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Justice Alito, Originalism, and the Aztecs

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When the Free Exercise Clause of the First Amendment[1] was written, not a single person in America had ever claimed that there should be, or that this provision would entail, a judicially enforceable right to exemption from laws that do not aim at interfering with religion. The doctrines and practices of strict scrutiny, narrow tailoring, and compelling interests came into existence in the 1960s. At the time of the framing, they were as unimaginable as TikTok.

Yet Justice Samuel Alito has persuaded himself that such a right is the Clause's original meaning. The arguments with which he defends this conclusion, in his *Fulton v. Philadelphia* concurrence, are abuses of originalist reasoning.[2]

This is not necessarily to condemn judicially crafted exemptions.[3] It is, however, to say that if such exemptions are to be defended, this case must be made on nonoriginalist grounds.

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Alito is an inclusive originalist. He thinks that original meaning is the primary source of constitutional law, although other modalities, such as precedent, may legitimately be relied upon when the Constitution's original meaning authorizes it.[4]

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

2. The present Essay is a sequel to Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. UNIV. L. REV. 727 (2009).

3. As it happens, I think they can play a valuable role in a diverse society. *See generally* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 93–107 (2020); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 107–08 (2013).

4. *See* Steven G. Calabresi & Todd Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 507 (2019) ("Under Justice Alito's 'inclusive originalism,' judges may evaluate precedent, policy, or practice, 'but only to the extent that the original meaning incorporates or permits them.'").

Discerning original meaning, he believes, requires close attention to the cultural background at the time a law is written. "[W]hen textualism is properly understood, it calls for an examination of the *social context* in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment."[5] The interpreter's job, in reading a text, is "examining what readers would have understood its words to mean when adopted . . . ."[6]

Concurring in the judgment in *Fulton v. Philadelphia*,[7] he argues that the Court should overrule *Employment Division v. Smith*, which held that burdens on religion do not in themselves create any presumptive right to exemption from generally applicable laws.[8] Rather, the Free Exercise Clause should be understood to hold "that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest . . . ."[9] That requirement, he has said, is "exceptionally demanding."[10] His case for this conclusion is an originalist one: "we must ask whether the Free Exercise Clause protects a right that was known at the time of adoption to have defined dimensions."[11]

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Alito begins with the text: "we should begin by considering the 'normal and ordinary' meaning of the text of the Free Exercise Clause: 'Congress shall make no law . . . prohibiting the free exercise [of religion].'"[12] Alito's method is to parse, using dictionaries of the time, the words "prohibit," "free," and "exercise." "Those words had essentially the same meaning in 1791 as they do today."[13] He thinks the conclusion is straightforward:

> If we put these definitions together, the ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation

5. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting) (emphasis added).
6. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring).
7. *Fulton*, 141 S. Ct. at 1883. For reasons not pertinent here, this was a case in which the claimant prevailed on grounds that did not require the Court to decide whether to radically change its Free Exercise Clause doctrine.
8. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).
9. *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring).
10. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
11. *Fulton*, 141 S. Ct. at 1899 (Alito, J., concurring).
12. *Id.* at 1895 (quoting District of Columbia v. Heller, 554 U.S. 570, 576 (2008)) (observing that the "terms and phrases" of the Second Amendment carry their "normal and ordinary" meaning).
13. *Id.* at 1896.

> adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.[14]

On the contrary, "the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance."[15]

If you google "hilarious translation fails," you will discover that a rich array of embarrassing mistakes happen when a translator of unfamiliar terms tries to do what Alito does, using a dictionary to "put these definitions together" like Lego pieces.[16] With any term of art, one must look to context to discern the meaning that speaker and audience actually attribute to it at the time it is used.

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Alito does try to discern social context. But it doesn't lead where he thinks.

He finds support for his reading in the analogous provisions in state constitutions, beginning in 1649. At the time of the founding, religious liberty "was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment."[17] More than half of them

> contained free-exercise provisions subject to a "peace and safety" carveout or something similar. The Georgia Constitution is a good example. It provided that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the *peace and safety* of the State." Ga. Const., Art. LVI (1777), in Cogan 16 (emphasis added). The founding era Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and South

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14. *Id.*
15. *Id.* at 1897.
16. *Fulton*, 141 S. Ct. at 1896. Alito also is curiously selective in his use of dictionaries:
> He notes, with multiple sources, that the term "exercise" had both a broad primary definition ("[p]ractice" or "outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private"). Which of these should control the interpretation of the Free Exercise Clause? The first appears to be its non-specific use as "practice or performance," as in musical or physical exercise. The second definition, however, appears in explicit connection with religion and has a singular meaning: "Act of divine worship."

Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, AM. CONST. SOC. SUP. CT. REV. 221, 236 (2020–21) (footnotes omitted).

17. *Fulton*, 141 S. Ct. at 1901.

> Carolina all contained broad protections for religious exercise, subject to limited peace-and-safety carveouts.[18]

These provisions, he thinks, show the untenability of *Smith* as an originalist matter.

> If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn't they also be sufficient to address the same type of conduct when carried out for a religious reason? *Smith*'s defenders have no good answer.[19]

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There is, however, data not accounted for in Alito's historical narrative. Those "peace-and-safety" provisions indeed were in the laws of the eight states he enumerates. Connecticut had no free exercise provision.[20] The protections in North Carolina, New Jersey, and Pennsylvania were confined to freedom of "worship," which might be read to exclude other forms of the exercise of religion, and so make any such proviso superfluous.[21]

But Virginia had no such limitation. Michael McConnell's study of the origins of free exercise, which Alito cites more than a dozen times, states:

> The Virginia Bill of Rights, the model for three of the state proposals for the first amendment and presumably the greatest influence on Madison, is especially clear on this point. It provides that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience" and defines "religion" as "the duty which we owe to our Creator, and the manner of discharging it." In the biblical tradition,

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18. *Id.* at 1902.

19. *Id.* at 1903.

20. Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990).

21. *Id*. at 1460. McConnell writes:

> By contrast, eight states—New York, New Hampshire, Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, and South Carolina—plus the Northwest Ordinance, confined their protection of conduct to acts of "worship." The word "worship" usually signifies the rituals or ceremonial acts of religion, such as the administration of sacraments or the singing of hymns, and thus would indicate a more restrictive scope for the free exercise provisions.

Id. As I'll shortly explain, this restriction is not necessarily all that restrictive, depending on what ceremonial acts a religion happens to demand.

> "duties" to God included actions, perhaps all of life, and not just speech and opinion. So according to Virginia, the right of free exercise extended to all of a believer's duties to God and included a choice of means as well as ends.[22]

But if McConnell is right that Virginia protected all of a believer's duties to God, then it would follow that those duties overrode all secular laws in all circumstances. If the provisos limit the availability of exemptions, then a right without an express proviso has no limits.

Can it really mean that? To reach for a hackneyed but pertinent example, did these provisions protect human sacrifice of unwilling victims?[23] If, as Alito claims, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship,"[24] then by Alito's logic, any interference with (for example) Aztec practices would have been unconstitutional in, at a minimum, Virginia. Had Aztecs appeared there, they would have been happy to learn that their religious practices were unconstrained by any obligation to respect the peace and safety of the state. Since Aztec sacrifice was in fact a form of worship, perhaps it was also protected in North Carolina, New Jersey, and Pennsylvania.[25]

Moreover, Alito's evidence shows that the constitution writers of the founding generation knew how to include a peace-and-safety proviso when they wanted to. No such proviso appears in the First Amendment.[26] Does this mean that, after the ratification of the Bill of Rights, the Aztecs

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22. *Id.* at 1459–60 (citations omitted). As I'll argue below, these differences in language, between "free exercise" and "worship," probably made no difference to the founding generation. Modern efforts to assign operational significance to those differences are anachronistic.

23. Reynolds v. United States, 98 U.S. (8 Otto.) 145, 166 (1878). For an argument that another of McConnell's influential arguments, based on a reading of Madison's Memorial and Remonstrance, leads to that same implausible conclusion, see KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?, *supra* note 3, at 95–97.

24. *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring).

25. And perhaps Georgia, the example Alito cites, which was no longer helpful to him when the First Amendment was framed. "In 1789, Georgia adopted a free exercise provision that broadened the right of free exercise contained in its 1777 Constitution, removing a caveat that stated that free exercise could be precluded if it was 'repugnant to the peace and safety of the state.'" Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1473 (2012), cited by Alito in *Fulton*, 141 S. Ct. at 1900 for the proposition that "the Free Exercise Clause had more analogs in State Constitutions than any other individual right."

26. McConnell recognizes the difficulty, and responds:

> Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary.

Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1116 (1990). It is a strange interpretive strategy to insist that a text is an exceptionless command, and then to infer limitations because the command is implausibly strong.

could safely sacrifice their victims in the territories and the District of Columbia as well?[27] Is that same privilege now incorporated into the Fourteenth Amendment?

Something obviously has gone wrong in our reasoning.

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Consider an alternative explanation for why those provisions were there in the first place. Vincent Phillip Muñoz, whose work is cited six times by Alito,[28] argues that many constitutional provisions at that time were not intended to be rules of law. They "were not simply constitutional law in the way that the Bill of Rights is part of the Federal Constitution. They included non-justiciable statements about the fundamental purposes and principles of the political community."[29] No judicially enforceable right was created by, for example, Section 15 of the Virginia Declaration of Rights, which declared that "no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[30] Provisions like this show that

> [W]e cannot and should not assume that every provision of the pre-1787 state declarations of rights was understood to announce a legal rule or a restriction enforced by judicial review. The primary purpose of the state declarations was to educate the people about liberal political principles

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27. Alito observes, evidently thinking that it helps his argument:
> In the Northwest Ordinance of 1787, the Continental Congress provided that "[n]o person, demeaning himself in *a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." Art. I (emphasis added). After the ratification of the Constitution, the First Congress used similar language in the Northwest Ordinance of 1789.

Fulton, 141 S. Ct. at 1903. But there was no such proviso in the First Amendment itself. Perhaps the Ordinance's limitation itself was unconstitutional?

28. *Id*. at 1899, 1911 (quoting Vincent P. Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1085, 1112, 1115, 1118–19, 1120 (2008)).

29. Vincent P. Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387, 1391 (2016). I will rely here on this article, but Muñoz has further documented his claims in Religious Liberty and the American Founding (2022) (see especially the passages listed under "Alito" in the index) and *James Madison's Political Science of Religious Liberty*, 10 AM. POL. THOUGHT 552 (2021).

30. Muñoz, *If Religious Liberty Does Not Mean Exemption, supra* note 29 (quoting VA. CONST. art. I, §15 (1776)).

> and, in particular, the natural rights social compact political philosophy that animated Founding-era constitutionalism.[31]

The protection of free exercise was absolute within a limited sphere.

It helps to remember the core evils that the religion clauses were directed at. The role of paradigm cases in constitutional law has been emphasized by Jed Rubenfeld. He observes that such cases frequently anchor constitutional argumentation, sometimes in a way that is only distantly related to the semantic meaning of the pertinent constitutional provision. For example, the language of the Fourteenth Amendment is broad and vague. The Amendment was enacted with the specific purpose of invalidating the Black Codes.[32] Passed by white-controlled legislatures after the Civil War, the Codes imposed specific legal disabilities on Black people, such as requiring them to be gainfully employed under contracts of long duration, excluding them from occupations other than manual labor, and disabling them from testifying against whites in court.[33] The language of the Fourteenth Amendment's text, however, standing alone, could support a judicial opinion upholding, say, a statute requiring all and only Black people to be employed as servants or laborers, by applying rationality review. That would obviously be an interpretive travesty.[34] The unconstitutionality of the Black Codes is so much a part of the Amendment's meaning that to say that this is a settled interpretation is a misleading understatement. Rather, "[t]his piece of the Fourteenth Amendment's meaning *precedes* interpretation."[35] Any interpretation of the Amendment must be a chain of inferences from the core commitment represented by this paradigm case.[36]

Similarly with the Free Exercise Clause. A principal grievance of the Baptists, who insisted on the First Amendment as a condition of supporting ratification of the Constitution, was the prosecution of unlicensed preachers.[37] "Virginia made the most intense effort by

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31. *Id.* at 1392. *See also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 10 (1999) ("Massachusetts [1780] was . . . the first state to replace the weak 'ought not' found in all previous bills of rights (e.g., 'the liberty of the press ought not be restrained') with the injunction 'shall not,' which Madison later followed.").

32. *See generally* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).

33. *Id.*

34. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 181 (2001).

35. *Id.* at 183.

36. *Id.* at 178–95. The importance of paradigm cases in constitutional law is further elaborated in Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1923–29 (2012).

37. The pertinent history is concisely documented in Lupu & Tuttle, *supra* note 16, at 237–40, a powerful critique of Alito's purported originalism that complements the present Essay. *See also*

requiring all preachers to obtain a license from a board of Anglican clergy."[38] Religion, the Baptists—and the Presbyterians and the Deists—thought, was none of the state's concern.[39] They aimed to prohibit laws that deliberately targeted disfavored religions.[40] When they defended religious practice as well as belief, the practice they focused on was religious ceremony.[41] Ira Lupu and Robert Tuttle, reading the text in context, conclude that "'exercise of religion' referred to acts of worship, and certainly did not encompass all religiously motivated conduct."[42]

The basic picture here is that made familiar by John Locke, who argued that "the business of Laws is not to provide for the Truth of Opinions, but for the Safety and Security of the Commonwealth, and of every particular mans [sic] Goods and Person."[43] In religious matters, because the state has no authority, "no man will have a Legislator imposed upon him, but whom himself has chosen."[44] But Locke didn't think that religious scruples excused anyone from obeying otherwise valid laws: if the state is doing its legitimate business, religious objections could have no weight.[45] The Virginia Declaration of Rights was authored principally by the Lockean George Mason.[46]

Muñoz writes that Alito's "peace-and-safety carveouts" are not carveouts at all:

> Strictly speaking, boundary provisos were not needed, because natural rights are, by nature, bounded. The Founders' understanding of natural

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Andrew Koppelman, *Corruption of Religion and the Establishment Clause,* 50 WM. & MARY L. REV. 1831, 1864, 1870 (2009) (describing the conceptions of religious liberty of Isaac Backus and John Leland, two influential founding-era Baptist ministers).

38. Lupu & Tuttle, *supra* note 16, at 239.

39. Koppelman, *supra* note 37, at 1874 (discussing Madison's endeavors to bring together rationalist Deists, Baptists, and Presbyterians to disestablish Anglicanism in Virginia).

40. *Id.*

41. McConnell writes, as evidence that Americans rejected the distinction between belief and action:

> Historian Thomas Curry recounts the 1651 flogging of Obediah Holmes, a Baptist, for holding a religious meeting in Lynn, Massachusetts: "To the familiar argument that he was sentenced not for conscience but for practice, [Baptist minister John] Clark replied that there could be no such thing as freedom of conscience without freedom to act."

McConnell, *supra* note 20, at 1451–52 (citing THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 15 (1986)). The example of course has nothing to do with generally applicable laws that do not target religion as such.

42. Lupu & Tuttle, *supra* note 16, at 237. They also note that Alito's case for reading "free exercise" more broadly than acts of worship—to encompass, for example, the discrimination at issue in *Fulton*—rests on no historical evidence whatsoever, but instead merely cites precedent from the twentieth century that did not rely on originalist reasoning. *Id.* at 236 & n.60 (noting the "entirety of [Alito's] explanation" relies on *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

43. JOHN LOCKE, A LETTER CONCERNING TOLERATION 46 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

44. *Id.* at 29.

45. *Id.* at 48.

46. Koppelman, *supra* note 37, at 1864 n.153.

> rights does not include, under religious free exercise, the liberty to disturb the public peace or act licentiously regardless of whether boundary provisos are textually specified. From the perspective of the Founders' natural rights social compact theory, the boundary provisos were superfluous. This helps to explain why some states included them but other states did not.[47]

Lupu and Tuttle explain the purpose of these provisions. The First Great Awakening involved religious revival meetings that "led some listeners to collapse, others to speak in tongues, and still others to cry out in fear for their souls."[48] These practices "stood in sharp contrast to the learned sermons and staid services of Congregationalist clergy in New England, or Anglican priests in the southern colonies."[49] The peace-and-safety provisions, they argue, reflect a concern that "worshippers might disturb public peace and order."[50] Their account complements that of Muñoz. If these provisions had any operational effect, it would have been to permit regulation of such disruptive ceremonies—an issue that (so far as is known) never arose in practice, which is why the interpretation of this language was almost never adjudicated.[51]

Finally, there is some evidence that this kind of language was simply boilerplate. A version appears in the Rhode Island Royal Charter, approved by England's King Charles II in 1663.[52] It decrees "that no person . . . shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony," but may "freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments . . . they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others . . . ."[53] If texts written a century later have similar language, that may simply signify that this was the settled way for lawyers to describe religious liberty.

If these accounts are right, then none of these state constitutional provisions support an originalist case for judicially enforceable religious exemptions.

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47. Muñoz, *supra* note 29, at 1415.
48. Lupu & Tuttle, *supra* note 16*,* at 239.
49. *Id.*
50. *Id.* at 240.
51. The single exception is People v. Philips, 1 W.L.J. 109, 112–13 (Gen. Sess., N. Y. 1813), holding that a Catholic priest's refusal to testify about a confession was protected by the state constitutional right to the free exercise, and did not fall within New York's exception for "acts of licentiousness" and "practices inconsistent with the tranquility and safety of the State."
52. R.I. DEP'T OF STATE, RHODE ISLAND'S ROYAL CHARTER (1663).
53. *Id.* Thanks to Steve Calabresi for pointing out the relevance of this text.

I cannot here settle the dispute about historical meaning. I haven't offered much evidence. But I can say that Muñoz, Lupu, and Tuttle have offered an account that is consistent with the data and does not produce absurd results. Alito has not. This suffices to refute Alito's claim that "*Smith*'s defenders have no good answer" to the question of why the boundary provisos are there.[54]

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In *Bostock v. Clayton County*, Alito wrote in dissent: "If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[55] This point exposes the deepest difficulty with Alito's purported originalism. Consider again the rule of law that he takes the Free Exercise Clause to enact: "[a] law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest."[56] This is strict scrutiny, a procedure by which judges determine, on a case-by-case basis, whether the burden that the law imposes on a claimant is justified.

In an exchange in *Fulton* with Justice Barrett about the relevance of certain precedents, Alito writes:

> And the [*Cantwell*] Court said not one word about "strict scrutiny," a concept that was foreign to Supreme Court case law at that time. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1284 (2007) ("Before 1960, what we would now call strict judicial scrutiny . . . did not exist").[57]

Alito evidently is aware of Richard Fallon's scholarship. But he doesn't notice the challenge it poses to his interpretation of free exercise.

Fallon's argument, more fully developed in his book, *The Nature of Constitutional Rights*, is that the compelling interest test is a twentieth-century innovation in constitutional law.[58] The balancing of rights against interests was unknown to the founding generation. "Through most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other"—which meant

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54. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1903 (2021) (Alito, J., concurring).
55. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting).
56. *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring).
57. *Id.* at 1892 n.25.
58. RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 6 (2019). The sentence quoted by Alito appears in *id.* at 30.

that "the Court did not view itself as weighing or accommodating competing public and private interests . . . ."[59] Even the *Lochner* Court's examination of the reasonableness of statutes, which now appears to many as involving excessive judicial discretion to invalidate laws,[60] was regarded by the Court as "a definitional requirement of valid exercises of the police power."[61]

Strict scrutiny responded to concerns about unbounded judicial discretion by giving courts the new assignment of ad hoc balancing limited to a narrowly bounded set of rights. Since the 1930s, the Court normally does not weigh burdens against benefits, but merely rubberstamps whatever the legislature has done.[62] Constitutional rights are islands of skeptical review in an ocean of deference. *Sherbert v. Verner*,[63] in which the Supreme Court (in 1963!) first accommodated a free exercise claim, meant that the Court would demand justification for burdens on religion.[64] That involves a degree of discretion that would have astounded the founding generation of lawyers, who would have regarded the weighing of state interests as a policy judgment that was inherently nonjudicial.[65] Fallon concludes that in free exercise cases, strict scrutiny "amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right."[66] McConnell agrees:

> [I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine 'compelling interest' test. . . . Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.[67]

In practice, Fallon writes, "the Supreme Court has frequently adopted an astonishingly casual approach in labeling asserted governmental

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59. *Id.* at 14.

60. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE FREEDOM 2 (2011) ("Supreme Court justices of all ideological stripes use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional.").

61. FALLON, *supra* note 58, at 15.

62. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.").

63. Sherbert v. Verner, 374 U.S. 398, 409 (1963).

64. Fallon's claim, that modern strict scrutiny is an artifact of the late twentieth-century, is supported and more fully documented in Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

65. *See* Christopher Wolfe, *The* Smith *Case, Religious Freedom, and Originalism*, PUB. DISCOURSE (Sept. 23, 2021), https://www.thepublicdiscourse.com/2021/09/77887/ [https://perma.cc/J6KN-E8N4].

66. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271, 1312 (2007).

67. McConnell, *supra* note 26, at 1127.

interests as either compelling or not compelling."[68] Although the weighing of interests is formally presented as an on/off toggle, either compelling or not compelling, in fact, the question of narrow tailoring is likely to be resolved differently depending on the importance of the interest. In short, "the strict scrutiny test permits and even requires judges to engage recurrently in only minimally structured appraisals of the significance of competing values or interests in many cases."[69]

All this is a modern innovation. Yet Alito claims that it is the original meaning of the Free Exercise Clause.

In *Bostock*, Alito invites us to "imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill . . . ."[70] He concludes that they "would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."[71] Title VII, however, announces a rule whose terms are clear enough that inquiry into its authors' intentions is unnecessary and, for a Scalian originalist, impermissible.[72] The Free Exercise Clause is more opaque. Its central term is a legal term of art that is incomprehensible without reference to the historical context that generated it.[73]

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68. FALLON, *supra* note 58, at 54. This was true until the present term, where the rule evidently has become much more favorable to religious claimants. *See generally* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. (forthcoming July 2023).

69. FALLON, *supra* note 58, at 66–67. This is why the originalist credentials of judicial exemptions cannot be rehabilitated by arguing, as Stephanie Barclay does, that early courts sometimes construed laws to exempt religious actions that were not part of the mischief that a statute aimed to prevent. Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 62 (2020). The mischief rule does not excuse conduct that *is* part of the problem that the statute aims to remedy, such as the need to recruit troops, Welsh v. United States, 398 U.S. 333, 334 (1970), or to induce children to attend school, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972). Moreover, to the extent that a court relies on the mischief rule, it does so based on its interpretation of the statute, not any characteristic of the claimant. Describing any of the rule's applications as "religious exemptions" thus is misleading, even if some prevailing claimants are religious, for the same reason that describing some of its applications as "exemptions on Tuesday" is misleading even if some of the prevailing claims are adjudicated on Tuesdays.

70. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting).

71. *Id.*

72. *See* Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves,* 105 MINN. L. REV. HEADNOTES 1, 8 (2020).

73. Yet another originalist argument, weaker than the others, is to point to the fact that legislatures sometimes crafted exemptions:

> [I]t has been argued that they show only what the Constitution permits, not what it requires. City of Boerne, 521 U. S., at 541, 117 S. Ct. 2157 (opinion of Scalia, J.). But legislatures provided those accommodations before the concept of judicial review took hold, and their actions are therefore strong evidence of the founding era's understanding of the free-exercise right.

Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1906–07 (2021) (Alito, J., concurring). These

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Alito's other argument, one that cannot be so easily refuted, is the parade of horribles that would be possible if free exercise did not protect religiously motivated conduct.[74] The state could outlaw sacramental wine, or kosher and halal slaughter, or circumcision, or the Jewish, Sikh, and Muslim practice of covering one's head even in court.[75]

This kind of argument has a familiar predecessor: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[76]

What Alito proposes is really substantive due process. He regards certain rights as so important that, even though they are not specifically guaranteed by the Constitution, they deserve judicial protection. Alito might not put it this way, but he seeks to protect "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[77] There is, of course, some textual basis in the Constitution for the judgment that religion is valuable. But that judgment also inevitably leans on the fact that special treatment of religion is "deeply rooted in this Nation's history and tradition."[78]

Moreover, what Alito proposes is an unusually far-reaching version of substantive due process. In its existing form, that doctrine protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[79] Justice Scalia was right that a rule of religious accommodation is far broader, entailing "constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . ."[80] In that form, Eugene Volokh observes, it "would require courts to routinely and definitively second-

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statutes are consistent with free exercise as Alito understands it. But actions consistent with a rule are not strong evidence that the rule is being followed, because an infinite number of possible rules are consistent with any action. The 1941 American entry into World War II is consistent with a rule that the United States is permitted to defend itself from foreign attack only in years that end in the numeral 1. Is that hypothesis confirmed by the reactions to the attacks on Fort Sumter (1861) and the World Trade Center (2001)?

74. *Id.* at 1884.

75. *Id.*

76. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

77. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228 (2022).

78. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see also* KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?, *supra* note 3, at 93–107 (arguing that the practice of giving religion special treatment can be justified even to nonreligious Americans).

79. *Casey*, 505 U.S. at 851.

80. Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

guess legislative judgments about the normative bases for a wide range of laws, and about the laws' practical necessity."[81]

The practice of judicially crafted exemptions for religious dissenters is a modern innovation. It is best understood as a manifestation of a broader liberal aspiration to accommodate idiosyncrasy and weirdness, to make room for the enormous proliferation of conflicting ideals that emerge in a free society.[82] McConnell articulates a late twentieth-century aspiration when he envisions free exercise as "protecting pluralism—the right of individuals and institutions to be different, to teach different doctrines, to dissent from dominant cultural norms and to practice what they preach."[83]

It can be done, but it demands a remarkable level of nuance and perceptiveness on the part of judges.[84] Nuance is not evident in Alito's tendency to construe religious liberty as a right to violate any law that does not pursue its purpose with monomaniacal intensity.[85] Nor in Gorsuch's effort to grant constitutional status to vaccine resistance, threatening to bring measles and polio back to the United States.[86]

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81. Brief for Professor Eugene Volokh as Amicus Curiae Supporting Neither Party at 1–2, Fulton v. Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123).

82. KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?, *supra* note 3, at 93–107 (analyzing accommodations requested by both the religious and secular as resting on a "distinctive interlocking pattern of mutual transparency and opacity" in which the values of each group is shared "at least at an abstract level"). The utopian aspiration here is akin to Herbert Marcuse's concept of "surplus-repression," repression of individual desires that exceeds the needs of civilization. *See generally* HERBERT MARCUSE, EROS AND CIVILIZATION (2d ed. 1966).

83. Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different,* N.Y. TIMES, (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html [https://perma.cc/G2QJ-LD2D].

84. For illustrations of what a nuanced approach would look like, see generally 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under* Smith *and after* Smith, 20 CATO SUP. CT. REV. 33 (2021).

85. *See* Andrew Koppelman, Opinion, *The Supreme Court Creates a New Religious Aristocracy*, HILL (Apr. 19, 2021, 12:30 PM), https://thehill.com/opinion/judiciary/548912-the-supreme-court-creates-a-new-religious-aristocracy/ [https://perma.cc/L96L-8GU3] (discussing the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), which announced a "right to nullify even the most urgent laws" that "do not mention religion at all" if it "treats some comparable secular activities more favorably" than religion).

86. *See* Andrew Koppelman, Opinion, *Neil Gorsuch's Terrifying Paragraph*, HILL (Dec. 5, 2021, 8:00 AM), https://thehill.com/opinion/judiciary/584198-neil-gorsuchs-terrifying-paragraph/ [https://perma.cc/7C47-PKF4]; *see also* Andrew Koppelman, Opinion, *Has the Supreme Court Been Infected with Long Trump Syndrome?*, HILL (Nov. 2, 2021, 7:30 AM), https://thehill.com/opinion/judiciary/579406-the-supreme-court-and-long-trump-syndrome/ [https://perma.cc/BZ3U-TUH8]. For a fuller critique of the Court's recent religion clause jurisprudence, see Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, *supra* note 68. I will here acknowledge that the recent behavior of the Court has made me think that, even if judicial accommodation is justifiable in

Substantive due process makes sense if you agree with the Court that the rights in question are so important that they deserve this kind of protection. It is intellectually vulnerable, but politically robust.[87] It has sometimes produced stable and popular doctrine: after the 1986 defeat of Robert Bork's Supreme Court nomination, which was commonly attributed to his declared skepticism about the right, later Supreme Court nominees ritually recited their obeisance to the right to privacy.[88] But whatever the argument might be for judicial creation of religious exemptions from generally applicable laws, it is not originalist. It is a modern invention, and ought to own up to its provenance.[89]

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principle, these judges ought not be trusted with the responsibility for crafting unreviewable exemptions. That raises the question of how they could possibly be stopped. The biggest litigation in which I ever played a significant role was predicated on the assumption, vindicated by the result, that Justice Gorsuch is a conscientious jurist who will follow an argument where it leads even if it contradicts his political preferences. *See generally* Brief for William N. Eskridge Jr. and Andrew M. Koppelman as Amici Curiae Supporting Employees, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 8-107). I believe that this is true of other judges who have embraced extravagant views of religious liberty. It is possible that judges who have such views can be persuaded that the original meaning of Free Exercise gives them no authority to impose them on the polity. This Essay is written in the spirit of an advocate who, believing that a forum will apply adverse law to his case, nonetheless thinks that the court can be persuaded that it lacks jurisdiction.

87. *See* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 35–52 (2002) (evaluating the vulnerability of the right to privacy).

88. *See* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 739–43 (2010) (recounting John Roberts and Samuel Alito's acknowledgements of a right to privacy in their confirmation hearing testimony).

89. This Essay thus vindicates Neil Siegel's claim that "Justice Alito voices the concerns of Americans who hold traditionalist conservative beliefs about speech, religion, guns, crime, race, gender, sexuality, and the family." Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164, 165 (2016). The fact that the framers did not share those concerns is an embarrassing detail.