STATING THE OBVIOUS: PROTECTING RELIGION FOR RELIGION'S SAKE

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I. THE INSIGHT: CONSTITUTIONAL RIGHTS MUST BE UNDERSTOOD IN LIGHT OF THEIR PURPOSE

Sometimes, in legal theory as well as in life, an insight is expressed that in retrospect seems so obvious that it is remarkable that no one had said it before or at least said it so plainly. Such is the case with John Garvey's observation that our identification, interpretation, and application of constitutional rights should include an understanding of the *purpose* of those rights, hence the title of his book, *What Are Freedoms For?*[1] Freedoms exist not merely for the neutral purpose of promoting individual autonomy in its most isolated sense but rather to protect certain higher values or goods that we as a society have selected as especially worthy.[2]

Illuminated by that bright light, the clouds of confusion surrounding the meaning of the Free Exercise Clause of the First Amendment[3] begin to lift. However archaic it may seem to the modern sophisticated mind, the manifest purpose of the clause is straightforward—to recognize and protect the positive good of religious faith and practice. By singling it out for protection in the Con-

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1. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996).

2. *Id.* at 19 ("[F]reedoms allow us to engage in certain kinds of actions that are particularly valuable. The law leaves us free to do *x* because it is a good thing to do *x*.").

3. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

stitution, the Founders identified religion as something uniquely valuable and worthy of encouragement.

II. THE ORIGINAL RELIGIOUS PURPOSE OF THE FREE EXERCISE CLAUSE

While today's constitutional theorists are eager to declaim a theory of freedoms that accommodates and authenticates the claim of conscience by the unbeliever as well as that by the religious adherent, the founding generation did not regard religion and irreligion as equivalent as a matter of personal morality, of civic virtue, or in truth. To be sure, the Founders respected the autonomy of each individual to disclaim a religious belief and guarded against direct penalization of unpopular doctrine or coerced support for religion, at least by the federal government, through the Establishment Clause.[4] But to the argument that affirmative protection for religious exercise thereby grants special privileges to the faithful—a criticism that resonates in the modern liberal mind—the Founders might have responded: "Yes, so what's your point?"

The Founders lived in an era of political and philosophical consensus that religion was the indispensable foundation of a successful and free society. Thus, encouragement to religious believers by making space for religious practice and limiting governmental expansion into that space was an intuitively proper goal of constitutional governance. Moreover, the Founders universally believed in God and that He governs in the affairs of men. To use contemporary rhetoric, the Founders tolerated nonbelief by the minority, but they did not accept it. To the contrary, they feared that a loss of religious grounding would undermine the virtue of the citizenry and occasion the withdrawal by divine Providence of the blessings that had been showered upon the new nation.

George Washington expressed the sense of the times in his Farewell Address upon leaving the Presidency when he uttered these familiar words:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens .... Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[5]

Even the eighteenth century's closest approximation of modern agnostics or humanists—the deists such as Thomas Jefferson and Benjamin Franklin—

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4. *See id.* ("Congress shall make no law respecting an establishment of religion ....").

5. GEORGE WASHINGTON, FAREWELL ADDRESS (1796), *in* THE AMERICAN READER 37, 39 (Diane Ravitch ed., 1990).

intertwined religious principle and Enlightenment thought in their political philosophy.[6] Jefferson, who was hostile to organized religion and certainly departed sharply from Protestant orthodoxy, nonetheless viewed the world, the course of human history, moral teachings, and personal immortality from a fundamentally religious perspective.[7] Franklin revealed his personal religious sentiments during the Constitutional Convention in 1787 when he proposed prayer to open each day's session. Reminding the delegates that the Continental Congress prayed daily for divine protection during the Revolutionary War, he said that "[a]ll of us who were engaged in the struggle must have observed frequent instances of a Superintending providence in our favor."[8] He further confessed: "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—*that God governs in the affairs of men.*"[9] As English Professor Daniel Ritchie explains, in an essay on Edmund Burke, the noted English political thinker who was a contemporary of the Founders: "Democracies need religion and its institutions to remind them of the eternal order from which their natural rights derive, the moral order by which they will be judged, and the surrounding disorder with which they are threatened."[10]

A focus on the religious beliefs of national leaders, while confirming the pervasive religious ethos of that generation, understates the pious climate of the founding era. The founding came in the wake of a tremendous religious revival

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6. *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 46-48 (1982) (explaining that such leaders as George Washington, Thomas Jefferson, and Benjamin Franklin "may not have been men moved by religious passions," but they were marked by a religiously-shaped culture from which they could not escape and did not try; indeed, these leaders "felt that Providence had set them apart for great purposes").

7. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 157-58 (1991) ("[E]ven those Americans like Jefferson, who departed from Protestant orthodoxy under the influence of the Enlightenment and who were accordingly sometimes regarded by their more pious contemporaries as 'infidels' or even 'atheists,' viewed the world in strongly religious terms."); *see also* ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 147-49 (1990) (discussing religious beliefs of Jefferson, the core of which included the unity of God and the expectation of personal immortality); DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 27-56, 151-66, 243-48 (1948) (characterizing Jeffersonian thought as having an essential Christian foundation). By discussing Jefferson here, I do not mean to suggest that his peculiar views of the First Amendment in isolation are deserving of any particular weight; indeed, Jefferson was not involved in the drafting or ratification of either the original Constitution or the Bill of Rights and thus was more a spectator than a participant. Rather I intend to demonstrate the power and pervasiveness of religiosity in the founding era. As Ellis Sandoz asks, if even Jefferson was a believer in God, then who in the founding period was not? "The answer that is persuasively suggested is *nobody.*" SANDOZ, *supra*, at 149.

8. James Madison, Notes (June 28, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 451 (Max Farrand ed., rev. ed. 1966).

9. *Id.*

10. Daniel Ritchie, *Burke's Mansions*, FIRST THINGS, Apr. 1998, at 55 (book review).

in America, the Great Awakening.[11] The strongest proponents of the addition of the religion clauses to the Constitution "were members of the most fervent and evangelical denominations in the nation."[12] The Baptists, Quakers, Lutherans, and Presbyterians "provided the political muscle for religious freedom in America."[13]

With respect to the First Amendment in particular, Joseph Story, who served on the Supreme Court from 1811 to 1845, explained in his early treatise on the Constitution:

> The promulgation of the great doctrines in religion, the being, and attributes, and providence of one Almighty God; the responsibility to Him for all our actions, founded upon moral accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues; —these can never be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them.[14]

Of course, contemporary American society, or at least its social elite, may not still share this religious Weltanschauung. The Second Amendment to the Constitution[15] presents a similar problem. In his now-classic essay, *The Embarrassing Second Amendment*, Sanford Levinson was persuaded by the textual and historical evidence that, contrary to his own policy preferences, the Founders designed the Second Amendment to protect the individual's right to keep and bear arms.[16] As Randy Barnett and Don Kates have summarized recently, substantial research conducted in the past decade "has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment."[17] Indeed, the founding generation maintained

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11. MIDDLEKAUFF, *supra* note 6, at 42-48; THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 95-96 (1986).

12. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990); *see also* CURRY, *supra* note 11, at 198 (describing call by Baptists in Virginia for religious freedom amendment to Constitution).

13. McConnell, *supra* note 12, at 1517.

14. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 442 (1840).

15. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

16. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

17. Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); *see also id.* at 1144-46 & 1144 n.13 & 1145 n.17 (listing scholarly publications finding a broad individual right to bear arms in the Second Amendment).

a worshipful view of firearms[18] and idealized the armed freeholder as the bulwark of republican government and the personification of civic virtue.[19] However much these attitudes may offend modern liberal sensibilities—and recognizing that there remains room for disagreement on the legitimate scope of regulatory measures short of confiscation of all arms—fidelity to the Constitution, as written, demands that "the right of the people to keep and bear arms . . . be treated the same as the other rights of the people specified in the Constitution—no more and no less."[20]

The same is true of the constitutional right to religious exercise, notwithstanding any evolution in public or elite attitudes. Drawing upon Levinson's label for the Second Amendment, Michael Stokes Paulsen has recently characterized the First Amendment problem as that of the "Embarrassing Free Exercise Clause."[21] As Paulsen writes:

> It is embarrassing, to the skeptical, rationalist, nonreligious or irreligious mind, to think that the Constitution might single out religion for special protection, and perhaps even preferred treatment—and not provide comparable protection for skepticism, agnosticism, rationalism, humanism, or atheism—and do so because the Framers believed in God. It would be like learning that the Constitution contained a provision providing for the protection of ghosts.[22]

But in the end, either we believe in and guarantee constitutional rights as designed and ratified or there is no value in having a written Constitution. As Larry Alexander says in the paper presented in this symposium, if the Constitution was adopted by a people with religious beliefs, "then it is *their* beliefs, not [ours], that account for the constitutionalizing of religious freedom."[23]

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18. C. Asbury, The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution (1974) (unpublished Ph.D. dissertation, University of Michigan) (referring to the Founders' views "about the relationship between men and arms" as having an "almost religious quality"), *quoted in* Barnett & Kates, *supra* note 17, at 1216.

19. Robert E. Shalhope, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125, 128 (describing the "civic virtue . . . of the armed freeholder: upstanding, courageous, self-reliant, individually able to repulse outlaws and oppressive officials, and collectively able to overthrow domestic tyrants and defeat foreign invaders"); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 232 (1983) ("[T]he ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent—defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.").

20. Barnett & Kates, *supra* note 17, at 1142.

21. Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1610-12 (1997) (book review).

22. *Id.* at 1612.

23. Larry Alexander, *Good God Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemption*, 47 DRAKE L. REV. 35, 38 (1998).

Although I join in Garvey's conclusion that the Free Exercise Clause was designed to favor and encourage religious exercise, I may differ somewhat in my exposition of that purpose, grounded in the original understanding of the founding generation.[24] The Framers and Ratifiers of the First Amendment did not intend to embed a particular religious doctrine—even the common Protestant perspective that Garvey describes[25]—into constitutional bedrock. Rather, they intended to elevate religious practice generally. The Founders believed religious faith to be vital to the success of the Republic and valued religious communities as essential to the moral foundation of society. They also believed in God and that the fate of nations lay in His hands. For these reasons, they desired to protect religion in general, but had the humility not to declare any particular religious doctrine as governmental truth nor to single out any particular way of knowing God as the sole path to salvation.

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24. In this regard, I also quibble with Michael Stokes Paulsen on the precise articulation of the clause's purpose. Paulsen argues that "[w]e do not protect religious liberty for secular society's sake" and that the "secondary benefits to society" from protecting religious exercise are incidental to its primary purpose of protecting true religion. Paulsen, *supra* note 21, at 1600; *see also* GARVEY, *supra* note 1, at 270 (similarly criticizing the "religion-builds-good-character" justification for religious freedom). In my view, the writings of the founding era, with their heavy emphasis on religion as a pillar of society and as the font of civic virtue, make clear that the Founders saw religion's benefits to secular society as a central (but not the only) basis for protection of religious exercise. However, the distinction between our understandings of the pro-religion rationale for the Free Exercise Clause may fade (but not disappear) when we consider the reason the founding generation believed religion to be the foundation of a free republic. They believed that a free people must be a religious people precisely because they believed there was something authentic to religion, that is, that God does exist and does intercede in the affairs of mankind. Thus, a nation that becomes separated from God and deafens its ears to His claims upon its people will inevitably decline. In other words, the purpose of protecting religion for religion's sake and protecting it for the sake of a healthy and free republic are one and the same. Nonetheless, I think our difference is more than a matter of mere nuance, because the Founders' view of religious faith and republican virtue as intertwined entailed a more generalist and non-sectarian view of the value of religion, removed from any particular religious doctrine or denomination. As Larry Alexander suggests, the Garvey-Paulsen theological view of the Free Exercise Clause may be vulnerable to the charge that it invites adoption of a particular sectarian understanding of what constitutes good and valuable religion worthy of protection. As Alexander argues, "if certain strands of Protestantism provide the prism through which we are to view claims of religious freedom, then the religious duties that such Protestants recognize—*and only those duties*—should be exempt from general laws." Alexander, *supra* note 23, at 40. Anticipating this objection, Garvey argues that "God's revelation is progressive" and that "free inquiry [is] not only safe but actually desirable" in bringing individuals closer to God. GARVEY, *supra* note 1, at 51. Paulsen responds that while "we protect the core freedom because we believe it consists of something objectively important and true," the Free Exercise Clause includes "some measure of overbreadth" protecting even "religious rubbish" because we do not trust political majorities and government agents to draw the proper line. Paulsen, *supra* note 21, at 1606. In my view, the stronger rejoinder is that given in the text above.

25. GARVEY, *supra* note 1, at 50-54.

The enthusiasm and religious devotion of evangelical Christians and Protestant dissenters provided the popular impetus for adding a religious liberty provision to the Constitution,[26] while the temperate, universalist-minded national figures provided the political leadership and diplomatic skills to accomplish the task. This coalescence of an evangelical constituency and the deistic or unitarian national leaders of the founding era in petitioning for, drafting, and ratifying the Free Exercise Clause undergirds that clause with a more catholic (small "c") religious purpose.[27] Thus, James Madison, a person of uncertain religious beliefs,[28] was elected to the First Congress with the crucial support of Virginia Baptists upon his pledge to secure a guarantee of religious liberty in the Constitution, a promise he kept as the principal drafter of the First Amendment.[29] In leading the cause in Congress, Madison reminded his colleagues that amending the Constitution was "required by our constituents."[30]

Among the federal leaders, both George Washington and James Madison corresponded congenially with minority and outcast religious communities, including Roman Catholics, Jews, and Quakers, expressing appreciation of those congregations and the assurance that they were included within the guarantee of

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26. *See supra* notes 11-13 and accompanying text.

27. As discussed earlier, *supra* notes 5-13 and accompanying text, the leaders of the founding, while believing in a Supreme Being and divine intervention in the course of history, did not share the religious passions or adherence to Protestant or even Christian doctrine of the general populace or the evangelical champions of a religious freedom amendment to the Constitution. Yet the support or cooperation of these leaders was essential to the framing and congressional passage, if not the ratification, of the amendment. Therefore, it is crucial to synthesize, or seek the least common denominator, of the insistent views of the evangelical Protestants and the cooperating federalist allies in the adoption of the First Amendment. The generous attitude of the founding era leaders on the question of accommodation of religious conscience is further illustrated by the example of religious exemption from military conscription discussed below.

28. McConnell, *supra* note 12, at 1452 ("While Madison's religious convictions as an adult are unknown, as a young man he attended a Presbyterian college in New Jersey (Princeton) instead of pursuing the more natural course of study at the Anglican college, William and Mary, in his own state.").

29. CURRY, *supra* note 11, at 198-99; SANDOZ, *supra* note 7, at 204; McConnell, *supra* note 12, at 1476-77.

30. SANDOZ, *supra* note 7, at 204. President Washington, also recognizing the political need to quiet objections to the Constitution by those desiring specific protection of certain rights, had raised the issue in his inaugural address. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 59 (1993).

> Washington, ever sensitive to the possibility that he might be accused of overstepping his powers (such as in presuming to initiate legislation), forbore in his inaugural address from telling Congress what measures he thought it ought to take—with one exception. His single recommendation was that the amending power of the Constitution be used to make certain that "the characteristic rights of freemen" might be "more impregnably fortified."

Id.

religious liberty.[31] As a prime example of this inclusive attitude, James Iredell, speaking at the North Carolina ratifying convention for the original Constitution in 1788, described genuine religion as involving sincere belief "in a Supreme Being, and in a future state of rewards and punishments" and observed that "many nations entertain this belief who do not believe either in the Jewish or Christian religion."[32] Iredell's "eloquent and energetic efforts" on behalf of the ratification of the Constitution so impressed President Washington that he subsequently nominated him to the Supreme Court.[33]

A generous appreciation for religion was likewise evident in the political writing of the framing period. For example, Nicholas Collin of Philadelphia (writing under the pseudonym of "A Foreign Spectator") published an influential series of essays in 1787 on "The Means of Promoting Federal Sentiments in the United States," in which he described religion "as a political blessing" necessary

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31. *See, e.g.*, Letter to the Hebrew Congregation of the City of Savannah (May 1790), *in* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING: SELECTIONS FROM WASHINGTON'S LETTERS 12 (Edward F. Humphrey ed., 1932) ("May the same wonder-working Deity, who long since delivered the Hebrews from their Egyptian oppressers, and planted them in the promised land . . . continue to water them with the dews of Heaven" and hoping that every denomination would participate "in the temporal and spiritual blessings of that people, whose God is Jehovah."); Letter of George Washington to Religious Society Called Quakers (Oct. 1789), *in id.* at 11 ("I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit."); Letter from James Madison to Mordicai Noah (May 1818), *in* JAMES MADISON ON RELIGIOUS LIBERTY 80 (Robert S. Alley ed., 1985) (responding to a letter containing "the eloquent discourse delivered at the Consecration of the Jewish Synagogue," Madison wrote that he "ever regarded the freedom of religious opinions & worship as equally belonging to every sect" and "observ[ing] with pleasure the view you give of the spirit in which your Sect partake of the blessings offered by our Gov. and Laws"); Letter from James Madison to Jacob de la Motta (Aug. 1820), *in id.* at 81 ("Among the features peculiar to the Political system of the U[nited] States, is the perfect equality of rights which it secures to every religious Sect . . . . Equal laws protecting equal rights, are found . . . the best guarantee of loyalty & love of country; as well as best calculated to cherish that mutual respect & good will among Citizens of every religious denomination which are necessary to social harmony and most favorable to the advancement of truth. The account you give of the Jews of your Congregation brings them fully within the scope of these observations.").

32. James Iredell, Remarks at North Carolina State Convention (July 30, 1788), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 66 (Neil H. Cogan ed., 1997). Iredell was defending the provision in Article VI of the Constitution prohibiting a religious test as a qualification for public office under the United States and explaining that an oath would retain its binding quality as a solemn appeal to the Supreme Being, whatever the particular religious tenets of the oath-taker. *Id.* However, Iredell agreed, belief "in a Supreme Being, and in a future state of rewards and punishment" was necessary to bind the conscience beyond the mere fear of worldly punishment for perjury. *Id.* at 67. Beyond this basic understanding of religious conscience, Iredell allowed, we may "very safely leave religion to itself." *Id.*

33. Robert M. Ireland, *James Iredell*, *in* THE OXFORD COMPANION TO THE SUPREME COURT 440, 440 (Kermit J. Hall ed., 1992).

for public virtue.[34] Collin confirmed a "veneration for every religion, that reveals the attributes of the Deity, and a future state of rewards and punishments," and agreed that he would "rather see the opinions of Confucius or Mahomed inculcated upon our youth, than to see them grow up wholly devoid of a system of religious principles."[35] In sum, for the generation of the founding and framing, the points of common ground for all was that there is a Supreme Being, that He governs in the affairs of mankind, and that there are sacred duties owed by believers toward their God, although the Founders did not presume to declare the nature of those sacred duties.[36]

Thus, contrary to Larry Alexander's complaint, fidelity to the original understanding of the Free Exercise Clause and its exaltation of religious faith to constitutionally-protected status need not and should not be "sectarian all the way down."[37] Considering the Free Exercise Clause in historical context reveals a religious, *perhaps* even theistic justification, but not a theological or sectarian one. There is no room under the First Amendment, as drafted and ratified by the founding generation, for governmental evaluation of the legitimacy, validity, or value of religious doctrine—other than from the perspective of the religious believer himself—in determining the proper scope of accommodation.[38]

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34. Nicholas Collin, *An Essay on the Means of Promoting Federal Sentiments in the United States* (1787), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 406, 419 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

35. *Id.* at 420.

36. Indeed, to the extent that sectarian religious principles influenced the actual framing of the First Amendment, the evangelical proponents viewed voluntary religious societies as the "only legitimate institutions for the transmission of religious faith," McConnell, *supra* note 12, at 1443, and thus honored the resulting diversity in religious doctrine and practice.

37. *See* Alexander, *supra* note 23, at 40.

38. Another way in which I differ from Garvey should be apparent by a comparison of our analytical approaches. Although I believe Garvey asks the right questions about the purpose of constitutional rights and more often than not reaches the right answers, he wanders far afield from the path laid out by the text and history of our written Constitution in getting to the destination. Thus, with his discussion of the justification for the Free Exercise Clause, he states that the purpose in protecting the good of religious faith "is the most convincing explanation for why our society adopted the right to religious freedom in the first place." GARVEY, *supra* note 1, at 57. However, this original purpose is adduced only as secondary support for the conclusion and, indeed, Garvey cites the likely historical understanding only in passing. *See also* John Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 5 (1998) (finding the historical evidence against a fundamental right to suicide and assisted suicide to have "some weight" but not regarding it as a "fatal objection," and instead developing other reasons to reach that conclusion, including a moral view of the greater values of living courageously, living not just for self but in a community, and respecting the lives of others).

III. THE EXAMPLE OF CONSCIENTIOUS OBJECTION—THEN AND NOW

An example from the founding era, with modern parallels, illustrates this understanding of the right of religious exercise as broadly extended to accommodate claims of religious conscience, even in the face of majority antipathy and under exigent circumstances, and yet limited to claims that are religious in nature. In the years leading up to and during the Revolutionary War, the pacifist Quakers became an increasingly despised minority.[39] Because of their refusal to take up arms and their repudiation of war, the Quakers were frequently castigated as cowards and (mistakenly) charged with treason against the new republic and stubborn loyalty to the hated English crown.[40] Since the average recruit into General Washington's Continental and militia regiments had been drafted or "levied,"[41] resentment against those who refused military service on religious grounds was understandable. Indeed, popular hostility from their fellow citizens even led to isolated instances of whippings or other physical mistreatment of Quakers, as well as general societal censure.[42]

Notwithstanding this antagonistic public sentiment, the Continental Congress speaking as the voice of the nascent nation endorsed exemptions from conscription into the militia for religious pacifists, stating that "[a]s there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend[s] no violence to their consciences."[43] The individual states generally granted exemptions to conscription for religious conscientious objectors during the founding era, with "[f]ive of the newly independent states—Pennsylvania, Delaware, New Hampshire, Vermont, and New York—[going] so far as to put provisions granting such exemptions in their constitutions."[44]

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39. BENJAMIN HART, FAITH & FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY 204 (1988).

40. *Id.*; PETER BROCK, PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR 183-258 (1968).

41. MIDDLEKAUFF, *supra* note 6, at 511.

42. BROCK, *supra* note 40, at 240. The Quakers were not alone; Mennonites also suffered attacks to person and property because of their refusal to bear arms during the Revolutionary War. James O. Lehman, *The Mennonites of Maryland During the Revolutionary War*, 50 MENNONITE Q. REV. 200, 205-08 (1976).

43. Resolution of July 18, 1775, *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (Worthington Chauncey Ford ed., 1905).

44. Ellis W. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 375 (1993-1994). West disputes the conscription exemption example as supportive of a broad-based right of religious freedom including a right of exemption from laws of general application. *Id.* at 375-401. He argues that exemptions from conscription were granted to religious conscientious objectors during the Revolutionary War period for reasons of sympathy and that the historical evidence demonstrates that legislatures did not feel bound by natural law to grant such exemptions. *Id.* In the fuller context of the period, I find the interpretation of this episode as evidencing a broader

Obviously, the refusal of the Quaker to take up arms, even in self-defense, conflicted with the majority view of the founding generation and with the leaders of the founding in particular—or the Revolution would never have occurred or succeeded and we would have no Constitution to interpret and enforce. Indeed, as discussed earlier, the position of conscientious objection to violence, even in self-defense, stood in sharp contrast with the republican ideal of the independent yeoman bearing arms in defense of life, liberty, property, and country. Thus, the Founders vehemently rejected the religious doctrines of the Quakers. And yet, even in our nation's most perilous hour, when the very survival of the newly-declared independent republic was in doubt, the Founders with deliberation chose to respect the claims of religious conscience and excused the religious objector from conscription into military service.[45] Thus, the founding generation's concept of religious freedom and respect for religious conscience was broad and extended well beyond the particular sectarian doctrines of mainstream churches attended by leading Founders.

The example of the conscientious objector remains relevant today and may be used to illustrate the continued proper application of the Free Exercise Clause in the context of modern society. In *Thomas v. Review Board*,[46] Eddie Thomas,

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commitment to religious freedom to be much more compelling. That there was debate about whether to grant such exemptions, that the arguments in favor were not always stated explicitly in religious liberty terms, and that the exemptions did not always offer full accommodation of religious conscientious objectors cannot obscure the truly remarkable fact that the exemption was generally granted and even constitutionalized in many states. It is striking that the Continental Congress and most states extended protection on religious conscience grounds to a despised religious minority and granted an exemption from military service during a time of greatest need for armed resistance. Given the patriotic fervor of the times, the extreme national exigency, the intense public antipathy toward the pacifists, and the deviance of the conscientious objector from the prevailing republican ideal of the armed freeholder, the congressional and legislative sensitivity toward and accommodation of religious conscience was nothing short of extraordinary. Combined with the pervasive religiosity of the period, and the consensus that natural rights preexisted government, this exemption expressly for the purpose of protecting religious conscience is best understood as a recognition by the Founders that sacred duties may not be subordinated to the commands of secular government.

45. *See* McConnell, *supra* note 12, at 1469 (discussing the Continental Congress's exemption from conscription and characterizing "[t]he language as well as the substance of this policy" as "particularly significant, since it recognizes the superior claim of religious 'conscience' over civil obligation, even at a time of 'universal calamity'"). Because of the strength of the government's interest in raising an army as necessary to the national defense, the particular and difficult example of exemption from conscription on religious grounds remained controversial, as demonstrated by the debate in the First Congress on whether to add an express militia exemption clause to the Constitution. *See id.* at 1500-03. Moreover, a militia exemption clause would have applied to the states, *see id.* at 1500-01, in contrast with the other Bill of Rights provisions, a controversial proposition in and of itself. Nonetheless, the more telling point is that when it counted during the founding era, during the Revolution itself when the very survival of the nation was at stake, the Continental Congress came down firmly on the side of religious conscience.

46. Thomas v. Review Bd., 450 U.S. 707 (1981).

a member of the Jehovah Witnesses who was conscientiously opposed to war on religious grounds, was transferred by his factory employer to the line manufacturing turrets for tanks.[47] When the employer refused to change his duties, he quit and then applied to the state for unemployment compensation benefits.[48] The state denied benefits on the ground that leaving the job because of religious convictions was merely a voluntary termination and not for good cause, a decision that was upheld by the state supreme court.[49] The United States Supreme Court reversed, holding that, in the absence of a compelling government interest, the state may not "condition[] receipt of an important benefit upon conduct proscribed by a religious faith, or . . . den[y] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[50] The Court prefaced this holding by explaining that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[51]

Speaking at a previous symposium sponsored by the Drake Constitutional Law Resource Center, Professor Steven Gey posed the hypothetical of "another Thomas—Thomas'[s] secular evil twin—who in every other respect held exactly the same views with exactly the same magnitude of fervor as the first Thomas, but who did not base those views on belief in God or of the Jehovah's Witness faith or whatever, but rather was a secular pacifist."[52] Under the *Thomas* holding, that person would not obtain the same accommodation. Gey said he framed this hypothetical to "appeal to [our] intuition," and contended that this result is intuitively wrong, that it "does not make sense to our judgment about what's fair and what's not and what's constitutional and what's not."[53] He argued that advocates of religious exemptions have failed to explain "why religion is different—that is, better—than other forms of deeply held personal beliefs."[54] Indeed, quite to the contrary, Gey argued that religion was worse. He concluded that "several salient characteristics of religion"—including the "appeal[] to some verity, some essential truth or existence outside the individual" that the individual must acknowledge as external authority—"is fundamentally incompatible with a modern democracy."[55]

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47. *Id.* at 707.
48. *Id.*
49. *Id.* at 709-13.
50. *Id.* at 717-18.
51. *Id.* at 713.
52. Steven G. Gey, Symposium Panel, in Law, Religion, and the "Secular" State, at 113 (Proceedings of the Second Annual Symposium of the Constitutional Law Resource Center, Drake University Law School, Apr. 13, 1991).
53. *Id.* at 112-13.
54. *Id.* at 112.
55. *Id.* at 113-14.

By contrast, the Founders would not have blinked an eye in granting preference to religious conscience over a claim based merely upon a personal ethical code or humanist philosophy.[56] And they would have regarded the suggestion that religion is fundamentally incompatible with democracy as astonishing, since they believed precisely the opposite, that liberty could not survive without religion. We should not be surprised that the Free Exercise Clause was not motivated by and is not animated by modern rationalistic, liberal philosophy. As Ellis Sandoz writes, the American "founding [was] a unique anti-modernist rearticulation of Western civilization, one rooted in differentiated understanding of reality profoundly indebted to classical and Christian influences."[57] But unless and until the Constitution is amended to reflect current secular trends in political, philosophical, and moral thinking, we must accept the Free Exercise Clause for what it is.

IV. THE *SMITH* RULE AND ORIGINAL PURPOSE

To be sure, the Supreme Court—one hopes temporarily—has failed to uphold the Free Exercise Clause as an affirmative and meaningful right to practice religion. In *Employment Division v. Smith*,[58] the Supreme Court, in an opinion by Justice Scalia, held that the constitutional right of free exercise of religion did not prohibit enforcement of Oregon drug laws against sacramental use of peyote by Native Americans.[59] More broadly, the Court ruled that Oregon did not need to establish any compelling governmental interest to justify application of these laws in a manner that burdened a religious practice.[60] Enforcement of a law of general application that is formally neutral toward religion, the Court ruled, does not infringe upon the free exercise of religion, notwithstanding that application of such a general law may significantly burden

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56. *See* McConnell, *supra* note 12, at 1498 ("From the perspective of the advocates of religious freedom in 1789, the protection of private judgment (secular 'conscience') fundamentally differs from the protection of free exercise of religion."). Paulsen makes the same point, Paulsen, *supra* note 21, at 1617-19, in criticizing the Supreme Court's decisions construing statutory provisions exempting from military conscription those religiously opposed to war because of a "belief in relation to a Supreme Being" and re-defining religion for this purpose as nothing more than "the devotion of man to the highest ideal that he can conceive," *see* United States v. Seeger, 380 U.S. 163, 180-84 (1965). The Founders would not have recognized this dilution of the meaning of religion or chosen to extend freedom of conscience to include it. *See* McConnell, *supra* note 12, at 1498-99 ("From the religious point of view, the difference between religious and secular forms of conscience is that the former represent an obligation to an authority higher than the individual, while the latter are manifestations of mere individual will or judgment.").

57. SANDOZ, *supra* note 7, at 25.

58. Employment Div. v. Smith, 494 U.S. 872 (1990).

59. *Id.* at 874-90.

60. *Id.* at 882-89.

the exercise of religious faith through religious practice.[61] Thus, a general law does not even implicate the First Amendment and is not subject to any constitutional scrutiny. In sum, the *Smith* Court ruled that the Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires,"[62] but does not extend protection to religious practices that contradict generally applicable law.[63]

However, the constitutional text does not refer to the holding of religious beliefs; it refers to the "free exercise" of religion.[64] The plain import of the phrase "free *exercise*" is one of acting upon one's beliefs; "exercise" denotes action, not passive contemplation.[65] Further, although authored by perhaps the leading exponent of an originalist approach to interpretation of the Constitution, the *Smith* decision ignored the historical evidence about the understanding of the Free Exercise Clause.[66] The more substantial historical evidence shows that the Founders intended by the Free Exercise Clause to preserve the ability of citizens to fulfill obligations as members of civil society without surrendering their religious convictions.[67]

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61. *Id.* at 878-82.

62. *Id.* at 877.

63. *Id.* at 878.

64. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . .").

65. *See* OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL—RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 19 (1986) (observing that the words "free exercise" "mean more than advocacy of belief: by definition, the words denote action or activity") (the authors of this valuable historical report were now-Professor Jay S. Bybee of the University of Nevada at Las Vegas Law School and Lowell V. Sturgill, Jr., of the Department of Justice); McConnell, *supra* note 12, at 1409 ("As defined by dictionaries at the time of the framing [of the Free Exercise Clause], the word 'exercise' strongly connoted action."). Oddly enough, Justice Scalia in *Smith* acknowledged that the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." Employment Div. v. Smith, 494 U.S. at 877. Nevertheless, Justice Scalia would not hold that the conduct component of exercise of religion warranted any protection from laws that would eviscerate the practices of a religious community, provided that the law at issue was not intentionally designed to disadvantage that particular religious practice. This is a strangely crabbed understanding of a right to "exercise" religion. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1115-16 (1990) (arguing that a reading of "free exercise" to prevent the government from enacting laws that make a religious practice illegal is the "*more obvious and literal* meaning").

66. *See* Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 212; Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260.

67. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998); REPORT TO THE ATTORNEY GENERAL—RELIGIOUS LIBERTY

That default in analytical approach was remedied in part in the very recent Supreme Court decision of *City of Boerne v. Flores*,[68] in which the conversation about the original meaning of the Free Exercise Clause was at least opened. In *City of Boerne*, the Court invalidated the Religious Freedom Restoration Act (RFRA),[69] holding that Congress exceeded its power under the Fourteenth Amendment to enforce constitutional rights by enacting a law that purported to change the substance of a constitutional provision.[70] Through RFRA, Congress essentially had attempted to reverse the effect of the *Smith* decision by statutorily adopting a rule setting aside laws that substantially burden religious practice unless justified by a compelling government interest. Although no member of the Court expressly disagreed with the essence of the Court's opinion—that Congress's enforcement power under the Fourteenth Amendment is only preventive or remedial—three Justices dissented on the different ground that the *Smith* articulation of the Free Exercise Clause should be re-examined.[71]

Justice O'Connor, joined by Justice Breyer, surveyed the historical evidence surrounding the framing and ratification of the Free Exercise Clause.[72] Based upon the text, historical context, specific historical examples of affirmative accommodation (including the religious exemption from military conscription), and the breadth of parallel state constitutional provisions when the First Amendment was drafted and ratified,[73] Justice O'Connor concluded that "the Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application."[74] Justice Scalia, joined by Justice Stevens, wrote a separate con-

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UNDER THE FREE EXERCISE CLAUSE, *supra* note 65, at 39; McConnell, *supra* note 65, at 1117-19; McConnell, *supra* note 12, at 1511-13. *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916, 932-48 (1992) (arguing that the historical evidence demonstrates that the Free Exercise Clause was not intended to provide a constitutional right of religious exemption from civil laws).

68. City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

69. 42 U.S.C. § 2000bb (1994).

70. City of Boerne v. Flores, 117 S. Ct. at 2162-72.

71. *Id.* at 2176-85 (O'Connor, J., dissenting, joined by Justice Breyer); *id.* at 2185-86 (Souter, J., dissenting).

72. *Id.* at 2178-85 (O'Connor, J., dissenting). Justice Breyer did not join the first part of Justice O'Connor's dissent on the scope of Congress's enforcement power under the Fourteenth Amendment, but joined in full with her analysis of the Free Exercise Clause. *Id.* at 2186 (Breyer, J., dissenting).

73. *Id.* at 2178-85 (O'Connor, J., dissenting).

74. *Id.* at 2185. Justice Souter, in a separate dissent, called for reargument of the case for the purpose of specifically reexamining the validity of the *Smith* opinion's interpretation of the clause. *Id.* at 2185-86 (Souter, J., dissenting). Although Justice Souter stated that he wished to reserve a final judgment on the merits of the issue pending full adversarial consideration, he acknowledged that he had "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence," doubts that had been intensified by the historical evidence adduced in

currence in rejoinder to the Justice O'Connor dissent.[75] Justice Scalia interpreted colonial and revolutionary era religious freedom charters to prohibit only discriminatory laws targeted at religion, construed charter caveats or provisos limiting the scope of religious liberty to peaceable conduct as broadly mandating obedience to general civil laws, and argued that exemptions from civil laws on religious grounds during the colonial and founding period were understood to be a matter of legislative grace.[76] Accordingly, Justice Scalia found the historical evidence to undercut a broad reading of the Free Exercise Clause.[77] While the contrasting Justice Scalia concurrence and Justice O'Connor dissent reached opposite conclusions based upon the same historical evidence, we still may be encouraged that the debate on the original understanding of the clause has been joined and the vulnerability of *Smith* has been revealed.[78]

And, to the extent of any doubt in the historical record of specific intent to provide exemption for religious believers from conflicting demands by civil

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Justice O'Connor's opinion. *Id.* at 2186. Justice Souter had volunteered similar doubts in an earlier opinion, confirming that he leans toward reversal of the *Smith* rule. *See* Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) (expressing "doubts about whether the *Smith* rule merits adherence" and stating that "in a case presenting the issue, the Court should reexamine the rule *Smith* declared").

75. City of Boerne v. Flores, 117 S. Ct. at 2172-76 (Scalia, J., concurring in part, joined by Justice Stevens).

76. *Id.* at 2173-75. This last point is a rather unremarkable observation about the pre-constitutional period. *See id.* at 2183 (O'Connor, J., dissenting) ("To be sure, legislatures, not courts, granted these early accommodations. But these were the days before there *was* a Constitution to protect civil liberties—judicial review did not yet exist.").

77. *See id.* at 2173-75 (Scalia, J., concurring in part).

78. The majority opinion by Justice Kennedy failed to directly address the question and somewhat contradicted itself on the question of the authoritativeness of the *Smith* rule. On the one hand, Justice Kennedy demanded that the political branches respect a judicial interpretation of the Constitution and understand that, "in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *Id.* at 2172. On the other hand, the opinion had earlier acknowledged indirectly that *Smith* departed from the Court's prior precedent. *See id.* at 2160-61 (observing that, in *Smith*, the Court had declined to apply the balancing test for religious freedom claims set forth in Sherbert v. Verner, 374 U.S. 398 (1963)); *see also id.* at 2177 (O'Connor, J., dissenting) (citing pre-*Smith* free exercise cases that generally held that "where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest"); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 158 (1997) ("Prior to *Smith*, the freedom-protective interpretation was a firmly established (albeit haphazardly enforced) doctrine of constitutional law."). In other words, the Court itself in *Smith* had failed to live up to the standard of respect for precedent pronounced in *City of Boerne* for the political branches and had done so in the very context at issue in that case.

society,[79] the balance is tipped by the manifest religious *purpose* of the Free Exercise Clause in the context of its ratification by the people of the founding generation. Justice Scalia's opinions in both *Smith* and *City of Boerne* neglected to consider the religiously devout environment of the founding era,[80] although such an immersion in the historical context is essential to the originalist interpretive enterprise.

To the ears of a nation founded on violent rebellion against a regime accused of infringing God-given natural rights—a nation that still revered the independent freeholder armed against tyranny—the suggestion that civil government could trespass upon the walk of the faithful in the ways of the Lord would have sounded hollow and peculiar. For a people that believed in "the

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79. *See* McConnell, *supra* note 12, at 1415 (stating that, "[w]hile the historical evidence may not be unequivocal (it seldom is), it does, on balance, support" an interpretation of the Free Exercise Clause that includes constitutionally compelled exemptions for religious believers from generally applicable laws).

80. Interestingly, Justice Scalia has recognized—and heavily relied upon—the pervasively religious climate of the founding period in the context of interpreting the Establishment Clause, finding the historical practice justifies greater accommodation of religion by government. In *Lee v. Weisman*, Justice Scalia dissented from an opinion holding that a school could not appoint a clergyman to deliver a nonsectarian prayer at a high school graduation. Lee v. Weisman, 505 U.S. 577, 631-46 (1992) (Scalia, J., dissenting). In the course of his dissent, Justice Scalia wrote:

> From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President.

Id. at 633. Near the end of that opinion, Justice Scalia appealed to the religious devotion of the American people and their leaders from the founding to the present day:

> Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."

Id. at 645. One wishes that Justice Scalia would listen to the Free Exercise Clause with ears similarly attuned to the worshipful music that reverberated around the framing and ratification of the First Amendment. If God does exist and makes claims upon His people—or at least if the founding generation so believed—then does that not inform our understanding of the purpose for which a constitutional protection of religious exercise was designed?

absolute *sovereignty* of God,"[81] the hierarchy of duties—God and country, in that order—was manifest and acknowledged.[82] As James Madison, the primary drafter of the First Amendment, said in his famous *Memorial and Remonstrance Against Religious Assessments,* the religious duty of conscience to the Creator is—

> precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered a member of Civil Society, he must be considered as a subject of the Governor of the Universe. And if a member of Civil Society, who enters into any subordinate association, must always do it with a reservation of his duty to the General Authority, much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[83]

Religious exercise was specifically protected in the constitutional text precisely and logically because the exercise of religion was regarded as valuable, indeed the shared need and desire of a faithful people, and was understood to be true and right.[84]

V. CONCLUSION—THE FOUNDING AND CONTEMPORARY GENERATIONS

In the end, there may be little or no disconnection and distance between the people of the founding era and our generation on this question. Taking religion seriously, valuing religious faith as a good in itself and not merely as a manifestation of individual autonomy, and elevating the religious claim of conscience above arguments from secular humanist philosophy may mystify or even offend the elite who dominate our cultural and educational institutions. But the religious justification still resonates with many, if not most, Americans. A poll of the citizens of the state in which this symposium is being held, just two weeks

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81. *See* SANDOZ, *supra* note 7, at 157 (referring to the powerful concept of "the absolute *sovereignty* of God" for the Americans of the founding period).

82. *See Acts* 5:29 (King James) ("Then Peter and the other apostles answered [the council leaders] and said, We ought to obey God rather than men."). The "ubiquity of the Bible in early America" and the persistence of Bible reading throughout the formative period, SANDOZ, *supra* note 7, at 129, ensured that this and other scriptural passages were universally familiar among Americans.

83. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 1 AMERICAN POLITICAL WRITING *DURING THE* FOUNDING ERA 1760-1805, at 631, 632 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

84. *See* GARVEY, *supra* note 1, at 49 ("The best reasons for protecting religious freedom rest on the assumption that religion is a good thing. Our Constitution guarantees religious freedom because religious people want to practice their faith.").

before, found that nearly nine out of ten pray and believe in answers to prayer.[85] Stephen Carter has noted the same phenomenon at the national level, as nine out of ten Americans believe in God and four out of five pray regularly, although the political and social culture may denigrate the sincere believer and trivialize religion.[86]

In explaining the purpose of the Free Exercise Clause, and comparing the generations of the founding and the present day, Michael McConnell aptly concludes:

> To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like "God" that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.[87]

In any event, whatever may be the mood of these present times, the pro-religion purpose underlying the Free Exercise Clause and enshrined in its text must be acknowledged and given effect. Fidelity to the Constitution means that, when it comes to upholding and implementing the religious justification underlying the Free Exercise Clause, failure is not an option.

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85. Thomas A. Fogarty & Tracy Deutmeyer, *Poll Finds Iowans Pray Religiously*, DES MOINES REGISTER, Apr. 10, 1998, at 1M, 2M.

86. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 4 (1993).

87. McConnell, *supra* note 65, at 1152. Indeed, as Dan Conkle has noted, the passage of RFRA, notwithstanding its subsequent invalidation by the Supreme Court, "demonstrates that contemporary American values support the protection of religiously motivated conduct even from laws of general application." Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 91 (1995).