

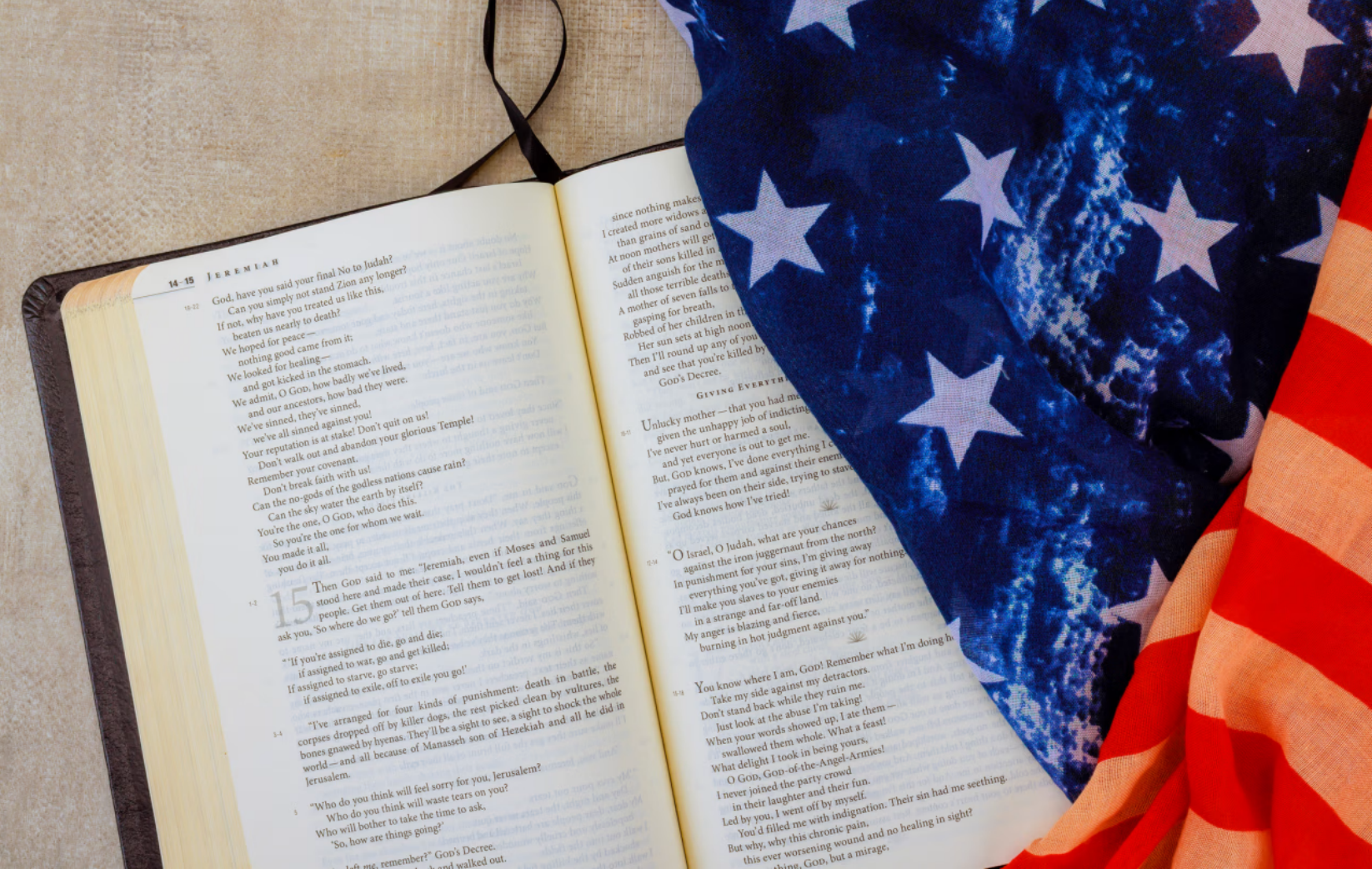
OPINION LETTERS Follow

Why Employment Division v. Smith Must Go

We have more evidence of judicial protection of religious practice than we do for perhaps any other constitutional right in the Founding era.

Sept. 19, 2025 at 1:48 pm ET

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Prof. Richard Garnett is a stalwart friend of religious liberty, but he's mistaken that judges would become micromanagers if the Supreme Court overturned *Employment Division v. Smith* (Letters, Sept. 16).

That 1990 decision was universally unpopular when Justice Antonin Scalia wrote it, and it remains so today. It's why the federal government and more than half the states have passed legislation to ensure that when a law burdens religious practice, believers get their day in court. Instead of the "anarchy" that Justice Scalia and Prof. Garnett envisioned, this has yielded carefully considered judicial decisions in which religious claimants sometimes win and sometimes lose.

My firm, the Becket Fund for Religious Liberty, has worked on such cases for years. These laws have protected our clients, ranging from the Little Sisters of the Poor to Sikh Marines to Orthodox Jews, all penalized when their faith conflicted with an agency fiat, regulation or Covid shutdown order.

The laws that protected them should protect all Americans. But today your rights may depend on which state you live in. If the court were to overrule *Smith*, we would all enjoy religious freedom guaranteed by the Constitution, rather than relying on the whims of legislators.

Such a decision would disrupt the status quo, which incentivizes gamesmanship, as regulators change the rules when a precedent doesn't go their way. If recent disputes have shown anything, it's that political processes often fail to protect religious beliefs that are unpopular with those in power.

That's why courts have long safeguarded free exercise. We have more evidence of judicial protection of religious practice than we do for many other constitutional rights in the Founding era. In *People v. Phillips* (1813), the first religious-exercise case in this country, the Supreme Court recognized that the confidentiality of the Catholic confessional had to be honored. It did so with an evidentiary review that resembles modern strict scrutiny, the same process *Smith* later rejected. These cases aren't ancient history: Becket is fighting Washington state to preserve the seal of the confessional today.

We don't have to choose between legislative and judicial protections for religious freedom. Our Constitution functions best when legislatures and courts alike seek to safeguard our First Amendment rights—a future possible once the justices overrule a 35-year-old mistake.

Lori Windam

Becket Fund for Religious Liberty

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Appeared in the September 20, 2025, print edition as 'Why Employment Division v. Smith Must Go'.

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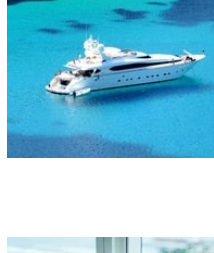
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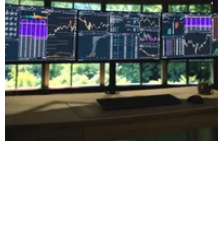
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