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THE HISTORICAL ORIGINS OF JUDICIAL RELIGIOUS EXEMPTIONS

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The Supreme Court has recently expressed a renewed interest in the question of when the Free Exercise Clause requires exemptions from generally applicable laws. While scholars have vigorously debated what the historical evidence has to say about this question, the conventional wisdom holds that judicially created exemptions would have been a new or extraordinary means of protecting religious exercise—a sea change in the American approach to judicial review when compared to the English common law.

This Article, however, questions that assumption and looks at this question from a broader perspective. When one views judicial decisions through the lens of equitable interpretation, one finds historical evidence of widespread judicially created exemptions that have been hiding in plain sight. Indeed, the judiciary's ability to modify statutes to cohere with higher law principles like constitutional rights was widely accepted in the early republic. Though the judiciary did not always use modern language of exemptions, this was functionally what judges were doing on a large scale throughout the country and across a host of personal rights. The mode of analysis courts used to create these equitable exemptions also provides an important historical antecedent for modern strict scrutiny analysis.

An understanding of wider historical judicial practices helps avoid the trend of treating free exercise judicial remedies as an island in the law, and it also provides additional support for an original understanding in favor of religious exemptions. Thus, contrary to the conventional view, this Article demonstrates that judicially created religious exemptions are well within our constitutional traditions of judicial review, and may have more historical support than the Court's current approach.

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INTRODUCTION

Religious exemptions have become controversial—and that's putting it mildly. Within the last year, four Justices on the Supreme Court signaled their interest in revisiting whether the Free Exercise Clause requires judges to provide religious exemptions from generally applicable laws.[1] And in a case the Court will hear this term, *Fulton v. City of Philadelphia*, one of the questions presented specifically raises this question.[2] Reconsidering whether the First Amendment requires religious exemptions would involve evaluating whether Justice Scalia's opinion for the Court in *Employment Division v. Smith* should remain good law.[3] Some scholars and jurists alike have sharply criticized *Smith* for eviscerating free exercise protections.[4] On the other hand, *Smith* has its defenders.[5] Some of these defenders argue, fairly, that revisiting

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1 *See* Kennedy v. Bremerton Sch. Dist., 139 S.Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (discussing the possibility of revisiting *Employment Division v. Smith*).

2 *See, e.g.*, *Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (last visited Feb. 7, 2020) (noting that cert was granted Feb. 24, 2020); *see also Ricks v. Idaho Contractors Board*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ricks-v-idaho-contractors-board/ (last visited Feb. 7, 2020) (noting that there is a pending cert petition that also raises this question).

3 Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

4 *See, e.g.*, Horvath v. City of Leander, 946 F.3d 787, 794 (5th Cir. 2020) (Ho, J., concurring) ("*Smith* [is] 'the Dred Scott of First Amendment law.'" (quoting *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102nd Cong. 171 (1992) (statement of Nadine Strossen, President, American Civil Liberties Union); and quoting *id.* at 42 (statement of Oliver S. Thomas on behalf of the Baptist Joint Committee, the American Jewish Committee, and the Coalition for the Free Exercise of Religion))); *see also* Garrett Epps, *Elegy for a Hero of Religious Freedom*, ATLANTIC (Dec. 9, 2014), https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/. For scholars critiquing *Smith*, see JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 138 (3d ed. 2011) (describing *Smith* as a "travesty"); Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 106 (2016) (quoting *Smith*, 494 U.S. at 890) ("*Smith's* approach to free exercise continues to control for constitutional purposes and is, for more general political purposes, more entrenched than ever. Its admonition about fabulously remote threats of anarchy in a world where each 'conscience is a law unto itself' has ironically become more apt as a warning against the multiplying number of secular interests argued to be legally cognizable than against religious accommodation run amok."); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 448; Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 157 (2004) (arguing that *Smith* "eviscerated" the Free Exercise Clause); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1 ("*Smith* produced widespread disbelief and outrage.").

5 *See, e.g.*, Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1820–21 (2011) ("*Smith* affirms not the irrelevance or the dangers of religious freedom, but instead what my colleague Professor Kelley has called the relative primacy of political actors in the accommodation of religion. . . . [I]t is about institutional competence, comparative advantage, federalism, and the limits of judicial

this issue raises important questions about whether judicially crafted exemptions can be justified as a historical matter, particularly with a Supreme Court increasingly focused on grounding constitutional interpretation in originalism.[6]

Much has been written about what the historical evidence tells us regarding the scope of free exercise rights. And a key aspect of this debate has focused on what role, if any, the judiciary would have been understood to play in protecting these rights. Philip Hamburger has argued that there is insufficient historical support for the idea that free exercise protections included the ability of judges to craft exemptions from generally applicable laws.[7] Hamburger argues that the lack of evidence of judicial religious exemptions underscores the fact that the scope of religious exercise rights only included the ability to be free from overt religious government discrimination or persecution based on religion.[8] And Hamburger claims it is "improbable" that the Founding generation would have contemplated a judiciary with the power to craft exemptions.[9] Justice Scalia cited to Hamburger's work in support of his conclusion that judicially created religious exemptions are not historically justified.[10]

In contrast to Hamburger and Scalia, Michael McConnell argues that the most influential Founding-era theory of religious liberty was that it flowed

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review. These considerations should not be regarded as unwelcome or hostile interlopers in the religious liberty conversation." (citing William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000))); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending "*Smith's* rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself"); Matthew J. Franck, *Professor Paulsen and Justice Scalia: A Qualified Defense of the* Smith *Decision*, PUB. DISCOURSE (Jun. 17, 2015), https://www.thepublicdiscourse.com/2015/06/15047/ ("[I]t is hard to credit the idea that the founding generation envisioned such an enlarged role for the judiciary as the exemptions approach requires."); Vincent Phillip Muñoz, *Muñoz: Justice Scalia was Right About Religious Free Exercise*, L. & RELIGION F. (Sept. 6 2016), https://lawandreligionforum.org/2016/09/06/munoz-justice-scalia-was-right-about-religious-free-exercise/ (emphasis omitted) ("Justice Scalia's non-exemptionist reading of the Free Exercise Clause is the only construction consistent with the American founders' natural rights political philosophy and their attendant social compact constitutionalism.").

6 *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (emphasizing the importance of grounding First Amendment jurisprudence in history).

7 *See* Hamburger, *supra* note 5, at 916 (questioning the originalist historical evidence in favor of religious exemptions); *see also* Marshall, *supra* note 5, at 309 (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself").

8 *See* Hamburger, *supra* note 5, at 916–17.

9 *Id.* at 931–32.

10 *See* City of Boerne v. Flores, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part).

from religious *duty*, which trumps the claims of civil society.[11] As a result, religious exercise included the right to engage in religious conduct even when that conduct incidentally conflicts with general legal requirements (so long as that conduct did not endanger public health or safety).[12] Regarding judicially created exemptions to protect this right, McConnell asserts that "the advent of judicial review had transformed a principle of free exercise previously enforced solely through legislative action into one enforceable through the courts."[13] McConnell points to this empowerment of the judiciary in support of his important argument that religious exercise was not limited to freedom from religious discrimination.[14]

Gerard Bradley, by contrast, disagrees that such a change regarding the judiciary occurred, and argues that if it had, "the abrupt turn would have left a measurable historical path."[15] Bradley also argues that McConnell and other proponents of religious exemptions fundamentally misunderstand judicial review, and that creating any sort of exemptions for conduct was an invention from the late twentieth century.[16]

While these scholars and jurists disagree about what the evidence shows, they seem to agree that it would have been a new or extraordinary role for the judiciary to protect religious exercise by exempting conduct from laws—a sea change in the law.[17] Such a position logically places a heavier burden on proponents of religious exemptions to demonstrate that the United States, in fact, departed from the English judicial practices and empowered American jurists to take on a new powers. And a failure to demonstrate this judicial departure in the context of religious exercise would provide additional evidence for the idea that religious exercise did not include the ability to engage in religious conduct contrary to general laws. But is that understanding correct?

This Article challenges the conventional wisdom that the judicial practice of exempting conduct from statutes was either new or extraordinary.

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11 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414–15, 1511–13 (1990).

12 *Id.*

13 *Id.* at 1510.

14 Douglas Laycock has made similar arguments to McConnell. *See* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990). In a similar vein, John Eastman has pointed to the record of the First Congress, arguing that Congress's deliberation over a proposed conscription exemption in the Bill of Rights, and its discussion of William Penn's imprisonment for refusing to remove his hat in court, demonstrates "that the Founders recognized, as part of their legal landscape, broad accommodation of religion." Brief for Center for Constitutional Jurisprudence as Amici Curiae Supporting Petitioners at, Fulton v. City of Philadelphia (No. 19-123). *See also* John Yoo & James C. Phillips, *More on the Free-Exercise Clause and Religious Exemptions*, NAT'L REV. (Dec. 12, 2018, 6:30 AM), https://www.nationalreview.com/2018/12/constitution-free-exercise-of-religion-clause-exemptions/ (making similar arguments).

15 Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 267, 271–72 (1991).

16 *See id.* at 271–72.

17 *See id.*

Just the opposite, this Article shows that under a widely accepted doctrine called equity of the statute, judicially created exemptions were frequently employed during the Founding period to protect a wide variety of liberties from laws that swept too broadly.[18]

As described perhaps first by Aristotle, "laws, being in their nature general, cannot decide rightly in the infinite variety of particular cases."[19] Thus, "[w]hen an *exception to the rule occurs* . . . this exception is admitted in equity, which thus supplies the defect of law."[20] Under this doctrine of the equity of

18 To be sure, the Founding period is not the only relevant time period for understanding the Free Exercise Clause. For an excellent discussion of the history relevant to the Free Exercise Clause during the Reconstruction Period, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

19 1 HENRY WILLIAM DESAUSSURE, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF SOUTH-CAROLINA: FROM THE REVOLUTION TO DECEMBER, 1813, INCLUSIVE xxxii (Columbia, Cline & Hines 1817) (quoting ARISTOTLE, ARISTOTLE'S ETHICS AND POLITICS, bk. V, ch. 10 (John Gillies, trans., London 1797) (c. 384 B.C.E.)).

20 *Id.* (emphasis added); *see also* ARISTOTLE, ETHICA NICOMACHEA bk V, at 1137b (W.D. Ross trans., Oxford Univ. Press 1925) (c. 384 B.C.E.) ("When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. . . . And this is the nature of equitable, a correction of law where it is defective owing to its universality."). Some scholars have debated whether Roman law had some influence on this doctrine. *See* THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 296 (New York, John S. Voorhies 1857); Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 65–69 (1994) (footnotes omitted) ("In Roman law, we saw, the ground rules of statutory interpretation changed profoundly with the transition from a representative republic to an increasingly autocratic empire, and a similar dichotomy developed (almost simultaneously, this time) between the *ius commune* and canon law in the Renaissance. It stands to reason that English lawyers (including English common lawyers) drew upon the civil or canon law model of statutory interpretation most congenial to their respective eras as well as their constitutional preferences."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 30 (2001) (citing 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA 2 (San Francisco, A.L. Bancroft 1881)) (Pomeroy argued that equity was "borrowed" by English chancellors "from the acquitas and judicial powers of the Roman magistrates"); Frederick J. deSloovère, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 593 (1936) ("Equitable interpretation seems therefore to have evolved in England in part from the doctrine of interpretation by *voluntas* of the Roman law, in part from the doctrine that positive legislation was conceived to be declaratory of natural-law principles demanding an extension of statutory precepts to accord with the interpreter's own ideas, or those objectively established, as to natural rights and justice, in part from the civil-law doctrine that treats a statute as a principle, and in part from the influence of the equity courts with respect to poorly drawn and inadequate statutes of the time.").

the statute,[21] English courts regularly created exemptions to statutes, dating potentially as early as the fourteenth century in England.[22] As Blackstone explained, these courts relied on equity principles to "*except*[ ] those circumstances" from legislation to avoid results that infringed on a host of personal liberties and common-law norms.[23] Like Aristotle, Blackstone referred to "equity," as a judicial "method of interpreting laws" that involved "correction" where the "law (by reason of its universality) is deficient."[24] This statutory interpretation method should not be confused with remedies specific to courts of equity, as opposed to courts of law. As John Manning explained, "while the modern lawyer equates the term 'equity' with the extraordinary relief dispensed by the chancellor, the doctrine of the equity of the statute also had a life of its own in the run-of-the-mill statutory decisions rendered by the law courts."[25] This interpretation method was the norm understood by leading English and American jurists leading up to and immediately following the American Revolution.[26]

An understanding of these wider judicial practices helps avoid the trend of treating free exercise judicial remedies as an island in the law. Indeed, some of our country's earliest cases granting religious exemptions reflect an understanding of religious exemptions growing out of this background equitable interpretation norm.[27] One could argue that it would have been an "abrupt turn" in the law to place a unique bar on the judiciary's equitable ability to protect just one type of individual right—religious exercise. And if judicially created exemptions would not have been an anomalous means of protecting religious rights, then opponents of religious exemptions cannot rely on *that* historical argument—the unprecedented nature of judicial exemptions—as evidence that religious exercise was understood narrowly as only a prohibition on legislative discrimination.

An understanding of broader juridical norms regarding equitable interpretation also has important implications for assessing whether the Court's

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21 *See* Manning, *supra* note 20, at 31; S.E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 204 (1936).

22 *See infra* Section II.B.

23 1 WILLIAM BLACKSTONE, COMMENTARIES *61 (emphasis added); *see* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1012 (2001) ("The reasoning in the reported decisions [surrounding the Founding period] reveals that judges considered statutory goals. . . , the common law, natural law and common sense, and constitutional values relevant to the application of statutes; the results in the cases demonstrate that judges were often willing to bend or break the letter of the law to accommodate norms and practices.").

24 1 BLACKSTONE, *supra* note 23, at *61.

25 Manning, *supra* note 20, at 30 (citing HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 28, at 57 (2d ed. 1911)); *see also* 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 261 (Philadelphia, Bird Wilson 1804) (explaining that when courts used the method of equitable interpretation, "we find no difference between a court of law and a court of equity").

26 *See infra* Sections II.B–C.

27 *See infra* Sections III.A–B.

reasoning in *Smith* is justified as a historical matter. In *Smith*, Scalia argued that religious exemptions would be a "constitutional anomaly,"[28] that neutral and generally applicable statutes were entitled to deference (rather than scrutiny) from the judiciary,[29] and that providing exemptions would undercut rule-of-law norms and create a system that was "courting anarchy."[30] To the contrary, this Article demonstrates that equitable exemptions to statutes were a judicial norm, not an anomaly.[31] Broad, generally applicable laws were often treated with suspicion, not deference.[32] And providing exemptions to laws was understood as more respectful to rule-of-law norms than declaring a law void.[33] Thus, some of the fundamental assumptions on which the Court relied in *Smith* do not find support in the relevant historical evidence.

Admittedly, the fact that *Smith* relies on assumptions without basis in history does not go the full distance of establishing that religious exemptions *are* supported by history. Indeed, even some defenders of *Smith* acknowledge that the case relies on faulty analysis for a number of reasons.[34] While a full treatment of all the relevant historical evidence is beyond the scope of this Article, understanding the role equitable interpretation plays in judicial exemptions provides potential additional historical support for a modern religious exemption framework.

Specifically, the mischief rule was a form of equitable interpretation that focused on the problem the legislature was trying to solve when it crafted the law.[35] Courts would exempt applications of laws that did not actually help the government address the mischief at issue. This sort of analysis is similar to that used by early antebellum courts providing religious exemptions, when they determined that exempting religious objectors would not actually undercut government interests in peace and safety. Indeed, it is plausible that the mischief rule would have frequently justified lower court decisions to decline to apply laws to religious objectors. Notably, this mischief analysis resembles modern strict scrutiny analysis in certain respects, particularly under the portion of the test that looks at whether application of a law to a

28 Emp. Div. v. Smith, 494 U.S. 872, 886 & n.3 (1990).

29 *See id.* at 885–86 (emphasizing the need to protect "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct"); *see id.* at 878 ("[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). For a subsequent important exception to this holding, see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

30 *Smith*, 494 U.S. at 888.

31 *See infra* Section III.A.

32 *See infra* Section III.B.

33 *See infra* Section III.A.

34 *See, e.g.*, Bradley, *supra* note 15, at 247 ("I propose to defend *Smith*'s abandonment of *Sherbert*, though not all of its reasons for so doing.").

35 *See infra* Section III.B.

specific scenario would actually advance the government's interest.[36] This argument contradicts the position asserted by some jurists and scholars that the "compelling interest test" used in a religious exemption regime simply has no basis in history.[37]

This Article proceeds in four parts. Part I provides background on religious exemption cases, along with the relevant scholarly debate regarding what we should make of these cases. Part II addresses the critique that there is little evidence of judicially created exemptions at the Founding period, explaining both why that is the case and pushing back on the conventional wisdom about which default norms should govern in the face of a lack of historical precedent. Part II then traces the historical origins of judicially created exemptions to statutes and explains how equitable judicial review norms gained further legitimacy in the American context of constitutional restraints on the legislature. This Part concludes with a brief overview of how equitable interpretation may have evolved over time into, among other things, the modern constitutional doctrine of as-applied challenges. Part III situates our earliest American judicial exemption conflicts in the broader lens of this judicial review context and explores the implications of viewing these cases, as well as the *Smith* decision, through the broader lens of equitable interpretation. Part III also describes how the mischief rule operates as a historical antecedent of aspects of modern strict scrutiny analysis. Part IV addresses potential counterarguments and identifies areas where further research is warranted.

I. Background

A. A Brief Sketch of Religious Exemption Cases

Through the early republic until 1813, there are no published cases in which the judiciary addressed a religious exemption question.[38] The first

36 *See infra* Section II.B; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (explaining that strict scrutiny requires the government to prove its interest is "compelling" and its law is "narrowly tailored to advance that interest"); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) (explaining that the compelling interest standard requires courts to "look[ ] beyond broadly formulated interests" and instead "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants").

37 *See infra* Section III.A.

38 McConnell, *supra* note 11, at 1504 (stating *Phillips* is "[t]he earliest state court decision expressly addressing the exemption question"). Justice Scalia has argued that the first religious exemption case was *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213, 1 L. Ed. 353 (Pa. 1793), "decided just two years after the ratification of the Bill of Rights." City of Boerne v. Flores, 521 U.S. 507, 543 (1997) (Scalia, J., concurring in part). This case reads in its entirety as follows:

> In this cause (which was tried on Saturday, the 5th of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The Court, therefore, fined him £10; but the defendant, afterwards, waving the benefit of his testimony, he was discharged from the fine.

applicable case in 1813 is *People v. Phillips*,[39] which dealt with whether New York could subpoena a Catholic priest and force him to testify (or face punishment for refusing) about a confession the priest had received about stolen jewelry. We only have record of this case because the attorney who represented the priest circulated his shorthand transcript of the proceedings. The court ruled for the Catholic priest, arguing that under both the common law and New York's constitution the priest was entitled to a religious exemption from the rule requiring testimony.[40] *Commonwealth v. Cronin* in 1856[41] is another early case coming out of Virginia with facts and a holding very similar to *People v. Phillips*. Both cases shed light on how judges at the time dealt with the lack of recorded decisions specifically allowing judicial religious exemptions, and the default norms that filled in the gaps in such an instance.

Other exemption cases that came after *People v. Phillips* were not necessarily uniform in their approach. As Professors McConnell, Garvey, and Berg observed, five states decided religious exemption cases.[42] One state—Massachusetts—provided no clear basis for its decision.[43] Two states required exemptions (New York and Virginia),[44] and two states rejected religious exemptions (Pennsylvania and South Carolina).[45] However, though Penn-

Stansbury, 2 U.S. (2 Dall.) at 213. It is unclear from this decision if the witness specifically requested a religious exemption, and even if so, why the court denied it. *Id.*

39 (N.Y. Ct. Gen. Sess. June 14, 1813). This case was not officially reported, but a record of the arguments and the court's ruling are found in WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (photo. reprint. 1974) (1813).

40 SAMPSON, *supra* note 39, at 103.

41 Commonwealth v. Cronin, 1 Q.L.J. 128, 128 (Va. Cir. Ct. 1856).

42 MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 131 (1st ed. 2002).

43 *See generally* Commonwealth v. Drake, 15 Mass. (14 Tyng) 161 (Mass. 1818) (The Supreme Judicial Court of Massachusetts refused to overturn a criminal conviction based on a confession made by a man to the members of his church but provided no explanation for this ruling. Attorneys for the prosecution argued that the confession had been voluntary and not required by religious belief, and thus implicitly that this was not a freedom of conscience issue.).

44 *See* SAMPSON, *supra* note 39, at 103; *Cronin*, 1 Q. L.J. at 128.

45 Philips v. Gratz (Simon's Executors), 2 Pen. & W. 412, 416–17 (Pa. 1831) ("The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect. . . . [C]onsiderations of policy address themselves with propriety to the legislature, and not to a magistrate, whose course is prescribed, not by discretion, but rules already established."); State v. Willson, 13 S.C.L. (2 McCord) 393, 396 (Const. Ct. 1823) (the court rejected the religious request of religious individuals to be "excused" from jury duty on account of conscientious objection, but the court never analyzed South Carolina's free exercise provision in the constitution). Subsequent courts, outside of the Founding time period, that rejected religious exemptions seemed to share a fear that religious exemption requests were a zero-sum conflict where religious objectors must always win and thus receive a "get out of the law free" sort of card, or where the government must always win so that its interests would not be thwarted. This

sylvania and South Carolina had appellate decisions rejecting religious exemptions, there was also evidence in both states of de facto exemptions just being allowed by trial judges with broad discretion.[46] Thus, the evidence "strongly suggests that the actual practice favored exemptions, even though the appellate decisions" in these states "went the other way."[47] Furthermore, Pennsylvania was also one of the states "most hostile to judicial review."[48] McConnell has observed that Chief Judge Gibson penned both *Simon's Executors* and *Lesher*, and in these cases "his rejection of constitutional judicial review and his position on free exercise exemptions were closely related."[49]

In federal court, only one religious exemption case has been found during the pre–Civil War period.[50] In that case, the lawyers on both sides seemed to assume that religious exemptions were a possibility, but the Supreme Court held that the First Amendment did not apply to state and local government actions and did not address the merits.[51] Because of the inapplicability of the First Amendment to state and local action, it was not until the 1878 case of *Reynolds v. United States* that the Supreme Court had a chance to interpret the Free Exercise Clause.[52] There, the Court held that the First Amendment did not prohibit the federal government from prohibiting polygamy in the federal territory that is now Utah.[53]

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mode of thinking increased as the pluralism of religions increased in the mid-1800s. *See generally* Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 981 (2011) (describing how judicial skepticism of beliefs increased as diversity of religious beliefs proliferated).

46 McConnell, *supra* note 11, at 1511 (citing Commonwealth v. Lesher, 17 Serg. & Rawle 155 (Pa. 1828)). The dispute arose because a lower court judge excused a juror from a case who had "conscientious scruples on the subject of capital punishment." *Lesher*, 17 Serg. & Rawle at 155. *See Willson*, 13 S.C.L. (2 McCord) at 395–96 ("There is set forth among the causes shown, a notice of certain instances of individuals being excused, as well as an appeal to good feelings, plainly interwoven in the brief. And no doubt, instances have occurred, and will again occur, where the parties attended at the time required by law, but there being superfluous jurors, were readily excused.").

47 McConnell, *supra* note 11, at 1511.

48 Campbell, *supra* note 45, at 996.

49 McConnell, *supra* note 11, at 1507. Gibson also espoused views that directly conflicted with those espoused by Madison in *Memorial and Remonstrance*. *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 48 (John J. Patrick & Gerald P. Long eds., 1999). McConnell argues that these combined views of Gibson "provide[ ] further reason to doubt that he represented the prevailing view on the interpretation of free exercise." McConnell, *supra* note 11, at 1509.

50 *See* Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845).

51 *Id.*; McConnell, *supra* note 11, at 1503 ("[I]t is suggestive that counsel for the city felt it necessary to defend the ordinance under the 'law of necessity' in light of its purpose to prevent the spread of yellow fever. This may indicate that the legal profession believed that interference with religious activities required compelling justification." (quoting *Permoli*, 44 U.S. at 601)).

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

53 *Id.* at 167.

In the 1943 case of *Murdock v. Pennsylvania*, the Supreme Court declined to follow the *Reynolds* approach and instead granted a religious exemption from an ordinance prohibiting door-to-door solicitation.[54] The Court held that "equality in treatment [did] not save the ordinance," because "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position."[55] The Supreme Court formalized its doctrine for providing religious exemptions in *Sherbert v. Verner* in 1963.[56] Under this strict scrutiny approach, the government would have to provide a religious exemption when its actions burdened religious exercise, unless the government had a compelling reason to override the religious belief and could not accomplish that interest in some other less restrictive way.[57] In 1972, the Court affirmed this approach for religious exercise in *Wisconsin v. Yoder*, where Amish plaintiffs requested an exemption from mandatory public school requirements.[58] Scholars debate how faithfully the Court adhered to this approach in the next two decades.[59]

Then in 1990, the Supreme Court reversed course in *Employment Division v. Smith*.[60] In his opinion for the Court, Justice Scalia rejected the legal framework that had presumptively favored religious exemptions. Instead, Scalia wrote that if a law were neutral and generally applicable, then it was entitled to deference from the judiciary rather than any form of heightened scrutiny.[61] To justify his decision in *Smith*, Scalia argued that religious exemptions would be a "constitutional anomaly,"[62] that neutral and generally applicable statutes were entitled to deference from the judiciary,[63] and that providing exemptions would undercut rule of law norms and create a system that was "courting anarchy."[64] In a subsequent concurring opinion in *City of Boerne*, Justice Scalia argued that these assumptions were supported by the historical record.[65]

Congress responded swiftly to *Smith* just years later by passing statutes such as the Religious Freedom Restoration Act (RFRA) to reinstate heightened scrutiny in certain contexts.[66] But as a matter of constitutional law,

54 Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943).

55 *Id.* at 115; *see also* Cantwell v. Connecticut, 310 U.S. 296, 306–11 (1940).

56 374 U.S. 398 (1963).

57 *Id.*

58 406 U.S. 205 (1972).

59 *See, e.g.*, Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 51–52 (2015).

60 494 U.S. 872 (1990).

61 *See id.* at 882, 886 n.3.

62 *Id.* at 886.

63 *Id.* at 885–86 (emphasizing the need to protect "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct").

64 *Id.* at 888.

65 *See* City of Boerne v. Flores, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part).

66 42 U.S.C. § 2000bb (2012); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210, 243–44 (1994). *See generally* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom*

Smith is currently the law of the land.[67] Its days, however, may be numbered. Within the last year, four Justices on the Supreme Court signaled their interest in revisiting whether *Smith* should remain good law.[68] And the Supreme Court is hearing a case this fall that presents the question of whether the Court should overrule this precedent.[69]

B. Competing Accounts of Historical Support for Religious Exemptions

This Section highlights three leading schools of thought about the historical support for judicially created religious exemptions: Justice Scalia's position (closely tracking Hamburger), McConnell's position, and Bradley's position.

Justice Scalia argued that the First Amendment's text preventing Congress from "prohibiting the free exercise [of religion]" simply means that government could not ban "acts or abstentions" if the government did so "*only* because of the religious belief that they display."[70] Justice Scalia cited to Hamburger to argue that early historical evidence suggested the Constitution did not prevent government from restricting "religious freedom" that resulted in "illegal actions" under generally applicable laws.[71] This meant that religious exercise was basically just a guarantee of "equality or nondiscrimination," according to Hamburger.[72] In other words, religious exercise could be completely restricted if the law did not discriminate between relig-

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Restoration Act, 39 VILL. L. REV. 1 (1994). Some states also responded by passing their own version of RFRA. *See, e.g.*, Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531 (1999) (describing situations to which state RFRAs have been applied); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374–75 (1996) ("[S]tate legislatures and courts have become bolder in conducting their own experiments in religious liberty that seem calculated to revisit, if not rechallenge, prevailing Supreme Court interpretations of . . . free exercise clauses.").

67 To be sure, *Smith* has been limited by cases such as *Church Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1990).

68 *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (discussing the possibility of revisiting *Employment Division v. Smith*).

69 *See, e.g.*, *Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (last visited Feb. 7, 2020) (noting that cert was granted Feb. 24, 2020); *see also Ricks v. Idaho Contractors Board*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ricks-v-idaho-contractors-board/ (last visited Feb. 7, 2020) (noting that there is a pending cert petition that also raises this question).

70 Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) (alteration in original) (emphasis added).

71 City of Boerne v. Flores, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part) (quoting Hamburger, *supra* note 5, at 919).

72 Hamburger, *supra* note 5, at 919.

ious and nonreligious conduct—a "general law[ ] governing conduct."[73] If the opposite were true, Scalia argued this would create "a private right to ignore generally applicable laws," which would be "a constitutional anomaly."[74] Scalia underscored the anomalous nature of this sort of religious exemption by pointing to the lack of Founding-era examples of judicially created religious exemptions.[75] Relying in part on this historical evidence, Scalia (like Hamburger) argued that the scope of religious exercise rights only included the ability to be free from overt religious government discrimination or persecution based on religion.[76]

In contrast, McConnell argues that "constitutionally compelled exemptions [from generally applicable laws regulating conduct] were within the contemplation of the framers and ratifiers" as a possible meaning of the Free Exercise Clause.[77] McConnell goes on to say that "the advent of judicial review had transformed a principle of free exercise previously enforced solely through legislative action into one enforceable through the courts,"[78] and that "[o]nce the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature."[79] Thus, by using this revolutionary power of judicial review, courts would now be able to play a more active role in the fate of legislation.[80]

Bradley, by contrast, disagrees that such a change involving the courts occurred, and argues that if it had, "the abrupt turn would have left a measurable historical path."[81] Bradley also takes the argument a step further than Scalia and Hamburger. He argues that McConnell and other propo-

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73 *City of Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part) (emphasis omitted). Hamburger also pointed to the text of the First Amendment in support of this interpretation:

> This assumption is apparent in the language of the First Amendment, which begins, "Congress shall make no law." Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise.

Hamburger, *supra* note 5, at 937–38 (quoting U.S. CONST. amend. I).

74 *Smith*, 494 U.S. at 886.

75 *See City of Boerne*, 521 U.S. at 542–43 (1997) (Scalia, J., concurring in part) ("[I]t would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, none exists." (citation omitted)).

76 *Id.* at 539, 542–44 (Scalia, J., concurring in part) ("The historical evidence . . . is more supportive of th[e] conclusion [in *Smith*] than destructive of it."); *see* Hamburger, *supra* note 5, at 916–17.

77 McConnell, *supra* note 11, at 1415.

78 *Id.* at 1510.

79 *Id.* at 1445.

80 *See id.*

81 Bradley, *supra* note 15, at 267.

nents of religious exemptions misunderstand judicial review during the Founding period. Judicial review in the early republic did not include creating exemptions from laws based on conduct.[82] Rather, "judicial review" at the Founding simply meant declaring that "a law was 'null' and 'void,'" akin to a "plain error" rule that "courts might void legislative action only when it was clearly, undeniably contrary to the obvious meaning of the constitutional text."[83] He thus asserts that judicially created statutory exemptions are a late-coming invention from "the late twentieth century"[84] and are simply "one aspect of the post–World War II takeover of our civil liberties corpus by political morality of liberal individualism."[85] Judicially created religious exemptions are, under this account, simply part of this activist liberal individualism, with no real basis in history.[86]

II. Rethinking the Historical Origins of Religious Exemptions

Bradley's argument highlights an important truth: the historical story of religious exemptions is simply part of a larger story about judicial review and early constitutional remedies. Leading scholars and jurists disagree about what the limited historical record has to tell us about judicially created *religious* exemptions. But they seem to share the conventional wisdom that judicially created exemptions would have been new and significant in the free exercise context.[87] By shifting the perspective to a broader historical lens, this Part challenges that conventional wisdom. In fact, under the doctrine of equity of the statute, one finds historical evidence of widespread judicially created exemptions from statutes that has been hiding in plain sight.

But before turning to the background equitable practices at play, this Part addresses why the lack of voluminous religious exemption cases should not be surprising, and in fact underscores the need to inform our analysis with an understanding of broader judicial review norms.

A. The Limited Historical Record Increases the Need for a Broader Understanding of Judicial Norms

Justice Scalia, Hamburger, and Bradley have argued that judicially created religious exemptions from statutes are not justified by the historical evidence because there are limited examples at the Founding period.[88] It is

82 *Id.* at 271–72.

83 *Id.* at 271 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

84 *Id.* at 272.

85 *Id.* at 248.

86 In a similar vein, Vincent Muñoz describes the evolution of the judiciary providing exemptions as "modern moral autonomy exemptionism" and distinguishes this from what the Founders envisioned. 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, 1388 (2016).

87 *See supra* Section I.B.

88 City of Boerne v. Flores, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in part); *see also supra* Section I.B.

true that we do not have a robust record of judicially created religious exemptions around the Founding period. But close historical analysis of judicial review norms reveals a number of reasons why this lack of evidence is unsurprising and may in fact cut against critics of religious exemptions.

One challenge for this theory is that judicial opinions were generally not published during the Founding period, and published reports were rare even in the early decades of the republic.[89] Gordon Wood has observed that "[w]ith no printed [colonial] decisions there could be little reliance on local precedents other than those in memory."[90] It is possible, then, that there are several judicially created religious exemptions from statutes of which we simply do not have record. With such an incomplete sample, one makes claims about the significance of lack of such decisions at one's own peril.[91]

Moreover, the volume of judicial decisions about constitutional issues was far lower at the Founding period than the modern judicial constitutional caseload, and that is especially true of federal courts.[92] In his important recent book surveying the historical development of judicial review of statutes, Keith Whittington observed that "[f]rom the founding through the Civil War, the Court reviewed laws at a low rate and somewhat sporadically."[93] While judicial enforcement of constitutional limits on statutes was "familiar," it was "not exactly common."[94] The Supreme Court, for example, struck down or invalidated federal statutory provisions "at a rate of less than one every two years (and state statutes at a slightly higher rate) in the decades prior to Reconstruction."[95] During this period, it was not uncommon for the

89 William Baude & Jud Campbell, Early American Constitutional History: A Source Guide 16 (last updated Nov. 2, 2018) (unpublished manuscript) (available at https://ssrn.com/abstract=2718777) ("Published reports of American judicial decisions were unknown at the founding and somewhat rare in the early republic."); Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 748 (2018) ("Legal publishing in the first two decades of the nineteenth century was spotty . . . .").

90 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 297 (1969).

91 As the old saying goes, the absence of evidence is not necessarily the evidence of absence.

92 Peterson, *supra* note 89, at 716 ("There is, I think, very little the early federal reporters can teach us about the 'original meaning' of judicial power. . . . [The federal courts'] jurisdiction was tiny, and what jurisdiction they had was so freighted with non-legal pressure that their decisions provide little helpful data for understanding the development of statutory interpretation as a legal, rather than diplomatic, activity."); *see* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 61 (2019) ("The power of judicial review developed gradually during the first half of the nineteenth century, facilitating the goals of national political actors and consolidating the Court's claimed ability to define the institutional limits of congressional power.").

93 WHITTINGTON, *supra* note 92, at 27.

94 *Id.*

95 *Id.*

Court to go a year without constitutionally limiting any statute.[96] Based on the evidence we have of district courts and circuit courts, which again were not reliably reported, there is a "similar story" of a low volume of cases evaluating the constitutionality of statutes compared to modern constitutional caseloads.[97]

In a similar vein, the volume of statutes passed by legislatures at the Founding period was much lower than it is now. In fact, "the output of Congress" measured by the number of pages in the *Statutes at Large* "has far outstripped the judicial review activity of the Supreme Court."[98] With a much lower number of laws at the Founding period, one would expect a much lower number of judicial opinions analyzing their constitutionality. And such a comparison does not include the much more voluminous amount of executive rules, agency regulations, and policies that pose potential constitutional challenges. Thus, when considering the low amount of governmental restrictions that created constitutional conflicts, the small amount of religious exemption cases is potentially more "judicially activist" by modern standards. Indeed, higher numbers of judicially created religious exemptions would likely be necessary to even attempt to maintain the scope of religious freedom the Founders envisioned.

One scholar has argued that not only were legislatures passing less laws than they do now, the laws that they passed were much less likely to be broadly applicable rules.[99] Rather, most legislation consisted of "private bills," which included things like authorization for new roads, or grants or contract awards to particular parties.[100] Broad rules were mainly provided by common-law rules, and the work of setting forth broad "standards" in legislation did not "dominate the business of legislation" for several decades after the Founding.[101] Chancellor Henry William DeSaussure from South Carolina explained, for example, that "judicial decisions . . . form the greater part of the rules, regulating property, and governing the acts and contracts of men."[102] James McCauley Landis observed that "[l]egislation of an early date is often special in character, applying, like the judgment of a court, to a particular situation brought to the attention of [the legislature]. The mod-

96 *Id.* at 27, 62 ("There were sixty-two cases between 1789 and 1861 in which the US Supreme Court substantively evaluated the constitutionality of a federal statutory provision. The Court struck down or imposed constitutional limitations on the applicable scope of the federal law at issue in 32 percent of those cases.").

97 WHITTINGTON, *supra* note 92, at 64; Eskridge, *supra* note 23, at 1012 ("Because many judicial decisions of this period were unreported and some were unwritten, the cases I read are not a complete sample even for the six states surveyed."); *see* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571–74 (1993).

98 WHITTINGTON, *supra* note 92, at 30–32.

99 Peterson, *supra* note 89, at 720.

100 *Id.*

101 *Id.*

102 DESAUSSURE, *supra* note 19, at xxvi.

ern concept of wide and generalized legislative powers was of slow growth."[103]

Describing the proliferation of private bills and paucity of general standards, one early commentator said,

> [Statutes] are of a political rather than a civil nature. . . . Of those which prescribe rules of civil conduct to the citizens, rules for making and expounding contracts, principles of decision on the questions daily agitated in our courts of justice, the number is small; indeed, it may be a question, whether our system of jurisprudence would suffer an injury by their total repeal.[104]

Another lawyer in 1809 stated, "[t]he common law, legislates by *principles*; the statute law, in *detail*. The former covers a multitude of cases, under a general rule, well digested; and explained, applied and universally known by a long practice."[105] In contrast, statutes "by attempting to provide for every particular case, and excluding every thing not expressly provided for, necessarily omits many cases, and would leave them destitute of any rule of decision, if the Judges had not the common law to fly to."[106] Thus, the need to create judicial exemptions from broad, generally applicable statutory standards—as opposed to adjustments in the common law—may also have been much less likely than it would by our modern lights, where generally applicable laws are the bread and butter of current legislative work.[107]

According to the legal historian Farah Peterson, it was not until the 1840s and 1850s that the role of the legislature began to shift, and this shift was not complete until well after the Civil War.[108] Rather than mainly passing private laws, legislatures began to enact more generally applicable laws. This shifted whole swaths of administration of social and economic relations from rules previously developed under the common law to statutory rules.[109]

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103 James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 215 (Roscoe Pound ed., 1934).

104 JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 160 (2004) (quoting Jeremiah Smith, *Book Review*, *in* 1 MONTHLY ANTHOLOGY & THE BOSTON REVIEW 138, 138 (1806) (reviewing *Reports of Cases Argued and Determined in the Supreme Judicial Court of the State of from Sept. 1804 to June 1805*)).

105 ANONYMOUS [JOSEPH HOPKINSON], CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES 29 (Philadelphia, William P. Farrand & Co. 1809).

106 *Id.*

107 WHITTINGTON, *supra* note 92, at 63 ("Both Congress and the Court were less active in the early decades of American history than they would become in later decades. The legislative output of Congress was lower, and the Court's docket was smaller. . . . Even so, the pace of judicial review increased over time. Prior to the 1820s the Court, on average, decided less than one case per year in which it reviewed the constitutionality of an application of a federal law. After that, the Court averaged one case per year, and this increased after the 1840s.").

108 Peterson, *supra* note 89, at 771–72.

109 *See id.* Of course, one could also argue that if there were fewer general statutes intruding liberty, the Framers of the Constitution would have been less concerned about this threat, and the First Amendment was unlikely to have been aimed at addressing a need for exemptions from such laws.

Additionally, as other scholars have recognized, "the culture of the United States in the late eighteenth century was fairly homogeneous, being composed almost entirely of Christian sects whose practices were unlikely to violate non-religious societal norms."[110] Conflicts did arise in contexts such as military conscription or swearing oaths, but statutes or the common law "usually accommodated" these known and fairly limited minority views likely to lead to conflict.[111]

The unsurprising limited historical record of judicially created exemptions in the religious context underscores the need to broaden our lens to look at judicial norms across a range of personal rights. Indeed, understanding the norms of equitable exemptions becomes more important, not less, when we face limited historical evidence of just one type of judicially created exemption.

B. The Equitable Origins of Judicial Exemptions to Statutes in England

To understand the historical pedigree of English courts creating exemptions from statutes, one must understand the broader theories about parliamentary sovereignty in which such exemptions arose. Lord Coke famously contended in *Bonham's Case* that "the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[112] While Coke's statement suggests that acts of Parliament will, at times, be void as against right and reason, Coke stops short of saying that *courts* have authority to proclaim the acts void. Indeed, in the case before him when Coke made this statement, Coke did not declare the law void, but instead construed the law to be *inapplicable* to Bonham.[113]

Legal historians have long debated the meaning of Coke's dicta regarding a void act.[114] Sir John Baker has pointed to contemporaneous rejections

110 William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 7 J.L. & RELIGION 363, 383 (1989).

111 Campbell, *supra* note 45, at 978.

112 Dr. Bonham's Case (1610), 77 Eng. Rep. 646, 652; 8 Co. Rep. 113b, 118a (KB) (citations omitted). Coke was not the first jurist to express this view. St. German put into the mouth of his doctor in the 1520s a theory that a statute against natural law (or the law of reason) was not law at all, and therefore was void. CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 97 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1528). A similar argument was made by Fortescue in the fifteenth century. But these arguments "bore little or no fruit in the practice of the courts." JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 223 & n.125 (5th ed. 2019) (footnote omitted) (citing NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 75–78 (1990)).

113 *Dr. Bonham's* Case, 77 Eng. Rep. at 651.

114 S.E. Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 544–45, 548 (1938) ("[W]e believe that some light may be thrown upon the problem by approaching it from the private law rather than from the constitutional law side, and we suggest that to some extent at least, later doctrines of natural law have been reflected backward upon Coke's statement, giving it a content it did not in fact have. His words have been read so long in the light of

of Lord Coke's position and noted that this statement bore little fruit in the practice of English courts.[115] Whittington has argued,

> It seems likely that in his own context, Coke was thinking about statutory interpretation and the internecine rivalries of the English courts rather than a form of modern judicial review in which courts could declare statutes null and void. Certainly, later English judges did not take Coke's assertions to be so bold[116]

as some later American jurists claimed.

However, English courts *did* appear to enforce limits on the lawmaking power of lower legislative bodies, such as municipal corporations, courts leet, and guilds, which did not have Parliament's sovereign power but were able to make "bye-laws" by immemorial custom or royal grant.[117] These legislative bodies were prevented from legislating "in a way which would contradict the common law by infringing the liberty of the subject."[118] Elizabethan judges were frequently asked to review municipal bye-laws, basing their jurisdiction on chapter 29 of Magna Carta.[119]

But as to acts of Parliament, political evolution in England regarding first parliamentary supremacy and later parliamentary sovereignty led to a narrow reading of *Bonham's Case* with regard to parliamentary power.[120] In his widely read treatise,[121] William Blackstone rejected the idea from *Bon-*

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theories Coke did not contemplate that it is difficult now to dissociate them. It is nevertheless to this that we now turn."); *see also* Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 49–61 (1926) (analyzing *Bonham's Case* and contemporary reactions to it). *But see* Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1207–08 (1976) (arguing that Coke's statement stood for the proposition that judges had the power to void statutes violating the fundamental law).

115 BAKER, *supra* note 112, at 223. Baker also notes that even Coke appears to have eventually changed his mind about this position. *Id.* at 223–24.

116 WHITTINGTON, *supra* note 92, at 40.

117 BAKER, *supra* note 112, at 225.

118 *Id.*

119 *Id.*

120 Eskridge, *supra* note 23, at 1006. The idea of parliamentary supremacy was not entirely new in Blackstone's era. Sir Thomas Smith asserted in 1565,

> [t]he most high and absolute power of the realme of Englande, consisteth in the Parliament. . . . The Parliament abrogateth olde laws, maketh newe, [and] giveth orders for thinges past, and for thinges hereafter to be followed, changeth rightes, and possessions of private men . . . . [T]o be short, . . . the parliament of Englande . . . representeth and hath power of the whole realme both the head and the bodie.

THOMAS SMITH, DE REPUBLICA ANGLORUM 48–49 (Leonard Alston ed., Cambridge Univ. Press 1906) (1583). Thomas Egerton said in 1591 that Parliament can do anything. Sir Francis Englefield's Case (1591) 74 Eng. Rep. 779, 783; 4 Leo. 136, 141 ("Parliamentum omnia potest.").

121 "Blackstone's *Commentaries* was the most widely read English law treatise in late-eighteenth-century America, and his account of statutory interpretation provides potentially valuable insights into the Founders attitudes." Manning, *supra* note 20, at 35. The Supreme Court has relied on Blackstone in a number of cases for a summary of the com-

ham's Case that courts could declare void acts of Parliament.[122] Blackstone concluded, "So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."[123] Blackstone's *Commentaries* described an act of Parliament as "the exercise of the highest authority that this kingdom acknowledges upon earth."[124] Blackstone also insisted that even "if the parliament will positively enact a thing to be done which is unreasonable," there was "no power that can control it" and judges were not "at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."[125]

Blackstone, however, did leave some leeway for courts. He believed that an act of Parliament "delivered in *clear and intelligible terms*, cannot be questioned, or its authority controlled, in any court of justice."[126] This "clear and intelligible terms" caveat turned out to have been fairly significant. He noted that

> where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.[127]

Blackstone endorsed this "equitable" form of interpreting a statute as "the correction of that, wherein the law (by reason of its *universality*) is deficient."[128] Because "all cases cannot be foreseen or expressed" in general laws, he explained, "there should be somewhere a power vested of *excepting* those circumstances which (had they been foreseen) the legislator himself *would have excepted*."[129] In other words, courts could equitably create exemptions from statutes if such consequences were contrary to the common law or law of reason. Regarding the definition of equity, Blackstone said, "[w]hat equity is . . . I shall therefore only add" that it is used to "correct and soften

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mon law that eighteenth and nineteenth century American lawyers would have studied. *See* Washington v. Glucksberg, 521 U.S. 702, 712 (1997); C.J. Hendry Co. v. Moore, 318 U.S. 133, 151 (1943); United States v. Wood, 299 U.S. 123, 138 (1936); Schick v. United States, 195 U.S. 65, 69 (1904); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1854).

122 1 BLACKSTONE, *supra* note 23, at *91.

123 *Id.* at *108.

124 *Id.* at *178.

125 *Id.* at *91; *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 237, 255, 398–99 (2008) (discussing how the "common law barred judges from" holding that "acts of Parliament" were "unlawful").

126 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *447 (O.W. Holmes, Jr. ed., 12th ed., Boston, Little, Brown, & Co. 1873) (1826) (emphasis added); *see* 1 BLACKSTONE, *supra* note 23, at *60, *62 (explaining that "the liberty of considering . . . cases in an equitable light" must be limited to "where words [of a statute] bear either none, or a very absurd signification").

127 1 BLACKSTONE, *supra* note 23, at *91.

128 *Id.* at *61 (emphasis added) (quoting GROTIUS, DE AEQUITATE § 3 (n.d.)).

129 *Id.* (emphasis added).

the rigor of the law, when through it's [sic] generality it bears too hard in particular cases."[130]

Equity did not always result in limiting statutory language. Sometimes it resulted in "enlarg[ing]" of the statutory language to apply the language of the statute to cases that would not ordinarily fall within the statute's meaning.[131] In other words, statutes could be read equitably in a way that limited the language (and thus created exceptions to a natural reading), or that broadened the language (and thus applied beyond a natural reading). The British legal historian Theodore Plucknett observed ways in which courts equitably interpreted statutes both to "restrict[ ] the scope of a statute by excepting particular cases from its operation" in some instances, and in others to "extend[ ] the application of statutes."[132] However, Plucknett suggested that this extension function by courts decreased over time.[133] Similarly, Bill Eskridge noted that, while sometimes courts broadened statutes equitably, "there was a general concern in England that there were too many statutes that swept too broadly," and this frequently "justified continuing judicial narrowing of statutes in a variety of cases."[134] James McCauley Landis

130 *Id.* at *92. One scholar has similarly noted that at its most basic level, equitable interpretation just meant "that strict law would not be applied" based on other external values or understandings. David Ibbetson, *A House Built on Sand: Equity in Early Modern English Law*, *in* LAW & EQUITY: APPROACHES IN ROMAN AND COMMON LAW 55, 56 (E. Koops & W.J. Zwalve eds., 2014).

131 1 KENT, *supra* note 126, at *465 (describing statutes that "are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy"); 6 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 386 (Henry Gwillim ed., 5th ed. 1798) ("In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged."); *see* Eyston v. Studd (1574), 75 Eng. Rep. 688, 699, 2 Plowden 459, 468 (KB) (Plowden's note) (sometimes "the letter of a statute is restrained," and sometimes it is "enlarged, by equity"); deSloovère, *supra* note 20, at 591 ("Conceived discrepancies between the intention of the legislature and the meaning of statutory words led at an early date to the doctrine of the equity of the statute, according to which courts might vary the explicit meaning of the text whenever by supposed equity such meaning ought for the sake of justice to be extended or restricted.").

132 THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 57–65, 72–81 (Harold Dexter Hazeltine ed., 1922); *see also* Manning, *supra* note 20, at 31–32 ("In one respect, the doctrine allowed judges to restrict the general words of a statute when they produced harsh results apparently outside the statute's policy.").

133 PLUCKNETT, *supra* note 132, at 75 (describing cases in which the "court went in extending the application of statutes, for the principle as well as the detail was subject to such extension or restriction as the judges thought expedient," but noting that this extension function occurred "more frequently, it will be observed, in the reign of Edward I than of his grandson").

134 Eskridge, *supra* note 23, at 1008. Eskridge contrasted this outcome with the heightened hesitancy of courts to *add* words to statutes. *Id.*; *see also* PETER BENSON MAXWELL, THE INTERPRETATION OF STATUTES 254–57 (Gilbert H.B. Jackson ed., London, Sweet & Maxwell Ltd. 8th ed. 1937) (1875) (citing a multiple statutes and cases from sixteenth to nineteenth centuries, where courts created equitable exemptions from statutes); *id.* at 254 ("Enact-

also explained that under the "doctrine of the equity of the statute . . . exceptions dictated by sound policy were written by judges into loose statutory generalizations."[135] In sum, English courts could avoid inequitable consequences by, among other things, creating exceptions from statutes by reading statutory language to apply less broadly than the plain text could allow. As Plowden explained in 1574, "equity . . . puts an exception to the generality of the text [of the statute law] for some reasonable cause."[136] And these judicially created exceptions are "as strong as if [they] had been expressly put in the Act."[137]

One method judges used to determine what constituted the most equitable application of a statute involved reliance on the "mischief rule." This rule focused on determining the context of the passage of the law and the problem, or mischief, the law was created to solve.[138] Lord Coke discussed the relationship between equitable interpretation and the mischief rule in his *Institutes of the Laws of England*:

> 'Equitie' is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, that for the law-makers could not possibly set downe all cases in expresse terms.[139]

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ments, also, which impose forms and solemnities on contracts on pain of invalidity, are construed so as to be as little restrictive as possible of the natural liberty of contracting."); R v. Seas (1784), 168 Eng. Rep. 255, 255, 1 Leach 305, 305 (KB) (concluding that a capital law prohibiting stealing "any goods, wares, or merchandises" from a stable did not apply to theft of a coachman's coat from a stable as it was not the type of typical "furniture" kept within a stable, even though this fell within the plain language of the statute).

135 Landis, *supra* note 103, at 215–16.

136 *Eyston*, 75 Eng. Rep. at 465; BAKER, *supra* note 112, at 222 (quoting Plowden's observation that sometimes the "sense and the reason of the law . . . is not as large as the letter"); *see also* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming 2021) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452037 ("[A]s time passes, and as a statute is pressed into service to answer questions never dreamed of at the time of its enacting, the mischief rule will tend to serve this stopping-point function by offering a narrower reading of the statute.").

137 *Eyston*, 75 Eng. Rep. at 698 (Plowden's note) (citation omitted) ("[T]he sages of our law, who have had the exposition of our Acts of Parliament, have in these and many other cases almost infinite restrained the generality of the letter of the law by equity, which seems to be a necessary ingredient in the exposition of all laws.").

138 *See, e.g.*, Bray, *supra* note 136 (manuscript at 3). Bray describes how in early modern legal usage, there does not appear to be a distinction between the mischief rule and the doctrine of equity of the statute. Bray argues that subsequently, a divergence occurred, and equity is more readily associated with broadening a statute, whereas mischief is more readily associated with narrowing a statute. *Id.* (manuscript at 22 n.841) (citing Eskridge, *supra* note 23, at 999).

139 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 21, at 24.b (Francis Hargrave & Charles Butler eds., Philadelphia, Robert H. Small 19th ed., 1853) (1628). Plowden's famous note to *Eyston v. Studd* also described the analysis courts should engage in when equitably interpreting a statute.

Blackstone illustrated how an equitable exception could be judicially derived by looking to the mischief of the law. He described a law stating, "whoever drew blood in the streets should be punished with the utmost severity."[140] Blackstone asked whether the law could punish a surgeon "who opened the vein of a person that fell down in the street with a fit."[141] Blackstone thought that the law could not be applied in this way. He analyzed "the effects and consequence, or . . . reason of the law," and explained that "the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."[142] As Theodore Sedgwick, an American lawyer, similarly explained, an equitable "construction ought to be put upon a statute as may best answer the intention the makers had in view; and the intention is sometimes to be collected from the *cause or necessity* of such statute."[143] Thus, judges would sometimes carve back the scope of the statute—i.e., create a statutory exemption—for inequitable circumstances that fell within the plain meaning of the statute but outside the mischief or "necessity" of the statute.

Scholars disagree about when equitable interpretation took hold in England, with some arguing it arose as far back as the thirteenth and fourteenth centuries.[144] Still others contend that the doctrine did not emerge in a meaningful way until the fifteenth century in England.[145] In St. German's early sixteenth-century treatise, he provides an early description of an equitable exemption, focused on mitigating the rigor of the law.[146] He explains that "[i]t is not possible to make any general rule of law but that it shall fail in some case" where "to follow the words of the law were in some case both against justice and the common wealth."[147] As a result, "in some cases it is good and even necessary to [depart] the words of the law and to follow that reason and justice requireth and to that intent equity is ordained / that is to say to temper and mitigate the rigor of the law."[148] To do otherwise would

> [A] man ought not to rest upon the letter only, . . . but he ought to rely upon the sense, which is temperated and guided by equity, and therein he reaps the fruit of the law, for as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense.

Eyston, 75 Eng. Reg. at 699 (citation omitted).

140 1 BLACKSTONE, *supra* note 23, at *60 (citation omitted).

141 *Id.*

142 *Id.* at *59–60.

143 SEDGWICK, *supra* note 20, at 298 (emphasis added).

144 *See* deSloovère, *supra* note 20, at 592; Landis, *supra* note 103, at 215–17; William H. Loyd, *The Equity of a Statute*, 58 U. PA. L. REV. 76, 77–78 (1909).

145 *See* Thorne, *supra* note 21, at 204; Manning, *supra* note 20, at 30.

146 ST. GERMAN, *supra* note 112, at 97.

147 *Id.* at 97. The original spelling used in this quote is as follows: "[A]ny generall rewle of the lawe . . . shall fayle in some case" where "to folowe the wordes of the lawe/ were in some case both agaynst Iustyce & the common welth." *Id.*

148 *Id.* (emphasis omitted). The original spelling used in this quote is as follows: "in some cases it is *good and even* necessary to leue the wordis of the lawe/ & to folowe that reason and Justyce requyreth/ & to that intent equytie is ordeyned/ that is to say to tempre and myttygate the rygoure of the lawe." *Id.*

be to allow a problematic "exception . . . [to] the law of reason."[149] Far better, in such a circumstance, to equitably create an "exception" which is understood "in every general rule of every . . . law."[150]

Regardless of when it began, Manning has observed that a "fairly extensive version" of this equitable doctrine for statutory interpretation "was assimilated into England's legal culture well before American independence"[151] and was described in treatises and digests by the leading English jurists.[152] This equitable interpretation method was thus an important norm understood by leading English and American jurists leading up to and immediately following the American Revolution.[153] And it should not be confused with remedies specific to courts of equity, as opposed to courts of law. Manning noted that the doctrine of the equity of the statute was often employed in ordinary statutory interpretation decisions rendered by the law courts.[154] Baker described equity "in the original sense of the term" as "judicial discretion to make the regular law function more effectively."[155] As James Wilson

149 *Id.* The original spelling used in this quote is as follows:

> The whiche is no other thynge but an excepcyon of the lawe of god/ or of the lawe of reason/ from the generall rewles of the lawe of man: when they by reason of theyr generalytye wolde in any partyculer case Iuge agaynste the lawe of god/ or the lawe of reason/.

150 *Id.* The original spelling used in this quote is as follows: "whiche excepcion is secretely vnderstande in euery generall rewle of euery posytyue lawe. And so it apperyth that equytie taketh not away the very ryght/ but only that that [semyth to be ryght by the generall wordes of the lawe/]." *Id.* (brackets in original).

151 Manning, *supra* note 20, at 32.

152 *See* 4 Bacon, *supra* note 131, at 649 ("A statute ought sometimes to have such equitable Construction as is contrary to the Letter."); 5 John Comyns, A Digest of the Laws of England 320 (London, A. Strahan 5th ed., corr., 1822) ("So, the judges expound a case within the mischief and cause of an act, to be within the statute by equity, though it be not within the words. . . . As, if a statute be remedial, it shall be extended by equity to other cases within the same mischief."); A Discourse upon the Exposicion & Understandinge of Statutes 140–41 (Samuel E. Thorne ed., 1942) ("Yt is therfore to be knowen that sommetymes statutes are taken by equytye more then the wordes, sommetyme contrary to the wordes, sommetyme it is taken strayctelye accordinge to the wordes, and sommetyme, where there are no wordes in the statute and yet a case happenethe upon an estatute, the commen lawe shall make a construccion."); Christopher Hatton, A Treatise Concerning Statutes, or Acts of Parliament: and the Exposition Thereof 31–32 (London, Richard Tonson 1677) ("All Statutes may be expounded by Equity so far forth as *Epicaia* goeth, . . . and Law of Reason from the general words of the Law of Man.").

153 While the practice of courts creating equitable exemptions to statutes was widespread, it was not uniformly accepted. Some courts rejected an equitable approach to statutory interpretation. *See, e.g.*, Nichols v. Wells, 2 Ky. (Sneed) 255, 259 (1803) ("[I]t is [courts'] duty to declare what the law is and not what it should have been."). One historian has noted that while equitable interpretation was not employed by all jurists, it was employed by the most influential ones—those who were the "leading thinkers" and who wrote the treatises and commentaries on early American law. Peterson, *supra* note 89, at 759.

154 Manning, *supra* note 20, at 30 (citing Black, *supra* note 25, at 57).

155 Baker, *supra* note 112, at 216.

noted, "[w]hen equity is taken in this sense, every court of law is also a court of equity. When equity is taken in this sense—and, applied to the interpretation of law, this is its genuine meaning—it is an expression synonymous to true and sound construction."[156] This practice provided an important judicial safety valve to avoid applications of laws that seemed, for a variety of reasons, particularly problematic.

C. Equitable Exemptions in the Early American Republic

American political leaders rejected Blackstone's notion of parliamentary sovereignty, instead adopting theories about popular sovereignty that created strict limits on legislatures. This shift in understanding about the location of sovereign authority provided a new role for courts to declare certain laws void in the early republic. In other words, while Lord Coke's vision of judges declaring laws void was waning in England, it was waxing and taking on real meaning in the colonies.[157]

In his well-known *Commentaries*,[158] Kent stated, "we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke . . . to declare, as he did in *Doctor Bonham's Case*, that the common law doth control acts of Parliament, and adjudges them void, when against common right and reason."[159] Kent went on to observe that "[t]he principle in the English government, that the Parliament is omnipotent, does not prevail in the United States" if there is a "constitutional objection to a statute."[160] Indeed, in America, all legislative bodies were viewed closer to subordinate Elizabethan legislative bodies in England, which were prohibited from "contradict[ing] the common law by infringing the liberty of the subject."[161] Thus, Kent argued that

> [t]he courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and to regard the Constitution, first of the United States, and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform.[162]

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156 WILSON, *supra* note 25, at 260 (emphasis added).

157 Eskridge, *supra* note 23, at 1067 (footnote omitted) ("As it waned in England, the voidance power waxed in America. Its earliest invocation by Supreme Court Justices was the opinion of Chief Justice Jay, Justice Cushing, and Judge Duane for the New York Circuit regarding their appointment to adjudicate pension claims, subject to administrative and then legislative review.").

158 According to one source, *Commentaries on American Law* was a best-selling American law book, and it became the legal text for many college students. JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763–1847, at 303–04 (1939) ("[N]o American work had ever earned so much money" and made it into the hands of many "college youths" because "Kent had become the favorite preceptor of the legal profession.").

159 1 KENT, *supra* note 126, at *448 (footnotes omitted); *see also* BAKER, *supra* note 112, at 224 n.131 (*Bonham's Case* "had some influence on the establishing of judicial review [of legislation] in America").

160 1 KENT, *supra* note 126, at *448.

161 BAKER, *supra* note 112, at 225.

162 1 KENT, *supra* note 126, at *449.

And a judicial declaration that a law was void might amount to the judiciary "disregard[ing] an unconstitutional act," as with a portion of the Judiciary Act of 1789 in *Marbury v. Madison*,[163] or in holding "the law," or a portion of the law, as "inoperative."[164]

Though debated by scholars,[165] some historical evidence suggests that the Founders anticipated judges playing an important role in enforcing constitutional limits, including in the form of enumerated rights, against legislatures. During the Constitutional Convention, Madison asserted that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void."[166] When introducing the Bill of Rights, Madison also explained,

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163 *Id.* at *453 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

164 *Id.* at *453 (citing Lindsay v. E. Bay St. Comm'rs, 2 S.C.L. (2 Bay) 38 (1796)); *see also id.* at *454 ("The theory of every government, with a written constitution, forming the fundamental and paramount law of the nation, must be, that an act of the legislature repugnant to the Constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which is not law. It is the province and the duty of the judicial department to say what the law is; and if two laws conflict with each other, to decide on the operation of each. So if the law be in opposition to the Constitution, and both apply to a particular case, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law."); 1 WILSON, *supra* note 25, at 460 ("When repugnant commands are delivered by two different authorities, one inferiour and the other superiour; which must be obeyed? When the courts of justice obey the superiour authority, it cannot be said with propriety that they control the inferiour one; they only declare, as it is their duty to declare, that this inferiour one is controlled by the other, which is superior. They do not repeal the act of parliament: they pronounce it void, because contrary to an overruling law.").

165 *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 73 (1985) ("[W]e are left with no obvious [constitutional] peg on which to hang Marshall's conclusion" regarding judicial review in *Marbury*); HAMBURGER, *supra* note 125, at 462 (describing the lopsided historical debate in favor of judicial review); ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760–1800, at 121 (1990); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 322–25 (1991); WOOD, *supra* note 90, at 453–63; PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW (2018) (arguing that constitutional review in the United States as currently employed was not anticipated by the Framers of the Constitution); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 636–59, 688–91 (1996); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 336 (1998) (defending Chief Justice Marshall's decision in *Marbury* regarding the interpretive question of judicial review); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts,* 49 STAN. L. REV. 1031, 1060–64 (1997); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 455 (2005) (arguing that judicial review before Marbury was "far more common than previously recognized").

166 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS]; WHITTINGTON, *supra* note 92, at 54. Tocqueville wrote of the power of judicial review in America. He observed, "within its limits, the power granted to the American courts to rule on the unconstitutionality of laws still forms one of the most powerful barriers that has ever been raised against the tyranny of

> [i]f they [proposed amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[167]

Hamilton similarly argued in the *Federalist Papers* that

> [t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution . . . must be regarded by the judges as[ ] a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.[168]

And in the case of an "irreconcilable variance . . . where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[169] James Wilson assured Antifederalists that when a federal law inconsistent with the Constitution came to the courts to be applied to a citizen, the judges would find that "it is their duty to pronounce it void."[170] John Marshall made similar assurances to Antifederalists in Virginia.[171] And he asked rhetorically, "[t]o what quarter will you look for protection from an infringement of the Constitution, if you will not give the

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political assemblies." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 175 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis, Liberty Fund 2010) (1835). Similarly, a popular Republican lawyer named Richard Rush asserted that

> the courts are always in fact interfering with the government! Pass but an embargo law; pass but an act for the enlistment of minors; let the legislature venture to . . . touch with only the pressure of a hair the supposed rights of the citizen, and you will soon see what a storm will be raised about the ears of their supposed sovereign authority.

RICHARD RUSH, AMERICAN JURISPRUDENCE 11 (Washington, D.C. 1815) (emphasis omitted).

167 James Madison, *James Madison, House of Representatives, 8 June 1789*, *in* 1 THE FOUNDERS' CONSTITUTION 479, 484 (Philip B. Kurland & Ralph Lerner eds., 1987).

168 THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

169 *Id.* at 467–468.

170 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 417 (Jonathan Elliot ed. 1836) [hereinafter 2 DEBATES] (emphasis omitted). Wilson also noted that unlike in England, "[i]n the United States, the legislative authority is subjected to another control, beside that arising from natural and revealed law; it is subjected to the control arising from the constitution." 1 WILSON, *supra* note 25, at 460. And a "transgression" of "the bounds of the legislative power—a power most apt to overleap its bounds," must be "adjudged" by the "judicial department." *Id.* at 462. Wilson called this "a noble guard against legislative despotism." *Id.*

171 3 DEBATES, *supra* note 170, at 553 ("If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."); WHITTINGTON, *supra* note 92, at 55.

power to the judiciary? There is no other body that can afford such a protection."[172]

Along these lines, during the Constitutional Convention, North Carolina's Hugh Williamson and Connecticut's Oliver Ellsworth debated whether the Constitution needed a prohibition on ex post facto laws. Ellsworth thought an explicit provision was unnecessary because such laws were "void of themselves" and thus would not be upheld by competent courts.[173] Williamson did not disagree, but he pointed out that his state constitution had an express provision dealing with this issue, and it had proved useful "because the Judges can take hold of it."[174] Both seemed to agree that natural law principles would render this sort of legislation unconstitutional with or without an express provision. But Williamson thought an express provision might embolden judges to enforce more strictly that principle against legislatures.[175] When debating the wording of the Second Amendment, Ebgert Benson of New York explained that interpreting the wording would be "a question before the Judiciary" relevant to "every regulation [the government would make] with respect to the organization of the militia, whether it comports with [the Second Amendment] or not."[176]

In the context of the Free Exercise Clause, St. George Tucker published a famous *View of the Constitution* in 1803 that included an example of judicial review.[177] He stated that the judiciary operated as "a necessary check upon the encroachments, or usurpations of power, by either of the other" branches of government, which helped ensure that "no individual can be oppressed."[178] He specifically argued that if "a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience," or "abridging" other First Amendment rights such as "speech, or of the press; or the right of the people to assemble peaceably," then it "be the province of the judiciary to pronounce whether any such act were constitutional, or not."[179] And if the law was not constitutional, that province was "to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act."[180]

One famous early case that illustrated the judiciary's willingness to declare a law unconstitutional (and simultaneously reject the notion of parliamentary supremacy) was the 1795 decision of *Vanhorne's Lessee v. Dorrance*.[181] In that case, Justice William Paterson riding circuit issued a ruling

172 3 DEBATES, *supra* note 170, at 554.

173 WHITTINGTON, *supra* note 92, at 54 (quoting 2 FARRAND'S RECORDS, *supra* note 166, at 376).

174 *Id.*

175 *Id.*

176 1 ANNALS OF CONG. 751 (1789) (Joseph Gales ed., 1834).

177 ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 293 (Liberty Fund 1999) (1803).

178 *Id.* at 292–93.

179 *Id.* at 293.

180 *Id.*

181 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857).

explaining that legislatures in the United States did not exercise the "absolute and transcendant" power of the English Parliament but were instead bound by the "permanent will of the people" as represented in the "fundamental law" of the Constitution.[182] He stated:

> The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.[183]

The court then held that the law was void.[184] Interestingly, this case eclipsed the subsequent 1803 *Marbury v. Madison* decision in the citations it received on the subject in the early nineteenth century.[185]

As this voidness doctrine gained acceptance in America, equitable exemptions also took on new importance. In England judges would strain to interpret acts of Parliament to avoid unreasonable results that Parliament *could* lawfully accomplish if it simply legislated clearly enough. In America, at least in the constitutional context, judges strained to interpret legislation to avoid unconstitutional results that legislatures *could not* lawfully accomplish, even with absolute clarity. James Otis, in the colonies, described this equitable approach before the American Revolution, stating that "judges will strain hard rather than interpret an act void, ab initio."[186] Perhaps this is why some scholars have argued that American judges in the Founding period "interpreted statutory words more equitably than English judges . . . in the same period."[187] Early American courts interpreted laws liberally to cohere (rather than conflict) with constitutional principles that placed real limits on legislatures.

Justice Story, riding circuit in Massachusetts, provided an example of this sensibility in the early American republic. He stated:

> Whenever it becomes our duty to decide on the constitutionality of laws, sound discretion requires, that the court should not lightly presume an excess of power by the legislative body*; nor so construe the generality of words, as*

182 *Id.* at 308, 28 F. Cas. at 1014.

183 *Id.*

184 *Id.* at 320, 28 F. Cas. at 1030 ("The confirming act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.").

185 WHITTINGTON, *supra* note 92, at 58.

186 JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 110 n.* (Boston, Edes & Gill 1764).

187 Eskridge, *supra* note 23, at 1013 ("Without doubt, there is continuity between judicial construction of statutes in the United States in the 1780s and early 1790s and English practice as reflected in Blackstone and Bacon.").

> *to extend them beyond its lawful authority*, unless the conclusion be unavoidable.[188]

In other words, even if general words could be read to include a problematic (or unconstitutional) application of the law, a judge should not interpret the words to extend to such a result and should cabin them to a lawful range of application. By doing so, courts could enforce constitutional limitations by "bend[ing] statutes" so as "not to infringe" on constitutional principles.[189]

Early jurists did not understand there to be this obligation to "bend" or interpret laws liberally or equitably in every circumstance. As one judge explained, "[t]hat a law is in itself inequitable . . . will not justify the court in dispensing with it. This would be to usurp legislative power."[190] Rather, the most important place for this method of interpretation arose when necessary to conform statutes to higher "fundamental law," which often took the form of constitutional law. Chief Justice Marshall provided an important explanation of this point in his *Fisher* decision:

> That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where *rights are infringed*, where *fundamental principles are overthrown*, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness* to induce a court of justice to suppose a design to effect such objects.—But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid

188 United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (emphasis added).

189 WHITTINGTON, *supra* note 92, at 24 (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §153, at 142 (Boston, Little, Brown & Co. 1856)); *id.* at 23 ("Story is not proposing that the courts reserve the constitutional question for the future or defer to legislative judgment on a contested constitutional point. . . . For Story, the question is merely one of the forms by which courts enforce constitutional limitations on legislative authority. If the statute is 'clear and precise,' the courts may have to declare it void. If the statute is less clear, the courts may be able to announce that the proposed application of the law exceeds the power of Congress and that such application will be regarded as off-limits and not judicially enforceable.").

190 Wilson v. Wilson, 30 F. Cas. 248, 249 (C.C.D.C. 1805) (No. 17,848) (Kilty, C.J.); *see also* Evans v. Jordan, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice) (observing that construction of a statute "is never to be carried so far as to thwart . . . [the] policy which the legislature has the power to adopt"), *aff'd*, 13 U.S. (9 Cranch) 199 (1815); The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice) (noting that the rule of lenity does not "overrule[ ]" the legislature, but avoids "extend[ing] the law to cases to which the legislature had not extended it"), *rev'd*, 12 U.S. (8 Cranch) 221 (1814).

> an inconvenience which ought to have been contemplated in the legislature when the act was passed . . . .[191]

Thus, if general language of a statute caused *ordinary* political inconveniences, the text should be read in its "ordinary sense" even if inconvenient. Indeed, in such contexts judges would engage in a strict textualist reading even when doing so would lead to inconvenience or perhaps injustice.[192] On the other hand, courts would *not* interpret the general language of a statute to violate "rights" or contravene "fundamental principles" unless the legislature had clearly required such a result. But if the legislature *had* been crystal clear that it meant to transcend its constitutional authority, then in that case the judiciary might have to declare the law void.[193] As Justice Story explained,

> As little reason could there be to imagine the legislature would voluntarily transcend its constitutional authority. The language must be very clear and precise, which would impose on the court the duty of declaring the solemn act of the legislature to be void. The court could never incline so to construe doubtful expressions, much less to seek astutely for hidden interpretations, which might darkly lead to such a result.[194]

Historians have noted that the late 1790s through early 1820s saw a high point in equitable interpretation of legislation.[195] Legal scholars of every

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191 United States v. Fisher, 6 U.S. (2 Cranch) 358, 389–90 (1805) (emphasis added).

192 Perhaps the inconveniences in these cases did not rise to the level of conflict with natural law principles embodied in the common law or constitutions. For example, in *Flanegan v. Negley*, the judge issued an opinion dealing with Pennsylvania's mandatory arbitration act. 3 Serg. & Rawle 498, 499 (Pa. 1817). He stated,

> The Court, however, are not ignorant of many inconveniences attending the arbitration system. They have, on several occasions, pointed them out. But it would be a breach of duty in them, to assume the right of amending the law. They are bound to give an honest interpretation to the acts of the legislature, according to what appears to them to be their true meaning. When inconveniences are felt, it is to be presumed, they will be remedied, by those to whom the Constitution has entrusted the power. In conformity to the construction already established, I am of opinion, that the judgment in this case should be affirmed.

Id. In a concurring opinion in this case, Judge Duncan similarly stated, "The inconveniences arising from this construction, are many, and call loudly on the legislature for amendments and alterations. But this consideration will not justify the Court in departing from the provisions of the act." *Id.* (Duncan, J., concurring). And in another arbitration decision in *Morrison v. Weaver*, the Pennsylvania court stated, "An appeal . . . is certainly not expressly given [under the arbitration law at issue]; and this Court cannot supply that which the legislature has totally omitted, even though we should suppose the omission arose from an oversight." 4 Serg. & Rawle 190, 190–91 (Pa. 1818). Thus, these cases illustrate limits, at least for some judges, in their willingness to bend statutes to their preferences, particularly if they did not see conflicting natural law or constitutional principles at stake.

193 *Wonson*, 28 F. Cas. at 750.

194 *Id.*

195 Peterson, *supra* note 89, at 713 ("The late 1790s through the early 1820s saw a high point in what contemporaries called 'equitable interpretation' of legislation—interpreta-

stripe—including legal process theorists,[196] advocates of textualism,[197] and critics of textualism[198]—have debated the relevance of equitable interpretation and its place in American constitutional law. But perhaps part of the story is that during the early republic, judicial declarations that a law was void were fraught with danger to judicial institutions.[199] When judges issued such decisions, they did so with an apologetic tone.[200] Equity thus provided an important and less controversial method for the judiciary to put a constitutional check on legislatures by molding the statutes into a form that cohered with fundamental law.[201]

Where the legislature had drafted laws using broad and general language that *could* be read to sweep in constitutional interests, but did not

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tion that allowed courts to mold statutes in conformity with common law precedent and background legal norms. . . . This period of judicial collaboration in the legislative process represents an important stage in early American legal development.").

196 *See, e.g.*, Landis, *supra* note 103, at 214–18; *see also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400–01 (1950) ("[I]n the period of the Grand Style of case-law statutes were construed 'freely' to implement their purpose, the court commonly accepting the legislature's choice of policy and setting to work to implement it. . . . Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. . . . [T]he sound quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear . . . .").

197 Manning, *supra* note 20, at 8.

198 Eskridge, *supra* note 23, at 995–98; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1523– 24 (1998).

199 Peterson, *supra* note 89, at 758–59 ("[D]uring the first few decades of the nineteenth century . . . judicial review for constitutionality . . . was still only very rarely used. Judges of this generation understood that a decision striking down a statute was fraught with danger to the institution of the court and should be hazarded only in extreme and unavoidable cases of legislative wrongdoing.").

200 *See, e.g.*, Merrill v. Sherburne, 1 N.H. 199, 202 (1818).

201 Peterson, *supra* note 89, at 758–59 ("Although only some judges saw this as their responsibility, these were scattered throughout the nation's jurisdictions—[including] in New York, Massachusetts, Connecticut, Pennsylvania, North Carolina, South Carolina, Virginia, and Vermont, along with Francois-Xavier Martin in Louisiana, whose work became a model for codifiers, and Jeremiah Smith from New Hampshire, the home jurisdiction of Daniel Webster and other important lawyers." (footnote omitted)). Peterson also went on to note,

> Equitable interpretation was accepted by the leading thinkers (perhaps I should say the loudest, or most published, thinkers) on American law, but my sense is that many judges considered creative interpretations of statutes out of bounds. One point of similarity between Kent and the other judges who practiced equitable interpretation was their extreme erudition. Through extensive preparation for their role as judges, they had achieved a perspective from which they believed they could judge whether a statute transgressed a legal norm. Not all early nineteenth-century judges were well-educated in the law, however, so many had no basis from which to oppose or correct the direction their legislatures had taken.

Id. at 759.

require the result, courts argued the broad language was actually *evidence* the legislature had not specifically wanted the law to apply in the unconstitutional context. In the 1817 New York case of *Belknap v. Belknap*, Judge Kent addressed a law regarding the draining of swamps and bogs that defendants argued authorized the government to dig a ditch on adjoining land to drain a swamp.[202] The act stated that if inspectors found it necessary "to continue" a "ditch or ditches through lands adjoining" the swamp land at issue, "for the purposes of draining the same more effectually, they are authorized to agree and settle with the owner or owners of such lands" or if agreement cannot be reached to "apply to the Court to appoint appraisers" to assess the damage of the ditch.[203] The inspectors agreed to continue a ditch through a pond on an adjoining plot of land in order to drain a neighboring swamp, though the outcome of this ditch would have been to drain a pond that was important to downstream property owners.[204] Despite this authority technically falling within the broad language of statute, the court rejected this reading. The court observed, "it appears that this outlet is at the distance of one mile from the termination of the main ditch above alluded to."[205] The court concluded that "the inspectors have given too extended a construction to their powers under the act."[206]

The court noted that the authority to create a continual ditch on adjoining lands was "an invasion of the rights of property," and thus "it is evident that the act could only have had in view cases of the most immaterial and trifling consequence, or the power would *never have been granted with so little check*."[207] The court analogized to how carefully legislatures did act when they had meant to give government officials power to create highways over private land.[208] The court then contrasted that with the vague and general language here about continuation of ditches, and how it would be a "stretch of power never within the contemplation of the act" to allow the inspectors to drain the lake.[209] In other words, the statute in *Belknap* could be inter-

202 Belknap v. Belknap, 2 Johns. Ch. 463, 463–64 (N.Y. Ch. 1817).

203 *Id.* at 362.

204 *Id.*

205 *Id.*

206 *Id.* at 363.

207 *Id.* (emphasis added).

208 *Id.*

209 *Id.* at 364.

> Can we suppose that this act intended that these inspectors should carry their ditches where they pleased, without any regard to the improvements of others? I am entirely persuaded, that the project of draining this little lake, and thereby destroying one mill, and affecting, more or less, all the others which are supplied by its waters, is a stretch of power never within the contemplation of the act. It would be an unreasonable and dangerous construction. The power given was supposed to be harmless. It was never intended to touch and materially injure valuable improvements on adjoining lands; much less was it intended to break up useful ancient streams, and the natural and capacious reservoirs which fed them.

Id.

preted to give inspectors the authority to widen an outlet if necessary to drain the wetlands and "continue" the ditch. But because this would have deviated from norms about private property rights, the court interpreted the statute more narrowly than the text would allow.[210]

One early and prominent example of the Supreme Court engaging in the type of "bending" Justice Story described involved the 1800 case of *Mossman v. Higginson*.[211] The Court rejected a broad—and arguably the most natural—reading of the Judiciary Act of 1789, which extended jurisdiction of the federal circuit courts to:

> all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; *or an alien is a party*, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.[212]

Most of this statutory language tracked the diversity jurisdiction provided to federal courts under Article III, but the reference to "an alien" did not match any language in the Constitution's jurisdictional grant. The Court ruled that the Judiciary Act could not be construed to extend to a jurisdictional grant to aliens, as this would run contrary to the Constitution. "[T]he 11th section of the judiciary act can, and must, receive *a construction*, consistent with the constitution."[213] Note that the Court spoke in terms of construing this statute equitably to avoid the unconstitutional outcome of allowing courts to entertain suits with aliens, rather than pronouncing the Judiciary Act as written repugnant to the Constitution.[214] But in truth, the outcome in this case looks less like a construction of any sort of ambiguous language, and more like a refusal of the Court to apply the Act to extend jurisdiction to some cases that would exceed the bounds of Article III.

Nine years later in a similar case called *Hodgson v. Bowerbank*, the Court again explained that it lacked jurisdiction under the Judiciary Act even where

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210 *Id.* at 363. Virginia's Judge Spencer Roane equitably interpreted an inheritance law in Virginia to avoid conflict with republican principles. In *Tomlinson v. Dillard*, Judge Roane explained that while he "respect[ed] the Legislature of our country," he nevertheless felt "no hesitation to say, that this law . . . was anti-republican and aristocratic; founded on false principles, and on a total dereliction of the policy of the [earlier] act." 7 Va. (3 Call) 105, 110 (1801). As a result, he voted to limit the textual effect of the change in the new law.

211 Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800).

212 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (emphasis added).

213 *Mossman*, 4 U.S. (4 Dall.) at 14 (emphasis added).

214 The Court went on to explain,

> [I]t is true [that the Judiciary Act says], in general terms, that the Circuit Court shall have cognizance of suits "where an alien is *a party*," but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other.

Id.

one party was an alien.[215] The Court required that "the defendant . . . be expressly stated to be a citizen of some one of the United States. Otherwise the courts of the United States have not jurisdiction in the case."[216] In explaining why it interpreted that statute as having this construction, the Court said, "the statute cannot extend the jurisdiction beyond the limits of the constitution."[217]

Contemporaneous treatise writers described the constitutional significance of these cases, which placed the statute "in subordination to the constitution."[218] But this subordination need not come solely through the judicial power to declare laws void. Judges could also equitably modify laws to comply with the Constitution. In his 1827 *Digest of the Laws of the United States*, Thomas Gordon observed, "An act of congress, contrary to the constitution of the United States, is void—and courts of justice are bound so to declare it, *or to modify the law according to the constitution, if the case admit such modification*."[219] Gordon cited both *Mossman* and *Hodgson* as cases to support this proposition.[220] John Bouvier similarly cited *Mossman* for the proposition that "these general words" in the "judiciary act" must be "restricted by the provisions in the constitution."[221]

D. The Presumption of Legislative Compliance with the Constitution

When courts used equitable interpretation to avoid unconstitutional outcomes in the early republic, they often relied on the legal fiction that the legislature would not have intended its law to be applied in an unconstitutional way. In his *Commentaries*, Kent quoted Blackstone, but then added this qualifier:

> When it is said . . . that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, *out of respect and duty to the lawgiver*, that any

215 Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

216 *Id.* at 303–04 (emphasis omitted) (case reporter notes).

217 *Id.* at 304.

218 1 FRANCIS J. TROUBAT & WILLIAM M. HALY, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS, IN THE SUPREME COURT OF PENNSYLVANIA 91 (Philadelphia, R.H. Small 1837) (citing among others *Mossman*, 4 U.S. 12; *Hodgson*, 9 U.S. 303). John Pomeroy similarly wrote that even if Congress provided federal courts with jurisdiction through a statute, such a statutory power "is still a nullity if it transcends the scope of the constitutional grant." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 759, at 517 (New York, Hurd & Houghton 1868).

219 1 THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES 1 (Philadelphia, L. Ashmead & Co. 1827) (emphasis added).

220 *Id.*; WHITTINGTON, *supra* note 92, at 75.

221 3 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 107 (Philadelphia, Childs & Peterson 1858).

> very unjust or absurd consequence was within the contemplation of the law.[222]

Similarly, while serving as an Associate Supreme Court Justice, James Wilson relied on Aristotle for the proposition that using equity was a *required* form of statutory interpretation, out of respect for the legislator, when general statutes led to problematic applications.[223] And in his *Commentaries on the Criminal Law*, Joel Bishop stated that judges should construe or apply statutes to avoid constitutional conflicts on the assumption that the "legislature intended its acts to be . . . constitutional."[224]

An 1808 Massachusetts case provides an example in which the court noted that if it did not interpret the law equitably, giving a presumption of lawful intent to the legislators, the court would have to perform the harsher remedy of declaring the law void.[225] In *Baxter v. Taber*, Judge Parsons analyzed a case about a debtor's escape from the terms of the debtor's bond to the prison.[226] Debtors imprisoned during this period were given more latitude by the prison to roam the prison "yard" and sometimes even public roads.[227] This treatment was meant to be "humane to debtors," unlike other felons or criminals.[228] Here, there was a dispute about the prison's ability to extend the limits of the "yard" to cover other private residences.[229] Judge Parsons explained, "It is urged, that by virtue of [general language in the statute], the sessions may extend the limits of the gaol yard, at its pleasure, including within its limits a whole town, and making every man's house and land part of the prison, of which the sheriff has the custody."[230] In the face of this argument, Judge Parsons responded, "We are, however, satisfied that no opinion could have less foundation."[231] The court reasoned that "[t]o

222 1 KENT, *supra* note 126, at *447–48 (emphasis added). He also added, "[W]e cannot but admire the intrepidity and powerful sense of justice which led Lord Coke . . . to declare . . . that the common law doth control acts of Parliament, and adjudges them void, when against common right and reason." *Id.* at *448.

223 2 WILSON, *supra* note 25, at 260–62. "By Aristotle, equity is thus defined—'the correction of that, in which the law is defective, by being too general.' In making laws, it is impossible to specify or to foresee every case . . . [I]n interpreting them, those cases *should be excepted*, which the legislator himself, had he foreseen them, would have specified and excepted." *Id.* at 260 (emphasis added) (footnote omitted). This interpretation "is drawn from . . . the motive which prevailed on the legislature to make it." *Id.* Wilson also quoted Blackstone in his discussion of "excepting those circumstances which (had they been foreseen) the legislator himself would have excepted." 1 BLACKSTONE, *supra* note 23, at *61.

224 1 BISHOP, *supra* note 189, § 153, at 142 ("We have seen, that statutes are sometimes void as unconstitutional, and as contrary to natural justice. But courts will always presume the legislature intended its acts to be reasonable, constitutional, and just, and will so construe them as not to infringe these principles.").

225 Baxter v. Taber, 4 Mass. (4 Tyng) 361, 365 (1808).

226 *Id.* at 364.

227 *Id.* at 365.

228 *Id.* at 364–66.

229 *Id.* at 365.

230 *Id.*

231 *Id.*

give a power of this extent to the sessions, *could not have been within the intent of the statute*: and if the legislature *had* intended it, it is manifest that the execution of the power would have been unconstitutional."[232]

But what did courts mean when they employed this legal fiction of a lawful legislative intent? According to Manning, "Blackstone did not . . . equate [equitable interpretation] with the search for actual or likely intent" of the legislature.[233] Similarly, Sam Bray has observed that judicial references to "true intent" of the legislatures was a "product of its time" that did not require "a search for the subjective intent of members of Parliament."[234] Rather, as Sir John Baker observed, "[T]he intention of the [law] makers could only be a kind of fiction, a constructive intention to be gathered from the wording, and especially from the preamble which purported to explain it."[235] The more subjective search for legislative intent we now associate with purposivism came about much later with a transformation initiated by Henry Hart and Albert Sacks.[236]

Indeed, when Blackstone encouraged judges to create exceptions that legislators would have created "had they . . . foreseen" the circumstances, Blackstone explicitly rejected the use of subjective legislative intent as governing authority.[237] He analogized to Roman laws where the custom was to send questions of interpretation of the law to the emperor to "take his opin-

232 *Id.* (emphasis added). The court determined the application of the law would have been unconstitutional because "it would have been an appropriation of private property to public uses without compensation to the proprietors." *Id.*; *see also* Dupy v. Wickwire, 1 D. Chip. 237, 238–39 (Vt. 1814) ("Even if the legislature should have specially provided, that the deponent, should be liable to all the pains and penalties of wilful and corrupt perjury, for false swearing; such *ex post facto* provision would have been void, as being against the constitution of this State, the constitution of the United States, and even against the laws of nature. The deposition, therefore cannot be admitted on the authority of the act of the legislature.").

233 Manning, *supra* note 20, at 36.

234 Bray, *supra* note 136 (manuscript at 14–15) (quoting Heydon's Case (1584) 76 Eng. Rep. 637, 638 (Ex.)).

235 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 79–80 (2003). *See also* Bray, *supra* note 136 (manuscript at 15) (describing the "fiction" of legislative intent being a constructive intention).

236 Bray, *supra* note 136 (manuscript at 19–20). *See also* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1370 (2015) ("Legal process theorists Professors Hart and Sacks thought courts should adopt an interpretation that best promotes the purpose of the statute and the legal system as a whole, so long as the text would 'bear' that reading. The purpose the court should impute to the legislature is not an actual, historical intent or purpose, but should flow from the assumption that legislation is an act of 'reasonable persons pursuing reasonable purposes reasonably.' Their central example of this technique for inferring purpose is, again, *Heydon's Case*, which attends not to the text or historical intention, but rather the 'mischief' in the old law and the 'true reason for the remedy.'" (footnotes omitted) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994))).

237 1 BLACKSTONE, *supra* note 23, at *61–62.

ion upon it."[238] He described this as a "bad method of interpretation," and said similarly that "[t]o interrogate the legislature to decide particular disputes . . . affords great room for partiality and oppression."[239] This was in part "[b]ecause a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign," could not provide advance "notif[ication] to the people who are to obey it," and thus "can never be properly a law."[240] Thus, "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable."[241] These "signs" include things like "the words, the context, the subject matter, the effects and consequence," and the "cause which moved the legislator to enact" the law to begin with.[242]

This final "sign" of the legislative will is related to the mischief rule, meaning the doctrine that a statute should be interpreted so as to correct the mischief or problem the law was originally passed to solve.[243] And as Blackstone explained, "when this reason [for the law's enforcement] ceases, the law itself ought likewise to cease with it," even if the words could be extended further.[244] This limiting interpretation of the law, consistent with the "cause which moved the legislator to enact" the law, is what Blackstone described as "equity," or the "correction of that, wherein the law (by reason of its universality) is deficient."[245]

Consistent with a more objective legal fiction approach to legislative intent, Kent stated in his *Commentaries* that "the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute."[246] Beyond that inquiry,

> the intention [of the legislature] is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion[, following the] maxims of sound interpretation . . . .[247]

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238 *Id.* at *58.

239 *Id.*

240 *Id.* at *45.

241 *Id.* at *59.

242 *Id.* at *59, *61.

243 Bray, *supra* note 136 (manuscript at 3, 18–19).

244 1 BLACKSTONE, *supra* note 23, at *61.

245 *Id.*

246 1 KENT, *supra* note 126, at *461–62.

247 *Id.* at *462–63; *see also* Woodruff v. State, 3 Ark. 285, 285 (1841) ("Such a construction ought to be put upon a statute as may best answer the intention the makers had in view; and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances. When discovered, the intention ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter [of the statute]."); Humbert v. St. Stephen's Church, 1 Edw. Ch. 308, 312 (N.Y. Ch. 1832).

In other words, Kent focused his analysis on what the legislature *should* have intended, and this included lawful purposes to which the law could be applied consistent with constitutional laws.[248]

Chancellor DeSaussure similarly described in his commentary what was meant by legislative "intent" in the context of equitable interpretation. He quoted an "English writer" stating that "[e]quity is a judicial interpretation of the laws, which presupposing that the legislator intended what is just and right, pursues and effectuates such intention."[249] He later said, "no legislator, however learned or sagacious, ever did, or can provide by statute for the infinite variety of cases perpetually growing out of the complex and ever varying relations and transactions of men."[250] However, he also emphasized the importance of deriving meaning "in the first place" from the "statutes enacted" themselves.[251]

Perhaps one of the most fascinating examples is from Vermont's Judge Nathaniel Chipman, who had a chance to rule on a similar statute that he had actually debated when he served before as a member of the legislature.[252] In *Starr v. Robinson*, Chipman addressed a new statute providing "that all bond or bonds which have been taken by the Sheriff . . . are, hereby discharged."[253] The case was brought by a debtor who, after being committed to the debtor portion of the prison until his debt was paid, had "escaped from the liberties of the prison," and afterward his debt was assigned to a third-party creditor to collect the debt.[254] The debtor argued that this new statute relieved him of his debt now to this third-party creditor. Judge Chipman addressed the debtor's argument that "the act is too clear to admit of construction, that the words are express" and clearly include "all bonds."[255]

Judge Chipman admitted, "[t]he act, indeed, sets out with a *very broad expression*, 'all bond or bonds' and if this clause were not explained by what precedes and what follows, it might almost afford a pretext for the defendant's construction."[256] Yet Judge Chipman stated that if the legislature had made absolutely clear that the law meant to remove a debt obligation to a private third party as well, this interpretation would have been unconstitutional:

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248 Peterson, *supra* note 89, at 735 ("Kent did not seek the legislature's purpose in the records of legislative debates or other circumstantial evidence that might have revealed the legislators' actual intent. Instead, he focused his analysis on what the legislature should have intended, using as a guide his own sense of the background law and what he believed were proper legislative goals." (emphasis omitted)).

249 DESAUSSURE, *supra* note 19, at xxxi (quoting 3 RICHARD WOODDESSON, LECTURES ON THE LAW OF ENGLAND 145 (Philadelphia, John S. Littell 1842)).

250 *Id.* at xxvi.

251 *Id.*

252 Peterson, *supra* note 89, at 755 ("[H]e did participate in the assembly debate on an act that came before his court in an 1814 case.").

253 1 D. Chip 257, 258 (Vt. 1814).

254 *Id.* at 257.

255 *Id.* at 258 (emphasis added).

256 *Id.* at 260.

> It ought further to be observed, that had the provision under consideration, been so clearly expressed as clearly to admit of the defendant's construction, yet it could not avail him, *it could not be permitted to operate; it would have been a palpable violation of the constitution of the United States*, which renders null and void every act, even of a state legislature, made in violation of any express provision of that constitution. In that instrument it is expressly declared that no state shall pass any law impairing the obligation of contracts.[257]

Judge Chipman concluded by emphasizing the interplay between courts' interpretation of an objective, constitutional legislative intent as a presumption that the legislature was not trying to violate the Constitution. And his mode of construction was in some ways giving the benefit of the doubt to himself, given his previous position on the legislature when this law was passed. "[C]ertainly the Court ought anxiously to avoid any construction of a law which would imply in the legislature either an *ignorance* of their powers and duties, or a *design* to violate the national constitution."[258]

Many additional cases illustrate the interplay between early "modifications" of statutes to avoid unconstitutional applications and the legal fiction of appropriate legislative intent.[259] Judge Tilghman from Pennsylvania explained that "it must be acknowledged, that *general expressions are sometimes to be modified*" when the application "would produce a degree of injustice not to be attributed to the legislature."[260] While riding circuit, Justice Samuel Nelson observed that the Judiciary Act was "defective in respect to the jurisdiction conferred upon the circuit courts."[261] But he noted that "the meaning intended by congress" was to avoid violating the Constitution, and courts were required to construe the statute "in connection with the provision of the constitution."[262] In South Carolina, a court noted, "It is clear, that statutes passed, against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles*."[263] The court reasoned that "[i]n the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be evidently against common reason" because it would result in "a forfeiture of property."[264] The court thus determined it was "bound to give such a construction" to the statute that would be "consistent with justice," and to assume that the "legislature never had it in their contemplation" to lead to the forfeiture of property.[265]

It was true that sometimes unavoidable conflicts would arise between the Constitution and the plain language of statutes. In such a context, a Pennsylvania judge in 1825 noted:

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257 *Id.* at 260–61 (emphasis added).
258 *Id.* at 261 (emphasis added).
259 *See* WHITTINGTON, *supra* note 92, at 75.
260 Waln v. Shearman, 8 Serg. & Rawle 357, 360 (Pa. 1822) (emphasis added).
261 Prentiss v. Brennan, 19 F. Cas. 1278, 1279 (C.C.N.D.N.Y. 1851).
262 *Id.*
263 Ham v. McClaws, 1 S.C.L. (1 Bay) 93, 95–96 (Ct. C.P. 1789).
264 *Id.* (emphasis omitted). Sadly, the "property" at issue in this case involved slavery.
265 *Id.*

> when a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and to the people, the only source of legitimate power, who . . . formed the constitution of the state.[266]

But this judge also noted, "Nevertheless, the utmost deference is due to the opinion of the legislature,—so great, indeed, that a judge would be unpardonable, who, in a doubtful case, should declare a law to be void."[267] Courts should instead assume that the legislature intended its law to be constitutional. Judges understood it as their obligation to employ this legal fiction of assuming that the legislature did not clearly intend the unconstitutional application when it drafted broad and general language in the statute.[268] In such contexts, courts would functionally carve back such problematic applications of the statute.

E. The Evolution of Constitutional Adjudication

Whittington has pointed to early equitable interpretation cases that served as historical analogs for modern as-applied constitutional challenges.[269] As-applied challenges essentially result in a judicial narrowing of statutory application to comply with constitutional mandates.[270] Two key moves appear to have occurred over time, described further below. First, judges spoke more clearly in terms of conflicts with constitutional requirements, rather than lofty rhetoric about fundamental principles or natural law. Second, judges moved away from relying on the legal fiction of legislative intent to justify mental gymnastics in an unnatural statutory construction and more candidly started to explain that certain applications of statutes were simply unconstitutional (as opposed to the statute itself being declared void).

In the early republic, judges employed equitable interpretation as a way to mold statutes to higher law principles that judges discerned, including, but not limited to, constitutional limitations. One important complexity, though, is that for many Founding-era jurists, constitutional principles, principles of justice, and the common law were viewed as interchangeable princi-

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266 Eakin v. Raub, 12 Serg. & Rawle 330, 339 (Pa. 1825) ("The people declared, also, on their adoption of the constitution of the United States, 'that it should be the supreme law of the land, and that the judges in every state should be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.'" (quoting U.S. CONST. art VI, cl. 2)).

267 *Id.* at 340.

268 *See* WHITTINGTON, *supra* note 92, at 23–24.

269 *See id.*

270 For further discussion of how exemptions are simply one form of as-applied challenges, see Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1596 (2018).

ples, all derived from the natural law.[271] In the Massachusetts case of *Holden v. James*, for example, Judge Jackson equated constitutional and natural law principles, stating that delegating certain powers to government would be "manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws."[272] In this same vein, in *Dupy v. Wickwire*, the court noted that interpreting the law as an ex post facto law "would have been void, as being against the constitution of this State, the constitution of the United States, and even against the laws of nature."[273] From a modern lens, this makes it difficult to determine when courts understood themselves to be engaging in constitutional versus common-law adjudication, or whether they even believed there was a difference between the two modes of adjudication.[274]

Rhode Island provided an early example of constitutional adjudication not being necessarily wedded to a written constitution in the 1786 case of *Trevett v. Weeden*.[275] The court invalidated a law that precluded jury trials for defendants who had refused to accept the state's paper money as legal tender and described the law as unconstitutional, despite the fact that Rhode Island did not have a written constitution at the time.[276] Nevertheless, this case is "understood as part of the development of a judicial power to hold statutes unconstitutional."[277] The lawyers challenging the Act described it as "unconstitutional & void."[278] This case highlights how "constitutional" principles

271 *See* Judd Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 254 (2017) (explaining how constitutional values and natural law principles (as embodied in the common law) were often discussed in tandem and equated); 1 BISHOP, *supra* note 189, § 153, at 142 ("We have seen, that statutes are sometimes void as unconstitutional, and as contrary to natural justice."). Chancellor DeSaussure stated that "equity is synonimous to justice." DESAUSSURE, *supra* note 19, at xxxi (quoting 3 BLACKSTONE, *supra* note 23, at *429). To be sure, some jurists separated these principles. *See, e.g.*, 1 WILSON, *supra* note 25, at 460 ("In the United States, the legislative authority is subjected to another control, beside that arising from natural and revealed law; it is subjected to the control arising from the constitution.").

272 Holden v. James, 11 Mass. 396, 405 (1814).

273 1 D. Chip. 237, 238 (Vt. 1814).

274 *See* Eskridge, *supra* note 23, at 1015 ("For the most part, the state statutory interpretation decisions were like *Miller* and *Darby*: the judges attended to the statutory words and the whole statute, read the words in the context of the matter regulated and the spirit of the statute, and were quietly willing to narrow or expand the letter of enacted law in light of the common law, the legislative policy, common sense and good reason, and higher law norms such as the law of nations or constitutional principles."). *But see* Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 39–40 (2001) ("Rights under th[e] constitution were drawn from a variety of sources, moreover, of which natural law was only one, and not necessarily the most important one at that.").

275 *See* HAMBURGER, *supra* note 125, at 435–36; WHITTINGTON, *supra* note 92, at 45.

276 *See* HAMBURGER, *supra* note 125, at 443; WHITTINGTON, *supra* note 92, at 45.

277 HAMBURGER, *supra* note 125, at 436. For further discussion of the case, see *id.* at 435–49.

278 *Id.* at 441.

were often interchangeable with background natural law principles and the common law.

Viewed from this historical perspective, early Founding-era judges interpreted statutes equitably in a range of different contexts, including but not limited to constitutional contexts. As Judge Thomas Ruffin from North Carolina believed, "the role of the judge was to incorporate legislation into the general fabric of jurisprudence by interpreting it to cohere, rather than conflict, with preexisting legal structures."[279]

But in later decades, equitable interpretation increasingly occurred "under the aegis of fundamental principles embodied in the Constitution" with judges emphasizing "the common law less and constitutional values more."[280] Courts became more transparent about when they were engaging in explicit constitutional adjudication, and over time courts used fewer references to equity.[281] No matter what label it was given, equitable "interpretation" or "bending" or "modification" of statutes thus seemed to have more staying power in the context of avoiding unconstitutional outcomes. Over time judges presented themselves "less as wise men applying precepts and more as experts of the complex mechanism of law or even as mere wordsmiths."[282] This was possibly, in part, because equitable interpretation outside constitutional contexts became increasingly difficult to square with separation of powers norms in the new republic.[283] According to Manning, "when judges promote constitutional values by shading statutory meaning (within a range that the statutory language will bear), their action surely has a firmer basis" than equitable interpretation "which draws upon more open-ended conceptions of external moral principles."[284]

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279 Peterson, *supra* note 89, at 753; *see, e.g.*, Frew v. Graham, 4 N.C. (Taylor) 609, 609 (1817). Nathaniel Chipman, a Vermont judge, similarly explained, "[J]udges, from the nature of their official employment, are informed of the difficulties, which arise in the interpretation of the laws, and of those cases, in which they prove deficient, unequal, or unjust in their operation. Such information is highly necessary to the legislative body." NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 126 (Rutland, J. Lyon 1793).

280 Eskridge, *supra* note 23, at 1060, 1084.

281 *Id.* at 1084.

282 *Id.* at 1008; Peterson, *supra* note 89, at 770 ("During the Jacksonian era, the American judiciary was [also] forced to redefine itself, now as an integral part of a democratic republican government. The surge of populism that carried Jackson into the presidency in 1828 signaled the rise of a political party obsessed with democratic legitimacy in government office and deeply suspicious of delegated authority. These trends, combined with Democrats' disdain for erudition and their repudiation of the condescension of an earlier generation's 'natural aristocracy,' forced judges interpreting statutes to find new ways to justify their role in the lawmaking process." (emphasis omitted) (quoting Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 394, 396 (Albert Ellery Bergh ed., 1907))).

283 Manning, *supra* note 20, at 56–58 ("[B]icameralism and presentment . . . cannot easily be squared with the exercise of broad judicial lawmaking authority outside the constitutionally ordained legislative process.").

284 *Id.* at 125.

As judges relied less on notions of "equity" and more on technical conflicts with the Constitution, "equitable interpretation . . . fell away, and judicial review for constitutionality took [its] place."[285] But even after interpreting statutes to comport with external moral principles fell away, the principle of limiting statutes to comport with higher constitutional principles remained. By 1835, Tocqueville used much different language than that of Justice Story or Chief Justice Marshall to describe the constitutional adjudication in which American courts were engaging. He did not refer to liberally "interpreting" statutes, but instead used the sort of descriptions we now use for modern as-applied challenges. He stated, "Americans have recognized the right of judges to base their decisions on the constitution rather than on the laws. In other words, they have allowed them *not to apply laws that would appear unconstitutional*."[286] Tocqueville later explained, "[W]hen the judge challenges a law in an obscure debate and *on a particular application*, he partially conceals the importance of the challenge from the eyes of the public. His decision intends only to strike an individual interest; the law is harmed only by chance."[287]

Other state courts began to move away from reliance on congressional intent and speak more transparently about the type of as-applied constitutional remedy they were providing from overly broad statutes. In Massachusetts, a court reasoned that because a particular "construction" of a statute "would make it conflict with the Constitution of the United States," the court "therefore must presume that such was *not the intention* with which the act was framed."[288] This sentence about legislative intent sounds in the types of Blackstonian equitable arguments courts had historically made. But the court did not end with this analysis. Rather, it continued, "or if it was so [that the legislature had an unconstitutional intent], then *the intention must be held to be ineffectual*. . . . In applying the statute, its general terms are made to conform to narrower limits of the judicial powers as established by the constitutional provisions."[289]

One possible explanation for the decreased reliance on the fiction of legislative intent may be that it just was not as necessary in America as it had been under English common law. In England, where Parliament was sovereign, courts did not have authority to strike down discrete applications of laws. Thus, courts' ability to bend or modify laws only came by asserting that judges were simply fulfilling Parliament's true wishes. As Plowden explained,

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285 Peterson, *supra* note 89, at 771 ("Judicial review, while more rigid and more authoritarian, was more acceptable to the new political culture because it represented a claim to a specialized expertise that legislatures did not share. These moves preserved a sphere for judicial action that was not poisonous to Jacksonian political tendencies. Legal 'science' does not compete with popular sovereignty, because it posits a law that *is* rather than a law that *does*.").

286 1 TOCQUEVILLE, *supra* note 166, at 170 (emphasis altered).

287 *Id.* at 174 (emphasis added).

288 Florence Sewing Mach. Co. v. Grover & Baking Sewing Mach. Co., 110 Mass. 70, 80 (1872) (emphasis added).

289 *Id.* at 80–81 (emphasis added).

"in order to form a right judgment when the letter of a statute is restrained . . . by equity,"[290] then you should "suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."[291] In America, where legislatures were not sovereign and were subject to real external constitutional limits enforced by courts, this legal fiction was not necessary in the same way to authorize courts to limit certain applications of statutes.[292]

In 1870, The Supreme Court for the first time spoke in terms of the constitutionality of a statute "when applied" to specific contracts.[293] The Court first used the specific term "as applied" to refer to a constitutional challenge in the 1890 case of *Leisy v. Hardin*.[294] There, the dissent described previous cases as holding that "statutes were held to be constitutional, as applied to" certain factual situations.[295] In 1892, "Justice Brewer was the first Supreme Court Justice to write of a 'challenge' to a 'law' or a 'statute.'"[296]

290 Eyston v. Studd (1574), 75 Eng. Rep. 688, 699, 2 Plowden 459, 468 (KB) (Plowden's note); BAKER, *supra* note 112, at 222.

291 *Id.*

292 An additional practical reason for relying on the intent of legislatures under early English common law was that for centuries statutes were not written down carefully or kept in an accessible location. It was not until 1810–22 that an official version of the *Statutes of the Realm* was published, but even this volume was acknowledged to be incomplete. BAKER, *supra* note 112, at 219.

293 Legal Tender Cases, 79 U.S. 457, 529, 553 (1870) ("[W]e hold the acts of Congress constitutional as applied to contracts made either before or after their passage.").

294 To find this case, I searched *"as applied"* in Westlaw and filtered by U.S. Supreme Court cases. On December 20, 2019, this search brought back 132 cases. The earliest case is Leisy v. Hardin, 135 U.S. 100, 136 (1890).

295 *Leisy*, 135 U.S. at 136 (Gray, J., dissenting).

296 Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1230–32 (2010) ("[T]he law as found in the office of the [S]ecretary of [S]tate is beyond challenge." (footnotes omitted) (quoting United States v. Ballin, 144 U.S. 1, 9 (1892) (Brewer, J.))); *see also* Standard Stock Food Co. v. Wright, 225 U.S. 540, 548 (1912) (Hughes, J.) ("The appellant challenges the constitutional validity of the statute . . . ."). As noted by Nicholas Quinn Rosenkranz, "Six state court opinions had previously used the 'challenge to statute' formulation." Rosenkranz, *supra*, at 1230 n.63 (noting how this phrasing eventually caught on, and we have countless subsequent examples); *cf.* State v. Creditor, 24 P. 346, 346 (Kan. 1890) ("He appeals, and *challenges the validity of the statute*." (emphasis added)); State v. Dinnisse, 41 Mo. App. 22, 22 (Ct. App. 1890) ("The defendant in his brief *challenges the constitutionality of the law* under which he was prosecuted." (emphasis added)); Livesay v. Wright, 6 Colo. 92, 96 (1881) ("This, in effect, *challenges the statute* as unconstitutional." (emphasis added)); Mo. Pac. Ry. Co. v. Haley, 25 Kan. 35, 52–53 (1881) ("[T]he defendant's counsel *challenge the constitutionality of the statute* in a long and able argument." (emphasis added)); Hallenbeck v. Hahn, 2 Neb. 377, 398 (1872) ("We may well, therefore, call upon those who *challenge the validity of the law* of 1869 to point out the section of that instrument which has been disregarded in its enactment . . . ." (emphasis added)); People v. Carpenter, 24 N.Y. 86, 92 (1861) ("Those who *challenge the existence of the law*, were called on to show the notices were not given." (emphasis added)).

Even after 1890, though, courts continued to engage in creative "interpretation" or "bending" of statutes to avoid unconstitutional outcomes.[297] Still, the as-applied terminology appears to have gained prominence through the early 1900s,[298] even as aggressive "interpretation" of statutes declined. By 1913, the Supreme Court contended that it was better for courts to be transparent about the unconstitutionality of statutory applications, rather than liberally construe statutes beyond a meaning the plain language could bear.[299] The risk of such a requested approach "in the manner now asked for would be to make a new law, not to enforce an old one."[300] Thus, better for courts to simply speak in terms of unconstitutionality, rather than engage in linguistic gymnastics to save it.

It was not until the 1970s that the Court formally described its two forms of judicial review of statutes as "facial challenges to statutes" and "as-applied challenges to statutes."[301] In the modern context, the Court has continued

297 *See, e.g.*, Keller v. United States, 213 U.S. 138, 147–48 (1909) (engaging in aggressive interpretation of an immigration act to avoid a constitutional conflict).

298 *See, e.g.*, Nelson v. Montgomery Ward & Co., 312 U.S. 373, 374–75 (1941) (citing Montgomery Ward & Co. v. Roddewig, 292 N.W. 142 (Iowa 1940)) (noting that the Iowa Supreme Court "held that the Iowa Use Tax as applied to these mail orders is unconstitutional"); Weems v. Bruce, 66 F.2d 304, 307–08 (10th Cir. 1933) (concluding a law was unconstitutional and void as applied to foreign corporations); Hixon v. City of Philadelphia 32 Pa. D. & C. 436, 442–43 (Ct. C.P. 1938) ("We therefore conclude that, as applied to plaintiff, the ordinance imposing a 10 percent tax on gross receipts from all transactions in or for the parking of automobiles on open parking lots is constitutional, and that council had the power to enact it."); State v. Sheldon, 213 P. 92, 96 (Wyo. 1923) ("A statute unconstitutional as to a certain class, but constitutional as applied to other classes, may be held to have been intended to apply to the latter, if that appear to be in harmony with the purpose of the Legislature."); Sloane v. Commonwealth, 149 N.E. 407, 407 (Mass. 1925) (The laws "purporting to authorize the excise, were declared 'illegal, unconstitutional and void' as applied to the petitioner by the Supreme Court of the United States in a judgment rendered on May 4, 1925." (quoting Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925)) Notably the judgment mentioned in the earlier U.S. Supreme Court case (268 U.S. 203) does not use the "as applied" language.); Joel v. Bennett, 115 N.E. 5, 7 (Ill. 1916) ("[B]ut in such case the law is invalid only as applied to the particular conditions and valid as applied to other conditions.").

299 *See* Butts v. Merchs.' & Miners' Transp. Co., 230 U.S. 126, 135 (1913).

300 *Id.* (quoting United States v. Reese, 92 U.S. 214 (1875)).

301 Rosenkranz, *supra* note 296, at 1230–32 & n.69. The phrase "facial challenge" first appeared in the Supreme Court opinion in *Lemon v. Kurtzman.* 403 U.S. 602, 665 (1971) (White, J., concurring) ("Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment . . . ."). The phrase appeared a few more times in the following decade. *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 761 (1976) ("It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."); Young v. Am. Mini Theaters, 427 U.S. 50, 94 (1976) ("Our usual practice, as the Court notes, is to entertain facial challenges based on vagueness and overbreadth by anyone subject to a statute's proscription."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."); Alexander v. Ams. United Inc., 416 U.S. 752, 757 (1974)

with these two forms of constitutional challenges. The Court has described facial challenges as "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[302] When a statute is facially invalid, generally all applications of the statute are invalid.[303] The statute is, as it was understood historically to be, void.[304]

The much more common modern constitutional remedy is the as-applied remedy. The Court has explained that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute . . . may be declared invalid to the extent that it reaches too far, but otherwise left intact.'"[305] In this vein, the Supreme Court has described as-applied challenges as "the basic building blocks of constitutional adjudication."[306] An as-applied challenge arises when the Court is being asked to decide whether it is constitutional for a statute to be applied to a particular factual situation.[307] Sometimes the Justices may conclude that a statutory provision is constitutionally problematic, at least for the circumstances of the case before them. Such as-applied invalidations effectively narrow the scope of a statute but do not necessarily render a judgment about all its possible applications.[308] As Richard Fallon has explained, the meaning of statutes

("Because their objections to the Service's action included a facial challenge to the constitutionality of federal statutes . . . ."). As Rosenkranz explained, "Only in recent years has the phrase become ubiquitous." Rozenkranz, *supra* note 296, at 1232 n.69. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167 (2007) ("[A]ppellees are making a facial challenge to a statute" (quoting Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990))); Washington v. Glucksberg, 521 U.S. 702, 739 (1997) (discussing when parties "mak[e] facial challenges to state statutes").

302 United States v. Salerno, 481 U.S. 739, 745 (1987).

303 *See* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329–30 (2006) ("[T]he courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely."); WHITTINGTON, *supra* note 92, at 17.

304 *But see* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 937 (2018) (arguing that it is a fallacy to act as though laws have been erased by judicial declarations of voidness).

305 *Ayotte*, 546 U.S. at 329 (alteration in original) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504, (1985)); *see also* Tennessee v. Garner, 471 U.S. 1, 11–12 (1985); United States v. Grace, 461 U.S. 171, 180–83 (1983).

306 *Gonzales*, 550 U.S. at 168 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000)).

307 As Whittington has explained,

> More often, the Court is asked to evaluate a statute that is already being applied and can be considered within a specific factual situation. . . . The decision to uphold a statute, however, is always a decision to uphold its particular application in the case at hand. The justices may conclude that the litigant is not entitled to have the effects of the statute set aside in the specific case before the Court, but that does not necessarily mean that there are no circumstances under which the statute's application would be constitutionally defective.

WHITTINGTON, *supra* note 92, at 16.

308 *Id.*

"frequently must be specified through case-by-case applications; the process of specification effectively divides a statutory rule into a series of subrules; and in most but not all cases, valid subrules can be separated from invalid ones, so that the former can be enforced, even if the latter cannot."[309] This modern remedy is important for purposes of this Article because, as I have written elsewhere, religious exemptions are simply one form of as-applied challenges.[310]

Scholars have vigorously debated the contours, appropriateness, and even reality, of facial versus as-applied challenges.[311] Nevertheless, the Supreme Court embraces these two dominant modes of modern constitutional adjudication.[312] It is not clear, however, that the Court has ever recognized the equitable historical antecedent of as-applied challenges to statutes.

III. Implications

The foregoing sheds light on Founding-era religious exemption cases. Contrary to the assertions of scholars,[313] Founding-era cases granting religious exemptions would not have been viewed as "aberrant legal analysis."[314] Rather, such cases would have been part of a broader established norm connected to equitable interpretation of statutes, which became an important tool for enforcing constitutional limits on legislatures.

This Part also highlights how two early religious exemption cases—*Phillips* and *Cronin*—fit within these broader judicial practices and understandings. Section A discusses the ways in which an understanding of equitable interpretation undercuts at least three of the assumptions the Court relied on in *Smith*. Section B discusses an implication of equitable interpretation that provides additional historical support for the type of analysis courts engage in under a modern religious exemption framework.

309 Fallon, *supra* note 306, at 1325–26 (emphasis omitted) (footnote omitted).

310 Barclay & Rienzi, *supra* note 270, at 1596.

311 *Compare* Fallon, *supra* note 306, at 1326 (arguing all challenges are really as-applied challenges), *with* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1, 157 (1998) (arguing that all challenges must be facial because all rights are rights against rules, which must be challenged facially).

312 *See* Luke Meier, *Facial Challenges and Separation of Powers*, 85 Ind. L.J. 1557, 1557–58 n.3 (2010) (arguing that the Supreme Court's "as-applied" preference confirms its "fidelity to the traditional model" (quoting David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 Hastings Const. L.Q. 689, 697 (2009))); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 Fordham Urb. L.J. 773, 773 (2009) ("One recurring theme of the Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation."); Rosenkranz, *supra* note 296, at 1233, 1239 ("[T]he Court insists that 'as-applied' challenges are the most common and preferred form of constitutional challenge.").

313 *See supra* Section I.B.

314 Bradley, *supra* note 15, at 292.

A. Smith *Relied on Assumptions Unfounded by Historical Evidence*

In *Smith*, Justice Scalia argued that religious exemptions would be a "constitutional anomaly,"[315] that neutral and generally applicable statutes were entitled to deference rather than scrutiny,[316] and that providing exemptions would undercut rule-of-law norms and create a system that was "courting anarchy."[317] It turns out that all three of Justice Scalia's concerns are undercut by the historical evidence.

1. Judicially Created Exemptions Were a Default Norm, Not an Anomaly

Contrary to Justice Scalia's assertion,[318] or the arguments of other scholars,[319] exemptions from generally applicable laws were not anomalous at the Founding period. To the contrary, as discussed above, scholars who have surveyed Founding-era cases outside the religious context found a substantial number where courts "had no problem announcing exceptions to old, broadly-phrased laws where application" contradicted other forms of fundamental law.[320] At English common law, Theodore Plucknett observed how regularly judges created equitable exceptions to the application of broad statutory language.[321] James Landis also explained that "exceptions dictated by sound policy were written by judges into loose statutory generalizations."[322] Historians such as Professors Wood and Rakove have emphasized the early republic was a period where attitudes were "emphatically favorable" towards "a judicial willingness to bend statutory words to avoid clashes with constitutional principles."[323] And of course Blackstone described the important judi-

315 Emp. Div. v. Smith, 494 U.S. 872, 885–86 (1990).

316 *Id.* at 885 (emphasizing the need to protect "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct").

317 *Id.* at 888.

318 *Id.* at 885–86.

319 *See supra* Section I.B.

320 *See, e.g.*, Eskridge, *supra* note 23, at 1021–22.

321 PLUCKNETT, *supra* note 132, at 57–65, 72–81; *see also* Manning, *supra* note 20, at 31–32 ("In one respect, the doctrine allowed judges to restrict the general words of a statute when they produced harsh results apparently outside the statute's policy."). Similarly, Eskridge noted that "there was a general concern in England that there were too many statutes that swept too broadly," and this "justified continuing judicial narrowing of statutes in a variety of cases." Eskridge, *supra* note 23, at 1008. Eskridge contrasted this outcome with the heightened hesitancy of courts to *add* words to statutes. *Id.*; *see also* R v. Seas (1784), 168 Eng. Rep. 255, 255, 1 Leach 305, 305 (KB) (concluding that a law prohibiting stealing "any goods, wares, or merchandises" from a stable did not apply to theft of a coachman's coat from a stable, even though this fell within the plain language of the statute); MAXWELL, *supra* note 134, at 254–57 (citing multiple cases from the sixteenth to nineteenth centuries where courts construed broad statutes not to apply to outcomes contrary to the common law).

322 Landis, *supra* note 103, at 213, 215.

323 Eskridge, *supra* note 23, at 1018.

cial function "of *excepting* those circumstances, which (had they been foreseen) the legislator himself *would have excepted*."[324]

In the specific context of religious exemptions, both the *Phillips* and *Cronin* courts appear to have been aware of this default norm and assumed that the norm should govern in the religious context absent specific precedent to the contrary. The judges in both cases noted the lack of historical evidence for the particular religious exemption request they were dealing with. In *Phillips*, the court noted that "[t]here are no express adjudications in the British courts applied to similar or analogous cases."[325] But rather than treat the lack of cases as an obstacle to a religious exemption, as Justice Scalia did, the court said that the lack of cases meant that nothing would "contradict the inferences to be drawn from the general principles which have been discussed and established" regarding protection of religious rights in the face of general requirements.[326] In other words, without precedent to the contrary, the court was free to modify the general rule to cohere with constitutional requirements just as courts did with other sorts of rights or fundamental laws.

Similarly, in *Cronin* the court observed that "[i]t is a little remarkable that the whole range of English Reports furnish no case in which the question has ever arisen" regarding the type of religious exemption being requested by a Catholic priest.[327] Rather than use this as a reason not to provide an exemption in this case, the court determined this lack of precedent "has strongly impressed me with the conviction, that the exemption of a Catholic priest is . . . a principle of law so well recognized there, that it has been deemed useless to make it the subject of adjudication."[328] The court instead looked for precedent to the contrary, and concluded that "in England during centuries whilst the Catholic religion prevailed there no case can be found in which the disclosure was coerced."[329] The court thus took the lack of precedent preventing exemptions as a situation in which default constitutional equitable traditions would govern the analysis.[330] And this default norm required providing the priest an exemption from the rule.

The *Cronin* court also noted that in the United States the question had only been "twice decided," both "in favor of exempting a Roman Catholic priest from disclosing confessions made to him."[331] We only have record of one of these decisions, and it is *People v. Phillips*.[332] The *Cronin* court

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324 1 BLACKSTONE, *supra* note 23, at *61 (emphasis added).

325 SAMPSON, *supra* note 39, at 103.

326 *Id.*

327 Commonwealth v. Cronin, 1 Q.L.J. 128, 134 (Va. Cir. Ct. 1856).

328 *Id.* at 134. The court also noted the possibility "that the relation of priest and penitent has been held so delicate and sacred, that no one had the hardihood to draw aside the veil, which conceals it from public gaze." *Id.* at 134–35.

329 *Id.* at 141.

330 *See id.* at 141–42.

331 *Id.* at 136.

332 While I have not been able to locate a record of the case the *Cronin* court mentioned, there is record of a different criminal case decided four years after *Phillips*. In

acknowledged that while the "question has never been adjudicated in any of the courts of last resort in the United States," the two decisions cited were "persuasive" and "derive[d] additional weight from the eminent and learned names connected with them."[333]

The court also noted the broader legal landscape, in which these sorts of religious exemptions were afforded by legislatures in New York, Missouri, Wisconsin, Michigan, and in countries such as Scotland.[334] In the court's mind, these legislative exemptions provided additional evidence that an exemption was also required here by the judiciary. Note that the court did not look at these legislative exemptions as evidence that the business of providing an exemption was *solely* the responsibility of the legislature.

Thus, both courts assumed that precedent or historical evidence was needed to show that such an equitable exemption would *not* be required. Without such contrary precedent, judicial norms of granting exemptions to cohere rules with higher laws controlled the outcome.

Justice Scalia and Bradley have both belittled the importance of *People v. Phillips* because it dealt with a common-law rule, and not a statute.[335] Scalia stated that *Phillips* "is weak authority . . . because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege."[336] The same could be said of *Cronin*.

But there are a few problems with this argument. First, the two cases Justice Scalia relies on as denying religious exemptions similarly do not involve any clear request for an exemption from a statute as opposed to a common-law rule.[337] We simply lack evidence one way or another about

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People v. Smith, a New York court declined to extend the privilege to a protestant minister, reasoning that confession was not a required sacrament in the protestant faith. 2 N.Y. City-Hall Recorder 77 (Ct. Gen. Sess. 1817). However, interestingly, the minister in that case also apparently did not assert any privilege or have any problem discussing what the defendant had disclosed—so he was not requesting an exemption. *Id.*; *see also* Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037, 1051 (2005). Ultimately in 1828 the New York legislature adopted a statute that codified and substantially broadened the *Phillips* privilege: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." Cox v. Miller, 296 F.3d 89, 103 (2d Cir. 2002) (quoting N.Y. Rev. Stat. 1828, pt. 3, ch. 7, tit. 3, § 72). For an excellent in-depth discussion of the facts surrounding the *Phillips* case, see STEVEN T. COLLIS, DEEP CONVICTION: TRUE STORIES OF ORDINARY AMERICANS FIGHTING FOR THE FREEDOM TO LIVE THEIR BELIEFS 7–12 (2019).

333 *Cronin*, 1 Q.L.J. at 136–37.

334 *Id.* at 137.

335 Bradley, *supra* note 15, at 290; City of Boerne v. Flores, 521 U.S. 507, 543 (1997).

336 *City of Boerne*, 521 U.S. at 543 (Scalia, J., concurring in part) (footnote omitted).

337 *Id.* (first citing Philips v. Gratz (Simon's Executors), 2 Pen. & W. 412 (Pa. 1831) (a Jewish man requested a continuance for a trial date, which was not a rule coming from a statute); and then citing Stansbury v. Marks, 2 U.S. (2 Dall.) 213, 1 L. Ed. 353 (Pa. 1793) (the court does not indicate the rule came from a statute, nor that a religious exemption

what an early court would have done with a clear religious exemption request to a *statutory* general rule.

Second, in taking this position, Justice Scalia misunderstands the equitable relationship between statutes and the common law in the early republic. Specifically, as discussed in Section II.A, statutes were viewed as a reflection of or amendment to the common law that courts wove into the fabric of other general principles. In his pamphlet *The Rights of the British Colonies Asserted and Proved*, James Otis argued that "all antient and modern acts of parliament . . . can be considered as part of, or in amendment of the common law."[338] Similarly, Judge Thomas Ruffin from North Carolina explained "that the role of the judge was to incorporate legislation into the general fabric of jurisprudence by interpreting it to cohere, rather than conflict, with preexisting legal structures."[339] As a result, judges often equitably modified statutes in the same way they modified the common law to protect individual rights and principles of justice. As scholars have noted, "The most famous statutory interpreter of that period was Lord Mansfield, Chief Justice of the Court of King's Bench (1756–1788)—and he construed statutes almost as dynamically as he reconfigured the common law."[340] This phenomenon extended widely to other jurists in the early republic as well.[341]

Finally, and perhaps most importantly, in both *Phillips* and *Cronin*, the courts equated the method they would use to analyze either common-law rules or any other "law of the state" that impinged on religious freedom.[342] The *Phillips* court specifically commented on equitable limits on the legisla-

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was specifically requested, nor why the court denied it if it was requested)). *Simon's Executors* similarly does not appear to deal with an exemption request from a statute. Instead, it involved a contract action that

> had been set for trial on a Saturday and the plaintiff, Levi Philips, who was Jewish, moved for a continuance on the ground that "he had scruples of conscience against appearing in court to-day, and attending to any secular business; and that he believes his presence and aid will be material in the progress of the cause."

McConnell, *supra* note 11, at 1508. Perhaps the only case that involved a clear written law at issue was *Permoli*, but the Court never addressed the question on the merits. Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589, 601, 610 (1845).

338 Otis, *supra* note 186, at 108.

339 Peterson, *supra* note 89, at 753; *see, e.g.*, Frew v. Graham, 4 N.C. (Taylor) 609, 609 (1817). Nathaniel Chipman, a Vermont judge, similarly explained, "[J]udges, from the nature of their official employment, are informed of the difficulties, which arise in the interpretation of the laws, and of those cases, in which they prove deficient, unequal, or unjust in their operation. Such information is highly necessary to the legislative body." Chipman, *supra* note 279, at 126.

340 Eskridge, *supra* note 23, at 1008.

341 Other courts observed that "principles of natural religion are part of the common law." Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 401 (Pa. 1824).

342 Sampson, *supra* note 39, at 111 ("Suppose that a *decision of this court, or a law of the state* should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative." (emphasis added)); *see* Commonwealth v. Cronin, 1 Q.L.J. 128, 138 (Va. Cir. Ct. 1856).

ture for religious rights, concluding that "no human *legislator* has a right to meddle with religion."[343] And the *Cronin* court also stated that if "*any other principle of law*" deprived any religious group of "one of the sacraments of their Church, and thus deny to them the 'free exercise of their religion according to the dictates of conscience,'" such groups "should be held exempt from the operation of *any such rule, or principle of law*."[344] Thus, the fact that these cases specifically dealt with a general rule originating in the common law does not necessarily limit the relevance of their default equitable analysis in favor of exemptions.

2. Broad, Generally Applicable Statutes Were Not Immune from Judicial Scrutiny

Justice Scalia argued that generally applicable laws should not be subject to heightened judicial scrutiny.[345] The contrary result, he said, would create "a private right to ignore generally applicable laws."[346] Subsequently in his *City of Boerne* concurrence, he argued that the historical evidence supported an understanding that religious exercise should be protected only "*so long as it does not violate general laws governing conduct.*"[347] Scalia relied on various sources, including Hamburger, for the proposition that "[e]very breach of a law is against the peace" and "freedom" only included "the right 'to do only what was not lawfully prohibited.'"[348]

Yet this argument begs the question about how judges went about determining what was "lawfully prohibited" under laws to begin with. Under equitable interpretation of statutes, judges determined that many applications of a statute would not themselves be lawful, thus requiring exemption.[349] Indeed, a court's refusal to apply a statute in light of constitutional limitations followed from a recognition that the constitutional limitations were *themselves* part of the law.[350] And in providing a judicially created religious exemption for the application of a law, a judge would essentially issue a ruling that a religious objector had never violated a law to begin with.[351]

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343 SAMPSON, *supra* note 39, at 109 (emphasis added).

344 *Cronin*, 1 Q.L.J. at 140 (emphasis added).

345 Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990).

346 *Id.* at 886. Vincent Phillip Muñoz similarly argued that "[i]f the state is furthering a legitimate civic interest, *indirect* burdens on religious beliefs and practices do not violate the rights of religious liberty." Vincent Phillip Muñoz, *How the Founders Protected the Natural Right of Religious Liberty*, NAT'L REV. (Dec. 7, 2018, 6:30 AM) (emphasis added), https://www.nationalreview.com/2018/12/founders-protected-religious-freedom-first-amendment-natural-rights/.

347 *City of Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part).

348 *Id.* at 539–40 (first quoting Queen v. Lane (1704) 87 Eng. Rep. 884, 885, 6. Mod. 128, 129 (QB); and then quoting Ellis West, *The Case Against a Right to Religion-Based Exemption*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990)); *see also* Hamburger, *supra* note 5, at 918.

349 *See supra* Section II.C.

350 *See supra* Part II.

351 *See, e.g.*, Commonwealth v. Cronin, 1 Q.L.J. 128, 142 (Va. Cir. Ct. 1856).

Scalia's thumb on the scale in favor of any generally applicable legislation is also not borne out by the historical evidence. Judges often viewed broad and general language skeptically, as a mandate that needed to be reined in to prevent problematic applications. Blackstone, for example, described the defect inherent in laws by nature of their broad universality.[352] James Wilson similarly criticized legislation as "defective" when the language was "too general."[353] Along these lines, in *Belknap* Judge Kent found that broad sweeping language was evidence that the legislature had not specifically authorized an invasion on property rights.[354] Kent arrived at this conclusion despite such an application being within the most natural reading of the broad statute.[355] The Vermont case of *Starr v. Robinson* provides another example in which the "very broad expression" of the statute, if read literally, would have been unconstitutional.[356] As a result, the court explained that the statute's language "could not be permitted to operate," or else the judiciary would have had to declare the law "null and void."[357] This and other cases discussed above in Part II provide examples where generally applicable laws were subject to judicial scrutiny, and legislatures were not simply given a pass to accomplish with overly broad language what they were prohibited from doing with targeted and discriminatory language.

And indeed, the *Phillips* and *Cronin* cases reflect this understanding that generally applicable laws merited scrutiny where their application resulted in consequences that religious groups experience as persecution. The *Phillips* and *Cronin* courts both began by noting they were dealing with a generally applicable rule that nevertheless operated to exert pressure on religious individuals that they experienced as religious persecution.

The *Phillips* court noted, "It is a *general rule*, that every man when legally called upon to testify as a witness, must relate all he knows. This is essential to the administration of civil and criminal justice."[358] The *Phillips* court then noted the significant burden the government's rule would place on the priest's ability to exercise his religion. Requiring the priest to testify would place him "between Scylla and Charybdis" where the priest must "either violate his oath, or proclaim his infamy in the face of day" and be subject to

352 1 BLACKSTONE, *supra* note 23, at *61.

353 2 WILSON, *supra* note 25, at 260.

354 Belknap v. Belknap, 2 Johns. Ch. 463, 470 (N.Y. Ch. 1817).

355 *Id.* at 472 ("Can we suppose that this act intended that these inspectors should carry their ditches where they pleased, without any regard to the improvements of others? I am entirely persuaded, that the project of draining this little lake, and thereby destroying one mill, and affecting, more or less, all the others which are supplied by its waters, is a stretch of power never within the contemplation of the act. It would be an unreasonable and dangerous construction. The power given was supposed to be harmless. It was never intended to touch and materially injure valuable improvements on adjoining lands; much less was it intended to break up useful ancient streams, and the natural and capacious reservoirs which fed them.").

356 Starr v. Robinson, 1 D. Chip. 257, 260 (Vt. 1814).

357 *Id.* at 261.

358 SAMPSON, *supra* note 39, at 97 (emphasis added).

"degradation" as a consequence of committing the crime of not testifying.[359] Similarly, in *Cronin* the court observed that the priest would be forced to choose to "either violate the oath administered to him by giving false testimony, or by disclosing what he has received in the confessional, violate the ecclesiastic oath administered at the time of his ordination," or by "silence" find himself in the "contempt" of the court.[360] The priest would thus be "pressed by the whole weight of the penal branch of the law, and be prohibited from the exercise of this essential and indispensable part of [his] religion in confessing all such misdeeds."[361] To the priest, the court noted, this "would be *little short of persecution*."[362]

The *Cronin* court determined that "the great constitutional boon of religious toleration, which secures to all the 'free exercise of religion according to the dictates of conscience,' cannot be enjoyed by this class of our people" if they had no right to an exemption.[363] Thus, an equitable modification to the general rule was necessary to avoid "persecution" of this class of religious individuals and make sure that "all men shall be free" to practice their religion on equal footing without consequences that would "affect, diminish, or enlarge their civil capacities."[364] In other words, religious groups could experience persecution just as acutely whether from targeted legislation or generally applicable legislation that simply disregarded their religious needs.

Along these lines, the *Phillips* court also observed that governments throughout time had violated important fundamental rights regarding religious freedom in "a history of oppression and tyranny over the consciences of men."[365] Indeed, the court acknowledged that the early American colonies themselves had been "infected with . . . narrow views, and bigoted feelings" against religious minorities.[366] The court described its state constitutional guarantee of religious liberty as a "monument of . . . wisdom" and "liberality,"[367] operating as a "preventative" meant to safeguard against the history of such "calamities, that have deluged the world with tears and with

359 *Id.* at 99. In other words, if forced to testify, "he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience." *Id.* at 103.

360 Commonwealth v. Cronin, 1 Q.L.J. 128, 139 (Va. Cir. Ct. 1856).

361 *Id.* at 138–39.

362 *Id.* at 139 (emphasis added).

363 *Id.* at 142.

364 *Id.* at 137.

365 SAMPSON, *supra* note 39, at 109.

366 *Id.* at 110.

367 *Id.* at 110. New York's constitution specifically provided as follows:

> [T]hat the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

blood."[368] In other words, religious exemptions were necessary to avoid blood, tears, and calamities of historical persecution that could be accomplished just as effectively indirectly through general legislation as it could with targeted legislation.

In response to arguments by the government, both the *Phillips* and *Cronin* courts rejected the idea that a religious exemption would give the religious individual unfair treatment or an unjust privilege. The *Cronin* court acknowledged the government's argument that "this exemption of Catholic clergymen would be extending to them a privilege not enjoyed by clergymen of the protestant persuasion."[369] But the court responded by observing that "[n]o Protestant claims any such exemption, and they cannot be said to be denied that which they lay no claim to."[370] The court also explained that if a "rule of evidence, or any other principle of law, shall deprive Protestants of one of the sacraments of their Church, and thus deny to them the 'free exercise of their religion according to the dictates of conscience,'" such Protestants "should be held exempt from the operation of any such rule, or principle of law."[371] In that respect, religious exemptions from generally applicable laws did not create a privilege for one religious group. It put them on the same playing field as other religious groups by removing the application of a law that was leading to consequences the religious believers experienced as persecution.[372]

This historical perspective tracks the approach the Court employed in modern First Amendment jurisprudence that predated *Smith*. Specifically, the Court explained that "equality in treatment [did] not save [a generally applicable] ordinance," because "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position."[373]

3. Exemptions Were a Means of Protecting Rule-of-Law Norms, Not Courting Anarchy

Justice Scalia argued that any society adopting a system of religious exemptions would undermine rule-of-law norms to the extent that it was "courting anarchy."[374] Similarly, Vincent Phillip Muñoz argued that "if exemptions are constantly and continually necessary to protect such a fundamental right, something has gone drastically wrong with our system of

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5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2637 (Francis Newton Thorpe ed., Gov't Printing Off. 1909) (1906).

368 SAMPSON, *supra* note 39, at 109.

369 Commonwealth v. Cronin, 1 Q.L.J. 128, 140 (Va. Cir. Ct. 1856).

370 *Id.*

371 *Id.*

372 Indeed, the court criticized the government's argument about privilege as "rather more popular than logical," and thought the argument "may be invoked to excite prejudice," it "should never be allowed to disturb" the court's judgment. *Id.* at 140–41.

373 Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

374 Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

law."[375] This argument depends on the premise that the rule of law is embodied in statutes and judicial protection of constitutional rights is not included in a rule-of-law norm. But as Kent noted long ago, "if the law be in opposition to the Constitution, and both apply to a particular case, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law."[376] Kent asked, "how can [courts] close their eyes on the Constitution, and see only the law?"[377]

If there was a conflict between a constitutional protection and a statute, historically courts provided equitable exemptions to statutes precisely *because* they understood that remedy to be much more respectful of the legislature than simply declaring a law void. For example, Justice Samuel Nelson observed that courts should construe statutes "in connection with the provision of the constitution."[378] Judge Tilghman from Pennsylvania explained that "it must be acknowledged, that *general expressions are sometimes to be modified*" when they conflict with other fundamental law.[379] In the 1808 *Baxter* case, the court noted that if it didn't read an exception into the statute, it would be required to declare the statute "unconstitutional."[380] And Justice Story noted the importance of equitable modifications so as to avoid assuming that "the Legislature would voluntarily transcend its constitutional authority."[381] As discussed above, equity provided an important method for the judiciary to put a constitutional check on legislatures without using the more politically charged judicial remedy of declaring a law void.[382]

Interestingly, this rule-of-law preference for exemptions continues today. As Justice O'Connor put it for a unanimous Court, whereas facial challenges result in "invalidat[ing] the law wholesale," carving back just certain applications of statutes is a more "modest remedy" that allows the judiciary to "try not to nullify more of a legislature's work than is necessary."[383] Or as Justice Stevens put it, when the Court strikes down statutes facially, rather than to certain applications, "[t]he Court operates with a sledge hammer rather than a scalpel."[384] Notably Justice Scalia has also repeatedly written in favor of the

375 Muñoz, *supra* note 347.

376 1 KENT, *supra* note 126, at *453.

377 *Id.*

378 Prentiss v. Brennan, 19 F. Cas. 1278, 1279 (C.C.N.D.N.Y. 1851); WHITTINGTON, *supra* note 92, at 75.

379 Waln v. Shearman, 8 Serg. & Rawle 357, 360 (Pa. 1822) (emphasis added).

380 Baxter v. Taber, 4 Mass. (4 Tyng) 361, 365 (1808) ("To give a power of this extent to the sessions, could not have been within the intent of the statute: and if the legislature had intended it, it is manifest that the execution of the power would have been unconstitutional, as it would have been an appropriation of private property to public uses without compensation to the proprietors.").

381 United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

382 *See supra* notes 199–201 and accompanying text.

383 Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329, 331 (2006).

384 Citizens United v. FEC, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part).

"usual rule" that facial invalidation is an exceptional judicial remedy, whereas as-applied invalidation is the norm.[385]

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Admittedly, the fact that *Smith* relies on assumptions without basis in history does not go the full distance of establishing that religious exemptions *are* supported by history. A full treatment of all the relevant historical evidence is beyond the scope of this Article. But understanding the role equitable interpretation plays in judicial exemptions provides one additional important implication supporting a modern religious exemption regime, discussed below.

B. The Mode of Analysis Courts Used to Create Equitable Exemptions Has Some Resemblance to Modern Strict Scrutiny Analysis

Hamburger has argued that "it is improbable that the framers and ratifiers of the Bill of Rights deliberately adopted a balancing test as the standard of individual religious liberty and federal power when these were in conflict."[386] Bradley argues that the "narrowly tailored means" to achieve a "compelling [government] interest" test had no basis in the law prior to the Court's 1963 decision in *Sherbert*.[387] And Scalia spared no indignation in *Smith* when he said, "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[388] Scalia also asserted, "[N]o one . . . contends that" the compelling interest test "conforms" to early historical evidence of religious liberty.[389]

On the other hand, both Laycock and McConnell argue that early state constitutional protections of religious liberty were roughly the eighteenth-century versions of what judges today would do under a compelling-interest test.[390] Early state constitutional provisions protecting religious liberty frequently contained provisos to "protect public peace and safety."[391] Laycock

385 City of Chicago v. Morales, 527 U.S. 41, 77–78, 83 (1999) (Scalia, J., dissenting); *see also* Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1176–1181 (1996) (Scalia, J., dissenting from denial of certiorari); Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1011–13 (1992) (Scalia, J., dissenting from denial of certiorari).

386 Hamburger, *supra* note 5, at 931.

387 Bradley, *supra* note 15, at 247.

388 Emp. Div. v. Smith, 494 U.S. 872, 889–90 n.5 (1990).

389 City of Boerne v. Flores, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part).

390 *See* Laycock, *supra* note 14, at 102–03 (1990) ("[P]eace and safety in their language, compelling interest in ours."); Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 185–86 (1992) ("This formulation was a precursor to the compelling-interest test . . . .").

391 McConnell, *supra* note 11, at 1464.

and McConnell argue that this is evidence of the sorts of government interests that would be necessary to lawfully burden religious exercise.[392]

Looking at this question with the tradition of equitable interpretation in mind provides additional historical support for some aspects of the strict scrutiny analysis courts engage in under a modern exemption regime. Specifically, the mischief rule was a form of equitable interpretation that likely could have led to judicial protections for religious objectors. This rule looked carefully at the problem the legislature was trying to solve when it crafted a law, and then whether application of the law to the particular facts before it would actually advance resolution of that mischief.[393] Where such an application would not actually help address the mischief that gave rise to the law, equitable interpretation norms suggested that an exemption should be provided. As Justice Story explained, "where a statute 'is susceptible of two interpretations, one of which satisfies the terms, and stops at the obvious mischief provided against, and the other goes to an extent, which may involve innocent parties in its penalties, it is the *duty* of the court to adopt the former.' "[394]

This mischief analysis has some resemblance to modern strict scrutiny analysis. Under the modern test, a court considers what "government interest" is animating enforcement of the law. This question is similar to asking what "mischief" animated historical statutes. Then under a less restrictive alternative analysis, one asks, at least in part, whether applying the law at issue to the religious objector *actually advances* the government's interest, or whether there are better ways to advance that interest.[395] This question is similar to asking whether the application of a law to a specific set of facts would actually meaningfully address the mischief the legislature was trying to ameliorate.

For example, let us consider the famous surgeon exemption case Blackstone relies on. There, the law at issue stated, "whoever drew blood in the streets should be punished with the utmost severity."[396] But the mischief motivating this law was most likely the desire to prevent violent and harmful drawing of blood. When Blackstone asks whether the law could punish a surgeon "who opened the vein of a person that fell down in the street with a fit," the answer is clearly no under the mischief rule.[397] Nothing about a

392 Laycock, *supra* note 14, at 103; McConnell, *supra* note 391, at 181.

393 *See generally* Bray, *supra* note 136.

394 *Id.* at 37 (emphasis added) (quoting Prescott v. Nevers, 19 F. Cas. 1286, 1288–89 (C.C.D. Me. 1827)).

395 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) (stating that the compelling interest standard requires courts to "look[ ] beyond broadly formulated interests" and instead "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 535 (1990) (stating that strict scrutiny requires the government to prove its interest is "compelling" and its law is "narrowly tailored to advance that interest").

396 1 BLACKSTONE, *supra* note 23, at *60.

397 *Id.*

surgeon opening a vein to help someone with an immediate health issue is actually helping solve the problem the legislature was ostensibly focused on—preventing violent bloodshed.[398]

Similarly, applying the mischief rule analysis to conflicts of conscience would likely have led courts to determine that religious objectors often fell outside of the mischief the law was really aimed at solving. Indeed, the courts in both *Phillips* and *Cronin* employed this sort of analysis when determining that a religious exemption was warranted for the Catholic priests in those cases.

For example, in considering the mischief at issue with applying a subpoena rule to force a Catholic priest to divulge a confidential confessional, the *Phillips* court exhibited skepticism of the government's claimed interest in public safety as applied to the case at hand. In response to the government's attempt to rely on hypothetical concerns or slippery slope arguments, the court stated, "The doctrine contended for, by putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning."[399] The court went on, "To attempt to establish a general rule, or to lay down a general proposition from accidental circumstances, which occur but rarely, or from extreme cases, . . . is totally repugnant to the rules of logic and the maxims of law."[400] The court emphasized that the "question is not" whether hypothetically the religious exercise could lead to a "public injury," but whether the government had shown that the specific religious exercise at issue had the "natural tendency . . . to produce practices inconsistent with the public safety or tranquility."[401] It would be "stretching [the constitution] on the rack" to say that the religious exercise here really threatened public safety or tranquility, the court concluded.[402] To hold otherwise "would be to mock the understanding, and to render the liberty of conscience a mere illusion."[403]

In a similar way, the *Cronin* court did not simply accept the government's claimed interest in "promoting the ends of criminal justice."[404] The court noted that "whilst cases may be supposed in which the concealment of a fact communicated in penance might have a pernicious effect, yet such instances are rare, and furnish no foundation for the rule that they should be required to disclose in all cases."[405] The court continued, "It has been truly said, that 'to attempt to establish a general rule, or to lay down a general proposition from accidental circumstances, which occur but rarely, or from

398 *See id.* at *46–47.

399 SAMPSON, *supra* note 39, at 112.

400 *Id.*

401 *Id.* at 112–13.

402 *Id.* at 113.

403 *Id.* at 113 ("It would be to destroy the enacting clause of the proviso—and to render the exception broader than the rule, to subvert all the principles of sound reasoning . . . .").

404 Commonwealth v. Cronin, 1 Q.L.J. 128, 140 (Va. Cir. Ct. 1856).

405 *Id.*

extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of the law.'"[406] Thus,

> [t]he question is not whether penance may sometimes communicate the existence of an offence to a priest, which he is bound by his religion to conceal, and the concealment of which may be a public injury, but whether the *natural tendency* of it is to produce practices inconsistent with the public safety.[407]

And the government had to "clearly" show this religious practice would be "inconsistent with the peace or safety of the state."[408]

Likewise, the *Cronin* court pointed out ways in which the government would be failing to advance its own interest if it refused a religious exemption. Criminals would stop confessing to priests if they knew the information could not be kept confidential, and thus the rule would "destroy the source itself" and "the rule would defeat itself."[409]

The *Phillips* court also spent time discussing existing secular exemptions to the general rule. These included exceptions for husband and wife, attorney-client privilege, answers that would result in self-incrimination, or answers that would disgrace or degrade him by "affect[ing] the purity of his character."[410] The court noted that the similarity of the way in which these exemptions undercut the general rule meant they had a "very intimate connexion with the point in question."[411] This analysis is not unlike the sorts of tailoring analysis courts engage in now, when they note secular contexts in which the government is undercutting its own claimed interest.[412] In other words, where the law had already excluded some scenarios from its application, use of mischief-rule-like analysis justified extending an exemption to a similarly situated religious individual.

On the other hand, denying a religious exemption would be justified under this sort of analysis where doing so would meaningfully advance the government's ability to address the mischief at issue. The government attorney in *Permoli* reflected this understanding regarding a potential religious exemption from an ordinance preventing dead persons from being exposed.[413] The attorney argued that "law of necessity" would justify applying the ordinance in an evenhanded way even against religious individuals who desired to perform religious rites in order to prevent the spread of "yel-

406 *Id.*

407 *Id.* (emphasis added).

408 SAMPSON, *supra* note 39, at 112.

409 *Cronin*, 1 Q.L.J. at 140.

410 SAMPSON, *supra* note 39, at 98–99.

411 *Id.* at 102.

412 *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 367 (2015) ("Although the Department denied petitioner's request to grow a 1/2-inch [religious] beard, it permits prisoners with a dermatological condition to grow 1/4-inch beards. The Department does this even though both beards pose similar risks.").

413 Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589, 600 (1845).

low fever."[414] The attorney noted that exemptions would undermine the "strong sanitory measures [that] are deemed indispensable . . . to check the range and prevalence of the pestilence when it comes" in "epidemic form."[415] One could imagine similar reasoning being used today under strict scrutiny analysis by courts who would deny a religious exemption to groups refusing to comply with government orders to avoid large gatherings during a pandemic.[416]

Thus, viewing religious exemptions in the context of equitable interpretation origins provides at least some historical support for judicial scrutiny that courts apply when exempting some religious behavior that does not seem to have any actual relationship to the "mischief," or government interest, or the law the government is seeking to enforce. The comparison to strict scrutiny is strengthened if one believes, as Laycock and McConnell have argued, that early state free exercise provisions suggest an understanding that only certain types of government interests were sufficient to impinge on religious exercise.[417] These interests included things like protecting public health and safety. If the government may only pursue certain strong interests to infringe on religious exercise, and under mischief rule analysis courts would look closely at whether the particular application of a law actually advances that interest, this begins to resemble modern strict scrutiny in many important respects. This historical practice might also provide additional explanation for why McConnell thought there was "strong[ ]" evidence of a widespread practice of lower courts offering religious exemptions in their discretion even in states like Pennsylvania and South Carolina where the appellate courts had rejected mandatory religious exemptions.[418]

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414 *Id.* at 600–01.

415 *Id.* at 600.

416 *See, e.g.*, Haley Hinds, *Tampa Megachurch Pastor Arrested After Leading Packed Services Despite 'Safer-at-Home' Orders*, FOX13NEWS (March 30, 2020), https://www.fox13news.com/news/tampa-megachurch-pastor-arrested-after-leading-packed-services-despite-safer-at-home-orders; Daniel Silliman, *A Few Churches Are Defying Bans on Large Gatherings. That Could be Bad for Religious Liberty.*, CHRISTIANITY TODAY (April 7, 2020), https://www.christianitytoday.com/news/2020/april/churches-defy-coronavirus-religious-liberty.html. On the other hand, this sort of analysis might be used to conclude that religious gatherings during a pandemic are not problematic if parishioners stayed in their car during a drive-in worship service, and if drive through restaurants and liquor stores remain open. On Fire Christian Center, Inc., v. Fischer, No. 3:20-CV-264, 2020 WL 1820249, at *7 (W.D. Ky. April 11, 2020) ("Louisville's actions are also overbroad because, at least in this early stage of the litigation, it appears likely that Louisville's interest in preventing churchgoers from spreading COVID-19 would be achieved by allowing churchgoers to congregate in their cars as On Fire proposes. On Fire has committed to practicing social distancing in accordance with CDC guidelines. 'Cars will park six feet apart and all congregants will remain in their cars with windows no more than half open for the entirety of the service.' Its pastor and a videographer will be the only people outside cars, and they will be at a distance from the cars." (footnotes omitted)).

417 Laycock, *supra* note 14, at 103; McConnell, *supra* note 391, at 186.

418 *See* McConnell, *supra* note 11 at 1511 (citing Commonwealth v. Lesher, 17 Serg. & Rawle 155, 155 (Pa. 1828)) (noting the dispute arose because a lower court judge excused

IV. COUNTERARGUMENTS

Given the judiciary's common use of equity to create exemptions from statutes, viewing religious exemptions through this broader historical context suggests that religious exemptions would not have been anomalous, and generally applicable laws were not immune from judicial scrutiny. That said, there are counterarguments that may limit the force of the historical significance of equity in the context of religious exercise.

A. Are Equitable Exemptions Really a Historical Analog for Modern Exemptions?

Modern constitutional exemptions across a range of different types of constitutional rights now have a name and can be easily identified: constitutional as-applied challenges.[419] By contrast, the background principles regarding equity of the statute were not grouped together in the separate doctrinal categories that they are today. Indeed, equity of the statute also resembles other modern doctrines like the canon of constitutional avoidance and the rule of lenity.[420] One could posit that equitable interpretation is a common ancestor for multiple modern constitutional doctrines. So is it fair to point to equitable exemptions as an early analog of as-applied challenges?

Admittedly, there are differences between early judicial practice and modern as-applied challenges—particularly rhetorical ones. Founding-era courts did not always speak explicitly in terms of a valid statute applying to a factual scenario but for a constitutional conflict that requires an exemption. Frequently courts spoke about the legislature not intending a law to apply broadly to certain circumstances, or in terms of "construing" a law to avoid certain problematic outcomes.[421]

But there are a number of reasons why these distinctions do not undercut the idea that equitable interpretation provides a historical analog for modern exemptions.

First, as a practical matter, it likely would not matter much to religious adherents whether you told them the court was "exempting" their religious

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a juror from a case who had "conscientious scruples on the subject of capital punishment" and that the evidence "strongly suggests that the actual practice favored exemptions, even though the appellate decisions" in these states "went the other way" (quoting *Lesher*, 17 Serg. & Rawle at 155)); *see also* State v. Willson, 13 S.C.L. (2 McCord) 393, 395–96 (Const. Ct. 1823) ("There is set forth among the causes shown, a notice of certain instances of individuals being excused, as well as an appeal to good feelings, plainly interwoven in the brief. And no doubt, instances have occurred, and will again occur, where the parties attended at the time required by law, but there being superfluous jurors, were readily excused.").

419 Barclay & Rienzi, *supra* note 270, at 1596.

420 Manning, *supra* note 20, at 96, 119–20. One could also analogize to the canon construing statutes narrowly in derogation of the common law. MAXWELL, *supra* note 134, at 254–57 ("Lord Nottingham said that all Acts which restrain the common law, that is, apparently, which impose restrictions unknown to the common law, ought themselves to be restrained in exposition.").

421 *See supra* Section II.D.

conduct from a statute, or "interpreted" a statute in an aggressive way to avoid a conflict with free exercise. Either result would provide more protection under the current *Smith* regime. And indeed, many early ministerial exception cases providing protection to religious adherents did so under a very strong form of constitutional avoidance.[422]

Second, modern constitutional doctrines likely never perfectly mirror historical practice, and it might be foolish to assume that they would. And it is worth remembering that while our modern constitutional doctrines draw clean lines between doctrines like constitutional avoidance and as-applied challenges, the Founding generation did not.

More important is that modern as-applied challenges mirror basic impulses of the historical actors in new doctrinal forms. Indeed, any differences do not detract from the more basic similarity, which is that in both the historical examples and modern as-applied challenges, the outcome was that a court refused to apply the words of a statute as broadly as the plain language could reasonably allow. And the court refused to do so because of external values that placed limitations on such an application.

For modern purposes, the most relevant external value is a constitutional one. In both instances, this decision by a court to read a statute more narrowly than the language could support acts as a sort of safety valve, allowing statutes to generally stay in place while preventing discrete applications from operating in constitutionally problematic ways. As Plucknett described equitable interpretation in a chapter entitled "Exceptions Out of the Statute," historically a "court restrict[ed] the scope of a statute by excepting particular cases from its operation although the statute itself contains little or nothing to warrant such a procedure."[423]

Whittington has observed a few of these similarities between early equitable cases and modern as-applied challenges. He argued that some of the early equitable exemption cases involved the judiciary "announc[ing] that the proposed application of the law exceeds the power of Congress and that such application will be regarded as off-limits and not judicially enforceable."[424] This statutory interpretation strategy allowed courts historically to "maintain that the legislature has not 'voluntarily transcend[ed] its constitutional authority' even as judges enforce constitutional limitations against the

422 *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979). Many ministerial exception cases prior to *Hosanna-Tabor* were also constitutional avoidance cases, including some of the earliest articulations of this doctrine. *See* Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Bollard v. Ca. Province of the Soc'y of Jesus, 211 F.3d 1331 (9th Cir. 2000); McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972) ("'If a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister." (quoting Ashwander v. Tenn. Valley Auth., 279 U.S. 288, 348 (1936))).

423 PLUCKNETT, *supra* note 132, at 57.

424 WHITTINGTON, *supra* note 92, at 23.

legislature and refuse to apply laws on constitutional grounds in the cases before them."[425] Without formally voiding statutes, this approach still "has an equivalent effect of signaling to litigants that the courts will engage in constitutional interpretation and free parties from the immediate burdens of statutes that cannot be constitutionally justified."[426] Whittington noted that "[w]e seriously misunderstand how courts have exercised the power of judicial review if we overlook" these early examples of laws being found "unconstitutional as applied."[427] On the other hand, perhaps the argument that judicially created exemptions have no basis in history proves too much, as it could place in question the entire modern practice of as-applied constitutional adjudication.[428]

B. What About the "Congress Shall Make No Law" Text of the First Amendment?

Bradley agrees with Scalia and Hamburger that the "Congress shall make no law" text of the Free Exercise Clause meant that "a class of legislation is forbidden" to Congress—specifically legislation aimed at specific religious belief or conduct.[429] Bradley argues that this was the historical understanding of the Free Exercise Clause.[430] Hamburger similarly argues that the Free Exercise Clause was meant to prohibit Congress from legislating in ways that were discriminatory to religion.[431] Perhaps putting it most pointedly, Nicholas Rosenkranz argued that if the religious exercise is burdened by an executive official merely applying a neutral and generally applicable law that Congress did not aim at religion, then the First Amendment has nothing to say about that and would allow no as-applied challenges to statutes.[432]

This textual interpretation, however, overlooks the historical context in which equitable exemptions arose and evolved. Specifically, when courts cre-

425 *Id.* at 24 (alteration in original) (quoting United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750)).

426 *Id.*

427 *Id.*

428 *See* Barclay & Rienzi, *supra* note 270, at 1595 (analyzing how a religious exemption is simply one type of an as-applied challenge).

429 *See* Bradley, *supra* note 15, at 306.

430 *Id.* Nicholas Rosenkranz has similarly argued that the "Congress shall make no law" constitutional text makes clear that judicially created religious exemptions are unjustifiable. Specifically, Rosenkranz argues that the First Amendment operates explicitly as a prohibition against Congress. Rosenkranz, *supra* note 296, at 1266. Thus, Rosenkranz argues that "[t]here can be no 'as-applied' challenge under the Free Exercise Clause, because application of the statute occurs long after the alleged constitutional violation is complete." *Id.* (emphasis omitted). In other words, if the religious exercise is burdened by an executive official merely applying a neutral and generally applicable law that Congress did not aim at religion, then the First Amendment has nothing to say about that. The amendment is aimed at Congress and not executive action. Thus, "a challenge under the Free Exercise Clause should always be 'facial,' not 'as-applied.'" *Id.* at 1268 (emphasis omitted).

431 *See* Hamburger, *supra* note 5, at 938.

432 Rosenkranz, *supra* note 296, at 1266.

ated equitable exemptions to statutes, the focus of the inquiry was often on the legislature and not on the executive officials. As discussed in Section II.D above, courts employed a legal fiction of presuming that the legislature would not have intended the broad sweep of legislation to include unconstitutional outcomes. Courts would even interpret general and broad laws as evidence that legislatures did not intend them to be applied to constitutionally problematic circumstances.[433] Thus, the judiciary would interpret laws equitably to comply with higher laws unless it was clear that Congress had interpreted the opposite result. And if Congress *had* clearly crafted a law aimed at such a result, the court may be forced to declare the statute altogether void, or repugnant to the Constitution.[434]

For example, in *Starr v. Robinson*, the court was concerned about the legislature interfering with freedom of contract by discharging a bond that had already been assigned to a third-party creditor.[435] The court observed that the legislature could not have "clearly expressed" an intent to interfere with such a bond, because if it had the law "would have been a palpable violation of the constitution of the United States."[436] The court would thus be required to declare the law "null and void."[437] However, the legislature was also prohibited from accomplishing this same result simply by virtue of drafting a law with very "broad expression" that indirectly swept in such an application.[438] In this latter case, the court equitably modified the statute to disallow this application to a bond assigned to a third party, and in so doing avoided the constitutional conflict.[439] In other words, equitable interpretation prevented the legislature from authorizing indirectly what it could not authorize expressly.

The First Amendment's focus on "Congress" fits with the method Justice Story described in which courts equitably modified statutes to avoid "declaring the solemn act of the Legislature to be void."[440] Relying on the legal fiction of the legislature's intent, Justice Marshall explained that courts would "struggle hard against a construction which will . . . affect the rights of

433 *See supra* Section III.B.

434 United States v. Fisher, 6 U.S. (2 Cranch.) 358, 389–90 (1805) ("That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.").

435 Starr v. Robinson, 1 D. Chip. 257, 259 (Vt. 1814).

436 *Id.* at 261.

437 *Id.*

438 *Id.* at 260.

439 *Id.* at 261.

440 United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

parties."[441] Further research is warranted to assess whether constitutional Framers discussed the Free Exercise Clause in this equitable context.[442]

As described above in Section II.E, this tradition of reliance on legislative intent originated in England, where Parliament was sovereign and courts did not have authority to strike down discrete applications of laws. Thus, courts' ability to bend or modify laws only came by asserting that judges were simply fulfilling Parliament's true wishes. As Plowden explained, whenever you read the text of statutes, imagine that the lawmaker is present, and ask about the equitable question at hand, then give yourself that answer which you imagine the lawmaker would have given.[443] In America, where legislatures were not sovereign and were subject to real external constitutional limits enforced by courts, this legal fiction was not necessary in the same way to authorize courts to ignore certain applications of statutes.[444] Eventually this legislative intent rhetoric fell out of much of our constitutional adjudication, but its historical use is important to understand the "Congress shall make no law" relationship to judicial exemptions from statutes.

C. How Does Equitable Interpretation Interact with Establishment Clause Considerations?

If equitable exemptions provide historical support for religious exemptions under the Free Exercise Clause, one fair question that merits attention is what the implications of this historical evidence might be for the Establishment Clause. Comprehensive treatment of this important question is beyond the purview of this Article, but a few preliminary considerations are worth noting.

First, equitable interpretation involves molding statutes to conform with some kind of external value or norm. So part of the answer to the question will depend on what standard or norm one understands the Establishment

441 *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (discussing this issue in the context of retroactive application of a law).

442 For an instructive analysis of facial versus as applied challenges in the First Amendment context, see John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 502–03 (2013) ("[T]he grants and limits of federal legislative power, like the Commerce Clause and the First Amendment, do not create duties at all. They grant and restrict power and do nothing else. As a result, no argument about facial validity that rests on the derivation of duties from such provisions can succeed. Legislators do have duties with respect to the constitutionality of legislation, I will argue, but those duties arise from other provisions of the Constitution and are qualified, not absolute. Because they are qualified, they also do not support an inference that grants and restrictions of power operate at the level of rules.").

443 Eyston v. Studd (1574), 75 Eng. Rep. 688, 695, 699, 2 Plowden 459, 465, 468 (KB) (Plowden's note); BAKER, *supra* note 112, at 222.

444 An additional practical reason for relying on the intent of legislatures under early English common law was that for centuries, statutes were not written down carefully or kept in an accessible location. It was not until 1810–22 that an official version of the *Statutes of the Realm* was published, but even this volume was acknowledged to be incomplete. BAKER, *supra* note 112, at 219.

Clause to set forth. One aspect of the Establishment Clause widely agreed upon by scholars, for example, is the idea that government cannot dictate to a church who its leaders should be.[445] And one can see that sort of external norm at play in the 2012 case where the Supreme Court granted an exemption for the Age Discrimination in Employment Act to protect a religious group's ability to select its religious leader.[446]

Other justifications for molding or exempting certain applications of statutes might vary depending on other substantive understandings of Establishment Clause protections. For example, professors such as Frederick Gedicks, Micah Schwartzman, Nelson Tebbe, and Richard Schragger argue that statutes such as RFRA must be read narrowly (or even read to provide an exemption from normal operation of the statute) where their application would operate to create certain types of harms for third parties.[447] I have elsewhere disputed that this is a correct doctrinal or historical understanding of the Establishment Clause,[448] along with numerous other scholars.[449] But if this understanding of the Establishment Clause were substantively correct,

445 *See, e.g.*, Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 La. L. Rev. 1057, 1066 (1989); Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, 7 Geo. J.L. & Pub. Pol'y 29, 33 (2009); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1583–84; Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837, 862 (2009); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L.L. Rev. 79, 118–19 (2009); Witte, Jr., *supra* note 66, at 413.

446 Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

447 *See* Nelson Tebbe, Religious Freedom in an Egalitarian Age 49–70 (2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* Law, Religion, and Health in the United States 215–39 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality 328, 333 (Susanna Mancini & Michel Rosenfeld eds., 2018); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L.L. Rev. 343, 361 (2014).

448 *See* Stephanie H. Barclay, *First Amendment "Harms,"* 95 Ind. L.J. 331, 337–38 (2020).

449 *See* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J.L. & Gender 103, 131 (2015); DeGirolami, *supra* note 4, at 13–32; Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 59 J. Church & State 357, 369–70 (2016); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 Vand. L. Rev. En Banc 39, 45–46 (2014); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 Notre Dame L. Rev. 1375, 1383–84 (2016); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 931–32, 934–36 (2019); Marc O. DeGirolami, Holt v. Hobbs *and the Third-Party-Harm Establishment Clause Theory*, Mirror Just. (Oct. 7, 2014), https://mirrorofjustice.blogs.com/mirrorofjustice/2014/10/where-has-the-establishment-clause-third-party-harm-argument-gone.html.

this judicial tradition of equitable interpretation would support the type of statutory narrowing of RFRA for which these scholars advocate.

CONCLUSION

Contrary to the assertions of scholars, early religious exemptions cases are not an outlier or an abrupt change in the law. They are simply another instance of early judicial review and its connection to equitable interpretation of statutes. An understanding of wider judicial practices helps avoid the trend of treating a judicial remedy for free exercise as an island in the law.

An understanding of this broader equitable context also has important implications for evaluating whether assumptions the Court's current approach to religious exemptions finds support in the historical evidence. In his well-known *Smith* decision, Scalia argued that religious exemptions would be a "constitutional anomaly," that neutral and generally applicable statutes were entitled to deference rather than judicial scrutiny, and that providing exemptions would undercut rule-of-law norms and create a system that was "courting anarchy." By broadening the historical lens to look at equitable judicial review norms at the Founding period, this Article demonstrates that equitable exemptions to statutes were a judicial norm, not an anomaly. Broad, generally applicable laws were often treated with suspicion, not deference, when they butted up against rights or other constitutional norms. And providing exemptions to laws was understood as more respectful to rule-of-law norms than declaring a law void.

Understanding the role equitable interpretation plays in judicial exemptions provides additional important implications supporting an original understanding in favor of religious exemptions. Specifically, the mischief rule was a form of equitable interpretation that focused on the problem the legislature was trying to solve when it crafted the law. Courts would exempt applications of laws that did not actually help the government address the mischief at issue. This sort of analysis is similar to that used by early antebellum courts providing religious exemptions, when they determined that exempting religious objectors would not actually undercut government interests in peace and safety. Indeed, it is plausible that the mischief rule would have frequently justified lower court decisions to decline to apply laws to religious objectors. Notably, this mischief analysis is analogous to modern strict scrutiny analysis, particularly the portion of the test that scrutinizes whether application of a law actually advances the government's interest.

Thus, contrary to the conventional view, judicially created religious exemptions are well within our constitutional traditions of judicial review and may in fact have more historical support than the Court's current approach.