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Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion

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Due in part to the influence of Michael McConnell, free exercise exemptionism is generally thought to be compatible with, if not dictated by, the founders' church-state political philosophy. This article rejects that position, arguing instead that America's constitutional tradition offers two distinct conceptions of religious liberty: the founders' natural rights free exercise and modern moral autonomy exemptionism. The article aims to distinguish these two approaches by clarifying how they are grounded upon divergent philosophical understandings of human freedom and by explaining how they advance different views of what religious liberty is, how it is threatened, and, accordingly, how it is best protected. The article also attempts to demonstrate how our modern approach expands the protection for religious liberty in some ways but limits it in others.

Despite the consternation over the Supreme Court's recent *Burwell* v. *Hobby Lobby Stores* (2014) ruling, the right to religious liberty is generally understood in contemporary American political and legal thought to mean that individuals and institutions deserve exemptions (or, at least, strong consideration for exemptions) from generally applicable laws that burden sincerely held religious beliefs and exercises. Take the dispute surrounding the Affordable Care Act's "contraception mandate." Hobby Lobby advocates (see, e.g., Rienzi 2012) contend that the Obama administration has a "crabbed view" of religious freedom because it has not extended exemptions to all those who seek them. They do not claim that the administration has rejected religious exemptions altogether, because Obamacare's HHS preventive care regulations do include some exemptions for some religious groups; critics simply want more. The disagreement, in other words, is over how extensively exemptions should be granted, not whether religious liberty requires them.

This broad consensus reflects the last fifty years of judicial and scholarly thought about religious free exercise. While the exemption approach has not always been embraced by the Supreme Court, since *Sherbert* v. *Verner* (1963) it reflects the dominant understanding of how religious free exercise is protected.[1] Moreover, it is commonly thought that exemptionism, as I shall call it, is supported both by the American founders' philosophy of religious freedom and modern interpretations of freedom of conscience. That view, I shall argue, is partially mistaken.

Part I of this article recounts the founders' understanding of the inalienable natural right to religious liberty and their attendant social contract constitutionalism. Part II describes modern free exercise exemptionism, first as it developed in constitutional practice and, then, its scholarly defenses that appeal to notions of autonomy. Part III compares the founders' natural rights free exercise constitutionalism with modern autonomy exemptionism. I reject Michael McConnell's influential interpretation that the founders' political philosophy counsels constitutional exemptionism and, instead, argue that the opposite is true: The founders' jurisdictional understanding of religious liberty denies the idea of a constitutional right to religious exemptions. Constitutional exemptionism, I conclude, is more properly understood and defended by appeals to secular notions of autonomy.

America's constitutional tradition offers two distinct conceptions of religious liberty: the founders' inalienable natural right of free exercise and modern moral autonomy exemptionism. The approaches are grounded upon divergent philosophical understandings of human freedom and competing notions that freedom's place in the moral order of the universe. They present different views of what religious liberty is, how it is threatened, and, accordingly, how it is best protected. This article does not advocate natural rights free exercise or moral autonomy exemptionism. Rather, it aims, first, to identify and distinguish the two leading accounts of and approaches to religious free exercise in our constitutional tradition; second, to challenge the widely accepted conclusion that the founders' political philosophy espouses constitutional exemptionism; and third, to clarify how our modern approach expands the protection for religious liberty in some ways but limits it in others.

I. THE FOUNDERS' NATURAL RIGHTS CONSTITUTIONALISM OF RELIGIOUS LIBERTY

The Founders' Philosophy of an Inalienable Natural Right to Religious Liberty

The framers generally held that religious free exercise is a natural right that belongs to all individuals.

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[1] See, notably, *Employment Division* v. *Smith* (1990). Andrew Koppelman (2013, 11) notes that "hardly anyone doubts" it is appropriate for some branch of government to possess authority to extend religious exemptions. The arguments, he continues, "are about who ought to draw those lines."

Article II of Delaware's 1776 Declaration of Rights, for example, states "that all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . ." (Kurland and Lerner 2001, 5:70). The same or similar natural rights language can be found in several of the early state constitutions—including Pennsylvania (1776), North Carolina (1776), and New Hampshire (1784) (Poore 1878, 1541, 1410, 1281)—and other significant founding-era documents. George Washington's ([1790] 1988, 548) letter to the Hebrew Congregation at Newport, Rhode Island, captures the founders' common understanding. "All possess alike liberty of conscience and immunities of citizenship," Washington writes. He then continues:

> It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.

By "inherent," Washington means that the right of religious liberty inheres in the individual absent of, and prior to, any state recognition or state action. As a *natural* right, religious liberty is not understood to be created by the state or by the mutual consent of citizens. Rather, the founders locate religious liberty in man's created nature and his prepolitical obligations to his creator.

Many founding-era documents acknowledge this understanding (without further explanation), as is the case in Washington's letter. Some set forth religious liberty in terms of individual rights, such as the aforementioned Delaware declaration; others include a statement of man's duties to the divine. Article XVI of Virginia's 1776 Declaration of Rights, for example, declares,

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force of violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . . (Kurland and Lerner 2001, 5:3)

Maryland's 1776 Declaration of Rights also derives religious freedom from the "duty of every man to worship God in such manner as he thinks most acceptable to him . . . ." (Kurland and Lerner 2001, 5:70). For the founders, the natural right to religious liberty and the duty to worship God are different sides of the same coin. Because an individual has a duty to worship God with conviction, he has a right among men to do so according to conscience.

This reciprocal relationship between duties to the creator and the moral norms arising from the created order of nature on the one hand and rights on the other can be seen in the most philosophical founding-era documents. In his Virginia Statute for Religious Freedom, Thomas Jefferson ([1777, 1779] 1984, 346) starts with the observation that "Almighty God hath created the mind free." He then proceeds, following Locke (Kessler 1983), to derive religious freedom from the nature of the mind's operations, operations that reflect God's "supreme will" and "Almighty power." James Madison ([1785] 1981, 7) adopts that argument and adds another. In his Memorial and Remonstrance Against Religious Assessments, he presents two reasons why men have an "unalienable" right to exercise religion according to conviction and conscience. First, following Jefferson, "the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men," and second, because "it is the duty of every man to render to the Creator such homage and only such as he believes to be acceptable to him." Because we have a divinely imposed duty to worship God according to conviction and conscience, Madison concludes, we have an inalienable right among our fellow men to do so.

According to the Memorial, religious exercise can be directed only by "reason and conviction," a presumption also shared by Jefferson's Statute. Madison does not attempt to demonstrate the truth of this understanding of religion, which has led some commentators (Banning 1995, 436 n.68; Rosen 1999, 23; but cf. Muñoz 2009, 29–32) to conclude he offers a distinctly Protestant account. This may be true, and Madison may have thought it sufficient to rely on the religious beliefs of his immediate audience (McConnell 2000, 50); but without too much trouble, we can reconstruct the philosophical steps that also might have led him to his understanding of religion.

Both Jefferson's and Madison's arguments recognize the freedom of the human mind, by which they mean our capacities of reason and free will. Man's capacities for reason and freedom allow us to be self-directed moral agents, not simply unreflective slaves of our instincts or passions. As Jefferson ([1777, 1779] 1984, 346) says in his Virginia Statute, even God, "lord both of body and mind," chose not to coerce man but rather to teach him by and through reason. Our ability to apprehend moral principles (including those that are divinely revealed) and our freedom to choose to follow them makes possible a distinctly human manner of worship. Man can worship God freely, according to his conviction and conscience. This capacity to worship freely—which, of course, includes the capacity to choose not to worship—suggests that, if men do have the duty to worship God, that duty can only be discharged though worship animated by conscientious conviction. Worship short of this, whether coerced or somehow otherwise prompted, would fail to reflect the full capacities of man's created nature. It therefore would not be fitting homage to a god that created mankind with freedom and reason. A god that creates a man capable of the exercise of freedom governed by reason would seem to settle for nothing less than freely given worship that reflects conscientious convictions. As Madison ([1813] 1984, 6:458–59) declares in one of his official presidential proclamations calling for a day of "public humiliation and prayer":

> If the public homage of a people can ever be worthy [of] the favorable regard of the Holy and Omniscient Being to whom it is addressed, it must be that, in which those who join in it are guided only by their free choice, by the impulse of their hearts and the dictates of their consciences . . . .

Only religion "freed from all coercive edicts" and "free-will offerings of humble supplication, thanksgiving and praise," Madison continues, "can be acceptable to Him whom no hypocrisy can deceive, and no forced sacrifices propitiate."

Jefferson's and Madison's argument for religious freedom assumes a creator God and the normative status of nature.[2] Given these assumptions—that God created nature (including human nature) and that this created nature establishes moral guidelines for human behavior—they philosophically deduce that religious duties can only be fulfilled according to conviction and conscience. And from that conclusion, they reason that all men have a natural right to religious freedom.

The Founders' Social Compact Constitutionalism: Limited State Jurisdiction with Discretionary Exemptions

Whether or not all the framers self-consciously adopted the natural theology just set forth, their natural rights philosophy clearly structured their constitutional design. The framers held that individuals do not alienate their natural right to religious liberty when joining the social compact and, therefore, the natural right to religious liberty is not part of the state's jurisdiction.

The clearest expression of the framers' social compact political philosophy can be seen in founding-era state declarations of rights. After recognizing "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings," the declarations of rights of Delaware (1776), Pennsylvania (1776), and Vermont (1777) immediately announce that "no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship" (Kurland and Lerner 2001, 5:70, 5:71, 5:75). Religious free exercise possesses a particular status with the framers' social compact constitutionalism. Although individuals themselves are parties to and members of the social contract, their religious exercises as such are not.

The framers approached religious liberty in terms of sovereignty and jurisdiction. Since individuals retain exclusive sovereignty over that which belongs to the natural right of religious liberty, the state lacks jurisdiction over such matters. Leaving aside for now the difficult question of what exactly is covered within the inalienable natural right to religious free exercise, the framers held that whatever belongs exclusively to that right remains beyond the government's direct prohibition and regulation.

[2] For a parallel account of the role of divine creation in Locke's thought, see Seagrave (2014, 24–55).

Understanding the framers' social compact theory reveals a crucial mistake made by Professor Michael McConnell, the former Tenth Circuit Court of Appeals judge who is widely regarded as one of the nation's leading church-state scholars. McConnell has argued that constitutional exemptionism follows from the founders' natural rights philosophy of religious liberty. His account has been extraordinarily influential, in no small part because of its scholarly prominence (lengthy articles in the *Harvard Law Review* and *University of Chicago Law Review*), its timing (surrounding the Supreme Court's controversial Free Exercise Clause decision in *Employment Division* v. *Smith* (1990)), and its impact (forming the basis of Justice Sandra Day O'Connor's dissenting opinion in *City of Boerne* v. *Flores* (1997), which sought to reverse *Smith*).

McConnell (1990a) offers a wide range of historical evidence to support his exemptionist account of the Free Exercise Clause, but, for our purposes, his interpretation of the founders' natural rights philosophy is most relevant. McConnell begins by linking the idea of the natural right of religious freedom to the original meaning of the Free Exercise Clause. "[T]here is reason to believe that this inalienable right understanding [of the founders]," he writes, "is the genuine theory of the Religion Clauses of the First Amendment." He then summarizes that teaching as follows:

> The reason the rights of conscience were deemed inalienable is that they represented *duties to God* as opposed to *privileges of the individual*. Thus the Free Exercise Clause is not an expression of the will of the sovereign but a declaration that the right to practice religion is jurisdictionally beyond the scope of civil authority. This, then, *is* an anarchic idea: that duties to God, perceived in the conscience of the individual, are superior to the law of the land. (1990b, 1151, emphasis in the original)

It is "anarchic," McConnell says, because the inalienable natural right of religious liberty means the civil law is subordinate to the perceived religious obligations of the individual rights-bearer. To fulfill his duties to God, the individual has a right not to obey civil laws he conscientiously believes to be incompatible with his religious precepts.

McConnell more fully explicates his anarchic interpretation of the inalienable right of religious liberty though an analysis of Madison's Memorial and Remonstrance. Quoting the Memorial, McConnell writes,

> Madison claimed that this duty to the Creator is "precedent both in order of time and degree of obligation to the claims of Civil Society," and "therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society." This striking passage illuminates the radical foundations of Madison's writings on religious liberty. While it does not prove that Madison supported free exercise exemptions, it suggests an approach toward religious liberty consonant with them. If the scope of religious liberty is defined by religious duty (man must render to God "such homage . . . as he believes to be acceptable to him"), and if the claims of civil society are subordinate to the

> claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable. (1990a, 1453)

McConnell constitutionalizes (and thereby tames) the founders' "anarchic" understanding by transforming Madison's natural right to disregard laws that impede a believer's perceived religious obligations into a constitutional right to a presumed exemption along the lines of the Supreme Court's Sherbert test.

If correct, McConnell's interpretation of Madison would offer a powerful natural rights and originalist argument for constitutional exemptionism. But McConnell, I believe, misinterprets the founders' understanding of the natural right to religious liberty; a misreading that, in turn, leads him to misinterpret the founders' social compact teaching regarding religious free exercise.

To see McConnell's mistake, it will be helpful to review the two analytically distinct stages of the framers' social compact political philosophy. Madison ([1830] 1865, 63) set forth a clear statement on the subject in his letter to N. P. Trist:

> Although the old idea of a compact between the Government and the people be justly exploded, the idea of a compact among those who are parties to a Government is a fundamental principle of free Government.

> The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here [in the United States] for the first time reduced to writing, by which the people in their social state agree to a Government over them.

At stage one, individuals initially agree to leave the state of nature and to form a political society. Madison, following Locke (Rosen 1999, 3, 6, 10, 88), calls this the "original compact." The original compact is among all the individuals who are members to it, not between the government and the people. At stage two, in Madison's words, "the people in their social state agree to a Government over them." The second stage of social compact theory involves the adoption of a form of government and constitutional rules. A political society specifies how the power of the community will be arranged, divided, exercised, etc. According to Locke ([1689] 2010, 331–2, 354) and Madison ([1835] 1900, 9:570–1), unanimity establishes (and then simple majority rule governs) the initial political society; constitutions, however, can legitimately empower one person, a few, many, or some combination thereof.

With these two stages in mind—we can call them the "original compact" and the "constitutional compact"—let us return to Madison's Memorial and Remonstrance. The first article pertains to the formation of the "original compact." Madison ([1785] 1981, 7) holds that men have a natural right to religious free exercise, a right that follows from the nature of their religious obligations to the Creator. Those duties, he says, are "precedent . . . in order of time . . . to the claims of Civil Society" because they exist in the state of nature, i.e., before the "original compact" is formed. Madison also says these religious duties are "precedent . . . in degree of obligation, to the claims of Civil Society." The importance of this becomes apparent in his subsequent reasoning. When men enter into civil society and form the "original compact," Madison says, they "reserve their allegiance to the Universal Sovereign." Here Madison qualifies the initial political society's jurisdiction, clarifying that, when individuals leave the state of nature, they do not include within the "original compact" their natural right pertaining to the discharge of religious duties.[3] This is why Madison emphasizes that the right of religious exercise is an "unalienable" natural right. Authority over religious exercises is not conferred to civil society and, therefore, Madison concludes, "Religion is wholly exempt from its cognizance."

If authority over religious free exercise is not part of the original compact, it cannot be within the authority of any subsequent government that the political society forms at the second stage of the social compact, what we have labeled the "constitutional compact." Madison ([1785] 1981, 7) begins Article 2 of the Memorial and Remonstrance accordingly:

> Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former.

Since the jurisdiction of the constitutional compact (including any governing bodies created by it) is derived from the original compact, what the latter lacks, the former cannot acquire.

Let us now return to McConnell's "anarchic" reading of the Memorial. McConnell interprets Madison's assertion that religious obligations are "precedent . . . in degree of obligation to the Claims of Civil Society" to mean that citizens have a right not to obey civil laws they conscientiously believe to be incompatible with their religious duties. Such a position supports constitutional exemptionism, McConnell (1990a, 1453) says, because "if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable."

McConnell mistakenly conflates Madison's jurisdictional limitations on the original compact with legal rules for the constitutional compact. When Madison says that members of civil society must reserve their "allegiance to the Universal Sovereign," he does not suggest, as McConnell contends, that citizens should receive exemptions from civil laws. Rather, Madison means that authority over religious exercise as such

[3] Elisha Williams, the influential mid-eighteenth century preacher, made the exact same point using similar language in his 1744 essay, "A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion" (in Sandoz 1990, 61). See, also, the religious liberty articles Isaac Backus proposed in 1779 for the Massachusetts state declaration of rights (in Gaustad 1993, 268).

does not become part of the original compact. Religious obligations remain outside the social compact and, therefore, beyond the jurisdiction of any constitutional authority created to govern it. McConnell's failure to distinguish the two stages of social compact theory leads him to assume that Madison is discussing stage-two constitutional rules about the operations of government power, when Madison is actually demarcating stage-one jurisdictional authority. The Memorial does not teach that individuals have a right to exemptions from burdensome civil laws; rather, it concludes that civil authorities lack sovereignty over the natural right of religious free exercise.

This lack of sovereignty means that legislators lack authority to prohibit that which belongs to the natural right of religious liberty. It also means that judges—who, too, are agents of the state—lack authority to balance elements of the natural right to religious liberty against other state interests. The act of balancing itself assumes jurisdiction: The "balancer" places the competing free exercise right and state interests on a scale. Even if the scale is tilted toward religious freedom (as McConnell would have it), the act of weighing assumes an authority that the founders deny. In this context, Madison's use of the word "cognizance" is telling. A state that must remain noncognizant of the natural right of religious liberty cannot make it the subject of legislative or judicial balancing. As we shall discuss momentarily, this does not mean that all laws that incidentally burden religious interests are unconstitutional but, rather, that the state may never legitimately exercise direct sovereignty over elements of the natural right to religious liberty.

This jurisdictional approach corresponds to the language of the First Amendment's Free Exercise Clause. The text imposes an absolute ban on Congress; it can "make *no law . . . prohibiting* the free exercise" of religion. Unlike the Fourth Amendment's protection against "unreasonable searches and seizures," or the Fifth Amendment's protections against deprivations of life, liberty, and property "without due process of law," the First Amendment affords no constitutional space for "reasonable" prohibitions of religious free exercise if "due process" is afforded or, to use modern terminology, "compelling state interests" are pursued. The categorical character of the Free Exercise Clause comports with the idea that the state lacks jurisdiction over the nonalienated right to religious liberty and, therefore, that the state can never directly prohibit any element of it.

In this sense, the framers understood and protected the natural right of religious liberty differently from most other natural rights. Take property, for example. The framers held that it is reasonable for individuals to exchange their natural right to property for a civil right to property, even with the knowledge that the state may tax and even take their property under some circumstances. As Article III of the 1784 New Hampshire Declaration of Rights states,

> III. When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void. (Poore 1878, 1280)

Individuals alienate their natural right to property in order to better secure their rights, including property rights, because without government most rights remain insecure. But the framers held that individuals make no such exchange regarding their natural right to religious liberty. Article IV of the 1784 New Hampshire Declaration of Rights continues:

> IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE. (Poore 1878, 1280–1)[4]

The framers held that it would never be reasonable for an individual to alienate sovereignty over his or her religious practices because the nature of religious worship itself, unlike the use of property, requires the individual to act according to conscience and conviction. "But our rulers can have authority over such natural rights only as we have submitted to them," Jefferson writes. "The rights of conscience we never submitted, we could not submit. We are answerable for them to our God" ([1785] 1984, 285).

The framers' jurisdictional approach to religious free exercise also includes a second distinction McConnell fails to make. While the framers held that all elements of the natural right to religious liberty remain beyond the jurisdiction of the state, they did not hold that all matters pertaining to religion are part of the natural right to religious liberty. The framers distinguished aspects of the natural rights of religious liberty from what we might call religious "interests."

Clear evidence of this distinction can be seen in the drafting of what became the Second Amendment. During the constitutional ratification debates, three states (VA, NC, RI) proposed an amendment that would protect religious objectors from military service. This led Congressman Madison to propose the following:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person. (*Annals of Congress*, 1789, 1:451)

On August 17, 1789, the House considered an amended version of Madison's initial proposal. Egbert Benson from New York moved to have the "religiously scrupulous" exemption removed because,

> No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and

[4] Such reasoning was not limited to arguments articulated at the state level. See, for example, the Anti-Federalist Brutus, ([1787] 2001, 1:451): "But it is not necessary . . . that individuals should relinquish all their natural rights. Some are such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc."

> therefore ought to be left to the discretion of the Government. (p. 780)

Three days later, the House resumed consideration of the exemption provision. Thomas Scott from Pennsylvania repeated Benson's point, contending that the matter was "a legislative right altogether" (p. 796). The congressional record is not sufficiently detailed to confirm whether Benson's and Scott's specific concern led to the ultimate defeat of the militia conscientious exemption proposal, but it does reveal that the drafters of the Bill of Rights were cognizant of—and that some sought to craft amendments in light of—the distinction between the natural right of religious liberty and matters of "religious persuasion."

The distinction between the natural right of religious liberty on the one hand and religious interests subject to state jurisdiction on the other also explains the seemingly curious fact that the First Congress considered a religious exemption in the context of drafting the Second Amendment, not the First. At no time did the advocates for the militia exemption contend that it was a part of (or required by) the text protecting religious free exercise. Moreover, the case for adding the conscientious objector exemption was pressed *after* the House had already adopted text that would become the First Amendment. Immediately prior to the August 20 debate on the militia exemption for the religiously scrupulous, the House had approved text protecting "free exercise" and the "rights of conscience" (p. 796). If "free exercise" was understood to include religious exemptions, the subsequent debate would have been superfluous; a constitutional right for religious exemption already would have been secured (cf. McConnell 1990a, 1501; Muñoz 2008, 1117–8; West 1993–4, 397). The debate continued because the drafters of the Bill of Rights understood exemptions and matters of religious free exercise to be analytically distinct legal subjects.

The distinction between free exercise and exemptions evinced in the First Congress's drafting record reflects the framers' two-track constitutional design to protect religious freedom. Boundaries on governmental sovereignty, demarcated by provisions in state declarations of rights and the federal First Amendment, were written to protect the inalienable natural right of religious freedom. This aspect of religious freedom remained, as it were, beyond the Constitution and thus out of reach of governmental power. Other facets of religious freedom, including conscientious exemptions from military service, were to be protected through the democratic political institutions established under the Constitution.[5] Representation, checks and balances, the separation of powers, federalism, an independent judiciary, and all the other features of the American constitutional system—including, of course, the multiplicity of interests and sects encouraged by the sheer size and entrepreneurial character of the American nation—would help to protect religious interests and, perhaps, afford religious individuals exemptions from burdensome laws. This two-track constitutional framework was designed, first and foremost, to recognize and protect the underlying nonalienated natural right to religious freedom, a right the founders held to limit the state's sovereignty and jurisdiction.

Before proceeding to a discussion of the modern autonomy exemptionism, three further observations about the founders' constitutionalism of religious liberty are warranted. I have tried to sketch the framers' broadly shared understanding; the further one digs for details, the more one finds disagreement. To take the most prominent example, I have left aside the question of what exactly belongs to the natural right to religious free exercise. I have done so, in part, because I am aware of no place where the founders defined with precision the exact contours of the right. My analysis (Muñoz 2015) of the founding-era state constitutions points to a general consensus that acts of worship as such made up the core of the nonalienated natural right to religious liberty, but whether the state could legitimately impose religious taxes (and thereby extend its jurisdiction over the funding of religion) or use religious affiliation to limit political rights (such as office holding) appear to have remained matters of dispute.

Second and relatedly, given its "nonbalanceable" character, the scope of the natural right of religious exercise can be expected to be deep but not necessarily wide. Several of the founding-era state constitutions indicate this textually. Article II of the 1780 Massachusetts Declaration of Rights, for example, states:

> No subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship. (Poore 1878, 957)

The founders understood the natural right of religious liberty to have natural limits—namely, at the points where legitimate state jurisdiction begins, i.e., protecting public peace and the rights of others (Hamburger 1992, 918–21; Hamburger 1993, 922–30; Hamburger 2004; cf. McConnell 1990a, 1461–6).

Third, given its grounding in the nature of man, the framers did not expect the natural right to religious liberty to evolve, grow, or change over time. The framers had a relatively fixed conception of human nature and, along with it, a stable notion of the rights that belonged to it (Mansfield 1993, 97).

II. MODERN MORAL AUTONOMY EXEMPTIONISM

To understand the founders, we began with their idea of the natural right of religious freedom and proceeded to the constitutional practice that followed. The modern approach is easier to understand in reverse: A

[5] For a history of legislative and judicial actions taken (and not taken) to protect religious interests before, during, and immediately after the founding era, see McConnell (1990a, 1503–11), Bradley (1991, 272–306) and West (1993–4).

new jurisprudence of religious liberty emerged in the middle of the twentieth century, which was then defended by theoretical justifications. To be sure, the new jurisprudence reflected earlier philosophical criticism of natural rights and social compact theory; but modern religious freedom, much like the philosophy that animates it, can be understood as an evolving process of practical adaptation to meet changing social conditions.

The Judicial Establishment of Moral Autonomy Exemptionism

The Supreme Court first adopted exemptionism in *Sherbert* v. *Verner* (1963).[6] The case involved a provision of the South Carolina Unemployment Compensation Act that denied benefits to claimants who failed, without good cause, to accept available employment. The state's unemployment commission found that Adell Sherbert had refused available work and, accordingly, rejected her application for benefits. Sherbert contended that the state's denial of benefits violated her rights of religious freedom. Every job available to her required Saturday hours; as a Seventh-day Adventist, she testified, accepting any of them would have required her to violate the Sabbath. The South Carolina Supreme Court was unsympathetic, upholding the denial of benefits while finding that the challenged statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience" (quoted in *Sherbert* 1963, 401).

The Supreme Court disagreed. In an opinion by Justice William Brennan, the Court declared that South Carolina's ruling

> forces her [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. (*Sherbert* 1963, 404)

The decisive facts driving Justice Brennan's opinion were, first, that Sherbert was engaged with a state-sponsored program and, second, she was left worse off than she otherwise would have been on account of her religious practice. The Court adopted the doctrine—now known as the Sherbert test—that, absent a properly pursued compelling state interest, the Free Exercise Clause prohibits the state from infringing individuals' religious exercises, even indirectly.

By focusing on the effects of a law as experienced by the particular religious individual, Justice Brennan and the Court implicitly rejected the framers' natural rights jurisdictional framework. That approach focuses on the law itself (not its effects) and asks whether the state has improperly exercised jurisdiction over the natural right of religious liberty. The absence of legal cognizance of religion, presumably, would have been *prima facie* evidence that the state had not entered the religious space jurisdictionally denied to it. Justice Potter Stewart noted that the South Carolina statute had not targeted religion and that South Carolina's stated reasons for denying Sherbert benefits did not include a religious rationale. "We do not have before us," he wrote in his opinion,

> a situation where a State provides unemployment compensation generally, and singles out for disqualification only those persons who are unavailable for work on religious grounds. This is not, in short, a scheme which operates so as to discriminate against religion as such. (*Sherbert* 1963, 416)

Nonetheless, Stewart concurred with the Court that acts of omission could be as constitutionally sinful as those of commission.

Sherbert's focus on how state action actually affects religious individuals expanded the range of behaviors protected by the Free Exercise Clause. Not just elements of the natural right of religious liberty, but any religious activity that a sincere religious individual perceives to have been burdened became eligible for constitutional protection. Even if, as discussed in Part I, the framers left unclear the precise boundaries of the natural right of religious free exercise, those lines were marked by reference to the state's legitimate jurisdiction; legislation that was unquestionably within the state's jurisdiction presumptively did not violate the natural right to religious liberty. In *Sherbert*, the Court severed the connection between free exercise and fixed jurisdictional boundaries.

A second expansion soon followed. To extend exemptions to religious individuals, the Court first has to identify those individuals as "religious." Ms. Sherbert's religious status was not at issue in her case, but the issue of who, exactly, counts as "religious" would quickly reach the Supreme Court.

That dispute arose under *United States* v. *Seeger* (1965), a case involving conscientious objector status from military service. After World War II, federal law exempted from combat service individuals whose conscientious opposition to war was based on "religious training and belief," a phrase that Congress defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code" (Universal Military and Training and Service Act 1948). Under that definition, Daniel Seeger's claim for conscientious objector status was denied, because he had been unwilling to confirm that his beliefs were grounded in belief in a "Supreme Being."

The Court resolved the issue by creatively crafting the following "Supreme Being test":

[6] Earlier calls for "accommodation" under the Free Exercise Clause can be found in the joint dissenting opinion of Justices Black, Douglas, and Murphy in *Jones v. Opelika* (1942) and Justice Brennan's opinion in *Braunfeld v. Brown* (1961).

> The test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. (*United States* v. *Seeger* 1965, 165–6)

What was important, according to the Court, was whether Seeger's beliefs were sincerely held and, "*in his own scheme of things*, religious" (*Seeger* 1965, 185, emphasis in the original).

Seeger was litigated primarily under a federal statute and not on First Amendment grounds, but the underlying extension of who is eligible for religious liberty protection would become, as we shall discuss below, a central feature of the philosophy of modern autonomy exemptionism. In awarding Seeger conscientious objector status, the Court severed any necessary connection between "religion" and the divine. Those who believed in God were still identified as "religious," but so too were those who, in their "own scheme of things," possessed deep, life-shaping convictions not attached to the divine. Under *Seeger*, the authority animating legal respect for conscientious convictions was no longer a transcendent deity but, rather, the individual himself and his or her ability to generate sincere and authentic meaning.

If any questions remained about whether religious liberty protections required belief in a transcendent god, the Court put them to rest five years later. In *Welsh* v. *United States* (1970), the Court awarded conscientious objector status (which, according to statute, was still based on "religious training and belief") to an individual who could not affirm belief in God and denied that his opposition to war was based religious training. Young men, the Court said, might not be "fully aware of the broad scope of the word 'religious'" as set forth by the Court. "A registrant's statement that his beliefs are nonreligious," the Court explained, "is a highly unreliable guide for those charged with administering the exemption" (*Welsh* v. *United States* 1970, 314).

The expansion of what practices could be protected, along with the extension of who was eligible for protection, led the court to devise a framework to limit the availability of "religious" exemptions. The most important constraint was set forth in *Sherbert* when Justice Brennan noted that the imposition of an indirect burden on religious exercise "may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (p. 403, citing *NAACP* v. *Button* (1963) at p. 48). Chief Justice Burger, in his subsequent implementation of the approach, used the image of balancing. Governmental interests, he said, would "overbalance" (*Wisconsin* v. *Yoder* 1971, 215) religious liberty when the state adopted "the least restrictive means of achieving some compelling state interest" (*Thomas* v. *Review Board of Indiana* 1981, 718).

The balancing approach to free exercise rights was concomitant with the Court's move to expand religious liberty protections. After *Sherbert*, activities within the state's traditional jurisdiction were eligible for Free Exercise Clause protections. To prevent exemptions from lifting all legal limits on religious individuals, a mechanism to impose state authority was required. In a sense, the modern Supreme Court did no more than develop legal language to adjudicate the same matter the founders addressed when considering Second Amendment exemptions for conscientious objectors. The founders recognized that, for what we deemed "religious interests" in Part I, "discretion" was needed to allow some state authority to extend some exemptions to some religious believers from some legitimate laws. "Compelling state interest" analysis (sometimes accompanied with a "least restrictive means" requirement[7]) formalized that discretionary process, allowing courts to affirm the state's legitimate jurisdiction and "compelling" interests while, at the same time, affording religious individuals consideration for protection from some burdensome laws.

The Supreme Court was not exactly following the founders, however. Most obviously, the framers explicitly had left discretionary authority over matters of "religious persuasion" in the hands of the legislature. *Sherbert* and the cases that followed transferred that authority to the judiciary: What is religion, who is "religious," and what constitutes an overriding "compelling state interest," ultimately, would be decided by courts. Exemptionism, moreover, rejected the framers' two-track constitutional design by shifting nearly all religious liberty claims into a single balancing framework. This move quietly eviscerated the framers' categorical, jurisdictional protection for the nonbelief elements of the natural right of religious liberty.

The case most clearly marking this shift, *Church of Lukumi Babalu Aye* v. *City of Hialeah* (1993), involved a Florida city's attempt to outlaw the religious practice of animal sacrifice by members of the Santeria religion. The Supreme Court found that the City of Hialeah had drafted ordinances that "by their own terms target . . . religious exercises" and "had as their object the suppression of religion" (p. 542). A unanimous Court, accordingly, struck down the ordinances. It did so, however, only after conducting "compelling state interest" and "narrowly tailored" means analysis. As stated by the Court,

> If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. (p. 533)

Under this doctrinal standard, a law that prohibits religious exercises as such could be constitutional if it was designed to narrowly pursue a compelling state

[7] See Weiss (2010) for a discussion of the role of the "least restrictive means" prong in the Court's Free Exercise Clause jurisprudence.

interest. Justice Anthony Kennedy, the author of the Court's opinion in *Lukumi Babalu Aye*, implicitly acknowledged this when he recognized that only "a law targeting religious *beliefs* as such is never permissible" (p. 533, emphasis added).

The distinction between beliefs and actions in the Court's religious liberty jurisprudence goes back to at least *Reynolds* v. *United States* (1879), but it is not one easily supported by the First Amendment's text, which protects religious "exercises" from prohibition, or the founding-era state constitutions, which uniformly use the language of "worship," not "beliefs." Even if the framers did not mark with precision all that belongs to the natural right of religious liberty, religious worship as such seems to have been part of it and, therefore, remains outside of the state's jurisdiction (along with religious beliefs). *Lukumi Babalu Aye* confirmed that, under the exemptionist balancing approach, the state can directly prohibit specific forms of worship, or the worship of specific religious sects, if it has a compelling reason to do so.

The Philosophy of Free Exercise Exemptionism

As noted earlier, the practice of exemptionism came before its philosophical defense and explication. Justice Brennan's opinion proceeded as if it were self-evident and uncontroversial that denying Adell Sherbert unemployment benefits was the same as fining her for keeping the Sabbath. His *Sherbert* opinion does not attempt to justify exemptionism philosophically, nor does it attempt to explain its consistency with (or even opposition to) the founders' natural rights constitutionalism. Extended legal and philosophical defenses, however, would soon follow.

With the prominent exception of Michael McConnell, most contemporary philosophical defenses of exemptionism center their arguments on a modern notion of human autonomy.[8] Jocelyn Maclure and Charles Taylor (2011) offer a particularly cogent example of the approach in their recent book *Secularism and Freedom of Conscience*. Maclure and Taylor propose "freedom of conscience" and "equality of respect" as the two principal ends of a well-functioning liberal democracy. By "freedom of conscience," they mean an individual should be allowed "to choose and realize his or her own conception of what a successful life is" (p. 71). Martha Nussbaum (2008), to take another leading defender of autonomy free exercise, reaches similar conclusions by grounding the special status of what she calls "liberty of conscience" in "the faculty with which each person searches for the ultimate meaning of life." This faculty itself, she says, "is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly" (pp. 168–9). While not all scholars adopt Nussbaum's particular emphasis on human cognition (cf. Maclure and Taylor 2011, 96), her focus on the individual's personal quest to identify and assert meaning is typical. William Galston (2002, 28) nicely captures the essence of autonomy free exercise in his notion of "expressive liberty": the freedom for individuals to live their lives in ways that express their deepest beliefs about what gives meaning or value to life. All these accounts have an underlying normative conception of human liberty that revolves around the individual developing his or her own deep, meaning-giving convictions.

To allow the individual to live according to those convictions, all these scholars contend that exemptions are needed.[9] Maclure and Taylor (2011, 66) emphasize that formal equality before the law offers insufficient protection in practice, because norms and laws of general applicability inevitably impose unfair burdens on some individuals' conscientiously held beliefs.[10] Nussbaum (2008, 21–5) emphasizes the plight of numerical minorities. In a democratic polity, "differential favorable treatment" is required to ensure substantive equality among all individuals deserving "equal respect." For autonomy to be realized in practice, individuals need sufficient space to follow their self-constructed moral identities. Exemptions with due limits are the constitutional means prescribed to maximize autonomous freedom in a diverse and pluralistic political community.

The autonomous notion of human freedom is joined by what Nussbaum (2008, 19) and Maclure and Tayor (2011, 20) label "equality of respect." All individuals, Maclure and Taylor state, possess equal moral value and dignity. Their notion of freedom of conscience, accordingly, extends to all individuals, who, they say, should have equal opportunity to choose and realize their deep convictions about the meaning of life (p. 71). Nussbaum (2008) advances the same idea through what she labels "the equality principle." When added to the autonomous notion of conscience, "equality of respect" and "the equality principle" require that the privileges of conscience be extended beyond religiously informed consciences alone (p. 22). "Within the context of contemporary societies marked by moral and religious diversity," Maclure and Tayor (2011, 89) write, "it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs

[8] This is not to say that every defense of exemptionism is philosophical or that all philosophical defenses focus on autonomy. For examples of the latter, see Garvey (1996), Wolfe (2012), and Tollefsen (2012). Nonphilosophical defenses of exemptionism—see, e.g., Laycock (1996a and 1996b), McConnell (1992), and Justice O'Connor's dissenting opinion in *City of Boerne* (1997)—tend to appeal to history.

[9] Not all scholars concerned with liberty of conscience, of course, champion exemptions. Leiter (2013), for example, agrees with the proposition that nonreligious claims of conscience ought to be treated equally to religious claims but denies that most claims of conscience ought to receive exemptions from generally applicable laws. Locke ([1689] 1983, 48–9), of course, also opposed exemptions in *A Letter Concerning Toleration*.

[10] This point and the one that follows are made by nearly every defender of exemptionism. For a particularly cogent example, see McConnell (1990b, 1133–6). For a systematic analysis of formal neutrality and its perceived shortcomings, see Laycock (1990 and 2007). Schwartzman (2012, 1401) helpfully points out that appeals to equality alone are not sufficient to require exemptions.

that allow individuals to structure their moral identity." They emphasize that, to the extent that religious convictions receive special protections, it is because of "the role they play in people's moral lives rather than from an assessment of their intrinsic validity" (p. 81). Nussbaum's (2008, 168) account sharpens the focus of this expansive notion of conscience by calling for accommodations for all convictions surrounding "what one might call ultimate questions, questions of life and death, the meaning of life, life's ethical foundations, and so forth." Under both accounts, religious individuals can receive protections from burdensome laws, but those protections are not limited to religious individuals alone. The autonomous conscience is protected, not religion as such.

The priority of the individual's conscience apart from any necessary religious conviction is reinforced by another foundational commitment of the autonomy school: the idea that the state should be neutral regarding competing conceptions of the good. Maclure and Taylor (2011, 10–1) make the point repeatedly on the first pages of Chapter 1 of their volume. "In a society that is both egalitarian and diverse," they write, "the state must be separate from the churches, and political power must be neutral toward religions." The state must also "treat equally citizens who act on religious beliefs and those who do not; it must, in other words, be neutral in relation to the different worldviews and conceptions of the good—secular, spiritual, and religious—with which citizens identify." As Micah Schwartzman (2012) bluntly concludes, treating atheists or agnostics differently than religious citizens "has absurd consequences" (p. 1416) insofar as these secular doctrines "cannot be distinguished on normative, epistemic, or psychological grounds from their religious counterparts" (p. 1421). For autonomy scholars, state neutrality accommodates the reality that moral and religious diversity cannot be overcome, what John Rawls (1993) calls "the fact of reasonable pluralism." The limits of human rationality and its inability to decisively adjudicate competing conceptions of the good make state neutrality a necessary requirement of any well-functioning modern liberal state. State neutrality fosters the commitment to individual autonomy, which, when coupled with the practice of exemptions for all core beliefs, complements and reinforces the norm of neutrality.

III. NATURAL RIGHTS FREE EXERCISE AND MORAL AUTONOMY FREE EXERCISE COMPARED

Due to the influence of Michael McConnell, exemptionism is generally thought to be compatible with, if not dictated by, the church-state philosophy of the founding. But if, as I have argued, McConnell misreads the founders, at least two competing accounts of religious free exercise exist within the American constitutional tradition. This section attempts to further clarify those traditions by explaining the philosophical and practical differences between the framers' inalienable natural rights approach and modern autonomy exemptionism.

1. Different Understandings of the Nature of Freedom and the Meaning of Religious Liberty

The most significant philosophical difference between the two lies in their conceptions of human freedom and the place of that freedom in the moral order of the universe. The framers derive the idea of a natural right to religious liberty from duties to God and the moral fabric of human nature, which itself is understood to be created by God. Their conception of religious freedom is oriented toward the divine; individuals require freedom so they can worship according to conscience. This does not imply the founders thought political authorities could legitimately suppress religious freedom if individuals blasphemed or committed idolatry—they understood this freedom itself to be a gift from God and an inalienable right. But it does suggest that, though establishing religious liberty is a great political accomplishment, it is not the final end or even an end in and of itself. The *telos* of the founders' understanding of religious freedom is the proper worship of God according to conviction and conscience. The right of religious liberty establishes the political means to facilitate that end.

The autonomy defense of exemptionism brings the *telos* of religious freedom down to man. The individual's autonomy becomes an end in itself. The free human being is the individual who finds his own meaning and then lives accordingly. Being sincere and authentic to oneself and one's own "core" principles is the foundation and overarching purpose of liberty of conscience. The Supreme Court articulated this conception of freedom with brilliant clarity in *Planned Parenthood* v. *Casey* (1992, 851):

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Casey, of course, adjudicated a different legal matter, but the Court's plurality reached its decision by employing the same understanding of freedom as embraced by autonomy exemptionism.

The autonomy notion of freedom also expands the meaning of religious liberty. While both approaches embrace the dignity of the individual, the founders' account of religious freedom is tethered to the worship of God. The natural right to religious freedom, as discussed, pertains to matters concerned exclusively with the divine. The concept of autonomy encompasses traditional notions of religion but is not limited to them. Nussbaum and Maclure and Taylor all draw our attention to this by including the word *conscience* in the titles of their books. The focus on *conscience* (as opposed to *religion*) conveys the idea that the object of protection is the individual's ability to search for ultimate meaning, a quest that may or may not involve worship, religion, or a sense of the divine. Liberty of

conscience includes, in Maclure and Taylor's words, "different philosophical conceptions that stand as the secular equivalents of religions" (2011, 13).

2. Different Understandings of How Religious Freedom is Threatened and, Therefore, Protected

These different conceptions of freedom lead to different conceptions of how religious liberty is best protected. In the framers' social contract constitutionalism, the state is viewed primarily as a potential threat to religious freedom. In particular, regarding the elements of the natural right of religious free exercise, the state is generally thought to be incapable of enabling or increasing freedom. To protect liberty, then, requires strict limitations.

It lies beyond the scope of this article to specify all the elements of the natural right of religious freedom in the framers' understanding; but, in general, it would seem that the regulation of religious exercise as such would remain beyond the state's competence. Perhaps an obvious violation would be the enforced prescription or prohibition of religious practice as such; say, a law that explicitly prohibited or required a particular religious observance on a day of the week that was legally specified as the Sabbath. If South Carolina had imposed a fine on Adell Sherbert specifically for attending religious services on Saturday, for example, it would seem to have violated her natural right of religious liberty. Another violation might have occurred if the state had specified the articles of faith necessary for Sherbert's church to be legally incorporated, or if it required her pastor to obtain a state-issued preaching license.

In the framers' natural rights understanding that which lies beyond the jurisdiction of the state also cannot legitimately be balanced against competing state interests, even if they are compelling and properly pursued. Regarding *Lukumi Babalu Aye*, once it was determined that the city had attempted to prohibit Santeria religious exercises as such, the ordinances in question would have been struck down. No compelling state interest or narrowly tailored means analysis would have been required. To further the preaching license example: Say South Carolina had experienced an epidemic of scam artists masquerading as prophets. At the same time, the state found itself in the midst of a dramatic influx of out-of-state, religiously intolerant sects advocating hatred toward any number of minority groups. Because of earlier efforts to increase respect for diversity, those new religious groups were deemed to be the only anti-diversity groups operating in the state. In the interests of preventing fraud and safeguarding cultural diversity, South Carolina establishes a licensing requirement for any minister that preaches in a house of worship (defined according to IRS tax exemption regulations). Those interests might very well be compelling, and, given the circumstances, the licensing requirement might even be the least restrictive means to prevent "religious" fraud and to safeguard the diverse populations targeted by "hate preaching." Under the jurisdictional approach to religious liberty, however, it would seem that such considerations would not and could not factor into judicial decision-making. Natural rights constitutionalism would ask only if the state exercised jurisdiction over elements of the natural right to religious liberty. If it had—and, presumably, requiring pre-clearance from the state to preach in a house of worship would be an example of an impermissible exercise—the statute would be struck down, regardless of any extenuating compelling state interests.

Modern exemptionism does not deny that state action can threaten religious freedom, but it recognizes that affirmative state action can help secure it and that rights of autonomy must be balanced against other competing rights and interests. Autonomous free exercise imposes limits on some (primarily legislative and executive) exercises of state power by empowering other (primarily judicial) state officials to neutralize and offset burdensome state actions. Instead of strict enforcement of the state's jurisdictional limits, exemptionism calls for superintendence of the exercise of all state power. Freedom is achieved not simply through the absence of state power but by a judicious and dynamic oversight of state action with regard to its impact on conscience. This more expansive role is called for because, it is held, laws and regulations that do not target religion as such can still deny liberty of conscience in practice.

Exemptionism, for perhaps obvious reasons, goes hand in hand with the modern administrative state. In the name of protecting individuals in advanced, culturally diverse, free-market economies, the modern state regulates much of what, at one time, was considered private. The more areas of life the state regulates, the more it will affect religious individuals and institutions. Take, for example, the regulation of employment. State licensing requirements imposed on pharmacists may require activities that some professionals find conscientiously objectionable. Employment nondiscrimination laws may intrude on the autonomy of churches and their ability to define their internal governing structures. In the view of autonomy free exercise, this expansion of what has become public and subject to state regulation necessitates a concomitant expansion of protections for matters of conscience.

Expanding the rights of conscience to include protection from the actual impact of law on religious belief necessitates a balancing approach to that right. Furthermore, as the notion of "religious" belief is expanded to include all beliefs involving "the ultimate meaning of life," potential conflicts between generally applicable laws and individuals' consciences rapidly multiply. Almost any law or regulation can impose burdens on the "core" beliefs of some individual, which means that every law can potentially be subject to liberty-of-conscience litigation. As a practical matter, some form of rights-balancing is necessary, given the complexities and demands of modern political life. Since not every burden on conscience can be relieved, the balancing approach allows exemptionism to maximize the liberty of conscience while recognizing the necessities of the modern state.

CONCLUSION: TRADING THE DEPTH OF NATURAL RIGHTS FOR THE BREADTH OF MODERN AUTONOMY

When the Supreme Court introduced the modern era of exemptionism, it offered no defense for its break with the founders' natural-rights constitutionalism, probably because it was concerned neither with the founders nor the idea of natural rights. While *Sherbert*'s precedential value has been curtailed by subsequent Court decisions (*Employment Division* v. *Smith* 1990), the exemptionist approach it adopted still governs some Free Exercise case law (*Lukumi Babalu Aye* 1993, *Hosanna-Tabor* 2012) and a fair amount of federal and state legislation. Among scholars, moreover, exemptionism remains the dominant understanding of what religious free exercise demands in a pluralistic liberal democracy.

At least prior to the Supreme Court's *Hobby Lobby Stores* (2014) ruling, exemptions for conscience remained one of the few bipartisan issues across politics, law, and academic scholarship. An astonishing coalition was formed to pass the exemptionist Religious Freedom Restoration Act (1993), with support ranging from the American Civil Liberties Union to the Traditional Values Coalition. What was done politically has been reinforced intellectually by an equally diverse range of scholars, from philosophical champions of liberal autonomy to the nation's leading conservative originalist church-state scholar. The modern coalition in favor of exemptionism would seem to be a model of Rawlsian overlapping consensus.

Exemptionism can be said to facilitate social harmony in other ways, as well. Much modern civil-rights legislation probably would not have been possible (or, at least, would have been much more difficult to pass) without religious exemptions. Title VII of the 1964 Civil Rights Act, for example, exempts religious employers from the statute's prohibition against workplace discrimination on account of religion. Without the religious exemption, the provision certainly would have faced opposition from religious institutions focused on protecting their religious character and mission. The same is probably true of contemporary legislation to protect homosexual rights. Though same-sex marriage remains extraordinarily divisive, one can imagine the social rancor that would ensue if traditionally oriented churches were forced to ordain homosexual unions. Religious exemptions from conducting homosexual marriages in houses of worship no doubt lessen at least some opposition to the extension of marriage equality. The expansion of the rights of conscience to include the "core beliefs" concerning questions of "ultimate meaning," moreover, furthers the notion of state neutrality between religion and nonreligion and, in the lexicon of its proponents, "equal respect" for all citizens.

The corollary of "equal respect" is the absence and abandonment of the idea of special protection for religion more narrowly or traditionally designated. The argument for natural rights free exercise is founded on, and limited to, the individual's duties to God. It extends only to those beliefs and actions that flow from those duties, not a more generalized notion of "ultimate meaning." In the natural rights tradition, religion is different because the character of authentic human worship itself makes it impossible and irrational for individuals to cede authority over their natural right of religious liberty: Forced worship is not worship at all. That right, as discussed, is narrow; it excludes from state jurisdiction only elements of the natural right of religious liberty. It does not offer constitutional protection from incidental burdens on religious practice but, rather, subjects what we have called religious "interests" to the democratic political process. Autonomy free exercise offers far more constitutional breadth, protecting against direct and indirect burdens on religious exercise, as well as covering conscientious actors in addition to traditional religious believers. This breadth is exchanged for depth, as a properly pursued compelling interest justifies state burdens on religion, whether direct or indirect.

In exchanging breadth for depth, modern free exercise exemptionism transforms the idea of limited government. Natural rights free exercise maintains that there are some interests the state can never pursue, no matter how "compelling." It holds that the individual retains a realm of unbreachable religious liberty that the state may never trespass. Modern exemptionism erases this categorical understanding of limits. The state is not limited in its reach, only in how it proceeds.

Whether this constitutes a worthy trade lies beyond the scope of this article. That question cannot be addressed, however, without clarity about the different approaches to free exercise within America's constitutional tradition. This article has attempted to shed light on those differences and, thereby, facilitate further reflection and choice about the most prudent and most proper way to protect our "first freedom."

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