

NOTES

LIBERTY OF CONSCIENCE, POLITICAL PROCESS THEORY, AND FOUNDING-ERA FREE EXERCISE

Religious freedom claimants have achieved tremendous success before the Supreme Court in recent years.¹ Yet free exercise jurisprudence has bounced between skepticism and embrace of religious exemptions from generally applicable laws, and differing judicial and scholarly approaches reflect disagreement on the purpose of the Free Exercise Clause. Grounding the doctrine in an originalist understanding of the clause could help tidy this mess. Founding-era sources reveal that the First Amendment’s drafters included the Free Exercise Clause to protect liberty of conscience — the right to choose for oneself what to believe. However, the drafters also understood the Free Exercise Clause to embrace political process theory — the notion that groups unable to vindicate their rights via the political process should receive more stringent constitutional protection. Therefore, an analysis of the original understanding of the Free Exercise Clause reveals that, as applied to generally applicable laws, the clause safeguards the liberty of conscience of only politically disempowered religious minorities.

This Note’s contribution is harmonizing these two theories: Liberty of conscience supplies the *what* of free exercise exemptions and political process theory supplies the *who*. This argument proceeds in five Parts. Part I argues that the Free Exercise Clause lacks a central theory, generating inconsistent results. Parts II and III explore the historical grounding and define the contours of liberty of conscience and political process theory, respectively. Part IV describes how this novel conception of free exercise would operate and addresses possible criticisms. Part V discusses the theory’s implications.

I. A PHILOSOPHICAL DISCONNECT

The jumbled state of free exercise doctrine demonstrates the inadequacy of the clause’s current philosophical underpinnings. Despite frequent litigation before the Supreme Court, Justices and scholars disagree about the meaning of the Free Exercise Clause and the sweep of its protection.² While *Employment Division v. Smith*³ held that the

¹ See Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 845 n.6 (2022).

² See Eric Segall, *Putting the “Exercise” Back in Free Exercise*, 106 KY. L.J. 635, 637 (2017); James M. Oleske, Jr., *A Regrettable Invitation to “Constitutional Resistance,” Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1354–55 (2017); Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 201.

³ 494 U.S. 872 (1990).

clause does not demand free exercise exemptions from generally applicable laws,⁴ religious claimants have not lost a free exercise exemption case before the Supreme Court — excluding the emergency docket — since 1997.⁵ The Justices seem poised to overrule *Smith* altogether⁶: Petitioners have openly asked to overturn *Smith*,⁷ and the Court seems keen to accept the invitation.⁸ Furthermore, in concert with the erosion of the Establishment Clause,⁹ the Court has transformed free exercise doctrine to require government funding for religious institutions where such funding was once barred.¹⁰ In other words, “[f]ree exercise is in the middle of a revolution.”¹¹

This revolution has been disorganized and unprincipled because free exercise doctrine lacks a central theory.¹² While there are many free exercise theories in circulation,¹³ few capture the original meaning of the Free Exercise Clause. Consequently, courts have long struggled to balance religious freedom, equality and dignitary rights,¹⁴ and state regulatory authority.¹⁵ And free exercise protection has often applied

⁴ *Id.* at 882; *see also id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940); *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

⁵ Lund, *supra* note 1, at 845 n.6.

⁶ *See* Laycock, *supra* note 2, at 201.

⁷ *See, e.g.*, Petition for a Writ of Certiorari at 35–37, *Miller v. McDonald*, No. 25-133 (U.S. 2026); *see also* Gabrielle M. Girgis, *What Is a “Substantial Burden” on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1759 & n.9 (2020).

⁸ *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment).

⁹ *See* *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Supreme Court, 2024 Term — Comment: The Structure of Religious Preference*, 139 HARV. L. REV. 211, 211–12 (2025) (quoting Frederick Schauer, *Disestablishing the Establishment Clause*, 2022 SUP. CT. REV. 219, 219 (2023)).

¹⁰ *Contrast* *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“No tax in any amount, large or small, can be levied to support any religious activities or institutions . . .”), *with* *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause . . .”). In 2025, a deadlocked Court failed to reach consensus on whether publicly funded religious charter schools were not only permitted by the Establishment Clause but mandated by the Free Exercise Clause. *Okla. Statewide Charter Sch. Bd. v. Drummond*, 145 S. Ct. 1381, 1382 (2025) (mem.), *aff’g by an equally divided court*, *Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1 (Okla. 2024).

¹¹ Lund, *supra* note 1, at 844.

¹² *See* Oleske, *supra* note 2, at 1357; John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 781–82 (1986). *But see* Schwartzman, Schragger & Tebbe, *supra* note 9, at 213 (2025) (arguing that religious “preferentialism” is the organizing principle).

¹³ *See infra* section I.A, pp. 1120–22.

¹⁴ *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 392 (1987); Barbara B. Knight, *Religion in Prison: Balancing the Free Exercise, No Establishment, and Equal Protection Clauses*, 26 J. CHURCH & STATE 437, 438 (1984); *see also, e.g.*, *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 588, 609 (8th Cir. 2022); Sara Edwards, *What to Do if CVS, The Nation’s Largest Pharmacy, Refuses to Fill Your Birth Control*, USA TODAY (July 29, 2022, at 11:34 ET), <https://www.usatoday.com/story/money/retail/2022/07/27/pharmacist-wont-fill-birth-control-because-faith/10154078002> [<https://perma.cc/P268-ZD6H>].

¹⁵ *See* Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1, 10 (2019); Elizabeth Sepper, *Free Exercise Lochmerism*, 115 COLUM. L. REV. 1453, 1459, 1464, 1468–69 (2015).

unequally to different faiths.¹⁶ Not only is an originalist understanding more faithful to the Framers' intent, but it also may lead to more predictable and principled judicial outcomes. Section I.A argues that the proffered philosophical explanations of the Free Exercise Clause are insufficient, and section I.B demonstrates the effect of this theoretical void on substantial burden jurisprudence.

A. Existing Theories Are Flawed

One theory of the Free Exercise Clause treats religious liberty as freedom of expression.¹⁷ By this view, the entire First Amendment shares the common justification of protecting individual expression, placing religious and secular beliefs on the same footing.¹⁸ But this theory overlooks two key points: First, the Framers considered religion to be a unique sphere that required protection and separation from the state.¹⁹ In light of the rule against surplusage,²⁰ the inclusion of both freedom of religion and freedom of speech in the First Amendment implies that the Framers recognized a distinction between the two.²¹ The Founders' particular emphasis on religious freedom was the result of the American colonies' role as a haven for persecuted religious minorities.²² Second, the Framers considered religious beliefs and practices to carry a moral and existential significance to their adherents above their expressive value.²³

¹⁶ Verna C. Sánchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 35 n.12 (1997); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 251 (2012) (finding that Muslim free exercise plaintiffs had a 22.2% likelihood of success in federal court compared to 38% for non-Muslims); see also Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1297 (2021).

¹⁷ See generally William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

¹⁸ See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 51 (1996). *Contrast* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592–93, 599–600 (1940) (rejecting a free exercise challenge to a school's policy requiring students to salute the flag), *with* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639, 642 (1943) (striking down an identical policy on speech grounds).

¹⁹ See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 298, 301 (Robert A. Rutland et al. eds., 1973) (1785); Vincent Blasi, *Essay, School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORN. L. REV. 783, 791 (2002).

²⁰ See, e.g., *United States v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”).

²¹ See Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–53 (2012); cf. GARVEY, *supra* note 18, at 45.

²² See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990) (“[The Framers] had, moreover, seen the results of religious conflict in England and of a variety of approaches to church-state relations in the colonies . . .”).

²³ See Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 THE FOUNDERS' CONSTITUTION 77, 77 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[A]ll attempts to influence [the mind] . . . are a departure from the plan of the holy author of our religion . . .”); see also Schwartzman, *supra* note 21, at 1354 & n.13 (collecting arguments about religion's special status).

Other scholars consider religion akin to minority status, analogizing the Free Exercise Clause to the Fourteenth Amendment's Equal Protection Clause.²⁴ This comparison has fallen out of fashion in the Supreme Court,²⁵ although Justice Barrett revived the analogy in her concurrence in *Fulton v. City of Philadelphia*.²⁶ Yet this idea fails to capture the Founders' belief that religion is more than minority status, incorporating morality, personal autonomy, and expression.²⁷ The Founding generation believed that religion was different from other personal characteristics, as "Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain, by making it altogether insusceptible of restraint."²⁸

Similarly, following the "most favored nation" theory, current Supreme Court doctrine holds that religion must be treated as favorably as comparable secular activities and entities.²⁹ However, the Free Exercise Clause is structured as a negative right, protecting against laws that "prohibit[] the free exercise" of religion.³⁰ The "most favored nation" view twists the Free Exercise Clause into a positive right to government subsidies for religion³¹ and to the ability to discriminate against others.³² While the First Amendment does elevate religion, the Free Exercise Clause was ratified to prevent religious persecution and coercion,³³ a function that does not require *preference* for religion. Further, the Framers' rejection of government funding for religion motivated the Establishment Clause,³⁴ so they did not intend the Free Exercise Clause to compel such subsidies.³⁵

Other scholars cast freedom of religion as "a dignitary right" protecting personal autonomy.³⁶ Yet, similar to the view of religion as

²⁴ See Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 277 (2006); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1498 (2023); see also Emp. Div. v. Smith, 494 U.S. 872, 886 n.3 (1990); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

²⁵ Cf. Mahmoud v. Taylor, 145 S. Ct. 2332, 2342 (2025) (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)) (holding that a generally applicable school policy violated the Free Exercise Clause based on disparate impact alone and without reference to minority status); *id.* at 2353 (quoting *Yoder*, 406 U.S. at 211).

²⁶ 141 S. Ct. 1868 (2021); *id.* at 1882–83 (Barrett, J., concurring).

²⁷ See GARVEY, *supra* note 18, at 42–43, 51–52.

²⁸ Jefferson, *supra* note 23, at 77.

²⁹ Lund, *supra* note 1, at 850; see also *id.* at 849; Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

³⁰ U.S. CONST. amend. I.

³¹ See Carson, 142 S. Ct. at 2002.

³² See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

³³ See Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705, 707–09 (2018).

³⁴ See Jefferson, *supra* note 23, at 77.

³⁵ See NOAH FELDMAN, *DIVIDED BY GOD* 209 (2005).

³⁶ Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 509 (2003); see GARVEY, *supra* note 18, at 42; see also Torcaso v. Watkins, 367 U.S. 488, 495 (1961); United States v. Seeger, 380 U.S. 163, 184 (1965).

expression, this theory discounts religion's unique position. The Founders saw religious freedom not only as a right but as a "duty . . . to render to the Creator such homage and such only as he believes to be acceptable to him."³⁷ By this view, religion is not a matter of personal autonomy, because religious practice is emphatically not an individual decision: "It is God who makes the choice."³⁸

Finally, "[t]he theological rationale" is the most popular justification for free exercise.³⁹ This theory posits that religion is grounded in divine authority such that forcing a choice between obeying the law and obeying one's religion is inherently wrong.⁴⁰ However, if religion is about answering to a higher authority, it may not accommodate religious diversity, as the majority need not accommodate beliefs that defy their version of that authority.⁴¹ The theological argument also rests on preventing interference with salvation.⁴² But the Founders celebrated religious diversity and sought to prevent religious persecution.⁴³ And many religions make no connection between practice and salvation,⁴⁴ yet Thomas Jefferson wrote that the clause's drafters intended to include Jewish people and members of other religions who do not seek reward in the afterlife.⁴⁵ Thus, each leading theory is inconsistent with either the structure or the original understanding of the Free Exercise Clause.

B. *Insubstantial Definition of Substantial Burden*

The lack of a central theory has rendered the Court's substantial burden case law incoherent. Prior to *Smith*, the Court held that a generally applicable regulation constituted a free exercise violation only where it imposed a substantial burden on the plaintiff's religious exercise (and was not "justified by a compelling governmental interest").⁴⁶ However, the Supreme Court's definition of substantial burden was

³⁷ Madison, *supra* note 19, at 299.

³⁸ GARVEY, *supra* note 18, at 46.

³⁹ Brownstein, *supra* note 36, at 509.

⁴⁰ *Id.*; see GARVEY, *supra* note 18, at 51–52; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1617 (1993); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014).

⁴¹ Brownstein, *supra* note 36, at 510; see also Letter from Benjamin Franklin to the London Packet (June 3, 1772), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 58, 58 ("[E]very sect believing itself possessed of *all truth*, and that every tenet differing from theirs was *error*, conceived that when the power was in their hands, persecution was a duty required of them by that God whom they supposed to be offended with heresy.").

⁴² See GARVEY, *supra* note 18, at 52–53.

⁴³ See James Madison, Speech at the Virginia Ratifying Convention (June 12, 1788), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 88, 88 (arguing that the "multiplicity of sects" would help avoid the tendency "of any one sect to oppress and persecute the rest").

⁴⁴ See, e.g., GARVEY, *supra* note 18, at 53 (discussing Calvinists, for example).

⁴⁵ See THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), as reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 85, 85.

⁴⁶ See *Emp. Div. v. Smith*, 494 U.S. 872, 883 (1990) (citing, inter alia, *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

indecisive and indeterminate.⁴⁷ Lower courts struggled to perform this analysis, resulting in circuit splits and divergent results.⁴⁸ Although *Smith* nominally dispensed with the substantial burden analysis for most state law cases,⁴⁹ its incoherence still matters: First, Congress included a statutory substantial burden test for federal laws in the Religious Freedom Restoration Act of 1993⁵⁰ (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000⁵¹ (RLUIPA). Under these statutes, the Court's substantial burden analyses have been equally tortured.⁵² Second, the Justices seem likely to bring back some sort of substantial burden analysis for constitutional exemption claims.⁵³

The Court struggled to evaluate substantial burden in its pre-*Smith* case law, never articulating a clear standard for substantiality and instead employing a piecemeal approach.⁵⁴ Absent a clear rubric, the Court looked to diverse factors to evaluate burdens on religion: the existence of a choice between a religious practice and a benefit or criminal sanction in *Sherbert v. Verner*,⁵⁵ *Thomas v. Review Board*,⁵⁶ and *Hobbie v. Unemployment Appeals Commission*;⁵⁷ the law's purpose to interfere with or penalize religion in *Gillette v. United States*;⁵⁸ the ability to practice one's religion in other ways in *O'Lone v. Estate of Shabazz*;⁵⁹ the presence of coercion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*;⁶⁰ and the character of government action in *Bowen v. Roy*.⁶¹ When deferring to the executive branch in cases like *Goldman v. Weinberger*,⁶² the Court made no attempt to evaluate the burden on religion at all.⁶³ At times, the Court looked for the mere existence of a legal-religious conflict,⁶⁴ and at times, it required that burden to be

⁴⁷ See Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 634 (2016); Eric H. Wang, Comment, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 726 (2023); Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1, 2; Jess Zalph, Comment, *A Weighty Question: Substantial Burden and Free Exercise*, 25 U. PA. J. CONST. L. 953, 954–55 (2023).

⁴⁸ Wang, *supra* note 47, at 744.

⁴⁹ See *Smith*, 494 U.S. at 883–84.

⁵⁰ Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), *invalidated in part by*, *City of Boerne v. Flores*, 521 U.S. 507 (1997); *id.* § 3, 107 Stat. at 1488.

⁵¹ Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc to 2000cc-5); *id.* §§ 2–3, 114 Stat. at 803–04.

⁵² See Helfand, *supra* note 47, at 1–3; Strasser, *supra* note 47, at 634.

⁵³ See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring); Zalph, *supra* note 47, at 956.

⁵⁴ Zalph, *supra* note 47, at 965–66.

⁵⁵ 374 U.S. 398 (1963); *id.* at 404.

⁵⁶ 450 U.S. 707 (1981); *id.* at 719.

⁵⁷ 480 U.S. 136 (1987); *id.* at 139.

⁵⁸ 401 U.S. 437 (1971); *id.* at 462.

⁵⁹ 482 U.S. 342 (1987); *id.* at 351–52 (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

⁶⁰ 485 U.S. 439 (1988); *id.* at 449–50.

⁶¹ 476 U.S. 693 (1986); *id.* at 699.

⁶² 475 U.S. 503 (1986).

⁶³ See, e.g., *id.* at 509–10.

⁶⁴ See, e.g., *United States v. Lee*, 455 U.S. 252, 257 (1982).

“substantial.”⁶⁵ The Court’s terminology sometimes determined the outcome of its analysis: In *United States v. Lee*,⁶⁶ the Court asked merely whether a tax “interfere[d] with [the appellee’s] free exercise rights” and found that it did,⁶⁷ whereas in *Hernandez v. Commissioner*,⁶⁸ the Court evaluated whether a tax “placed a substantial burden on the observation of a central religious belief or practice,” then implied that it did not.⁶⁹ This confusion is not lost on the Court, as it may have excised free exercise exemptions in *Smith* in part because of administrability issues with substantial burden analysis.⁷⁰

The Court’s application of the statutory test has further muddled substantial burden jurisprudence. While RFRA establishes that “[g]overnment shall not substantially burden a person’s exercise of religion” unless the law satisfies strict scrutiny,⁷¹ the provision includes no definition of substantial burden.⁷² In *Burwell v. Hobby Lobby Stores, Inc.*,⁷³ Justice Alito’s substantial burden analysis considered two factors: “the size of the penalty” and “the sincerity of the [plaintiffs’] beliefs.”⁷⁴ The Court had never before considered sincerity to be an element of substantial burden, and it had even rejected such an inquiry in the constitutional context.⁷⁵ The Court’s statutory substantial burden methodology has also differed from its constitutional one. In *O’Lone*, the Court’s constitutional substantial burden test hinged on whether the imprisoned plaintiffs were able to engage in “alternative means of” religious exercise.⁷⁶ Yet, in *Holt v. Hobbs*,⁷⁷ the Court made clear that “whether the RLUIPA claimant is able to engage in other forms of religious exercise” could not impact the substantial burden analysis.⁷⁸ This lack of agreement about the substantial burden test bodes poorly for the test’s application post-*Smith*.

The wide variance of substantial burden outcomes reflects the lack of philosophical cohesion in free exercise doctrine. While the Court purports to adopt an objective standard for substantial burden, in reality, it

⁶⁵ *E.g.*, *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

⁶⁶ 455 U.S. 252 (1982).

⁶⁷ *Id.* at 257.

⁶⁸ 490 U.S. 680 (1989).

⁶⁹ *Id.* at 699.

⁷⁰ *See* *Emp. Div. v. Smith*, 494 U.S. 872, 883 (1990) (describing divergent results reached under the *Sherbert* test).

⁷¹ 42 U.S.C. § 2000bb-1(a) to (b).

⁷² *See generally id.*

⁷³ 573 U.S. 682 (2014).

⁷⁴ *Zalph*, *supra* note 47, at 974.

⁷⁵ *Cf. Smith*, 494 U.S. at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment)) (disavowing judicial judgments about “the centrality of . . . religious practices”).

⁷⁶ *O’Lone v. Est. of Shabazz*, 482 U.S. 342, 351 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

⁷⁷ 574 U.S. 352 (2015).

⁷⁸ *Id.* at 362; *accord id.* at 361.

relies on subjective intuitions about what practices deserve free exercise guarantees.⁷⁹ And the proliferation of theories means that the Court's beliefs about the scope and nature of free exercise protection often change. Thus, the cases are coherent within each philosophical approach yet discordant across them. Of the cases discussed above, only those reflecting the theological rationale resulted in a finding of substantial burden. In those cases, the Court held that the mere existence of a choice between a religious practice and a government benefit was sufficient to create a substantial burden.⁸⁰ Yet cases reflecting other free exercise theories held that such a conflict was not enough.⁸¹ In cases reflecting the free speech and equal protection views of free exercise, the presence of alternative means of expression or the absence of discrimination counted against substantial burden.⁸² These cases betray significant disagreement about what the Free Exercise Clause protects. In several cases, the Justices emphasized the word "prohibit" in the First Amendment's text, concluding that only explicit prohibitions on religious practice can violate the Free Exercise Clause.⁸³ But, at the same time, the Court reasoned that prohibitions on practices do not violate the Free Exercise Clause, which protects beliefs rather than acts.⁸⁴ Coalescing around a substantive philosophy of free exercise will help the Court remain faithful to a clear method of substantial burden analysis.

II. LIBERTY OF CONSCIENCE AT THE FOUNDING

The Free Exercise Clause is ripe for originalism, as the Framers were prolific in their writings about religious liberty.⁸⁵ Yet, despite the Supreme Court's originalist leanings in other doctrinal spheres, its free exercise jurisprudence has been surprisingly divorced from original meaning.⁸⁶ A return to free exercise first principles would make the doctrine more faithful to the clause's true meaning and help craft a more concrete substantial burden test. This Part argues that the Framers'

⁷⁹ Cf. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–52 (1988) (explaining the need for a consistent limiting principle for free exercise claims while minimizing the burden on Indigenous religious beliefs).

⁸⁰ See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Rev. Bd.*, 450 U.S. 707, 717 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987).

⁸¹ See *Bowen v. Roy*, 476 U.S. 693, 706 (1986) (opinion of Burger, C.J.); *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990) (quoting *Gillette v. United States*, 401 U.S. 437, 461 (1971)).

⁸² See *Bowen*, 476 U.S. at 703, 708; *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 352 (1987); *Smith*, 494 U.S. at 877, 882.

⁸³ See *Lyng*, 485 U.S. at 451, 456 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)); *Bowen*, 476 U.S. at 700 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)); *id.* at 699; *Smith*, 494 U.S. at 878 (quoting U.S. CONST. amend. 1).

⁸⁴ See *Bowen*, 476 U.S. at 699; *Smith*, 494 U.S. at 877.

⁸⁵ Kent Greenawalt, *Originalism and the Religion Clauses: A Response to Professor George*, 32 *LOY. L.A. L. REV.* 51, 51 (1998).

⁸⁶ See McConnell, *supra* note 22, at 1413.

desire to safeguard liberty of conscience was the primary motivation for the Free Exercise Clause.

The Framers understood religious freedom in terms of *liberty of conscience* — an individual’s right to hold whichever religious beliefs they choose and to engage in uncompelled worship.⁸⁷ By this theory, humans are “rational creatures”⁸⁸ who have a responsibility to seek the truth, especially in the realm of spiritual or religious convictions.⁸⁹ While scholars have proposed slightly varying definitions of liberty of conscience,⁹⁰ the Framers seemed to adopt a conception attributed to Saint Thomas Aquinas, which embodies “the freedom to choose and exercise forms of divine worship.”⁹¹ This freedom includes the right to worship as one wishes, “join with” others in that worship, “and to refuse” entirely to participate in religious exercise.⁹² John Locke, whose philosophy informed the Framers’ conception of religious freedom,⁹³ wrote “that Liberty of Conscience is every man[’]s natural Right,”⁹⁴ because “true and saving Religion consists in the inward perswasion of the Mind, without which nothing can be acceptable to God.”⁹⁵ A rational person “cannot be compelled to the belief of anything by outward force.”⁹⁶ Instead, each person must be able to seek their own spiritual truth, and they logically must “recognize that other[s] . . . [a]re also rational” beings with this same right to “freedom of . . . belief.”⁹⁷ As such, the government may not compel anyone to engage in religious activity to which they object, or to abandon their religious convictions.⁹⁸ The Framers agreed that only “[r]eason and free enquiry” can create “true religion.”⁹⁹ Accordingly, they debated enshrining “equal rights of conscience” in the First Amendment¹⁰⁰ instead of “free exercise [of religion].”¹⁰¹ Although they altered the language due to disagreements about the Establishment

⁸⁷ See Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders’ Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387, 1392 (2016).

⁸⁸ Heyman, *supra* note 33, at 718, 722.

⁸⁹ *Id.* at 722 (quoting JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. III, ch. XI, § 3, at 509 (Peter H. Nidditch ed., Clarendon Press 1975) (1689)).

⁹⁰ See, e.g., Nelson Tebbe, *The Supreme Court, 2020 Term — Comment: The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 270–71 (2021).

⁹¹ Michael J. White, *The First Amendment’s Religion Clauses: “Freedom of Conscience” Versus Institutional Accommodation*, 47 SAN DIEGO L. REV. 1075, 1076 (2010); accord *id.* at 1079.

⁹² *Id.* at 1076.

⁹³ Heyman, *supra* note 33, at 708.

⁹⁴ JOHN LOCKE, A LETTER CONCERNING TOLERATION 51 (James H. Tully ed., Hackett Publ’g Co. 1983) (1689).

⁹⁵ *Id.* at 27.

⁹⁶ *Id.* at 7.

⁹⁷ Heyman, *supra* note 33, at 710–11 (describing Locke’s view).

⁹⁸ White, *supra* note 91, at 1079.

⁹⁹ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of N.C. Press 1955) (1787).

¹⁰⁰ 1 ANNALS OF CONG. 757 (1789) (Joseph Gales ed., 1834).

¹⁰¹ U.S. CONST. amend. 1.

Clause,¹⁰² members of Congress interpreted the “right of conscience” and the free exercise of religion to be synonymous¹⁰³ and read the clause to guarantee “that Congress shall make no laws touching religion, or infringing the rights of conscience.”¹⁰⁴ Such a conception would prevent explicit targeting of religion and prohibit laws that violate liberty of conscience even without direct reference to religion.¹⁰⁵

This focus on freedom from compulsion is evident in Founding-era sources. Informed by sectarian violence in Europe, Locke viewed religious intolerance and persecution as grave challenges to political stability¹⁰⁶ and saw compelled religion as an affront to liberty of conscience.¹⁰⁷ The Framers also echoed John Milton, who wrote that forcing the exercise of religion is “to compell hypocrisie, not to advance religion.”¹⁰⁸ Accordingly, in ratifying the First Amendment, Madison “apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”¹⁰⁹ In a letter to Jefferson, Madison celebrated the failure of a proposed tax to fund religious schools on the grounds that it would have coerced adoption of certain religious beliefs,¹¹⁰ expressing pride at having “in this country, extinguished forever the ambitious hope of making laws for the human mind.”¹¹¹ Jefferson also opposed “attempts to influence [religion] by temporal punishments or burthens, or by civil incapacitations.”¹¹² This idea was reflected in state constitutions, important source material for the Framers in formulating the First Amendment.¹¹³ The Virginia Declaration of Rights — drafted by Madison and animating his and

¹⁰² See 1 ANNALS OF CONG. 757–58.

¹⁰³ *Id.* at 758 (statement of Rep. Benjamin Huntington); cf. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), as reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 23, at 96, 96 (describing the final language as an “expression of the supreme will of the nation in behalf of the rights of conscience”).

¹⁰⁴ 1 ANNALS OF CONG. 759 (statement of Rep. Samuel Livermore).

¹⁰⁵ See Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 163 (2015).

¹⁰⁶ McConnell, *supra* note 22, at 1431.

¹⁰⁷ LOCKE, *supra* note 94, at 27.

¹⁰⁸ GARVEY, *supra* note 18, at 50 (quoting JOHN MILTON, A TREATISE OF CIVIL POWER IN ECCLESIASTICAL CAUSES (1659), reprinted in JOHN MILTON: SELECTED PROSE 296, 311 (C.A. Patrides ed., Univ. of Missouri Press rev. ed. 1985) (1974)).

¹⁰⁹ 1 ANNALS OF CONG. 758 (statement of James Madison).

¹¹⁰ Blasi, *supra* note 19, at 783–85.

¹¹¹ Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 211, 214 (Philadelphia, J.B. Lippincott & Co. 1865).

¹¹² Jefferson, *supra* note 23, at 77.

¹¹³ See Muñoz, *supra* note 87, at 1390 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O’Connor, J., dissenting)).

Jefferson's move to codify religious freedom¹¹⁴ — guaranteed “the free exercise of religion, according to the dictates of conscience”¹¹⁵ because “[r]eligion . . . can be directed only by reason and conviction, not by force or violence.”¹¹⁶ Other state constitutions across the new nation embraced mirroring language and values.¹¹⁷ According to both Jefferson and Madison, this anticompulsion principle necessarily required equal treatment for different faiths.¹¹⁸

The two Framers disagreed on the degree to which the Free Exercise Clause should protect religious conduct.¹¹⁹ A minimalist view of the Thomistic conception goes no further than to bar religious coercion by the government.¹²⁰ In this vein, and consistent with Locke, Jefferson opposed constitutional guarantees for religious acts.¹²¹ However, a broader definition of liberty of conscience requires interpreting the Free Exercise Clause to prohibit laws that burden practices necessary to maintain one's religious beliefs.¹²² And Madison embraced protections for some degree of conduct: “The [r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”¹²³ Another influence of the Founders, Minister John Leland, asserted that each person “should be protected in worshipping the Deity according to the dictates of his own conscience,”¹²⁴ likely including some religious practices along with private belief.

Yet the original understanding also reflected the need for limits on religious freedom. Locke assumed that religion can cause “no Injury” to third parties.¹²⁵ Similarly, the New York Constitution of 1777 granted “liberty of conscience” but made clear that such a right “shall not be so construed as to excuse acts of licentiousness, or justify practices

¹¹⁴ Heyman, *supra* note 33, at 707–08, 708 n.4 (quoting VIRGINIA DECLARATION OF RIGHTS (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 3, 3; LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 85–86 (1995)).

¹¹⁵ VIRGINIA DECLARATION OF RIGHTS, *supra* note 114, at 3.

¹¹⁶ *Id.*

¹¹⁷ *See, e.g.*, NORTH CAROLINA RATIFYING CONVENTION, DECLARATION OF RIGHTS AND OTHER AMENDMENTS (1788), *as reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 17, 18; NEW YORK RATIFICATION OF CONSTITUTION (1788), *as reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 11, 12.

¹¹⁸ *See* JEFFERSON, *supra* note 99, at 159; Madison, *supra* note 19, at 299; Blasi, *supra* note 19, at 802.

¹¹⁹ McConnell, *supra* note 22, at 1452–55.

¹²⁰ *See* White, *supra* note 91, at 1079–80.

¹²¹ *Id.*; McConnell, *supra* note 22, at 1433, 1451.

¹²² Tebbe, *supra* note 90, at 270, 272; Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. PA. L. REV. 147, 177 (2022).

¹²³ Madison, *supra* note 19, at 299.

¹²⁴ JOHN LELAND, *The Yankee Spy, in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 213, 228 (L.F. Greene ed., N.Y., G.W. Wood 1845).

¹²⁵ LOCKE, *supra* note 94, at 42.

inconsistent with the peace or safety of this State.”¹²⁶ The New Hampshire Constitution of 1784 was solicitous “to the dictates of [one’s] own conscience” with similar limitations.¹²⁷ These state provisions limited religious freedom based on its impact on third parties and state interests, stating explicitly that the dictates of conscience cannot “interfere with the religious practices of others,”¹²⁸ cause “civil injury or outward disturbance of others,”¹²⁹ or be “contrary to the ‘happiness,’ as well as the peace and safety, of society.”¹³⁰ In the same vein, Pennsylvania Founder William Penn explained that “[w]e are pleading only for . . . a *Liberty of Conscience* . . . and would not exempt any Man, or Party of Men, from not keeping those excellent Laws, that tend to Sober, Just, and Industrious Living.”¹³¹ Jefferson explained that “[t]he legitimate powers of government extend to such acts only as are injurious to others,” so governments may regulate conduct that harms third parties but not the conviction that “there are twenty gods, or no god.”¹³² Religious freedom is also limited by social responsibility: Jefferson believed that “man . . . has no natural right in opposition to his social duties.”¹³³ Accordingly, scholars understand liberty of conscience as constrained by government needs, impact on third parties, and responsibilities within the social contract.¹³⁴

III. THE ROLE OF POLITICAL PROCESS THEORY

Common understandings of liberty of conscience fail to emphasize a key element of the Framers’ intent: the protection of religious minorities. Liberty of conscience is a sweeping concept with the ability to hamstring the political branches.¹³⁵ The Framers understood this problem and sought to cabin its reach, both through the limits discussed above and by directing free exercise protection toward religious minorities.¹³⁶

¹²⁶ N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1328, 1338 (Ben Perley Poore ed., Washington, Gov’t Printing Off. 1877) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

¹²⁷ N.H. CONST. of 1784, pt. I, art. V, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 126, at 1280, 1281.

¹²⁸ McConnell, *supra* note 22, at 1462; *accord id.* at 1461.

¹²⁹ *Id.* at 1462 (quoting CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 126, at 1595, 1597).

¹³⁰ *Id.* (quoting DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES (Sep. 11, 1776), *as reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 23, at 70, 70).

¹³¹ WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE (1670), *reprinted in* 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443, 457 (London, Assigns of J. Sowle 1726).

¹³² JEFFERSON, *supra* note 99, at 159.

¹³³ Letter from Thomas Jefferson to Danbury Baptist Association, *supra* note 103, at 96.

¹³⁴ See Tebbe, *supra* note 90, at 270–71; White, *supra* note 91, at 1081; Douglas NeJaime & Reva B. Siegel, Feature, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2579 (2015).

¹³⁵ See Tebbe, *supra* note 90, at 271.

¹³⁶ See McConnell, *supra* note 22, at 1479–80.

While some scholars acknowledge the countermajoritarian and minority-focused nature of the Free Exercise Clause,¹³⁷ courts fail to incorporate this feature into free exercise doctrine.¹³⁸ Scholars propose other limitations on liberty of conscience,¹³⁹ but they neglect to consider which religious groups the Framers thought were eligible for such exemptions. This Part argues that political process theory is implicit in an original understanding of the Free Exercise Clause.

The Supreme Court introduced political process theory in its most famous footnote: *United States v. Carolene Products Co.*¹⁴⁰ commented that “prejudice against discrete and insular [religious, national, or racial] minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁴¹ Thus, the Court recognized that judicial intervention is sometimes necessary to ensure minorities’ enjoyment of certain rights.¹⁴²

Naturally, majoritarian democracy can lead to the infringement of minority rights.¹⁴³ In theory, minorities should achieve their policy goals, at least some of the time, through horse trading and coalition forming.¹⁴⁴ However, certain groups may be perennially unable to effectuate their preferences or may become “targets” of the majority.¹⁴⁵ Therefore, under the “pluralist” view of political process theory, when a minority group is disempowered, judicial attention is needed.¹⁴⁶ Professor John Hart Ely argues that the Founders understood this reality of democratic governance and included constitutional provisions to address the problem.¹⁴⁷ Thus, a key purpose of the Constitution and the institutional competence of the courts is to ensure that minorities (political, racial, religious, or otherwise) enjoy a minimum standard of rights.¹⁴⁸

The Framers’ conception of constitutional rights reflected political process theory. Madison understood that “the greatest danger lies . . . in the body of the people, operating by the majority against the

¹³⁷ See, e.g., MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 2, 20 (2008).

¹³⁸ See Helfand, *supra* note 47, at 3 & n.17.

¹³⁹ See, e.g., Tebbe, *supra* note 90, at 270–71; White, *supra* note 91, at 1076–77.

¹⁴⁰ 304 U.S. 144 (1938).

¹⁴¹ *Id.* at 153 n.4.

¹⁴² See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985). Political process theory is distinct from political process doctrine, which concerns structural barriers to political participation. See Margaux Poueymirou, Note, *Schuetz v. Coalition to Defend Affirmative Action & the Death of the Political Process Doctrine*, 7 U.C. IRVINE L. REV. 167, 168 (2017).

¹⁴³ JOHN HART ELY, DEMOCRACY AND DISTRUST 7–8 (1980).

¹⁴⁴ Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1531 (2015).

¹⁴⁵ *Id.* at 1529; *accord id.* at 1528, 1531, 1545.

¹⁴⁶ *Id.* at 1531–32; *accord id.* at 1529.

¹⁴⁷ ELY, *supra* note 143, at 7.

¹⁴⁸ See *id.* at 8.

minority.”¹⁴⁹ In enumerating fundamental liberties in the Bill of Rights, Madison explained that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights,” serving as “an impenetrable bulwark against every assumption of power in the legislative or executive” that might infringe on those rights.¹⁵⁰ Thus, courts would play an important role in protecting constitutional rights from the whims of the political branches. Madison also argued that Bill of Rights protections could not serve as absolute guarantees, but they might at least restrain the majority’s power to persecute minorities: While these rights “are not so strong as to satisfy gentlemen of every description . . . , [they] may be one means to control the majority from those acts to which they might be otherwise inclined.”¹⁵¹ Madison recognized a special need to protect those “governed by laws made neither by themselves nor by an authority derived from them,”¹⁵² an apt description of minorities who lack representation in the political process. Reconstruction-era evidence also supports a political process theory view of the Bill of Rights.¹⁵³ Insofar as the Founders understood many of the Bill of Rights’ guarantees to be judicially enforceable only on behalf of disempowered minorities, the same is true for the Free Exercise Clause.

The original meaning and purpose of the Free Exercise Clause incorporated the central tenets of political process theory. The Founders ratified the Free Exercise Clause explicitly for the purpose of preventing religious persecution against minorities.¹⁵⁴ Given the history of religious oppression in Europe and the Colonies,¹⁵⁵ the Framers felt the need to protect the religious diversity of the nation.¹⁵⁶ In his autobiography, Jefferson recalled that a representative proposed naming Jesus Christ as “the holy author of our religion” in the preamble, but Congress overwhelmingly rejected that alteration “in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.”¹⁵⁷ In recognition “that the majority may trespass on the rights of the minority,” Madison sought to render “Religion . . . exempt from

¹⁴⁹ 1 ANNALS OF CONG. 455 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

¹⁵⁰ *Id.* at 457.

¹⁵¹ *Id.* at 455.

¹⁵² Madison, *supra* note 19, at 300.

¹⁵³ See Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 679, 687 (2003); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 893–94 (1986); Edward J. Erler, *The Fourteenth Amendment and the Protection of Minority Rights*, 1987 B.Y.U. L. REV. 977, 980–81.

¹⁵⁴ See McConnell, *supra* note 22, at 1480.

¹⁵⁵ See JEFFERSON, *supra* note 99, at 157 (detailing the history of religious persecution in Virginia).

¹⁵⁶ See Madison, *supra* note 43, at 88; THOMAS PAINE, COMMON SENSE (1776), as reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 23, at 69, 69 (“[I]t is the will of the Almighty, that there should be a diversity of religious opinions among us”); McConnell, *supra* note 22, at 1421.

¹⁵⁷ JEFFERSON, *supra* note 45, at 85.

the authority of the Society at large” and from “that of the Legislative Body.”¹⁵⁸ Removing religious freedom from the political process was necessary because “one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.”¹⁵⁹ The Founders also signaled their belief that not every group could adequately protect their interests via the political process when they rejected the argument that the nation’s religious diversity was sufficient to guarantee religious freedom.¹⁶⁰ The Supreme Court and scholars of political process theory have also recognized the theory’s application to religious minorities.¹⁶¹

IV. A NEW FREE EXERCISE THEORY

The Free Exercise Clause is meant to protect the liberty of conscience of politically disempowered religious minorities. By this theory, only laws that impact the ability to hold one’s own beliefs may impose a substantial burden on religion. While majorities still enjoy protection from laws that target religion, courts should grant religious exemptions from generally applicable laws only to minorities. This Part explains the features of this theory and addresses counterarguments.

A. Combining Theories

The Free Exercise Clause safeguards liberty of conscience against government coercion. As eventual Supreme Court Chief Justice Oliver Ellsworth wrote, the dual goals of constitutional religious protection were “to exclude persecution” and to ensure “a right to worship God in that way which is most agreeable to his own conscience.”¹⁶² To fortify “the inward perswasion of the Mind” against “outward force,”¹⁶³ the Free Exercise Clause prohibits the government from compelling its citizens to practice a particular religion. It also guarantees individuals the freedom to seek religious truth to the extent practicable in civil society.¹⁶⁴ Therefore, the Free Exercise Clause bars laws that compel

¹⁵⁸ Madison, *supra* note 19, at 299.

¹⁵⁹ 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

¹⁶⁰ See McConnell, *supra* note 22, at 1479–80.

¹⁶¹ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . , [because] *freedom of worship* . . . and other fundamental rights may not be submitted to vote” (emphasis added)); cf. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750–51, 760–63 (1991) (arguing that political process theory was created to combat racial discrimination then demonstrating the theory’s function in the religious freedom context).

¹⁶² Oliver Ellsworth, *A Landholder VII*, CONN. COURANT, Dec. 17, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 497, 498 (Merrill Jensen ed., 1978).

¹⁶³ LOCKE, *supra* note 94, at 27.

¹⁶⁴ See Jefferson, *supra* note 23, at 77.

religion and force abandonment of religion.¹⁶⁵ Courts should generally defer to a religion's ex ante judgment on what practices impact its belief to avoid the thorny business of judicial theological analysis.¹⁶⁶ Liberty of conscience must also encompass non-Judeo-Christian conceptions of religion and conscience.¹⁶⁷ While this theory does not make a strict act-belief distinction,¹⁶⁸ the Framers' conception of liberty of conscience incorporated a third-party harm principle, denying exemptions that would impact the rights of others or seriously impede government function.¹⁶⁹

This theory defines minorities by political power. As mentioned above, the drafters of the Religion Clauses worried that large sects or coalitions might use their political power to impose their religion on others.¹⁷⁰ Thus, the Free Exercise Clause provides special protection to those who lack the ability to "combine together"¹⁷¹ to impact legislation.¹⁷² Some *discrete and insular* religious groups may be numerically small yet exercise outsized political influence, reducing the likelihood of political persecution.¹⁷³ Therefore, a focus on politically disempowered groups is more faithful to the Framers' understanding of the Free Exercise Clause than the traditional *Carolene Products* definition is. This Note borrows Professor Nicholas Stephanopoulos's definition: "A group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups."¹⁷⁴ As the Framers were most concerned with "[p]ersecuted" groups,¹⁷⁵ whether a group vindicates its policy preferences at about the same rate as other similarly situated groups is a good proxy for whether the group suffers from persecution and thus requires special protection.¹⁷⁶ Political power varies temporally¹⁷⁷ and geographically.¹⁷⁸ Therefore, minority designation should consider a group's power at a given time and relative to the jurisdiction of the particular law. Also, in keeping with

¹⁶⁵ 1 ANNALS OF CONG. 757–58 (1789) (Joseph Gales ed., 1834) (statement of James Madison) (interpreting a clause protecting "equal rights of conscience," *id.* at 757, to prevent the government from "compell[ing] men to worship God in any manner contrary to their conscience," *id.* at 758).

¹⁶⁶ See *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

¹⁶⁷ See JEFFERSON, *supra* note 45, at 85.

¹⁶⁸ See *supra* notes 119–24 and accompanying text.

¹⁶⁹ See *supra* notes 125–34 and accompanying text.

¹⁷⁰ See *supra* notes 149–61 and accompanying text.

¹⁷¹ 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

¹⁷² See Madison, *supra* note 19, at 299–300.

¹⁷³ See Girgis, *supra* note 122, at 173.

¹⁷⁴ Stephanopoulos, *supra* note 144, at 1545 (emphasis omitted).

¹⁷⁵ Letter from James Madison to William Bradford (Apr. 1, 1774), as reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 23, at 61, 61.

¹⁷⁶ See Stephanopoulos, *supra* note 144, at 1545.

¹⁷⁷ See Ackerman, *supra* note 142, at 718.

¹⁷⁸ See *id.* at 727.

the Framers' focus on persecution, groups experiencing discrimination and animus should receive heightened protection.¹⁷⁹

Courts should grant free exercise exemptions from generally applicable laws only to disempowered minorities. The Free Exercise Clause certainly prohibits religious persecution and direct targeting on the basis of religion.¹⁸⁰ However, the Framers understood that incidental burden claims required a limiting principle¹⁸¹ — permitting only claims by disempowered minorities. Because they understood the impossibility of universal exemptions to general laws, the Founders believed that “[t]he prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power.”¹⁸² Thus, only those most in need — namely, politically disempowered minorities — should receive heightened free exercise protection.¹⁸³ “Legislators are more likely to be [un]aware of” or overlook burdens on unfamiliar religions.¹⁸⁴ At the same time, general laws that would incidentally impact powerful religious groups typically include statutory exemptions secured via the political process.¹⁸⁵ Thus, powerful groups are less needful of constitutional protection and, by the Framers' understanding, should not receive exemptions from generally applicable laws.

B. Counterarguments

Critics may argue that the Framers sought to preserve religion from the corrupting influence of government¹⁸⁶ and cared little about protecting minority interests.¹⁸⁷ But these objectives are compatible. Although an original justification for the Establishment Clause was to separate religion from government to maintain its purity,¹⁸⁸ the Framers also saw it as a measure against religious coercion.¹⁸⁹ Moreover, the Free Exercise and Establishment Clauses have distinct motivations. Logically, a constitutional provision addressing government interference with individual liberties (the Free Exercise Clause) would be focused on

¹⁷⁹ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

¹⁸⁰ See JEFFERSON, *supra* note 99, at 158–59; Madison, *supra* note 19, at 82.

¹⁸¹ See *supra* notes 125–34 and accompanying text.

¹⁸² 1 ANNALS OF CONG. 454–55 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

¹⁸³ See *id.*; see also Girgis, *supra* note 122, at 154; cf. Richard H. Fallon, Jr., *Further Reflections on Rights and Interests: A Reply*, 27 GA. L. REV. 489, 494 (1993) (arguing that judicial intervention on behalf of parties' rights corresponds with the level of protection those parties are perceived to need).

¹⁸⁴ William P. Marshall, Correspondence, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 318 (1991).

¹⁸⁵ See Girgis, *supra* note 122, at 185.

¹⁸⁶ See, e.g., Blasi, *supra* note 19, at 791.

¹⁸⁷ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998).

¹⁸⁸ Madison, *supra* note 19, at 301 (“[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”).

¹⁸⁹ 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

minorities, while one preventing the state from declaring a particular affiliation (the Establishment Clause) would have a broader aim. Further, this view of the Establishment Clause fits into the liberty of conscience idea of the First Amendment, as it seeks to prevent government involvement from infecting the individual search for truth.¹⁹⁰

Another worry is that inviting an inquiry into the boundaries of conscience might pose Establishment Clause issues. A branch of Religion Clauses doctrine warns against excessive judicial inquiry into the contours of religion.¹⁹¹ Investigating whether a religious claim implicates liberty of conscience could invite a constitutionally fraught inquiry into the centrality of religious beliefs and practices.¹⁹² However, this theory makes this centrality inquiry unnecessary. Courts need only determine that a government action implicates belief, so it need not consider how important a particular practice is to the plaintiff's faith. Currently, judges have little guidance on how to evaluate substantial burden, leaving them free to conduct an unstructured and potentially biased centrality evaluation. The application of this theory would avoid impermissible inquiries, not create them.

Finally, in encouraging courts to overturn or undermine generally applicable laws, this theory may contradict democratic values. Professor Alexander Bickel coined the term “[c]ounter-[m]ajoritarian [d]ifficulty,” standing for the principle that courts harm democratic legitimacy when they invalidate statutes.¹⁹³ A version of political process theory that guarantees favorable substantive outcomes to minority groups, rather than merely a fair political process,¹⁹⁴ heightens this concern. However, the purpose of the Bill of Rights is to enumerate liberties that the majoritarian political process cannot deny.¹⁹⁵ Courts would likely undermine the legislature less frequently by this theory, as it excludes many claims that current free exercise jurisprudence allows. And when a court does invalidate a statute, it would be consistent with the Framers' intended constitutional structure.

V. IMPLICATIONS AND APPLICATIONS

The application of this theory would both expand and contract the reach of the Free Exercise Clause. Because it encompasses many conscience-based claims, this theory is more accommodating of free

¹⁹⁰ See Blasi, *supra* note 19, at 790.

¹⁹¹ See, e.g., Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).

¹⁹² D. Bowie Duncan, Comment, *Inviting an Impermissible Inquiry? RFRA's Substantial-Burden Requirement and "Centrality,"* 2021 PEPP. L. REV. 1, 3 (2022).

¹⁹³ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (emphasis omitted); *accord id.* at 17; see also ELY, *supra* note 143, at 4–5.

¹⁹⁴ See Ackerman, *supra* note 142, at 720.

¹⁹⁵ ELY, *supra* note 143, at 8; see 1 ANNALS OF CONG. 454–55 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

exercise exemptions than those that focus strictly on religious practices.¹⁹⁶ For example, a Quaker might object to compulsory military service on free exercise grounds, implicating conscience but not religious practice. On the other hand, freedom of conscience does not require accommodation of claims unrelated to conscience, such as challenges to reasonable time, place, and manner restrictions on worship.¹⁹⁷ And making exemptions available only to members of disempowered minority groups considerably narrows the scope of free exercise claims.

Elements of religion that do not involve freedom of conscience may still warrant protection. For example, it feels unfair to exclude religious nonprofits from benefits available to secular ones.¹⁹⁸ However, the Free Exercise Clause does not cover such claims. The Equal Protection and Establishment Clauses are better avenues for certain religious discrimination claims,¹⁹⁹ and many claims can be cast as free speech issues.²⁰⁰ Further, many religious groups can and should vindicate their rights politically, either through religious exemptions built into statutes²⁰¹ or through laws restoring a strict scrutiny regime to government actions that incidentally burden religion.²⁰² RLUIPA, the American Indian Religious Freedom Act²⁰³ (AIRFA), and federal regulations allowing doctors to decline to perform abortions “if it would be contrary to their religious beliefs or moral convictions”²⁰⁴ all demonstrate that religious groups often form coalitions and use the political process to vindicate their interests beyond what the Constitution requires.²⁰⁵

This theory would focus substantial burden analysis on a law’s impact on freedom of conscience. When determining whether a state action imposes a substantial burden on religion, courts should investigate whether that action interferes with a disempowered minority’s ability to form and hold their own religious beliefs. To constitute a substantial burden, the government action must compel religion or force abandonment of a religious belief. If this prong is satisfied, the court should determine whether the plaintiff belongs to a disempowered religious

¹⁹⁶ See, e.g., Segall, *supra* note 2, at 638–39.

¹⁹⁷ See, e.g., O’Lone v. Est. of Shabazz, 482 U.S. 342, 352 (1987).

¹⁹⁸ See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 453–56 (2017).

¹⁹⁹ See, e.g., Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm’n, 145 S. Ct. 1583, 1587 (2025).

²⁰⁰ See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

²⁰¹ See, e.g., *State Non-Medical Exemptions from School Immunization Requirements*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 22, 2026), <https://www.ncsl.org/health/state-non-medical-exemptions-from-school-immunization-requirements> [<https://perma.cc/PYE7-YDDS>] (“Twenty-nine states and Washington D.C. allow exemptions for individuals with religious objections to immunizations.”).

²⁰² See, e.g., 42 U.S.C. § 2000bb-1(a) to (b); Montana Religious Freedom Restoration Act, MONT. CODE ANN. §§ 27-33-101 to -105 (West 2026).

²⁰³ Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996–1996a).

²⁰⁴ Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2078, 2078 (Jan. 11, 2024) (to be codified at 45 C.F.R. pt. 88); *accord id.* at 2079–81.

²⁰⁵ Cf. Stephanopoulos, *supra* note 144, at 1531.

minority group under the test outlined above.²⁰⁶ Whether the plaintiff shares the belief or practice with other religious or political groups is relevant to the disempowerment analysis. For example, the *Hobby Lobby* plaintiffs were Mennonites, making up less than 0.1% of the United States population,²⁰⁷ but they shared their antiabortion views with many powerful religious sects.²⁰⁸ Finally, in line with the Framers' intent, the court should consider the exemption's impact on third parties and government functions. This inquiry might operate as a balancing test, weighing the infringement on liberty of conscience against the exemption's disruptiveness or ability to injure others.

An analysis of *Mahmoud v. Taylor*²⁰⁹ exemplifies how this new substantial burden analysis would operate. The plaintiffs in that case were Muslim, Catholic, and Ukrainian Orthodox parents of school-aged children in Montgomery County, Maryland.²¹⁰ They alleged that the Board of Education violated their free exercise rights by denying requests to remove their children from lessons involving books to which they had religious objections.²¹¹ The parents argued that exposure to "LGBTQ+-inclusive" materials that contradicted the teachings of their religions would "undermine [their] efforts to raise [their] children in accordance with' their religious faith."²¹² The Supreme Court held that the parents were "likely to succeed" on the merits, issuing a preliminary injunction requiring the school district to grant religious exemptions from its curriculum.²¹³ In doing so, the Court carved out an exception to *Smith*, asking whether the books "substantially interfere[d] with the [children's] religious development" and imposed a "burden on religious exercise"²¹⁴ by exposing students to conflicting ideas in "the potentially coercive" context "of classroom instruction."²¹⁵

Mahmoud would come out differently under this Note's theory. To start, the plaintiffs' claim implicated liberty of conscience, as religious coercion concerns "the inward persuasion of the mind."²¹⁶ While mere

²⁰⁶ See *supra* pp. 1133–34.

²⁰⁷ See Mennonite World Conf., ANABAPTISTS AROUND THE WORLD (2025), https://mwc-cmm.org/wp-content/uploads/2025/07/2025-MWC-World-Map-Purple-Gradient_A1-size_nobled.pdf [<https://perma.cc/U3KR-QEPR>]; U.S. and World Population Clock, U.S. CENSUS BUREAU (Jan. 15, 2026, at 03:27 UTC), <https://www.census.gov/popclock> [<https://perma.cc/K57V-EP7Z>].

²⁰⁸ See *Religious Groups' Official Positions on Abortion*, PEW RSCH. CTR. (Jan. 16, 2013), <http://pewrsr.ch/13sqVnk> [<https://perma.cc/L74A-6WF6>]; ELIZABETH DIAS & LISA LERER, THE FALL OF ROE 152–60 (2024) (describing the concentration of political power in the hands of anti-abortion activists on the religious right).

²⁰⁹ 145 S. Ct. 2332 (2025).

²¹⁰ *Id.* at 2347–48.

²¹¹ *Id.* at 2343 (quoting Petitioners' Appendix at 174a, 603a, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297)); *id.* at 2349.

²¹² *Id.* at 2348 (alterations in original) (quoting Petitioners' Appendix, *supra* note 211, at 544a).

²¹³ *Id.* at 2342.

²¹⁴ *Id.* at 2353.

²¹⁵ *Id.* at 2355; see also *id.* at 2358.

²¹⁶ LOCKE, *supra* note 94, at 27.

exposure to ideas in the classroom may not constitute forced abandonment of religion,²¹⁷ the Court's finding that the instruction "substantially interfere[d] with"²¹⁸ religion is sufficient to fulfill this prong, at least for the sake of argument. Next, the plaintiffs belonged to various religious groups, all of which were numerical minorities in Maryland.²¹⁹ Muslims in particular have experienced prejudice in Maryland, reducing their political power.²²⁰ However, many sects share the traditional views of gender and sexuality that the *Mahmoud* plaintiffs sought to insulate.²²¹ Though the parent-plaintiffs may be members of disempowered minority groups on first look, the very existence of their interfaith coalition demonstrates the ability to form alliances to vindicate their policy preferences. Further, such exemptions pose significant challenges to school administration, raising government function concerns.²²² Regardless of the outcome of the third-party harm balancing, the *Mahmoud* claim should have failed on the "powerlessness" prong.

CONCLUSION

More change is coming for the Free Exercise Clause. Over the past thirty years, the Supreme Court has eroded *Smith*, carving out fact patterns and rereading precedents. This approach has created a patchwork of rules and principles that lower courts and litigants have struggled to interpret. The time has come to rewrite free exercise doctrine. Its replacement should live up to the Framers' vision.

²¹⁷ Cf. *Mahmoud*, 145 S. Ct. at 2388 (Sotomayor, J., dissenting).

²¹⁸ *Id.* at 2353 (majority opinion).

²¹⁹ See *People in Maryland*, PEW RSCH. CTR., <https://www.pewresearch.org/religious-landscape-study/state/maryland> [<https://perma.cc/EGR9-GHCF>].

²²⁰ See Sade Ajishegiri & Rebecca Parnass, *Antisemitism and Islamophobia Soar in Maryland After October 2023 Hamas Attacks*, CAP. NEWS SERV. (May 9, 2025), <https://cnsmaryland.org/2025/05/09/antisemitism-and-islamophobia-soar-in-maryland-after-october-2023-hamas-attacks> [<https://perma.cc/9EYY-Y5DG>].

²²¹ See GREGORY A. SMITH ET AL., PEW RSCH. CTR., *DECLINE OF CHRISTIANITY IN THE U.S. HAS SLOWED, MAY HAVE LEVELED OFF* 240, 242 (2025), https://www.pewresearch.org/wp-content/uploads/sites/20/2025/02/PR_2025.02.26_religious-landscape-study_report.pdf [<https://perma.cc/CAR7-RVC2>].

²²² See *Mahmoud*, 145 S. Ct. at 2381 (Sotomayor, J., dissenting) ("The result will be chaos for this Nation's public schools.").