free Exercise Clause permits courts in limited circumstances to grant exemptions, but to support this proposition, he cites *Davis v. Beason* and makes no mention of *Reynolds*. *See id.* at 265.

293. A few courts cite *Reynolds* for the proposition that a misunderstanding of the law will not excuse a violation of the law. *See* United States v. Stone, 8 F. 232, 245 (C.C.W.D. Tenn. 1881); Armour Packing Co. v. United States, 209 U.S. 56, 86 (1908); Hamilton v. United States, 268 F. 15, 20 (4th Cir. 1920); Standard Oil Co. v. United States, 179 F. 614, 627 (2d Cir. 1910); Blumenthal v. United States, 88 F.2d 522, 530 (8th Cir. 1937); Fall v. United States, 209 F. 547, 552 (8th Cir. 1913); Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938). Others cite *Reynolds* for the closely related point that people are legally liable for violations of the law even if they were unaware of the legal consequences of that action. Bentall v. United States, 262 F. 744, 746 (8th Cir. 1919); Easterday v. United States, 292 F. 664, 667 (D.C. Cir. 1923); Duke v. United States, 90 F.2d 840, 841–42 (4th Cir. 1937). For other citations to *Reynolds*, see Hallock v. United States, 185 F. 417, 426–27 (8th Cir. 1911) (discussing grand jury); Kleindienst v. United States, 48 App. D.C. 190, 204 (D.C. Cir. 1918) (Smyth, C.J., dissenting) (quoting from *Reynolds*, "conscience or discretion of the court"); Rassmussen v. United States, 197 U.S. 516, 525–26 (1905) (citing *Reynolds* in discussion of Sixth Amendment), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970); Sothern v. United States, 12 F.2d 936, 936 (E.D. Ark. 1926) (discussing marriage as a civil contract); O'Donoghue v. United States, 289 U.S. 516, 536 (1933) (discussing judicial power).

with religious practices.[294] It is beyond the scope of this paper to survey all state court free exercise opinions from this period which cite *Reynolds*. The cases and the citations I have found to date do not give us a clear picture of what state judges understood *Reynolds* to mean—other than that they thought it was clear that the state constitutional protections of religious freedom did not bar the court from enforcing laws imposing on religious practice in circumstances where a judge agreed that the religious practice could reasonably be seen as harmful.[295] In most of these cases, requests were denied.[296] In only one case I have found to date, a state court, here the Kansas Supreme Court, cited *Reynolds* to support its grant of an exemption.[297] It referenced *Reynolds* for the proposition that "[t]he law interferes with no mere religious opinions, *nor with religious practices, except such as tend to subvert the foundation of public morals and order.*"[298] Applying that principle to the case at bar, it voided a provision of common law which had interfered with a person's ability to underwrite Catholic masses.[299] In so doing, it stressed that the petitioner felt religiously obliged to promote masses, and the enforcement of the law was not reasonably calculated to promote the public welfare.[300]

C. Reynolds *and the Protection in the Supreme Court from* Cantwell *to* Smith

Free Exercise Clause litigation began to reappear more regularly in the Supreme Court after the Court's 1940 decision in *Cantwell v. Connecticut*, which held that the Fourteenth Amendment incorporated the Free Exercise Clause and applied it against the states.[301] Thereafter, religiously observant citizens came regularly to federal court asking the Court to enjoin state governments—or occasionally the federal government—from enacting and enforcing laws that interfered, however unintentionally, with their religious obligations.[302] After a fifty-year hiatus, the Supreme Court was back in the business of deciding religious accommodation cases. In the process, the Justices were forced to engage anew with *Reynolds*.[303]

294. *See, e.g.*, Scoles v. State, 1 S.W. 769, 772 (Ark. 1886) (Sabbath-breaking); Wooley v. Watkins, 22 P. 102, 105–06 (Idaho 1889) (voting ban); Commonwealth v. Plaisted, 19 N.E. 224, 226 (Mass. 1889) (Salvation Army band); State v. White, 5 A. 828, 829 (N.H. 1886) (Salvation Army band); City of Wilkes-Barre v. Garabed, 11 Pa. Super. 355, 359 (1899) (Salvation Army band).

295. *See, e.g.*, cases cited *supra* note 294.

296. *E.g.*, *id.*

297. Harrison v. Brophy, 51 P. 883, 884 (Kan. 1898).

298. *Id.* at 884 (emphasis added).

299. *Id.*

300. *Id.* at 883–84.

301. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

302. *See* MCCONNELL ET AL., *supra* note 289, at 148–49.

303. *Cantwell*, 310 U.S. at 303–05.

With the exception of one short interlude in the early 1940s, Justices on the Court often (and correctly) cited *Reynolds* for the proposition that the Free Exercise Clause provides meaningful protections for religiously motivated action—although they disagreed about precisely how strong those protections were and about how a nineteenth-century approach to protecting religious freedom could be translated and recast in light of the Court's new turn to analyzing rights claims through a new "tiers of scrutiny framework."[304]

1. *Between* Cantwell *and* Sherbert*, the Supreme Court Often Cited* Reynolds *for the Proposition that the Free Exercise Clause Protected Religiously Motivated Action and* Required *an Ambiguous Intermediate Tier of Scrutiny*

Cantwell involved a Jehovah's Witness who had provoked a violent outburst while trying to proselytize by playing a recording in public which harshly criticized other Christian sects—a recording which provoked some Catholics to violence.[305] The Witness was prosecuted under a regulation which prohibited anyone from soliciting money for an organization (secular or religious) unless they had sought and received a license to solicit in advance.[306]

In overturning the Witness's conviction, the Supreme Court held that the Free Exercise Clause applied not just to the federal government but to the states as well and held that the Clause protected people not just from laws punishing people for their beliefs but also, up to a point, from laws interfering with their religiously motivated actions.[307] Turning to the merits, the Court highlighted language in the *Reynolds* opinion which stressed that the Clause protects much (though not all) religious conduct: "[T]he [Free Exercise Clause of the First] Amendment embraces two concepts,— freedom to believe *and freedom to act*."[308] And then, consistent with the nineteenth-century accommodationist view of free exercise that the *Reynolds* Court had enshrined into law,[309] it translated this principle into the newly emerging tiers-of-scrutiny framework as a mild standard of heightened scrutiny in which the interest of the state had to be merely "substantial" (rather than "compelling" or even "important") but still "narrowly drawn" to advance that substantial interest.[310] Although the Court recognized that, in this case, the regulation *did* promote a substantial interest, it concluded that the regulation was not "narrowly drawn to define and punish specific conduct [that] constitut[ed] a clear and present danger to [that]

304. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1958).

305. *Cantwell*, 310 U.S. at 300–03.

306. *Id.* at 301–03.

307. *Id.* at 303–04.

308. *Id.* at 303 (emphasis added).

309. *See* discussion *supra* Part III.

310. *Cantwell*, 310 U.S. at 304, 311 (noting that it was enough for a regulation to promote the "peace, good order," or even the "comfort of the community" in a manner that was "substantial").

substantial interest of the State."[311] Interfering unreasonably with the defendant's religious practice, the law was unconstitutional.[312]

While Justice Frankfurter joined the majority in *Cantwell*,[313] he felt it important in a subsequent case to stress that, whenever the Court evaluates the reasonability of legislative judgments, it should show significant (arguably total) deference to the legislature. Thus, in 1940, Frankfurter wrote for the majority in *Minersville v. Gobitis*, a case that involved a child who had been expelled from public school for refusing to participate in a required flag salute ceremony on religious grounds.[314] Notably, Justice Frankfurter insisted that laws imposing upon religious practice must be subjected to the same type of scrutiny as laws imposing upon free speech.[315] In this case, however, he felt that the legislature had established flag-salute ceremonies as a tool to promote the compelling interest of national unity at a time of grave external threats,[316] and he believed courts had no competence in deciding whether salutes would actually achieve this result.[317] While he appeared, in some ways, to be holding a law imposing upon religious practice to a standard of heightened scrutiny that was even stricter than the one announced in *Cantwell*, he also seemed to suggest that a religious petitioner had the burden of persuasion that a law failed to meet this standard, and that because reasonable people can often disagree, few petitioners would be able to bear this burden.[318] As such, the Court in *Gobitis* seemed to be flirting with a return to the practice of nineteenth-century anti-accommodationists like Justice Gibson of Pennsylvania, who had accepted that in theory free exercise guarantees protected religious action that was not harmful,[319] but stated that in practice, courts applying this principle should presume that anything a state had forbidden was too harmful to permit.[320]

311. *Id.* at 311.

312. *Id.*

313. *Id.* at 300.

314. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591–600 (1940).

315. *Id.* at 595 ("Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom.").

316. *Id.* ("We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.").

317. *Id.* at 597–98.

318. *Id.* at 598–99 ("Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. . . . Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law.") (footnote omitted).

319. *See* the discussion of nineteenth-century anti-accommodationism, *supra* Part II.

320. *See supra* note 98 and accompanying text; *cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) (overruling *Gobitis* and explaining "this is the very heart of the Gobitis opinion, it reasons that 'National unity is the basis of national security,' that the authorities have 'the right to select appropriate means for its attainment,' and hence reaches the conclusion that such compulsory measures toward 'national unity' are constitutional").

If a majority on the Court was willing in *Gobitis* to flirt with the adoption of a new radically anti-accommodationist interpretation of the Free Exercise Clause, buyer's remorse set in almost immediately. In 1943, in *West Virginia State Board of Education v. Barnette*, the Supreme Court explicitly overruled *Gobitis*, overturning "[t]he decision of this Court in Minersville School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it."[321] The *Barnette* Court made a point to stress that the law at issue violated the religious defendants' right to freedom of expression, and Stone's opinion did not explicitly address their overlapping argument that the law also violated their right to act in accordance with the requirements of their faith.[322] The ramifications of the opinion were, however, clear. The *Barnette* Court reconfirmed that the First Amendment was incorporated against the states and thus required judges to independently examine state restrictions on religiously motivated expressive activity according to a standard that seemed to require a very high degree of reasonability—an ambiguous standard that, though still a bit nebulous, was clearly more demanding than today's rational basis, but also less lethal than today's strict scrutiny: "[F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the [S]tate may lawfully protect."[323] Recognizing the implications, Frankfurter wrote a bitter dissent in which he lamented the Court's decision to second guess the legislature by applying any form of heightened scrutiny to a law burdening religious speech.[324] Perhaps because the case was formally decided on free expression grounds rather than free exercise grounds, Frankfurter never suggested that such a decision was inconsistent with *Reynolds*—only that it was unwise.[325] But the omission might also have resulted from his recognition that the majority opinion was not, in fact, irreconcilable with *Reynolds*.

In 1944, in *Prince v. United States*, the Court considered a challenge to a municipal employment ordinance which was preventing a pious family from performing its religious obligations.[326] At this point, the Court was still in the early stages of elaborating what was to become the "tiers of scrutiny" framework that we today use, and the Justices had not settled on the terminology that is familiar to us: rational basis, strict scrutiny, intermediate

321. *Barnette*, 319 U.S. at 642.

322. *Id.* at 634–35, 642.

323. *Id.* at 639.

324. *Id.* at 647–49 (Frankfurter, J., dissenting).

325. *Id.* at 651–52 (Frankfurter, J., dissenting). Frankfurter noted, correctly, that Free Exercise Clause cases did not involve the question *whether* political institutions could prohibit anti-social behavior carried out in the name of religion, but rather *who* should be trusted to make the final determination that a particular action was anti-social. *Id.* at 652. He believed it should be the courts. *Id.* at 665. That he did not cite *Reynolds* as precedent for this position indicates that he correctly understood *Reynolds* either to be silent on the question or to take the opposite position.

326. Prince v. Massachusetts, 321 U.S. 158 (1944).

scrutiny.[327] Nonetheless, in his dissent in this case, Justice Murphy argued that the Court should begin its review of any ordinance which interferes with religiously motivated activity on the assumption that such an ordinance is constitutionally invalid, and that a court can permit such presumptively unconstitutional ordinances only if the court concludes that the law is "necessary."[328] Such a test anticipates the still embryonic test of strict scrutiny.[329] Rejecting Murphy's position, the majority agreed that the Constitution guaranteed people's right to fulfill their religious obligations, but it also noted that *Reynolds* seemed to subject laws burdening religious practice to a standard of scrutiny that is clearly lower than today's strict scrutiny.[330]

Thereafter, the Justices on the Warren and Burger Courts concluded, correctly, that *Reynolds* was a precedent which supported the practice of subjecting any law which impeded religious obligations to some form of heightened scrutiny.[331] As will become apparent, however, the Justices continued to struggle to reach agreement about how the principle requiring judicial protection of religious practice, which had been announced in *Reynolds*, should be translated into the new tiers of scrutiny framework or about what level of heightened scrutiny the Court should apply to neutral laws of general application that interfered with religious obligations. Usually, if not uniformly, the Court subjected laws to a version of heightened scrutiny that appeared to be less rigorous than strict scrutiny, often citing *Reynolds* in support of this practice.

2. *Growing Anxieties Over the Tension Between the Level of Scrutiny Applied in Free Exercise Cases Versus Cases Involving Other Constitutionally Protected Rights*

In the 1960 case of *Braunfield v. Braun*, the Supreme Court cited *Reynolds* for the proposition that "legislative power over mere opinion is forbidden but it

327. *See* discussion *infra* Part IV.C.2.

328. *Prince*, 321 U.S. at 173 (Murphy, J., dissenting).

329. *Id.* at 173–76 (Murphy, J., dissenting) ("[T]he human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable, and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case. . . . If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.")

330. *Id.* at 171 (majority opinion) (upholding a law which imposed upon religious practices on the grounds that it responded to a genuine threat to the safety of children but stressing that the Court would *not*, in the future, uphold "'any [that is, every] state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare'") (alteration in original).

331. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 379–81 (2006).

may reach people's actions when they are found to be in violation of *important* social duties or subversive of good order."[332] By 1963, however, in cases implicating rights challenges *other* than free exercise challenges, a majority on the Court, led by Justice Brennan, was embracing ever more tightly the now familiar binary "tiers-of-scrutiny" approach.[333] That is to say, they would ask whether the core of a right had been violated; if not, the Court would only apply the rational basis test (which was more lenient than the standard which the *Reynolds* Court had applied to a free exercise challenge), and if the core of the right at issue had indeed been violated, the Court would apply strict scrutiny (which was far more rigorous).[334]

It is beyond the scope of this Article to explore all of the many critiques of Brennan's preferred new approach or of the occasionally less-than-forthright way in which the Court has applied it in actual cases. Professor Jamal Greene, one of the most eloquent of the approach's critics, has suggested that in many cases the Court's claims to be applying a binary tiers-of-scrutiny analysis simply cannot be taken seriously because the Court itself recognized quickly that these tiers were too blunt to handle the complex issues that arise when courts have to balance the needs of society at large against the rights of an individual.[335] Thus, Greene argued in the *Harvard Law Review*, the Court has, in practice, found surreptitious ways to instead decide the fate of laws with something that approximates an intermediate test for reasonability.[336] Whether or not this is true outside the area of free exercise, the Court seems to have found the binary tiers of scrutiny particularly difficult to apply in the free exercise context.[337] Thus, after flirting in 1963 with applying full strict scrutiny to any law that interfered with a person's ability to perform religious duties, the Court implicitly backed away.[338]

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332. Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (emphasis added).

333. *See* Siegel, *supra* note 331, at 362–64.

334. *See generally id.* Over the course of the 1950s in cases involving alleged violations of fundamental rights (and particularly in cases involving free speech) the Court applied increasingly severe standards of review to legislation and to enforcement decisions. "[After] 1962 when Justices Frankfurter and Whittaker retired for reasons of health," a majority on the Court embraced a test which included all three elements of today's strict scrutiny test: (a) burden on the government (b) to show that the law/decision promoted a "compelling state interest" and that (c) there was no alternative method to advance that compelling interest. *Id.*

335. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 33 (2018) ("We all have our favorite examples of the Court pretending to apply rational basis review but instead applying a heightened form of scrutiny, or vice versa. When an ex ante choice of category largely determines the ex post decision, manipulation of that choice is to be expected: to deny a rights claim within this framework is to say the right does not exist. And so these cases do not reflect lawlessness *tout court*, a standard accusation, so much as a breakdown in legal form, not so unlike resort to equity to surmount the limits of common law pleading. Still, lack of transparency about the basis for decision is a rule-of-law problem that the rights-as-trump frame invites.") (footnotes omitted).

336. *Id.* at 46–47.

337. *See* Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990).

338. *Id.*

Justice Brennan convinced a majority in the 1963 case of *Sherbert v. Verner* to join him in holding that when a person challenges a neutral law of general application which imposes on religious obligations, the government must demonstrate that its prohibition addresses a "compelling interest."[339] Finding that the law at issue in that case failed this extraordinarily rigorous standard, Justice Brennan voided the law.[340] By contrast, Justice Harlan's dissent (joined by Justice White) insisted that the Court could and should continue to apply a milder form of heightened scrutiny.[341] Because the law under attack would survive this level of scrutiny, the dissenters would have upheld it.[342]

In an exhaustive survey of subsequent free exercise cases, Michael McConnell argued that, although Justice Harlan had lost the battle in *Sherbert*, for a time it appeared that he might have won the war.[343] For over twenty-five years after *Sherbert*, the Court seems implicitly to have reverted to its longstanding practice of applying a mild form of heightened scrutiny which was stricter than rational basis but not so severe as strict scrutiny.[344] Even Justice Brennan, the author of the *Sherbert* majority, appeared to have supported this retreat. In *Wisconsin v. Yoder*, the majority—including Brennan—cited *Reynolds* for the proposition that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers,"[345] but that the State exceeds its power to regulate when judges find that a regulated action does not "pose[] some substantial threat to public safety, peace or order."[346] The replacement of the word "necessary" with the word "substantial" here is telling.

At the time it was decided, *Yoder* seemed notable primarily for the majority's apparent decision to retreat from *Sherbert*'s insistence that generally applicable laws interfering with religious obligations should be analyzed using the language of strict scrutiny and, instead, to reembrace, at least implicitly, the practice of applying something more demanding than rational basis review, but less exacting than strict scrutiny.[347] In retrospect, however, the case is also notable

339. Sherbert v. Verner, 374 U.S. 398, 406 (1963); *cf.* Nicholas Nugent, *Toward a RFRA That Works*, 61 VAND. L REV. 1027, 1034–35 (2008).

340. *Sherbert*, 374 U.S. at 410.

341. *See id.* at 423 (Harlan, J., dissenting) ("Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. . . . Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.") (internal citations omitted).

342. *See id.*

343. McConnell, *supra* note 337, at 1128–29.

344. *See id.*

345. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

346. *Id.* at 230 (quoting *Sherbert*, 374 U.S. at 402–03).

347. *Id.* at 219–22.

for a strange partial dissent penned by Justice Douglas, a short opinion the significance of which could hardly have been predicted at the time it was issued.[348]

In his partial dissent, Douglas rejected the majority's at-the-time unexceptional—and correct—view that *Reynolds* had interpreted the Free Exercise Clause to provide at least some qualified protection for people's right to act in accordance with their religious beliefs.[349] With no other Justice willing to sign, Douglas's opinion asserted for the first time that *Reynolds* had held that the Free Exercise Clause protected religious belief absolutely but religious practice not at all.[350] According to Douglas, the Court could not continue to apply any form of heightened scrutiny at all until the Court had expressly overruled *Reynolds*.[351]

Justice Douglas's claim probably reflects a development that will be discussed in the next Subpart, namely the mysterious spread within the legal academy during the 1960s and 70s of a mistaken, new, anti-accommodationist interpretation of *Reynolds*. However, as of 1973, this misinterpretation had not really infiltrated the judiciary. Not only was Justice Douglas's rereading of *Reynolds* rejected by his colleagues in 1973, but for twenty years it continued to find almost no favor on the Court.[352] Through the 1980s, *Reynolds* was cited in Supreme Court majority opinions only for the proposition that the Free Exercise Clause permitted judges to uphold *some* laws that interfered with religious obligations.[353] During that time, no Justice ever cited *Reynolds* for the proposition that the Free Exercise Clause required them to uphold (at least on free exercise grounds) all such burdens, and a number of majority opinions suggested that *Reynolds* is best read to require a form of heightened scrutiny.[354]

Away from the Court, however, around the time that *Yoder* was decided, academic misreadings of *Reynolds* had begun to appear, readings which were describing *Reynolds* as a case that might plausibly be read to say that the Free

348. *Id.* at 241–49 (Douglas, J., dissenting).

349. *Id.*

350. *Id.* at 247–49.

351. Douglas did not explain why he interpreted *Reynolds* in this hitherto-unprecedented way. It seems possible that his reading was influenced by some of the academic articles that are discussed *infra* notes 378–82.

352. *See infra* notes 354, 389.

353. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990) (finding, based on *Reynolds*, that Oregon could withhold unemployment payments from employees fired for their use of peyote, even when such use was a part of their religion).

354. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257–58 (1982) (citing *Reynolds* for the proposition that "[n]ot all burdens on religion are unconstitutional" and noting that the Court had since clarified this principle to say that the Court would not grant exemptions from laws when (and only when) the State could show the laws were "essential to accomplish an overriding governmental interest"). As late as 1983, in *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983), the Supreme Court cited *Reynolds* to support its assertion that "[o]n occasion [the Supreme] Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct."

Exercise Clause protected only belief and not action. Within the academy, they quickly began to metastasize.

D. Metastasizing Misreadings of Reynolds *Within the Academy and the Supreme Court's Eventual Adoption of Them*

After the Second World War, one finds a striking and hard-to-explain shift in casebooks and academic commentaries discussing Supreme Court cases on free exercise. To see this shift, one can compare casebooks from the 1950s with ones from the 1970s. From the earlier period, Foundation Press's 1954 edition of the Noel Dowling and Richard Edwards casebook *American Constitutional Law* and Dowling's influential 1959 follow-up, *Cases on Constitutional Law*, are representative.[355] They can be contrasted with the 1975 edition of Foundation Press's successor casebook, *Cases and Materials on Constitutional Law*, by Gerald Gunther.[356]

Dowling and Edwards' 1954 casebook discusses the *Reynolds* opinion in its section on "Freedom of Religion," and the description of the case is straightforward and non-controversial.[357] Drawing on language from Waite's discussion of the original understanding of the Free Exercise Clause, the casebook summarizes the holding of *Reynolds* as this: Congress cannot ever regulate what people believe, but is permitted to prohibit some religiously motivated activities, namely those which are "in violation of social duties or subversive of good order."[358] Case notes characterize subsequent precedents as, for the most part, ones in which the enforceability of a law imposing upon religious obligations depends upon the Court's independent evaluation of the reasonability of the legislature's conclusion that an act is harmful to important social interests and that prohibiting said act is likely to promote the public welfare.[359] The casebook does not characterize later cases which block enforcement of neutral, generally applicable laws interfering with religious obligations as cases which are inconsistent with the principle announced in *Reynolds*.[360]

355. NOEL DOWLING & RICHARD EDWARDS, AMERICAN CONSTITUTIONAL LAW (9th ed. 1954); *cf.* NOEL DOWLING, CASES ON CONSTITUTIONAL LAW (6th ed. 1959).

356. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975). The author thanks Professor Gerald Neuman for highlighting the subtle contrast between Dowling's, Edwards's, and Gunther's discussion of *Reynolds*.

357. DOWLING & EDWARDS, *supra* note 355, at 743.

358. *Id.*

359. *See id.* at 743–48 (noting that courts have exempted some people from punishment for violating neutral laws of general application which require them to violate religious beliefs, while at the same time, "the power of the states has not undergone complete subordination" and thus courts have occasionally refused to exempt pious people from the operation of laws which prevent them from fulfilling religious obligations).

360. *See id.* at 746–48.

Similarly, in Noel Dowling's more elaborate 1959 casebook, *Cases in Constitutional Law*, the section on "Freedom of Religion: The Free Exercise Clause" begins by describing the principle that the *Reynolds* Court had attributed to the founding generation and which it said should guide courts presented with a request for exemption on First Amendment grounds from a neutral, generally applicable law which interfered with religious practices—namely the principle that the government is permitted to punish religiously motivated actions when (and presumably only when) they "[violate] . . . social duties or . . . good order."[361] To demonstrate how the Court later applied this principle, Dowling provides case notes which describe how the Court has sometimes granted exemptions and has sometimes refused to do so.[362] The casebook gives excerpts from *Cantwell*, where the Court granted an exemption, and from *Gobitis*, where the Court did not.[363] Strikingly, the excerpts from *Gobitis* include not only portions of the majority opinion explaining why exemptions must, in this case, be denied in deference to the legislature's judgment that the prohibited action is harmful, but also extensive sections from Stone's dissent.[364] In the excerpted parts of this dissent, Stone agrees that legislatures can sometimes enact and executives can enforce neutral laws of general application which have the effect of preventing religious practices.[365] However, Stone cites *Davis v. Beason* for the proposition that this can be done when (and presumably only when) the acts being prohibited are actually harmful, and he insists that, in the case at bar, the majority has shown excessive deference to the legislature's judgment about harmfulness.[366] After providing these excerpts from Stone's dissent, Dowling's casebook explains that in *Barnette*, the Court, speaking through Justice Stone, overruled *Gobitis* and, for all practical purposes, adopted the approach proposed in Stone's *Gobitis* dissent.[367] In a series of short case notes, Dowling then summarizes cases in which the Court applied the Stone approach—evaluating neutral laws of general application in order to determine whether the Constitution permits those laws to be enforced against people whose religious practices are being impeded.[368] Again, the 1959 casebook does *not* describe opinions which grant religious exemptions as being in any way inconsistent with

361. DOWLING, *supra* note 355, at 962.

362. *Id.* at 970–71.

363. *Id.* at 963, 971.

364. *Id.* at 971–74.

365. *Id.* at 974–76.

366. *Id.* at 971–76.

367. *Id.* at 976–77.

368. *Id.* at 977 n.1 (suggesting that exemptions are *always* required when laws interfere with verbal attempts to advocate for a religious teaching); *id.* at 977 n.2 (suggesting that the Court should rarely, if ever, grant exemptions to federal laws enacted pursuant to Congress's war powers authority—with the implication that they can more easily be granted to laws enacted pursuant to other Congressional powers, such as its Commerce Clause powers).

Reynolds (or *Davis*).[369] Instead, it treats them implicitly as part of an ongoing attempt to determine the appropriate level of deference that judges should show to a legislature that has chosen to punish actions that some citizens feel religiously compelled to perform.[370]

By contrast, Gunther's 1975 casebook is remarkably different. Within its discussion of the First Amendment, it includes a section entitled "Constitution and Religion: . . . Free Exercise."[371] *Reynolds* appears in an unprecedented subsection here, "Introduction: The 'Belief-Action' Distinction and the Protection of [Religious] Conduct."[372] In his discussion, Gunther contrasts *Reynolds* and *Davis v. Beason* (each of which, he claims, adopted a "belief only" understanding of the Free Exercise Clause) with later cases in which the Court holds that the Clause protects religiously motivated action.[373] To support his interpretation of *Reynolds* as an opinion which holds religiously motivated action to be constitutionally unprotected, Gunther's casebook does not rely, as the earlier casebook had, upon *Reynolds*'s discussion of the original understanding of the Free Exercise Clause. Instead, apparently unfamiliar with the background and briefing of the case, Gunther looks to language from the section of the opinion that was devoted to refuting the appellant's claim that under emerging standards of criminal law, a religiously motivated actor does not have the *mens rea* necessary to be convicted of an intentional crime.[374] Presumably unaware that this section was addressed to a question of criminal rather than constitutional law, Gunther concludes: "[u]nder that view suggesting that only belief, not practice, is protected by the [F]ree [E]xercise [C]lause, does the clause assure any protection beyond that already afforded by the free speech guarantee?"[375] And in a footnote, he suggests that the answer is no and that post-war Supreme Court cases are thus inconsistent with the belief–action doctrine established in *Reynolds* and affirmed in *Davis v. Beason*.[376]

The difference between the casebooks from the 1950s and Gunther's is striking. Why did Gunther, unlike Dowling, look for the Court's constitutional holding in a section devoted to a question of criminal law, and why did he use that language to characterize *Reynolds* as categorically anti-accommodationist? And why was a similar, decontextualized misreading of the case being spread by other academics in the 1970s as well?

It is beyond the scope of this Article to explore fully the origins of this new approach to reading *Reynolds*. Having done only preliminary research, I can here

369. *See* DOWLING & EDWARDS, *supra* note 355, at 746–48.
370. *See id.*
371. GUNTHER, *supra* note 356, at 1505.
372. *Id.* at 1505–06.
373. *Id.* at 1506–07.
374. *Id.*
375. *Id.* at 1506.
376. *Id.* at 1506, 1506 n.2.

suggest tentatively some possible sources for this new, decontextualized, and ultimately incorrect reading of *Reynolds*. I will then make the more important point that this misinterpretation, so neatly captured in Gunther's casebook, continued to gain traction and had by the 1980s inexplicably become orthodox within the academy and thereafter, unfortunately, in the judiciary. Eventually, this widely shared misreading came to be used to justify the decision in *Smith*.

So where might we find of the roots of Gunther's reframing of *Reynolds* as a categorically anti-accommodationist opinion? In a 1962 law review article, Philip Kurland (who clerked for the anti-accommodationist Justice Frankfurter)[377] suggested obliquely that the *Reynolds* opinion was "tainted" by its tendency to treat "belief" as fundamentally different from "action" and to provide less protection for the latter.[378] Taking this intuition further, J. Morris Clark wrote in a 1969 issue of the *Harvard Law Review* that *Reynolds* might plausibly be read to hold that laws punishing religious belief should be subject to strict scrutiny, while laws which burden practice should be subject to nothing more than rational basis review.[379] Through some yet-undiscovered process, this fairly tentative provocation was taken up by other academics and converted into the stronger (demonstrably wrong) claim that *Reynolds* could *only* be plausibly read to hold that while religious belief received the highest protection, religious practice received none at all. As we have seen, the 1975 edition of Gunther's casebook takes this position.[380] Notably, by 1978, the first edition of Laurence Tribe's influential treatise on constitutional law also confidently asserted that *Reynolds* had held that the Free Exercise Clause only protected belief.[381]

Had this position by the mid-1970s already become orthodox within the academy? If not, it became so quickly thereafter. There is no space in this Article to survey all the academic work which misinterprets *Reynolds* during this period. As an example, though, one might note that in the 1982 edition of their influential casebook on church and state, *Toward a Benevolent Neutrality: Church, State, and the Supreme Court*, legal historians Robert Miller and Ronald Flowers asserted that the *Reynolds* opinion had not given First Amendment protection

377. *See Obituary: Philip Kurland, College and Law School*, U. CHI. CHRON. (Apr. 25, 1996), http://chronicle.uchicago.edu/960425/obitkurland.shtml [https://perma.cc/4S7K-QZHX].

378. *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8 (1961); *cf.* ROBERT E. CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES: A GUIDE TO CURRENT PROBLEMS AND EXPERIENCE 93 (1956).

379. J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 327 (1969) ("[The *Reynolds* opinion] left open the possibility that some actions lay beyond the pale of regulation, [but] the Court's failure to state the existence of any limitation on legislative power suggested that the scope of free exercise was circumscribed by the boundary between belief and act so long as a secular purpose for regulation existed.").

380. *See* GUNTHER, *supra* note 356, at 1505.

381. *See* LAURENCE H. TRIBE, THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS: LIMITS ON GOVERNMENT AUTHORITY, *reprinted in* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 853–54 n.13 (1st ed. 1978).

to religious action, and they criticized the opinion on the grounds that it proposed a "simplistic and antilibertarian 'action-belief' doctrine."[382] Similarly, in 1990, one of the country's most vigorous accommodationist academics lamented in the *Harvard Law Review* that the *Reynolds* Court had misunderstood the meaning of the Free Exercise Clause and had precluded the grant of exemptions: "[T]he term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief," he said and continued, "This point merits emphasis, because in 1879 [in *Reynolds*,] the Supreme Court, relying on Jefferson, explicitly rejected this reading."[383]

In that same year, in 1990, a majority on the Supreme Court embedded the now-orthodox academic misreading of *Reynolds* into its jurisprudence. In *Employment Division v. Smith*, the Court denied the request of two Native Americans for a religious accommodation of a ritual practice in the Native American Church.[384] According to a five-Justice opinion for the Court, authored by Justice Scalia, *Reynolds* stood for the principle that the Free Exercise Clause guaranteed to people only the freedom to believe what they chose and gave them no constitutional right to act in accordance with those beliefs, a principle that would preclude courts from granting Free Exercise Clause exemptions.[385] To explain away later cases that had applied heightened scrutiny to laws interfering with religious practice, the majority construed those later precedents as narrow ones—granting exemptions only in cases where the law being challenged was not generally applicable or where it not only imposed on religious practice but also violated some other right as well.[386] Underscoring the triumph of the new misreading of *Reynolds*, none of the four Justices who rejected Scalia's anti-accommodationist interpretation of the Free Exercise Clause called out Scalia's misreading of the *Reynolds* opinion or noted that the Court's previous decisions had, up to that point, interpreted *Reynolds* differently.[387]

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382. ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD A BENEVOLENT NEUTRALITY 59 (2d ed. 1982).

383. McConnell, *supra* note 139, at 1488; *see also* McConnell, *supra* note 337, at 1124 (1990) ("[*Reynolds*] was decided on the theory that the Free Exercise Clause protects only beliefs and not conduct—a premise that the Court repudiated in 1940.") (footnote omitted). McConnell's articles inspired rebuttals challenging his conclusions about *Reynolds*'s original understanding but agreeing that *Reynolds* precluded religious exemptions. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917–32 (1992); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–28 (1991).

384. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990).

385. *Id.* at 879 ("'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).' We first had occasion to assert that principle in *Reynolds v. United States* . . . .") (quoting *Gobitis*, 310 U.S. at 594–95).

386. *Id.* at 884.

387. *See id.* at 891–907 (O'Connor, J., concurring); *see also id.* at 907–21 (Blackmun, J., dissenting).

The *Smith* decision triggered a wave of vociferous criticisms.[388] However, while these critiques lamented *Smith*'s stingy understanding of free exercise, none seem to have recognized the fact that *Smith* had simply misunderstood *Reynolds* and its progeny.[389] Instead, modern judges and academics erroneously continued to assume that *Smith* had read *Reynolds* correctly and that overruling *Smith* meant implicitly overruling *Reynolds* as well.[390]

Despite their divergent political and jurisprudential backgrounds, the authors of all leading casebooks on religion and law today seem uniformly to agree that *Reynolds* interpreted the Free Exercise Clause in a categorically "anti-accommodationist" manner; in other words, they held that the Clause protects a person's right to believe, but it gives them no right to act in accordance with their belief.[391] The text of McConnell, Garvey, and Berg is typical of the modern consensus view among academics:

> In the view reflected in *Reynolds v. United States*, there was no room for constitutionally mandated religious exemptions. As a theoretical matter religion and civil authority occupied separate, nonintersecting spheres. They

388. Justice Alito has exhaustively catalogued these. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 543–619 (2021) (Alito, J., concurring) (describing the dissents in *Smith* itself, futile Congressional attempts to overturn the decision legislatively, critiques of *Smith* in the dicta of subsequent cases, and significant academic criticism).

389. The nearest I have found to a dissent from this view is a passing comment in Justice Souter's concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which he suggests that *Reynolds* could be read as ambiguous on the question of whether courts are precluded from granting exemptions outside the area of religious speech. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 575 n.6 (1993) (Souter, J., concurring).

390. *See* Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7, 22–25 (1995); *see also* Hamburger, *supra* note 383, at 915–16 nn.1–2; *see also infra* note 391 and accompanying text.

391. RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT 843 (1st ed. 2008) (characterizing *Reynolds* as protecting "only religious belief, and not actions mandated by religious belief"); ARNOLD H. LOEWY, THE FIRST AMENDMENT 1188, 1197 (1999) (explaining that *Reynolds* "held that the Free Exercise clause could never be a defense to a violation of a criminal statute" and "that a religious claim can never prevail over an otherwise valid state law"); MCCONNELL ET AL., *supra* note 289, at 148 ("In the view reflected in Reynolds v. United States, there was no room for constitutionally mandated religious exemptions."); JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM 296 (2d ed. 2001) (citing *Reynolds* for the proposition that "[f]or the criminal law to admit of [any] exceptions based upon religious conscience would invite anarchy and would strip the government of all power"); FRANK S. RAVITCH, LAW AND RELIGION, A READER 579 (1st ed. 2004) ("Under [the *Reynolds*] approach there is a dichotomy between belief and practice, with the former being absolutely protected but the latter receiving no protection when it conflicts with legal requirements."); STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 608 (5th ed. 2011) (claiming that *Reynolds* rejected Free Exercise Clause exemptions); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 621 (3d ed. 2008) (stating that *Reynolds* denied an exemption without discussing the broader issue of exemptions); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 476 (1st ed. 1999) (stating *Reynolds* protects religious belief, and not actions mandated by religious belief); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 974 (3d ed. 2008) ("[*Reynolds*] hold[s] that the Free Exercise Clause doesn't entitle people to religious exemptions from generally applicable laws."). Even the few who recognize that the *Reynolds* opinion does not explicitly preclude the possibility of exemptions refuse to entertain the possibility that the Justices meant explicitly to hold that such exemptions were sometimes required. *See e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 272 (1991) ("[T]he Supreme Court's first square confrontation with Free Exercise was in 1878. It unequivocally rejected the conduct exemption.") (footnote omitted).

> should not come into conflict. As a practical matter religious exemptions would "permit every citizen to become a law unto himself."[392]

Similarly, Foundation Press recently published a study guide for students of U.S. jurisprudence on Freedom of Religion. There, students seeking a quick, clear summary of early free exercise jurisprudence learn that:

> According to *Reynolds*, citizens have the right to *believe* in a religious practice such as polygamy, and they have the freedom to express their opinion through speech. Yet they are not free to act on their belief by actually engaging in the religious conduct. Needless to say, this is an extremely narrow, if not barren, interpretation of the Free Exercise Clause.[393]

Like the academy, the Supreme Court has continued to accept unquestioningly *Smith*'s misreading of *Reynolds*. In fact, it appears that the Court has now forgotten that anyone ever read the case differently. This is evident in the Court's recent opinions in *Fulton*.

As already noted above, in their *Fulton* concurrence, Justices Alito, Thomas, and Gorsuch follow the orthodox understanding of *Reynolds* and criticize that opinion at length, describing it as a case that "rested primarily on the proposition that the Free Exercise Clause protects beliefs, not conduct."[394] And similarly, Justices Barrett, Breyer and Kavanaugh fail to recognize that *Reynolds* might support their intuition that laws interfering with religious actions should be held to a form of heightened scrutiny that is less demanding than strict scrutiny. Thus, in their concurrence in *Fulton*, they lamented only that they were unsure whether the use of strict scrutiny was consistent with Supreme Court's precedents between *Sherbert* and *Smith*,[395] cases which sometimes used language different from the language that is usually associated with the strict scrutiny that *Sherbert* called for.[396] Understandably, given the widespread confusion about *Reynolds* today, they don't seem to appreciate the roots of that inconsistency: namely, that the Justices on the Vinson, Warren and Burger Courts had recognized that *Reynolds* had adopted a principle of mild accommodationism which did not align neatly with the rigid emerging tiers-of-scrutiny standard that was coming to be applied in many rights cases—one which, at least at the time of *Sherbert*, appeared to recognize only two tiers, rational basis or strict scrutiny.[397] The Justices in *Sherbert* and subsequent cases were struggling to agree about whether to shoehorn the old standard of protection into the rigid, new binary framework or, whether instead, to establish a new intermediate standard

392. MCCONNELL ET AL., *supra* note 289, at 148.

393. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 78–79 (1st ed. 2003).

394. Fulton v. City of Philadelphia, 593 U.S. 522, 595 (2021) (Alito, J., concurring).

395. *Id.* at 614–16 (Alito, J., concurring).

396. *Id.* at 598–603.

397. Siegel, *supra* note 331.

of review which more accurately captured the practice that *Reynolds* and its progeny had advocated.[398]

Fulton reveals dramatically how the academy and the courts have lost sight of the original meaning of *Reynolds*. By restoring the original understanding of *Reynolds* and its progeny, and by highlighting the good-faith struggle that the Supreme Court has followed as it tried to apply the *Reynolds* principle, this Article suggests that *Reynolds* illuminates an unexpected possible road map for the Court going forward as it prepares to replace *Smith*.

V. REREADING *REYNOLDS* AND ITS PROGENY—IMPLICATIONS FOR THE FUTURE

Who cares if the academy and the Supreme Court today misread a case decided almost 150 years ago? At least in this case, we all should care.

First, to adjust our understanding of *Reynolds* is not simply to adjust our reading of one case. *Reynolds* was the Supreme Court's first case involving the question of Free Exercise Clause exemptions, and it has become a central part of a myth that historians, lawyers, and judges tell about free exercise in the U.S. Supreme Court. Students in the U.S. today are told a dramatic story about the history of federal free exercise jurisprudence. The gist of this story is captured in the following passage taken from a leading academic historian:

> The U.S. Supreme Court generally followed Waite's [categorically anti-accommodationist] construction of the free exercise clause for eighty-four years. However, in a 1963 about-face, *Sherbert v. Verner* required government to demonstrate a compelling interest before requiring believers to do something their faith forbade, or before forbidding them from doing something their faith required. In short, *Sherbert* held that sometimes faith could trump law. Then, in 1990, [in *Employment Division v. Smith*] with four justices dissenting on the point, the Court generally reverted to Waite's interpretation in *Reynolds*. . . .[399]

This account is entirely typical of current descriptions of free exercise in the U.S. insofar as it depicts a Supreme Court careening drunkenly between absolute hostility towards religious exemptions and uncritical approval of them. But as this Article has made clear, this orthodox account of free exercise jurisprudence today has it completely wrong. Free exercise history is *not* a story of dramatic changes. Rather, it is one of relative consistency. The Justices who signed the *Reynolds* opinion understood themselves to be embracing and inscribing into the Court's jurisprudence a well-elaborated nineteenth-century accommodationist understanding of the Free Exercise Clause.[400] According to

398. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

399. STEPHENSON, *supra* note 169, at 176.

400. *See* discussion *supra* notes 262–65.

those Justices, constitutional guarantees of free exercise inscribed into law the fundamental right of a person not only to believe whatever one chose but also to act in accordance with one's beliefs *unless* a judge, after independent review, concluded that the religiously motivated action was reasonably likely to threaten the public health, welfare, or safety.[401] For roughly a century thereafter, judges in federal courts and state courts, including most importantly the Supreme Court, correctly understood the holding in *Reynolds*, and they generally tried to honor it.[402] As the tiers-of-scrutiny framework took hold in the second half of the twentieth century, some Justices on the Supreme Court suggested that courts should modify the standard of heightened scrutiny so that courts in free exercise cases would apply either the new rational basis test or the new strict scrutiny test.[403] But until 1990, any dramatic moves in either direction were quickly repented of and abandoned.[404]

Second, if the Court recognizes all of this, it will not only correct the historical record, but it will find powerful evidence to help it as it tries to develop a sustainable majority position regarding the appropriate standard of review to apply to neutral laws of general application which prevent people from fulfilling their religious obligations.

Restoring *Reynolds* can help resolve the debates in *Fulton* and pave the way for a robust post-*Smith* free exercise jurisprudence. As noted in the introduction, in *Fulton v. City of Philadelphia*, the Court heard a challenge to a municipal ordinance which required all adoption agencies occasionally working with the city to place orphans with same-sex couples.[405] Taken together, the opinions in *Fulton* reveal that there are at least five Justices on the Court today who are convinced that *Smith* was wrongly decided and want to hold that the Free Exercise Clause requires courts to apply *some* form of heightened scrutiny to laws that interfere with a person's ability to fulfill their religious duties.[406] *Fulton* also revealed, however, that those five are deeply divided about what standard of heightened scrutiny is appropriate.

While Chief Justice Roberts and three other Justices have refused to say yet whether they agree that *Smith* should be overruled and, if so, what standard of heightened scrutiny to apply to neutral laws that interfere with religious conduct,[407] others were less coy. Justice Alito, joined by Justices Thomas and

401. *See supra* note 182 and accompanying text.

402. *See supra* Part IV.

403. *See supra* Part IV.C.2.

404. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990).

405. Fulton v. City of Philadelphia, 593 U.S. 522, 529.

406. *Compare id.* at 543–44 (Barrett, J., concurring), *with id.* at 545–619 (Alito, J., concurring).

407. *Compare id.* at 522–43 (Roberts, C.J.) (joined by Kagan, J., and Sotomayor, J., and remanding without deciding either of these questions), *with id.* at 543–44 (Barrett, J., Kavanaugh, J., and Breyer, J., concurring in judgment but opining that *Smith* was wrongly decided and should be replaced by a test more nuanced than strict scrutiny). Justice Jackson, who replaced Justice Breyer, has not said where she stands on this issue.

Gorsuch, disagreed with the Court's decision to remand.[408] They insisted that the Court should have used *Fulton* as an opportunity to immediately overrule *Smith* and to hold that the Free Exercise Clause requires courts to apply strict scrutiny to any law or policy that interferes with a person's religious obligations.[409]

Justice Barrett, joined by Justice Kavanaugh and Justice Breyer, wrote separately to state that she agreed entirely that *Smith* was wrongly decided.[410] However, she expressed skepticism that the Court should instead apply "an equally categorical strict scrutiny regime." Her concurrence implies that she and the justices who co-signed might be willing to hold that the Free Exercise Clause requires courts to apply something less than strict scrutiny to neutral laws that interfered with religious practice but were struggling to understand whether such an approach can be justified under the Court's precedents.[411] To that end, she identifies provocative language in several exemptions cases from the period after World War II, language which suggests that the Court was *not* necessarily applying strict scrutiny in those cases.[412] Finding there is some ambiguity about the level of scrutiny that the Warren and Burger Courts applied to neutral laws of general application which interfere with religious practices, Justices Barrett, Kavanaugh, and Breyer felt compelled to join Justice Roberts's opinion for the Court.[413] By following Roberts's approach, the Court postponed the time when it would declare *Smith* overruled. It bought itself time to seek further briefing on the question of whether the Court would be justified in applying an intermediate standard of scrutiny to neutral laws interfering with religious practices.[414]

Count this Article as an advance briefing on those questions. The Court needs to correct the recent (but now hegemonic) misreading of *Reynolds* as a case holding that the Free Exercise Clause leaves religious actions unprotected. It must recognize that *Reynolds* ushered in a century of precedents (including some which postdate *Sherbert*) in which the Court consistently (if not uniformly) tried in good faith to follow *Reynolds*'s guidance by applying a form of heightened scrutiny that did not rise to the level of strict scrutiny. Once it does, the conclusion in Alito's *Fulton* concurrence becomes less obvious, and Justice Barrett and Kavanaugh's tantalizing alternative becomes more compelling.

Based on the findings of this Article, Justice Alito and the Justices who joined his concurrence in *Fulton* might reconsider their preference for strict scrutiny in cases involving challenges to neutral laws that interfere with religious

408. *Id.* at 545–619 (Alito, J., concurring).
409. *Id.* at 550–55.
410. *Id.* at 543–44 (Barrett, J., concurring).
411. *Id.*
412. *Id.*
413. *Id.*
414. *See id.*

conduct. If they do, a majority of five will coalesce around a new approach to resolving free exercise claims—one which restores the forgotten approach that the Court applied for over a century from *Reynolds* through *Smith* and protects free exercise through the application of an intermediate tier of scrutiny which falls somewhere between contemporary strict scrutiny and contemporary rational basis review.

Even if Justices Alito, Thomas, and Gorsuch remain steadfast in their preference for strict scrutiny, a reevaluation of the Court's understanding of free exercise precedents might allow for the formation of a different majority composed of Justices Barrett, Kavanaugh, and the four Justices who did not opine in *Fulton* on the questions, "Should *Smith* should be overruled?" and, if so, "What should replace it?" Confronted with the lost history of the Court's interpretation of the Free Exercise Clause from *Reynolds* through *Smith*, these Justices are likely to accept that it is time for *Smith* to be overruled. And they may be comforted by the fact that this consistent tradition of protection has never (or at least only once in *Sherbert*) required courts to strike down every law that fails the draconian test of strict scrutiny.

CONCLUSION

This Article has covered an enormous amount of ground. Its basic points can, however, be summarized concisely. In recent decades, the academy and the judiciary have come almost unanimously to embrace an understanding of *Reynolds v. United States*[415] that is demonstrably incorrect. They thus fail today to appreciate the relative consistency with which judges for a century understood the holding in *Reynolds* and faithfully tried to translate it for judges who felt compelled to analyze free exercise challenges through a tiers of scrutiny framework.

The Court's 1990 opinion in *Employment Division v. Smith*[416] represented a radical break with this tradition of engaging respectfully with the *Reynolds* Court's proposal that whenever a neutral law of general application interferes with religious obligations that law of general application must be subjected to independent review by judges in order to determine whether that interference is reasonable in light of the social benefits it is trying to promote. Instead, *Smith* embraced an idiosyncratic misreading of *Reynolds* that had been incubating quietly in the laboratory of academia and then tragically escaped to infect the Court. And working from this misreading, the *Smith* Court asserted that it did not have to struggle to understand what level of scrutiny to apply in cases involving requests for religious exemptions from generally applicable laws. Why? Because, it said, *Reynolds* had held that the Free Exercise Clause did not

415. 98 U.S. 154 (1879).

416. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

provide any protection for people who wished to act in accordance with their religious beliefs.[417]

Happily, two years ago, in *Fulton v. City of Philadelphia*, six Justices—five of whom remain on the Court today—made clear that they believe the words of the Free Exercise Clause and the writings of the founding generation can only plausibly be read to guarantee both the right to believe *and* the right, up to a point, to act in accordance with those beliefs.[418] They are thus prepared to overrule *Smith* and to hold that courts must subject to heightened scrutiny any law that interferes with religious practices. Those six Justices disagreed, however, about what free exercise should look like in a post-*Smith* world and, specifically, about what standard of scrutiny the Court should apply to neutral laws that interfere with a person's religious obligations.[419] Unfortunately, never thinking to question the current orthodoxy about *Reynolds*, the six failed to see that *Reynolds* and its progeny actually support their position that *Smith* must be overruled and that these cases may help the Court think in new ways about the standard that should be applied in religious liberty cases going forward. Hopefully this Article will help the Justices on the Court today see how the future of free exercise jurisprudence may be hiding in its nineteenth-century past.

417. *Id.* at 879–80.

418. *See supra* Introduction.

419. *See id.*