Protecting Religious Liberty: A Modest Proposal for Free Exercise Tests by the Courts

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In a 2016 *American Political Science Review* article, Vincent Munoz distinguished two different approaches to thinking about religious liberty issues. In that article, Munoz distinguished between

what he labeled as the Founders' "natural rights free exercise constitutionalism" and "modern autonomy exemptionism."[1] Munoz writes that the dominant approach of courts toward religious liberty in the last fifty years or longer is that "individuals and institutions deserve exemptions…from generally applicable laws that burden sincerely held religious beliefs and exercises."[2] This approach Munoz calls moral autonomy exceptionalism. The other approach, which Munoz claims was adopted by the American Founders, begins with a recognition that everyone has a natural right (grounded in a creator and nature itself) to religious freedom, and this right lies beyond the state's direct prohibition or regulation.[3] In actual practice this would translate into a recognition that all humans have this natural right of religious liberty, but "all matters pertaining to religion are not part of the natural right."[4] Nevertheless, if the particular claim fell within the sphere or jurisdiction of the proper meaning and scope of religion, it is not balanceable with other alleged state interests and must be allowed. The right of free exercise itself has natural limits, but it did not "evolve, grow, or change over time."[5]

Munoz's claim has been disputed, on both originalist and non-originalist grounds. This paper will therefore attempt to discern (1) a definition common for religion in the Founding era and (2) the original scope and meaning of the Free Exercise Clause. However, even if I am unable to determine precisely these meanings in their original context or in the debates surrounding them, a case can still be made that a "natural rights" approach may be more accurate than a moral autonomy approach. To put it another way, a non-balancing approach may be a better one than the current balancing approach.

At the outset as well, as Vincent Munoz has characterized the basic attitudes of those giving religion a special status in the American system, "[T]he Frist Amendment's text, whatever the Establishment Clause might mean, clearly gives special status to the 'free exercise' of religion.[6] After all it is specifically mentioned as a right among a relatively few other rights in the Constitution. It was placed at the beginning of the United States Constitution, as it had been in state constitutions, and it was (and is) mentioned as a "first liberty," not only in syntactical order but in priority. Moreover, religion itself has always been of first importance in all civilizations, precisely because it is about ultimate meaning and ultimate things.

Definition of Religion in the Founding Era

It will be important to understand the best we can the definition of the term "religion" in the eighteenth century, particularly in America but also in other Western European nations. If we know how religion was understood, we are better able to determine the scope of the Free Exercise Clause. What interferes in a relevant way with religious belief or practice marks the limit of government interference. But defining religion and its scope marks the limit of a claim of religious liberty.

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[1] Vincent Phillip Munoz, "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*," American Political Science Association*, vol. 110, No. 2 (May 2016), 369-381.

[2] Ibid., 369, citing for example, *Employment Division v. Smith* (1990).

[3] Ibid., 371.

[4] Ibid., 373.

[5] Ibid., 374.

[6] Vincent Phillip Munoz, "If Religious Liberty Does Not Mean exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty," *Notre Dame Law Review*, Volume 31 (2016), 1388.

Beginning with a broad understanding of the concept in the Enlightenment (c. 1650-1800), Peter Harrison writes that we began to see religious pluralism at the time of the Reformation, but pluralism did mot yet lead to toleration, much less a "natural right" of religious liberty.[7] Nevertheless, it did sow the seeds of new ideas about what constitutes religion. During most of the Reformation, if one deviated from the accepted tradition, whether Catholic, Lutheran, Calvinist or Anabaptist, one was considered to hold to a *different religion*. The Peace of Augsburg (1555) and the Peace of Westphalia (1648) granted a stunted for of toleration, and the French Edict of Nantes (1598) actually decreed toleration of two religious groups—Catholic and Calvinists—until 1675. But other belief systems, Deism, Antitrinitarianism, Dualism, for example, were heresies. Islam, Judaism, and other non-Western forms of religion were simply outside the religious pale, even though tolerated off and on.

It was not until the 1600s that we see the beginnings of writing about a form of toleration that went beyond narrow limits, and even talk about religious liberty as some sort of conscience right. The English clergyman Roger Williams, writing before John Locke, argued that it is "the will and command of God [that since the coming of Christ] a permission of the most Paganish, Jewish, Turkish or Antichristian consciences and worships, bee granted to all men."[8] It is evident that religion is being conceived much more broadly than before. This view seems to be quite close to one that would be accepted today, with the exception that atheism and agnosticism are not mentioned.[9] A few decades later, John Locke, in his famous *Letter Concerning Toleration*, included under the umbrella of toleration and "civil rights" "Presbyterians, Independents, Anabaptists, Arminians, Quakers and others…. Nay if we openly speak the Truth and as becomesone Man to another; neither Pagan, nor Mahumetan [Muslim], nor Jew ought to be excluded from the Civil Rights of the Commonwealth, because of his Religion."[10] Locke does except from toleration Roman Catholics, mainly because he considers the Catholic Church politically subversive. He also continues to use the language of the Reformation in asserting that "We are to enquire therefore, what men are of the same Religion….it is manifest that those who have not the same Rule of Faith and Worship, are of different Religions. Turks and Christians are of different Religions…."[11] Locke distinguishes different religions but he grants rights and toleration to nearly all. Moreover, he classifies all of them as religions. I would argue that Catholicism is an anomaly peculiar to Locke because of his specific historical context. With this reading then, we can argue that religion in the late seventeenth century was understood broadly.

However we still must address some of the newer developments such as Atheism, Rational Dissent and Deism. When did these traditions gain the status of religions? Or did they before the ratification of the Bill of Rights? Deism is a notoriously slippery and contested term. Harrison defines Deism as "the extreme manifestation of the rationalising tendency within the religious thought of seventeenth- and early eighteenth-century England."[12] Deists held a variety of views

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[7] Peter Harrison*, 'Religion' and Religions in the English Enlightenment*. Cambridge University, 1990, 7ff.

[8] *The Bloudy Tenent of Persecution* (1644) in *The Complete Writings of Roger Williams*. Eugene, OR, 1963, vol. 3, 3-4.

[9] These latter philosophical and theological positions are still problematic in legal discussions.

[10] John Locke, *A Letter Concerning Toleration* (1689) *in John Locke: A Letter Concerning Toleration and Other Writings*, edited by Mark Goldie. Liberty Fund, 2010, 58-59.

[11] Ibid., 63-64.

[12] Peter Harrison*, 'Religion' and Religions*, 62. Scholars expand on this definition in various ways, but details need not detain us.

on theological subjects and did not always espouse ideas we attribute to deism. This definition of deism would apply as well to Continental Europe with only slight variations. Deism was certainly considered a kind of religion, albeit a problematic one criticized by traditional Catholics and Protestants. Thomas Jefferson and Benjamin Franklin have often been labeled as deists, though the attribution is contested by some.[13] Franklin called himself a deist, while Jefferson used the term to describe others, including Jesus. I believe therefore that deism would be comprehended under the term "religion" at the time of the ratification of the Bill of Rights.

Atheism too was used as a pejorative term to cover many unorthodox belief systems in the eighteenth century, for example, freethought, pantheism and skepticism. Thomas Hobbes had been called an atheist in the seventeenth century because of his alleged philosophical materialism. According to Harrison, "'Atheism' in the seventeenth century had retained many of the connotations which it had acquired in classical antiquity. Atheists in both eras included those who denied the force of arguments which were regarded as supporting theism, or who proposed non-religious theories of the origins of religion."[14] Atheism therefore appears to have been a philosophical denial of certain doctrines that make God a viable entity (immortality, eternal punishment, etc.), but seldom an outright denial of the existence of any deity, even if that thought was called atheistic.[15] At any rate, atheism in its later philosophical form was, if one can even find it, a serious challenge. But how did it fare in relation to religious liberty? That question would become even more important as we enter the twentieth century: Would atheism be included under the term "religion" as understood by the First Amendment?

If we go back to John Locke, "Those are not at all to be tolerated who deny the Being of a God. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist."[16] Such a philosophy therefore could not in England in the late 1600s, be protected from government oppression or even persecution, as no right would exist. Thomas Jefferson, who was considerably influenced by Locke, drafted "A Bill for Establishing Religious Freedom" for the new state of Virginia in 1779, which stated in part:

"SECTION I. Well aware that the opinions and belief of men depend not on their own will, but involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free;…that all attempts to influence it by temporal punishments…or civil incapacitations, tend only to beget habits of hypocrisy and meanness…that the opinions of men are not the object of civil government, nor under its jurisdiction…no man shall be compelled to [to attend or support any church]…nor molested…that all men shall be free to profess…and maintain, their opinions in matters of religion…and that the same shall in no wise diminish, enlarge or affect their civil capacities."[17]

The wording of this statute still begs the question regarding Jefferson's or the general view of atheism. Jefferson later wrote in his *Notes on the State of Virginia* (1782, printed in 1784) that

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[13] See Thomas Kidd, "What is Deism?" in *Patheos*, March 2015, at https://www.patheos.com/blogs/anxiousbench/2015/03/what-is-deism/, retrieved February 5, 2022.

[14] Harrison, *'Religion' and Religions*, 34.

[15] The more virulent form of atheism would arise in the nineteenth century.

[16] John Locke, *A Letter Concerning Toleration*, 52-53.

[17] In *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, edited by Daniel L. Dreisbach and Mark David Hall. Liberty Fund, 2009, 250-251.

"But it does me no injury for my neighbor to say there are twenty gods, or no god."[18] James Madison argued for freedom of religion (more than toleration) using much the same wording as Jefferson.[19] However, Madison has left us comparatively little to enable any conclusions on his view of atheism. Taking Madison and Jefferson together, we may conclude that atheism is an unresolved problem for originalists, and possibly even problematic. According to Michael Paulsen, the best originalist connotation of the meaning of religion in the Free Exercise clause is a set of beliefs closely aligned with theism (including deism).[20] Paulsen may be correct, but his conclusion is debatable. I will therefore put aside atheism for the time being and assume the term religion includes at least all theistic belief systems.

The Bill of Rights and the Free Exercise Clause

It may be possible to get at the intent of Congress and official state sentiments regarding religious liberty we examine briefly the bills of rights in state constitutions and the Northwest Ordinance (1787). But to do this, we are required to add to the list of concepts to be defined, those of "free exercise" (or similar phrases) and that of how the Founders envisioned this right of religious liberty to be interpreted in practice. As I move into the following section, the latter problem will become all-important. If religious liberty is a natural right, made civil by the Constitution, what are its limits and how exactly are they to be determined by judges?

The Northwest Ordinance states: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory…."[21] Religion likely here excludes atheism, but does include other non-Christian religions. The practice of liberty is limited, as expected, by the requirement of non-violence, or possibly, any practice that might undermine morals (though the scope of the phrase seems narrower than that).

The *Virginia Declaration of Rights* (1776), drafted by George Mason and modified at the insistence of James Madison, reads in part: "all men are equally entitled to the free exercise of religion…; and that it it is the mutual duty of all to practise Christian forbearance, love and charity towards eachother."[22] This provision is nearly identical with Madison's *Remonstrance*. Pennsylvania's constitution of 1776 provides a unique perspective. Article II begins, "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understanding….Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority…assumed by any power…that shall interfere with, or…control the right of conscience in the free exercise of religious worship…."[23] What strands out here is the obvious limits on who is granted religious liberty and who is not. The language is limited to those "who worship Almighty God" and who

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[18] Ibid., 292.

[19] See his *A Memorial and Remonstrance Against Religious Assessments* (1785), in Ibid., 309-313.

[20] Michael Paulsen, "God is Great, Garvey is Good: Making Sense of Religious Freedom," in *The Free Exercise of Religion Clause: Its Constitutional History and the Contemporary Debate*, edited by Thomas Berg. Prometheus Books, 2008, 180.

[21] In Dreisbach and Hall, eds., *The Sacred Rights of Conscience*, 236.

[22] Article XVI, in Ibid., 241.

[23] *Pennsylvania Constitution* (1776), in Ibid., 242. The Pennsylvania Constitution of 1790 contains very similar language.

acknowledge "the being of a God." Everyone else does not have any religion. But all who do confess some deity are granted this right. Atheism is excluded. This fairly stark statement seems, as we will see, to capture the Founders' sentiments and definitely the sentiments of many state governments.[24]

Clearly beliefs in some deity are protected from interference by a religious liberty right. But the term "exercise" in the Constitution itself would tell us that at least certain actions related to religious beliefs are also protected. This problematic term will become crucial in the discussion of the appropriate test to be used to adjudicate a free exercise right.

The Bill of Rights of the United States Constitution, after it was proposed, went through several modifications in Congress. The progression in proposals might provide illumination as to the intended meaning at the time. But one can draw a couple of preliminary conclusions. First, the language of religious liberty is not at all self-evident, but it does also seem to be absolutist and therefore very broad in its scope. The fact that the language is somewhat vague would become the very foundation for the struggle by courts to find some workable test.

The Bill of Rights was proposed after the Anti-Federalists (and others) objected to its absence in the Constitution itself. Richard Henry Lee's suggestion in 1787 is simply that "the right of Conscience in matters of religion shall not be violated."[25] The Ratifying Convention of Pennsylvania requested an explicit addition to the Constitution: "The right of conscience shall be held inviolable" with following language intended to prevent the national government from infringing on the states' "preservation of liberty in matters of religion."[26] The Maryland Ratifying Convention's proposed amendment was also brief: "…that all persons be equally entitled to protection in their religious liberty."[27] Finally, Virginia proposed that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience,…."[28] New York, North Carolina and Rhode Island used language nearly identical to Virginia's.

These proposed additions to a Bill of Rights, as I mentioned above, were very broad and absolutist in their tenor. Of course no right is absolute, as it must contain some implicit or explicit limit to its scope. Such limits are sometimes determined by the language used. In these cases, the term "religion" and "conscience" are initially controlling of scope. Whatever falls under religion and religious conscience is the first and "outer" limit of the scope or extensiveness of the right of religious liberty. But that still leaves a massive conceptual territory that likely was not intended to be so large. The language of any liberty is not unlimited either theoretically or as applied to any given individual. It seems obvious to assert that the inner limit of any liberty includes the point at which the liberty (right) or any one individual infringes in some relevant way on others' rights. This and other factors are heavily dependent in turn on definitions of terms as well as historical and philosophical contexts. If we wish then to grasp the concept of religious liberty in order to

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[24] Similar language is found in the constitutions of Delaware, North Carolina, South Carolina, Vermont and New Hampshire, and, in an even stricter form, Maryland.

[25] Dreisbach and Hall, eds., *Sacred Rights of Conscience*, 408. But this was not a formal proposal, more akin to a list.

[26] Ibid. (1787), 415.

[27] Ibid. (1788), 416.

[28] Ibid. (1788), 416.

arrive at a useful test for its application, we must consider contexts and the entire notion of the structure of rights.[29]

When we come to the Congressional debates on the Bill of Rights, we can find a variety of wording. In one of his first acts in Congress, James Madison, as he promised, gave a speech introducing a bill of rights (among other modifications). He stated that "The civil rights of none shall be abridged on account of religious belief or worship…"[30] Madsion did recognize arguments that a bill of rights was unnecessary on account of the limited enumerated powers of the Congress. But he also feared that the "Necessary and Proper Clause" might provide an opening for government overreach and the denial of what would be rights.[31] Rights needed to be clearly defined against the legislature and against a majority of the people. The free exercise of religion, in belief and practice, therefore was specified, though as with other statements, its limits and scope were not defined.

A Draft Proposal from the House Committee suggested the following form: "The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion…"[32] Is it plausible that since the right mentioned was called a "natural right," that it preceded government, and that it is mentioned first, that it might be a fundamental right with an extremely broad scope preventing state interference? I am suggesting this possibility tentatively, but in historical context it makes good sense. How wide a scope the right was intended to be is not defined specifically. But it might certainly be broader that later Supreme Court interpretations. And it was intended to be broader by the Founders, as evidenced by Phillip Munoz and Philip Hamburger in their respective articles.[33]

The House Committee Report and House Debate began with a substantially shortened version of a religious freedom clause, stating simply, that "the equal rights of conscience" be infringed.[34] The debate itself was divided between those who believed a religion clause was unnecessary or harmful and those who agreed with it but quibbled over the precise wording. Madison stated that "he apprehended the meaning of the words [proposed] to be, that Congress not…enforce the legal observation [of religion or worship] by law, nor compel men to worship God in any manner contrary to their conscience."[35] The House resolution included the following wording: "Congress shall make no law…prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."[36] In the Senate, the religion clause was winnowed down from more expansive language that, for example, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion…."[37] The final wording in Conference

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[29] On some of these issues, see William A. Edmundson, *An Introduction to Rights*, Second edition. Cambridge University, 2012.

[30] "Speech in the First Congress Introducing Amendments to the U. S. Constitution," in Dreisbach and Hall, eds., *Sacred Rights of Conscience*, 420.

[31] Ibid., 423.

[32] In Ibid., 426.

[33] See Munoz, "If Religious Liberty Does Not Mean Exemptions, What Does It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty," *Notre Dame Law Review* (2016), 1387ff and Philip A. Hamburger, "Natural Rights, Natural Law and American Constitutions," *Yale Law Review*, volume 102 (1993).

[34] Dreisbach and Hall, editors, *Sacred Rights of Conscience*, 427.

[35] House Debate, Ibid., 427.

[36] Ibid., 431.

[37] Senate Debate (1789) in Ibid., 432.

Committee became the religion clauses of the First Amendment (except for replacement of an "a" with a "the"). With the twentieth century, the Free Exercise Clause was applied by the Supreme Court to the states by way of the Fourteenth Amendment.[38]

My tentative conclusion is that the Congress limited the term "religion" to any sect or to any traditional non-Christian religion (Judaism, Islam) and that the protection of beliefs was an absolute given while actions related to worship limited the scope of freedom of religion. However, I have detected sentiment for the protection of liberty outside the traditional sphere of worship as well. At least the wording of some of the proposals and other communications were broad in scope. In addition, the fact that the final version of the Free Exercise Clause was not limited to worship-related activities, as it had been in some earlier versions and proposals. There was no limiting language at all, unless one takes the view that anyone of this era would have understood the clause as limited to worship alone. Assuming a broad scope then, we still have not established a distinct boundary for actions—indeed, I am not convinced that is possible with precision.

Both Munoz and Hamburger point out the Founders "distinguished between civil protections for natural and non-natural or acquired rights."[39] As Munoz continues, "The failure to appreciate the Founders' distinctions between natural and non-natural rights has led some to conclude that the Founders limited religious freedom only to Christians or even just to Protestants."[40] As I have argued, the early state constitutions for the most part used fairly inclusive language, as did various Founding Fathers such as Jefferson and Madison.

The Founders then believed that religious liberty was not only a natural right, but was also an unalienable right. According to Munoz, understanding the idea of inalienability is a key part of understanding why the Founders believed religion to be special.[41] We begin with the natural rights social contract theory of the Founders. The first principle is that all men are by nature free and equal.[42] James Wilson elaborates: "But however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect, in which all men in society, previous to civil government, are equal….The rights and duties man belong equally to all….previous to civil government (the "state of nature"), all men are equal."[43] Natural rights give individuals freedom to act as they wish (within limits of natural law) and an immunity from others who would prevent them from acting. Individuals therefore may or may not exercise religion. Legitimate political authority is constituted to protect those natural rights.[44] Political authority exists both to protect natural rights from government and to prevent individuals from infringing on others' natural rights. Humans consent to enter into a social contract for those purposes. But some authority is not and cannot be given up to government, namely inalienable rights. Various Founders viewed religious beliefs and actions as immune from state interference. The duty owed by every person is to deity or their conception of ultimate meaning in life. Thus it cannot be granted

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[38] I will not pursue the events leading to this shift.

[39] See Munoz, Ibid., 1397.

[40] Ibid.

[41] Ibid., 1398.

[42] See Thomas Jefferson, Letter to Roger C. Weightman (June 24, 1826), *The Portable Thomas Jefferson*, edited by Merrill D. Peterson (1977), 585.

[43] See James Wilson, *Collected Works of James Wilson*, 3 volumes, edited by Kermit Hall and Mark David Hall (2007), 636-638.

[44] Munoz, "If Religious Liberty Does Not Mean Exemptions…," 1401-1402.

to government and it cannot be coerced by government. James Madison furthermore extends free exercise protection to believers and unbelievers.[45]

If this interpretation is correct, then Vincent Munoz is also correct is arguing that "judges lack authority to balance the inalienable elements of the natural right of religious liberty against other state interests."[46] These rights remain beyond state jurisdiction. As Munoz states, "The state…can never have a 'compelling interest' to regulate or infringe [these inalienable elements]."[47] Further, "the act of balancing itself assumes an authority that neither the state as a whole nor judges (as state agents) possess."[48]

Of course not every element related to free exercise was or should be outside state cognizance. But the limits of natural rights of religious liberty are themselves natural limits, at least according to many in the Founding Era. They have to do with natural law and its basic principles. Munoz states the issue this way: "the Founders understood the natural right of religious liberty to be categorical but not unbounded."[49] James Wilson exemplifies this idea in his *Lectures on Law*:

"that [man] has a right to exert those powers [given by nature] for the accomplishments of those purposes, in such a manner, and on such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours. This right is natural liberty. Every man has a sense of this right….while they [the exercise of these rights] are not injurious to others; and…no human institution has placed them under control of magistrates or laws…. The laws of nature are the measure and the rule; they ascertain the limits and extent of natural liberty."[50]

One can act according to one's own inclinations as long as he or she does not violate the limits set by natural law. Further, according to Wilson, the natural law contains two maxims: (1) that no person should cause injury to another and (2) that lawful "engagements" (contracts) voluntarily made ought to be fulfilled.[51] Thomas Jefferson wrote that "No man has a natural right to commit aggression on the equal rights of another."[52] Though God is the foundation of these natural laws, they apply to all men, Christians and non-Christians. Reason and not only special revelation allows all to "participate" in the divine natural law.[53] But the natural rights one possesses do not extend beyond the natural rights of others having the same rights. If for example, one wishes to kill another for religious reasons (the classic example of human sacrifice), such an "expression of liberty" is not protected by the killer's natural rights, but has violated the natural rights of the other

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[45] James Madison, *Memorial and Remonstrance Against Religious Assessments*, edited by Dreisbach and Hall.

[46] Munoz, "If Religious Liberty Does Not Mean Exemptions…, 1408, and also Idem., "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion, 369-381.

[47] Ibid., 1408.

[48] Ibid.

[49] Ibid., 1409.

[50] *Collected Works,* edited by Kermit L. Hall and Mark David Hall, volume 1, 638-639.

[51] Ibid., 498. This language is basically classical natural law theory, one of the fundamental tenets of which is, "do no harm." This tenet contains "built in" exceptions for self-defense, military service, etc. But its Christian version in Thomas Aquinas is essentially the same as Wilson's.

[52] Letter o Francis Gilmer (June 7, 1816), *The Works of Thomas Jefferson*, edited by Paul Leicester Ford (1905), 533-534.

[53] Again, this is Thomas Aquinas speaking, especially in his *Summa Theologica*, Part 2, questions 90-107.

to life and has thus violated a natural law principle as well. The law of nature to do not harm has its corollary right not to be harmed.[54]

Phillip Munoz argues that in state constitutions and the writings of the Founders, the right of religious liberty and conscience, in most cases he examines, are bounded by natural law limitations.[55] But, as Munoz adds, the reading of those as natural law boundary conditions has been challenged and defined as exemptions.[56] However, Munoz's response makes sense: "If the free exercise provisions were exemptions, "we would expect balancing-standard provisos to accompany free exercise texts in every relevant Founding-era declaration of rights of constitution."[57] Moreover, according to Munoz, "Strictly speaking, boundary provisos were not needed, because natural rights are, by nature, bounded."[58] In summary, religious freedom rights were natural rights, possessed by all humans at birth, and inalienable. They are bounded only by natural law itself, translated as duty not to interfere with others' like rights and cause harm as a result. The limits on rights then were categorical limits on state authority. They were (are) "strict and absolute limits…. Religious liberty is special because it places a categorical limit on governmental sovereignty."[59]

This is an originalist argument against the balancing-exemption test adopted by the current American courts. I have only touched on the positive case, as well as implied it in the originalist analysis above. IN the following section, I will examine how the United States courts, especially the Supreme Court, has treated the right of religious liberty.

What Have the Courts Done with the Founders?

The first case addressing religious freedom at the national level did not use a balancing test (or what I would call a utilitarian calculus). In *Reynolds v. United States* (1879) the Supreme Court held that a Mormon practicing polygamy could not challenge Federal anti-bigamy laws by invoking his religious freedom rights. The reasoning of the court began by stating the fundamental nature of the free exercise right. Moreover, the polygamist was free to believe that polygamy was ordained by God. In fact, the court wrote that Reynolds' belief was a sincerely held central tenet of the Mormon religion. However, Free Exercise rights are not unlimited. In this case, the court reasoned that the federal government cannot interfere with a person's religious beliefs, *except* when a religious practice violates certain notions of health, safety, and morality — police powers.[60]

The Supreme Court opinion read in part,

"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. Polygamy has always been odious among the northern and western nations of Europe,… So here, as a law of the organization of society,…it is provided that plural marriages shall not be allowed. Can a man

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[54] What is meant by "harm" is of course subject to debate. See John Stuart Mill, *On Liberty* (1859).

[55] See Munoz, "If Religious Liberty Does Not Mean Exemptions…," 1413-1415.

[56] Ibid., 1415, where the author mentions especially Michael McConnell.

[57] Vincent Phillip Munoz, "Church and State in Founding-Era State Constitutions," *American Political Thought*, volume 2 (2015), 13-17.

[58] See Ibid., 19-25, which is why, Munoz explains, some state documents did not include provisos.

[59] Munoz., "If Religious Liberty Does Not Mean Exemptions…," 1417.

[60] 98 U. S. 145 (1878).

excuse his practices to the contrary because of his religious beliefs? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[61]

The court implemented a fairly straightforward approach. Was religion involved here? The court answered in the affirmative. Reynolds had argued that both his beliefs and practice of polygamy were protected by the First Amendment because they constituted religion under the definition ascribed to the Free Exercise Clause. That right being a given, what then were its limits? Its limits here were the accepted moral beliefs about practices that were embodied in law. It was not whether the law had a better claim than the religious practice. That is utilitarianism, a calculus whereby the court "measures" the interest of the state against the interest of free exercise practices. Rather the decision turned on whether the law itself was legitimate as a support for morals and/or a stable society. Of course, one might argue that that approach leaves much leeway for state intervention, and it did, except that such leeway could be substantially reduced if the state's burden to show the objectively the connection of laws to moral behavior is strict. I would argue that the basis of societal morality ought to be rooted not in emotivism or relativism, or in some claim of opposing group rights, but in a natural law or modified divine command theory. I am speculating a bit, but I suggest that the *Reynolds* was in fact rooted in a traditional Judeo-Christian moral code. In arguing for some modified version of *Reynolds*, I am making a bold claim and one that is potentially unattainable. But I submit that the present balancing test is no better, and in fact, worse in some cases, and is highly dependent on the changing make-up of the Supreme Court as well as the idiosyncratic conceptions of the term "compelling interest" applied in such cases. I also content that the current balancing or utilitarian test tends to allow the devaluation of religion while over-valuing the state's interest.[62] A modified *Reynolds* test would give stability to the valuation of religion in its fundamental importance and would also move away from allowing governments to attach their own value to their laws and policies.

One representative instance of the current balancing method is *Sherbert v. Verner* (1963). The issue in that case concerned an unemployed individual's inability to take a job because of her alleged religious scruples regarding working on Saturdays. The employment compensation department of South Carolina required her to accept offered employment as a condition for benefits. She argued her Free Exercise rights had been violated. The United States Supreme Court opinion began by citing *Reynolds* and then stated

"If, therefore. the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate….[63]

For the first time, the court applied a balancing test, weighing the interest in Free Exercise by the individual against the "compelling interest" of the state. This is nothing more than a utilitarian calculus, with the difference that there are no mathematical calculations. Rather the court applies

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[61] Ibid.

[62] This is not to say this always occurs, but it does occur all too frequently.

[63] 374 U. S. 398 (1963)

a sort of ordinal analysis. The result in this case was a victory for the claimant. The costs to her from the state regulations were articulated by the court:

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry.**5** For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, 366 U.S., at 607, 81 S.Ct., at 1148. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her 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. Governmental 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.[64]

It appears that in this case, the Free Exercise interest was given a great deal of weight, even though the "burden" was said to be "indirect." The went on to address the state's interest:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation,' Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.[65]

The two interests are compared ordinally (which one is greater than the other) and the Free Exercise interest comes out ahead. But there is no necessary reason it should, even with a set of similar facts. The Free Exercise interest might well have been given less weight and arguably it was given the weight it was simply because of the general cultural context of that time period and the vestigial respect for religion. Moreover, the interests of the state might have been given greater weight except for the generally less deference to government at the time. Since the New Deal we have seen in the United States a much greater advocacy for state action as well as a much higher deference to administrative agencies (*Chevron* deference for example), in political thought, legislative and executive action, and judicial decisions. At the same time, we see arguably a decline in religious deference and an accompanying secularization. These factors have not bypassed courts.[66] Since the 1930s American jurisprudence has slowly been moving from both an

[64] Ibid.

[65] Ibid.

[66] On these trends, see Peter Harrison, editor, *Narratives of Secularization*. Routledge, 2018 and Charles Taylor, *A Secular Age*. Belknap Press of Harvard University, 2010. On the growth of the progressive or modern liberal

originalist orientation (with somewhat of a renaissance in recent years) as well as a view of religious freedom as a first priority right as over against the state.

Brief Philosophical Argument

The foundation of my (and others') argument is that religious liberty has been grounded on one of two basic moral philosophical systems: utilitarianism and some form of non-utilitarianism. The Founders, I argue, based their right on a non-utilitarian moral philosophy of natural law. Later theorists might perhaps have chosen different non-utilitarian grounds, Kantian deontology or even a modified Divine Command Theory. As I have also shown, modern American courts have used a utilitarian approach in essence, though not a pure theory. This difference creates the necessity of a choice related to whether we wish to base moral and legal theory and practice on an unstable foundation, as utilitarianism is, or a more stable, but also less accepted stable approach.

Natural law, from which natural rights are derived, has a long pedigree, dating in its more secular form to ancient times. It gained prominence in the work of Thomas Aquinas (13th century), who borrowed much from Aristotle and synthesized it with Christian thought. From Aquinas to the eighteenth century, natural law and natural rights theories remained virtually unchanged.[67] Utilitarianism, a form of consequentialism, though it had existed in some form throughout the centuries, was developed more explicitly by Jeremy Bentham and John Stuart Mill in the late eighteenth century and early to mid-nineteenth century. Utilitarianism is not rooted in any religious tradition, but does, according to Bentham, is grounded in human nature. As Bentham wrote,

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine wht we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.[68]

Utilitarianism (at least act utilitarianism) seeks no particular outcome *a priori*, but its adherents have believed (with modifications since Bentham[69]) that the moral or legal-political choice to be

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conception of the state, see James T. Kloppenberg, Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920. Oxford University, 1988. On the shift in judicial thought and practice with regard to the state, see Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence*. Intercollegiate Studies Institute, second edition, 2009. For an excellent treatment of the influence of scientific naturalism in many areas or thought and practice, including the law, see Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value*. University Press of Kentucky, 1973.

[67] See William A. Edmundson, *An Introduction to Rights*, Second edition and Richard Tuck, *Natural Rights Theories*. Cambridge University, 1979.

[68] *An Introduction to the Principles of Morals and Legislation* (1789), edited by J. H. Burns and H. L. A. Hart (1970).

[69] On the distinction between act and rule utilitarianism, see Geoffrey Scarre, *Utilitarianism*. Routledge, 1996.

made in each situation depends on the pain-pleasure calculus or happiness remainder. Another, somewhat cruder way to describe utilitarianism is as a cost-benefit calculus. It is utilitarianism that I argue has been more or less adopted by the American courts, not only as applied to religious freedom cases, but many other types of rights-based cases.

Utilitarianism gradually displaced natural rights theory (and its associated social contract theory) in the nineteenth century, as philosophers and jurists sought a more palatable method for deciding legal issues. Why it displaced natural rights theory is not as clear. Perhaps it was partially due to a secularizing influence, though the secularization theory has been challenged by those who believe (rightly in part) that what we now call secularization is really just new forms of "religion."[70] At any rate, both social contract theory and natural rights theory had been more or less rejected until the middle of the twentieth century.[71] Natural rights theory did survive in the Catholic tradition and it was from there that it has experienced a relative renaissance in recent decades, especially in areas related to certain ethical and legal issues touching in religion.[72] Social contract theory saw its "resurrection" with the publication of John Rawls' book, *A Theory of Jutsice* in 1971.[73] Thought it is possible to explicate a social contract theory with a utilitarian theory, scholars, such as Phillip Munoz in this paper, have combined social contract theory with natural rights theory, as he (and I) believe was the Founders' approach. The American Founders in fact would have been virtually unfamiliar with utilitarianism in any formal sense, and even if they had, would likely not have been attracted to it.

Conclusion

It is here where I must in brief form explain my own suggested legal test for religious liberty cases. This is by no means the last word. But I am convinced the time has come to begin to think about a new (or "old") approach to judicial decision-making in the area of religious liberty. I will begin by rejecting for the most part the balancing-utilitarian approach. As I stated earlier this approach has led to arbitrariness in case law. It is first dependent on the subjective value attributed to religious liberty versus the state. In fact, it seems to function at the Supreme Court level as a classic case of utilitarian decision calculus regarding a community decision. Each justice informally calculates his or her cost-benefit outcome for each entity choice—state and individual—and then collectively the court arrives at the "sum" of all costs and benefits through voting—a crude and sometimes skewed approach to utilitarian decisions. It is then the highest net value of one over the other competing values that determines the legal decision. Outcomes can change between and among cases even with the stable set of judges, and certainly as the court changes sitting judges over time. Religious liberty becomes uncertain and arbitrary. Moreover, in a more secular environment as time passes, the value of religious liberty may well decline in the eyes of judges, although I cannot say that with certainty.

But it does little good merely to criticize one method without some idea, though tentativer, of a replacement. I propose a method rooted in Phillip Munoz's originalist analysis. In other words, I am proposing a return to what I believe was the original meaning of the Free Exercise Clause.

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[70] See Peter Harrison, editor, *Secularization*.

[71] See Mark Hulliung, *The Social Contract Theory in America: From the Revolution to the Present Age*. University Press of Kansas, 2007. Many scholars have traced the decline of natural rights and natural law theory, including in America. On its use, see Benjamin F. Wright, *American Interpretations of Natural Law: A Study in the History of Political Thought*. Routledge (2017 reprint).

[72] The work of Robert P. George, among others, comes to mind. But see also John Finnis, *Natural Law and Natural Rights,* Second edition. Oxford University, 2011.

[73] Harvard University, 1971.

In a very general way, I would begin in any specific case, by defining whether what is being asserted as a free exercise right is in fact religion. This does not require the courts to become theologians, only that they develop a framework for defining what a religion is—not the truth or falsity of its content. This definition would include all traditional religions as well as encompassing non-traditional religions, likely including atheism.

Religion in the US Constitution is a primary right, a preferred right, if not a natural right in modern thought. So even though traditional natural rights theory may not be recognized by many jurists, the right of free exercise of religion is still embedded in the American social contract as fundamental law, acting as a proxy natural right.[74] Moreover, human rights law recognizes freedom of religious belief and practice as fundamental.[75]

If the activity alleged as free exercise is connected to religion, then the court proceeds determine whether the law or regulation issued by the state is equivalent to a natural law limiting a natural right. This can be a more difficult exercise for any court, but if the court can in some sense rely on what are fundamental laws and rights as counterweights, it will to some extent avoid simply extending state power because it believes states need or deserve more authority. It helps to understand that religious freedom must be given a high value—and for many good reasons, even if one is not a believer. The "harm principle" might serve as one criterion, though harm can be defined too broadly. Again, a court must hue to a more traditional and fixed meaning for harm and not diverge into extreme subjectivity.

If the harm is legitimate and is recognized as such, the assertion of religious freedom in the action itself cannot be accepted. But if the harm alleged is not in the category of objective harm, the freedom of religious exercise must be granted. It is a categorical approach we are suggesting—categories of religion versus non-religion versus categories of harm versus no-harm. One should not infringe the other. I do not weigh each, but define each and fix heir values based on a more objective measure.

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[74] See Vincent Ostrom, *The Political Theory of a Compound Republic*. University of Nebraska, 1987, for the distinction between fundamental laws of a constitution and ordinary law in legislative decision-making.

[75] See United Nations Declaration of Human Rights (1948).