SUPREME COURT OF THE UNITED STATES

No. 95–2074

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

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

[June 25, 1997]

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, concurring.

I write to respond briefly to the claim of JUSTICE O'CONNOR's dissent (hereinafter "the dissent") that historical materials support a result contrary to the one reached in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). See *post*, p. ___ (dissenting opinion). We held in *Smith* that the Constitution's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U. S., at 879 (quoting *United States* v. *Lee*, 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment)). The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause. The dissent's extravagant claim that the historical record shows *Smith* to have been wrong should be compared with the assessment of the most prominent scholarly critic of *Smith*, who, after an extensive review of the historical record, was willing to venture no more than that "constitutionally compelled exemptions [from generally applicable

laws regulating conduct] were *within the contemplation* of the framers and ratifiers as a *possible interpretation* of the free exercise clause." McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1415 (1990) (emphasis added); see also Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. Law Rev. 915 (1992) (arguing that historical evidence supports *Smith*'s interpretation of free exercise).

The dissent first claims that *Smith*'s interpretation of the Free Exercise Clause departs from the understanding reflected in various statutory and constitutional protections of religion enacted by Colonies, States, and Territories in the period leading up to the ratification of the Bill of Rights. *Post,* at 8–14. But the protections afforded by those enactments are in fact more consistent with *Smith*'s interpretation of free exercise than with the dissent's understanding of it. The Free Exercise Clause, the dissent claims, "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law"; thus, even neutral laws of general application may be invalid if they burden religiously motivated conduct. *Post,* at 3. However, the early "free exercise" enactments cited by the dissent protect only against action that is taken "for" or "in respect of" religion, *post,* at 8–11 (Maryland Act Concerning Religion of 1649, Rhode Island Charter of 1663, and New Hampshire Constitution); or action taken "on account of" religion, *post,* at 11–12 (Maryland Declaration of Rights of 1776 and Northwest Ordinance of 1787); or "discriminat[ory]" action, *post,* at 10 (New York Constitution); or, finally (and unhelpfully for purposes of interpreting "free exercise" in the Federal Constitution), action that interferes with the "free exercise" of religion, *post,* at 8, 11 (Maryland Act Concerning

Religion of 1649 and Georgia Constitution). It is eminently arguable that application of neutral, generally applicable laws of the sort the dissent refers to– such as zoning laws, *post*, at 4– would not constitute action taken "for," "in respect of," or "on account of" one's religion, or "discriminatory" action.

Assuming, however, that the affirmative protection of religion accorded by the early "free exercise" enactments sweeps as broadly as the dissent's theory would require, those enactments do not support the dissent's view, since they contain "provisos" that significantly qualify the affirmative protection they grant. According to the dissent, the "provisos" support *its* view because they would have been "superfluous" if "the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience." *Post*, at 12. I disagree. In fact, the most plausible reading of the "free exercise" enactments (if their affirmative provisions are read broadly, as the dissent's view requires) is a virtual restatement of *Smith*: Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*. The "provisos" in the enactments negate a license to act in a manner "unfaithfull to the Lord Proprietary" (Maryland Act Concerning Religion of 1649), or "behav[e]" in other than a "peaceabl[e] and quie[t]" manner (Rhode Island Charter of 1663), or "disturb the public peace" (New Hampshire Constitution), or interfere with the "peace [and] safety of th[e] State" (New York, Maryland, and Georgia Constitutions), or "demea[n]" oneself in other than a "peaceable and orderly manner" (Northwest Ordinance of 1787). See *post*, at 8–12. At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws. "[E]very breach of law is against the peace." *Queen* v. *Lane*, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q. B. 1704). Even as late as 1828, when Noah Webster published his American Dictionary of the English

Language, he gave as one of the meanings of "peace": "8. Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace;* to break the *peace*." 2 An American Dictionary of the English Language 31 (1828).[1] This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right "to do only what was not lawfully prohibited," West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. of Law, Ethics & Public Policy 591, 624 (1990). "Thus, the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions." Hamburger, *supra*, at 918–919.[2] And while, under this interpretation, these early "free exercise" enactments support the Court's judgment in *Smith*, I see no sensible interpretation that could cause them to support what I understand to be the position of JUSTICE O'CONNOR, or any of *Smith*'s other critics. No one in that camp, to my knowledge, contends that their favored "compelling state interest" test conforms to any possible interpretation of "breach of peace and order"– *i.e.*, that *only* violence or force, or any other

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[1] The word "licentious," used in several of the early enactments, likewise meant "[e]xceeding the limits of law." 2 An American Dictionary of the English Language 6 (1828).

[2] The same explanation applies, of course, to George Mason's initial draft of Virginia's religious liberty clause, see *post*, at 12–13. When it said "unless, under colour of religion, any man disturb the peace . . . of society," it probably meant "unless under color of religion any man break the law." Thus, it is not the case that "*both* Mason's and [James] Madison's formulations envisioned that, where there was a conflict [between religious exercise and generally applicable laws], a person's interest in freely practicing his religion was to be balanced against state interests," *post*, at 14– at least insofar as regulation of *conduct* was concerned.

category of action (more limited than "violation of law") which can possibly be conveyed by the phrase "peace and order," justifies state prohibition of religiously motivated conduct.

Apart from the early "free exercise" enactments of Colonies, States, and Territories, the dissent calls attention to those bodies', and the Continental Congress's, legislative accommodation of religious practices prior to ratification of the Bill of Rights. *Post*, at 14–17. This accommodation– which took place both before and after enactment of the state constitutional protections of religious liberty– suggests (according to the dissent) that "the drafters and ratifiers of the First Amendment . . . assumed courts would apply the Free Exercise Clause similarly." *Post*, at 17. But that legislatures sometimes (though not always)[3] found it "appropriate," *ibid.*, to accommodate religious practices does not establish that accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause. As we explained in *Smith*, "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." 494 U. S., at 890. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." *Ibid.*

The dissent's final source of claimed historical support consists of statements of certain of the Framers in the context of debates about proposed legislative enactments or debates over general principles (not in connection with the drafting of State or Federal Constitutions). Those statements are subject to the same objection as was the evidence about legislative accommodation: There is no

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[3]The dissent mentions, for example, that only seven of the thirteen Colonies had exempted Quakers from military service by the mid-1700's; and that "*virtually* all" of the States had enacted oath exemptions by 1789. *Post*, at 15–16 (emphasis added).

reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable. Thus, for example, the pamphlet written by James Madison opposing Virginia's proposed general assessment for support of religion, *post*, at 17–19, does not argue that the assessment would violate the "free exercise" provision in the Virginia Declaration of Rights, although that provision had been enacted into law only eight years earlier, *post*, at 14; rather the pamphlet argues that the assessment wrongly placed civil society ahead of personal religious belief and, thus, should not be approved by the legislators, *post*, at 18. Likewise, the letter from George Washington to the Quakers, *post*, at 20, by its own terms refers to Washington's "wish and desire" that religion be accommodated, not his belief that existing constitutional provisions required accommodation. These and other examples offered by the dissent reflect the speakers' views of the "proper" relationship between government and religion, *post*, at 21, but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship. The one exception is the statement by Thomas Jefferson that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises," *post*, at 19–20 (internal quotation marks omitted); but it is quite clear that Jefferson did not in fact espouse the broad principle of affirmative accommodation advocated by the dissent, see McConnell, 103 Harv. L. Rev., at 1449–1452.

It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent

were constitutionally required (either by State Constitutions or by the Federal Constitution), it 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, see, *e.g., id.,* at 1504, 1506–1511 (discussing early cases), none exists. The closest one can come in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777, quoted *post,* at 10, required acknowledgement of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. *People* v. *Philips,* Court of General Sessions, City of New York (June 14, 1813), *excerpted in* Privileged Communications to Clergymen, 1 Cath. Lawyer 199 (1955). Even this lone case is weak authority, not only because it comes from a minor court,[4] but also 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. On the other side of the ledger, moreover, there are two cases, from the Supreme Court of Pennsylvania, flatly rejecting the dissent's view. In *Simon's Executors* v. *Gratz,* 2 Pen. & W. 412 (Pa. 1831), the court held that a litigant was not entitled to a continuance of trial on the ground that appearing on his Sabbath would violate his religious principles. And in *Stansbury* v. *Marks,* 2 Dall.

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[4]The Court of General Sessions was a mayor's court, and the ruling in *Phillips* was made by DeWitt Clinton, the last mayor to preside over that court, which was subsequently reconstituted as the Court of Common Pleas. Clinton had never been a jurist, and indeed had never practiced law. Some years before *Phillips*, he was instrumental in removing the political disabilities of Catholics in New York. See 4 Dictionary of American Biography 221–222, 224 (1943).

213 (Pa. 1793), decided just two years after the ratification of the Bill of Rights, the court imposed a fine on a witness who "refused to be sworn, because it was his Sabbath."[5]

I have limited this response to the new items of "historical evidence" brought forward by today's dissent. (The dissent's claim that "[b]efore *Smith*, our free exercise cases were generally in keeping" with the dissent's view, *post*, at 3, is adequately answered in *Smith* itself.) The historical evidence marshalled by the dissent cannot fairly be said to demonstrate the correctness of *Smith;* but it is more supportive of that conclusion than destructive of it. And, to return to a point I made earlier, that evidence is not compatible with any theory I am familiar with that has been proposed as an alternative to *Smith*. The dissent's approach has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes, *post*,, at 4) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith:* It shall be the people.

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[5] Indeed, the author of *Simon's Executors* could well have written *Smith*: "[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." 2 Pen. & W., at 417.