IF RELIGIOUS LIBERTY DOES NOT MEAN EXEMPTIONS, WHAT MIGHT IT MEAN? THE FOUNDERS' CONSTITUTIONALISM OF THE INALIENABLE RIGHTS OF RELIGIOUS LIBERTY

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Is religion special, and does it, accordingly, deserve unique constitutional protections? A number of leading scholars say it is not, and it doesn't. In his recent thought-provoking article, *What if Religion Is Not Special?*, Micah Schwartzman contends that "religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment."[1] Christopher Eisgruber's and Lawrence Sager's conception of "Equal Liberty" similarly "denies that religion is . . . a category of human experience that demands special benefits and/or necessitates special restrictions."[2] Jocelyn Maclure and Charles Taylor espouse what is probably the prevailing position among contemporary political and legal theorists: "Within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs that allow individuals to structure their moral identity."[3] Other scholars have responded with various arguments to defend religion's special status and the practice of exemptions that they contend follows from it.[4]

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1 Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1353 (2012).

2 CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007).

3 JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 89 (Jane Marie Todd trans., 2011).

4 *See* KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW (2015); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996); Thomas C. Berg, *"Secular Purpose," Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24

This latter group would seem to have at least one distinct advantage on its side: the First Amendment's text, whatever the Establishment Clause might mean, clearly gives special status to the "free exercise" of religion.[5] This obvious point leads Schwartzman to conclude that "if the Religion Clauses are interpreted according to their original meaning, then they should be criticized as morally defective."[6]

Schwartzman's verdict, like the entire debate in which he participates, presumes that religion's special status means religious individuals and institutions deserve special consideration for exemptions from burdensome laws. But what if religious liberty does not mean exemptions? Would we still find the Constitution morally defective? And if religious liberty does not mean exemptions, what protection would the First Amendment offer? Can religion retain its special Free Exercise status while not dictating constitutional exemptionism?

This Article addresses those questions by taking a different approach to religion's specialness, one that does not presume the Free Exercise Clause means exemptions. It attempts to set forth an alternative paradigm for the constitutional protection of religious liberty by explaining why the Founders thought religion is special and by articulating their attendant constitutionalism of religious freedom. In doing so, it continues a line of inquiry, begun elsewhere,[7] that attempts to distinguish the Founders' natural rights constitutionalism from what I call modern moral autonomy exemptionism.

The Article is divided into three Parts. Part I documents the Founders' shared understanding that religious liberty is a natural right possessed by all individuals. Part II explains what the Founders meant when they labeled aspects of religious liberty an "unalienable" natural right. The inalienable character of the core of religious liberty reveals what the Founders found special about religion. It also accounts for religion's special constitutional status, which for the Founders primarily meant specific jurisdictional limits on state sovereignty rather than exemptions. Part III further clarifies the Founders' constitutionalism of religious freedom by explaining how the Founders understood natural rights to have natural limits. The Founders' theory of religious liberty included within itself reasonable limits on religious exercise.

A more thorough understanding of the Founders may or may not help us resolve our current debate over the proper scope of religious exemptions.

(2013); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013); Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395 (2014).

5 U.S. CONST. amend I.

6 Schwartzman, *supra* note 1, at 1355.

7 Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. (forthcoming 2016).

But should we seek to recognize the special character of religious liberty without committing ourselves to First Amendment exemptionism, the Founders offer an alternative approach, one that, at least arguably, animated the Founding's original natural rights constitutionalism.[8]

I. The Founders' Recognition of the Natural Right of Religious Freedom

A. State Declarations of Rights, 1776–1784

Attempting to articulate "the Founders' understanding" about anything gives rise to immediate difficulties. Who counts as a Founder? Did the Founders—assuming they can be properly identified—actually share a common view about any significant legal or political matter?[9] My previous scholarly work on the church-state political thought of the leading Founders has emphasized their differences and disagreements, and I only address Madison, Washington, and Jefferson.[10] Scholarship focusing on the "forgotten Founders" rightfully adds more voices to an already seemingly cacophonous conversation.[11]

Nonetheless, in their fundamental charters of government, the Founders themselves set forth a set of public documents that articulated common political principles. Between May 1776 and July 1786, eleven states and Vermont (which became a state in 1791) drafted state constitutions.[12] Eight of

8 To what extent the Founders' natural rights constitutionalism is reflected in the original meaning of the First Amendment will be the subject of a subsequent work. For an initial and cursory statement, see Muñoz, *supra* note 7 (manuscript at 5). The leading account of an originalist defense of exemptions remains Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Originalist criticisms of McConnell's interpretation include: Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992); Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083 (2008); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591 (1990).

9 Though focused more specifically on interpreting the Constitution's text than the "Founders' understanding" generally, Larry Solum's account of the "summing problem" is at least partially applicable to this issue. *See* Robert W. Bennett & Lawrence B. Solum, Constitutional Originalism 87–88 (2011); *see also* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

10 Vincent Phillip Muñoz, God and the Founders: Madison, Washington, and Jefferson (2009).

11 The Forgotten Founders on Religion and Public Life (Daniel L. Dreisbach et al. eds., 2009).

12 G. Alan Tarr, Understanding State Constitutions 61 tbl.3.1 (1998). Rhode Island and Connecticut simply revised their existing colonial charters by removing all references to the British Crown. *Id.* at 60. The colonies of South Carolina and New Hampshire adopted short, provisional constitutions in early 1776, but rewrote their constitutions in 1778 and 1784, respectively. *Id.* at 61 tbl.3.1. Vermont drafted a constitution with a decla-

those twelve states also drafted a declaration of rights. These state documents may be the best available sources for understanding the common mind of the Founders.[13] They represent every part of the new nation; more importantly, an examination of them provides a more complete account of the Founders' political principles than considering only the Declaration of Independence and the creation of the Constitution and Bill of Rights.[14] With regard to the core of religious freedom, moreover, the Founding-era state charters adopt substantially the same natural rights political principles.[15]

A few Supreme Court opinions have noted the importance of these state materials,[16] and Justice Sandra Day O'Connor identified them as "perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all," she wrote, "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."[17] Nonetheless, these state provisions generally have been overlooked and their value for understanding the Founders' shared political philosophy of religious liberty has been underappreciated.[18] These documents are the data through which this Article attempts to understand the Founders'

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ration of rights in 1777 and 1786. *See id.*; *see also* WILLIAM C. HILL, THE VERMONT STATE CONSTITUTION 27–29 (1992).

13 GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 20–21 (1987).

14 Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988).

15 Describing the guarantees of rights in early Founding-era state constitutions, Alan Tarr writes, "[T]he similarities among the states' declarations of rights are striking. All proclaim the same political principles and protect the same set of basic rights." TARR, *supra* note 12, at 75.

16 *See* Lee v. Weisman, 505 U.S. 577, 615 (1992) (Souter, J., concurring); Everson v. Bd. of Educ., 330 U.S. 1, 12–13 (1947); *id.* at 33–38 (Rutledge, J., dissenting).

17 City of Boerne v. Flores, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).

18 This is not to say that no scholars have taken notice of their importance vis-à-vis religious liberty. *See, e.g.*, BRADLEY, *supra* note 13, at 20–37; Mark D. McGarvie, *Disestablishing Religion and Protecting Religious Liberty in State Laws and Constitutions (1776–1833)*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 70 (T. Jeremy Gunn & John Witte, Jr. eds., 2012); Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1 (2015); G. Alan Tarr, *Religion Under State Constitutions*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 65 (1988); John K. Wilson, Note, *Religion Under the State Constitutions, 1776–1800*, 32 J. CHURCH & ST. 753 (1990). Writing more generally about the neglect of the Founding-era state constitutions in historical and legal scholarship, Daniel Elazar writes, "This slighting of state constitutional theory is ironic because the framers of the federal Constitution were influenced by their experiences with their respective state constitutions and the preexisting conceptions of constitutional government in the original states." Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 11–12 (1982). In a similar vein, Donald Lutz has written, "If we are ever to produce a complete and accurate American constitutional history, we must recognize that without the state constitutions in force in 1789 the national Constitution is an incomplete text. They must all be read together." Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 PUBLIUS 101, 101 (1980).

constitutionalism, recognizing the inherent limitations of relying on any document or set of documents to understand the Founders' collective enterprise(s).

One other methodological point ought to be made before proceeding. The state declarations of rights should be interpreted in their proper context, something we are liable not to do because of our familiarity with the Federal Bill of Rights. The pre-1787 declarations were not simply constitutional law in the way that the Bill of Rights is part of the Federal Constitution. They included non-justiciable statements about the fundamental purposes and principles of the political community.[19]

Section 15 of the Virginia Declaration of Rights exemplifies the non-legal character of some of the provisions of the state declarations:

> That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.[20]

Or consider Article VII of the 1776 Pennsylvania Declaration of Rights:

> That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office.[21]

These admonitions were not of a legal character and they demanded no specific legal action. They were non-justiciable in the sense that they were not designed for a Virginia citizen, for example, to file an Article 15 lawsuit if he believed the state was being insufficiently frugal.[22]

Political scientist Donald Lutz labels the state declarations "vague yardstick[s]" against which the people could measure the work of their legisla-

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19 DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 61 (1980) [hereinafter LUTZ, POPULAR CONSENT]; WILLIAM E. NELSON & ROBERT C. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 61, 82–86 (1987); Lutz, *supra* note 18, at 105.

20 Va. Bill of Rights (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1908–09 (Ben: Perley Poore ed., 1877) [hereinafter 2 CONSTITUTIONS].

21 PA. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1540–41.

22 In this light, the following statement by John Marshall during the Virginia convention to ratify the Federal Constitution is revealing:

> Does our [Virginia] Constitution direct trials to be by jury? It is required in our bill of rights, which is not a part of the Constitution. Does any security arise from hence? . . . . The [Virginia] bill of rights is merely recommendatory. Were it otherwise, the consequence would be that many laws which are found convenient would be unconstitutional.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 561 (Jonathan Elliot ed., Burt Franklin 1888). Article VIII of the 1776 Virginia Declaration of Rights stated, "[t]hat in all capital or criminal prosecutions a man hath a right . . . to a speedy trial by an impartial jury of twelve men of his vicinage." Va. Bill of Rights (1776), *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1909.

tures.[23] That characterization is unnecessarily disparaging and also overbroad insofar as some church-state provisions effectively functioned as constitutional law.[24] Lutz's observation, however, is helpful to remind us that we cannot and should not assume that every provision of the pre-1787 state declarations of rights was understood to announce a legal rule or a restriction enforced by judicial review. The primary purpose of the state declarations was to educate the people about liberal political principles and, in particular, the natural rights social compact political philosophy that animated Founding-era constitutionalism.[25] That is why they remain so valuable a resource for us today.

B. Recognition of the Natural Right to Religious Liberty

The eight pre-1787 state declarations reveal that the Founders held religious liberty to be a natural right that belongs to all individuals. This was the foundational principle that animated the Founders' political thought and action on matters of church and state.[26] As can be seen in Table 1, all eight state declarations of rights drafted between 1776 and 1786 included a statement of religious freedom. Five states (Delaware, Pennsylvania, North Carolina, Vermont, and New Hampshire) explicitly identified religious worship according to conscience as a natural and inalienable right. Three states (Virginia, Maryland, and Massachusetts) did not. But Massachusetts and Maryland included natural rights language elsewhere in their declarations of rights and adopted text protecting religious liberty that was consistent with, if not suggestive of, the natural rights understanding.[27] Virginia would recog-

23 As Lutz further explains, the non-legal character of the state declarations is evinced by the use of "ought" as opposed to "shall." In Founding documents at the time, "ought" was used to describe desirable political norms whereas "shall" was used to specify binding legal rules associated with the formal instruments of government. LUTZ, POPULAR CONSENT, *supra* note 19, at 62, 65, 67 tbl.3 (1980).

24 *See* Muñoz, *supra* note 18, at 7. The Massachusetts case *Barnes v. First Parish in Falmouth*, 6 Mass. (1 Tyng) 401 (1810), is case in point. The case was brought under Article III of the 1780 Massachusetts Declaration of Rights. Chief Justice Parsons's opinion for the court interprets Article III as a binding constitutional provision. *Id.* at 412–18.

25 Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. OF AM. PHIL. SOC'Y 261 (1987).

26 Compare this to Andrew Koppelman who, in his defense of religious neutrality, contends that what principally animated the Framers was a concern to prevent the corruption of religion through state control, a notion that has guided separationist Establishment Clause jurisprudence since *Everson v. Board of Education*, 330 U.S. 1 (1947). ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 46, 56–64 (2013); *see also* Engel v. Vitale, 370 U.S. 421, 431–32 (1962) ("The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.").

27 Article I of the 1780 Massachusetts Declaration of Rights begins by declaring that, "[a]ll men are born free and equal, and have certain natural, essential and unalienable rights . . . ." Article II then declares, "[i]t is the right as well as the duty of all men in society . . . to worship the Supreme Being." MASS. CONST. of 1780, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED

nize religious liberty as "of the natural rights of mankind" in 1786 when it adopted Jefferson's Statute for Religious Freedom.[28]

TABLE 1—RECOGNITION OF THE RIGHT TO RELIGIOUS LIBERTY IN STATE DECLARATIONS OF RIGHTS, 1776–1786[29]

Va. 1776[30]	SEC. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.
Del. 1776[31]	SEC. 2. That all men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings.
Pa. 1776[32]	II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding.
Md. 1776[33]	XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.
N.C. 1776[34]	XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.
Vt. 1777/ 1786[35]	III. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding, as in their opinion shall be regulated by the word of God.

STATES 957 (Ben: Perley Poore ed., 1877) [hereinafter 1 CONSTITUTIONS]. The religion article of Maryland's 1776 constitution does not name religious liberty a natural right, but refers to natural rights elsewhere in the same article. *Id.* at 819.

28 Thomas Jefferson, *A Bill for Establishing Religious Freedom in Virginia (1777, 1786)*, in VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS 580, 581 (2013).

29 TABLE 1 is adapted from a table in Muñoz, *supra* note 18, at 11 tbl.2.

30 Va. Bill of Rights (1776), *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1909.

31 Del. Decl. of Rights (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, 5 (Philip B. Kurland & Ralph Lerner eds., 1987).

32 PA. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1541.

33 MD. CONST. of 1776, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 817, 819.

34 N.C. CONST. of 1776, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 71.

35 VT. CONST. of 1786, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, 1866, 1868.

Mass. 1780[36]	II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.
N.H. 1784[37]	V. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason.

The drafting record of the 1776 Virginia Declaration of Rights suggests that those who adopted the declaration understood religious freedom to be a natural right. George Mason composed the initial draft, which he began with a ringing statement of natural rights:

> That all Men are born equally free and independant, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety.[38]

Mason also included specific text regarding religious freedom: "that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience."[39]

While much of Mason's draft was adopted with only minor revisions, a young James Madison took substantive issue with Mason's use of "toleration" and proposed in its place, "the full and free exercise" of religion.[40] The word

36 MASS. CONST. of 1780, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 957.

37 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1280, 1281.

38 *First Draft of the Virginia Declaration of Rights*, *in* 1 THE PAPERS OF GEORGE MASON: 1725–1792, at 277 (Robert A. Rutland ed. 1970).

39 Daniel L. Dreisbach, *George Mason's Pursuit of Religious Liberty in Revolutionary Virginia*, *in* THE FOUNDERS ON GOD AND GOVERNMENT 207, 210–11 (Daniel L. Dreisbach et al. eds., 2004) (quoting *First Draft of the Virginia Declaration of Rights*, *supra* note 38, at 278; *George Mason's Proposed Declaration of Rights*, *in* 1 THE PAPERS OF JAMES MADISON 172–73 (William T. Hutchinson & William M.E. Rachal eds., 1962)). The full text of Mason's initial proposal regarding religious toleration was as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, not by Force or Violence; and therefore that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals. And that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.

Id. For selections from Mason's initial draft and the final adopted text of the 1776 Virginia Declaration of Rights, see *id.* at 234–36.

40 The full text of Madison's initial proposed revision was as follows:

> That Religion or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or

"toleration" might imply that the state possessed legitimate authority over religion and that the practice of it was a civil privilege that could be granted or revoked at will; "full and free exercise," by contrast, was more compatible with the idea of inherent natural rights.[41] As Thomas Paine would write a few years later:

> Toleration is not the *opposite* of Intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of with-holding Liberty of Conscience, and the other of granting it. The one is the pope, armed with fire and faggot, and the other is the pope selling or granting indulgencies. The former is church and state, and the latter is church and traffic.[42]

The Virginia Convention seems to have agreed, adopting the following (in relevant part) as Section 16: "[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."[43]

Describing the Virginia Declaration in 1778, Mason wrote, "We have laid our new government upon a broad foundation, and have endeavored to provide the most effectual securities for the essential rights of human nature, both in civil and religious liberty . . . ."[44] While the religion article of Vir-

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> compulsion, all men are equally entitled to the full and free exercise of it according to the dictates of conscience; and therefore that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges; nor subjected to any penalties or disabilities unless under the color of religion, any man disturb the peace, the happiness, or safety of Society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

IRVING BRANT, JAMES MADISON: THE VIRGINIA REVOLUTIONIST 245 (1941). According to Thomas E. Buckley, Madison's initial proposal was submitted for consideration by Patrick Henry and his second proposed revision was submitted by Edmund Pendleton. *See* THOMAS E. BUCKLEY, S.J., CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 17–19 (1977). For further discussion of Madison's proposed amendment, see MUÑOZ, *supra* note 10, at 32–34.

41 BRANT, *supra* note 40, at 245.

42 THOMAS PAINE, RIGHTS OF MAN 78 (7th ed. 1791).

43 Va. Bill of Rights (1776), *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1909. For discussions of the significance and meaning of Madison's proposed changes to Mason's text, see Dreisbach, *supra* note 39, at 211–15, and MUÑOZ, *supra* note 10, at 32–34.

44 Letter from George Mason (October 2, 1778), *in* PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 303 (Hezekiah Niles ed., 1876) [hereinafter PRINCIPLES AND ACTS]. Mason's letter continues as follows: "[T]he people become every day more and more attached to it; and I trust that neither the power of Great Britain, nor the power of hell will be able to prevail against it." *Id.* It should be noted that, in what became Article I, the Virginia Convention changed Mason's "inherent natural rights" to "inherent rights." Va. Bill of Rights (1776), *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1908. Earlier in his letter to Mercer, Mason had written that his original draft "received few alterations; some of them I think not for the better." PRINCIPLES AND ACTS, *supra* at 303. For a discussion of the changes made to Article I, see HELEN HILL MILLER, GEORGE MASON: GENTLEMEN REVOLUTIONARY 149 (1975). For a helpful discussion of the role of natural rights in the American Founding, including a response to those who would minimize their importance, see MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM 274–93 (2002).

ginia's state declaration did not specifically label religious freedom a natural right, its language is consistent with such an understanding, as is the choice to replace the language of "toleration" with "full and free exercise."[45]

C. The Founders' Recognition of the Universality of the Natural Right of Religious Freedom

Understanding it as a natural right, the Founders recognized religious liberty to belong to individuals on account of their human nature, and accordingly, to be possessed by all individuals. The language of the state declarations of rights reflects this universal understanding. Six states used the phrase "all men" (Virginia, Delaware, Pennsylvania, North Carolina, Vermont, and Massachusetts). New Hampshire referred to "every individual."[46] Maryland somewhat confusingly seemed to restrict the protection of religious liberty only to those who "profess[ ] the Christian religion"; but in the immediate sequel, the text drops the religious limitation declaring that, "*no person* ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice," which suggests a more universal protection.[47] The use of "all men," "every individual," or "no person" in all eight documents is revealing, as those documents contain more restrictive language when referring to other, non-natural rights.[48] Aside from the possible exception of Maryland, the state declarations of rights recognize that all individuals possess the right of religious liberty, an understanding that reflects the Founders' underlying natural rights philosophy.

Today we tend to presume that natural equality (including our equality in natural rights) dictates non-discrimination in civil rights.[49] Some Founders, including Jefferson (at times) and Madison, adopted this position with regard to religious freedom.[50] In the Founding-era state declarations of

45 The Founders' explicit rejection of the language of "toleration" makes its return in contemporary scholarship all the more noteworthy. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

46 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1281. "Men" in this sense is properly understood as the generic noun for mankind, i.e., males and females.

47 MD. CONST. of 1776, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 819 (emphasis added).

48 Muñoz, *supra* note 18, at 27–30.

49 *See, e.g.*, Akhil Reed Amar, *What the Same-Sex Marriage Opinion Should Have Said (and Almost Did)*, SLATE (July 10, 2015, 1:28 PM), http://www.slate.com/blogs/outward/2015/07/10/supreme_court_gay_marriage_what_kennedy_s_opinion_should_have_said.html; *see also* Locke v. Davey, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 854–55 (1995) (Thomas, J., concurring).

50 Jefferson's Virginia Statute stated that "our civil rights have no dependance on our religious opinions." MUÑOZ, *supra* note 28, at 580 (alteration in original). Madison's original draft of what became the First Amendment's Religion Clauses included the provision, "[t]he civil rights of none shall be abridged on account of religious belief or worship." 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

rights and constitutions, however, the Founders set forth a more precise notion of natural rights and distinguished between civil protections for natural and non-natural or acquired rights.[51] The acknowledgment of equal natural rights was not necessarily understood to require the equal extension of, or equal protection for, non-natural or acquired civil rights within society.[52]

The failure to appreciate the Founders' distinction between natural and non-natural rights has led some to conclude mistakenly that the Founders limited religious freedom only to Christians or even just to Protestants. To take a notable example, in the Ten Commandments case of *Van Orden v. Perry*, Justice John Paul Stevens criticized an originalist approach to the First Amendment's religion clauses, because, in his words, "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity."[53] Justice Stevens's dissenting opinion continues "[t]he evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect 'religious freedom' in their various constitutions. Many of those provisions, however, restricted 'equal protection' and 'free exercise' to Christians, and invocations of the divine were commonly understood to refer to Christ."[54]

Justice Stevens is correct that some state constitutions limited equal protection of acquired civil rights to Christians, but it is not true that natural rights of religious free exercise were similarly limited. As can be seen in Table 1, the language of the Founding-era declarations of rights reveals that the Founders understood that *all individuals* possessed the right to worship according to conscience.

The Founders' understanding of the universal character of religious liberty is also evinced by the three states (New Jersey, Georgia, and New York) that did not draft a declaration of rights but did protect religious freedom in their constitutions. Article XVIII of New Jersey's 1776 Constitution declares "[t]hat *no person* shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."[55] Article LVI of the 1777 Georgia Constitution states that, "*[a]ll*

51 Muñoz, *supra* note 18, at 11–12, 27–32.

52 Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908, 918–22 (1993). A textual example of how the Founders both recognized the universal character of natural rights and also limited civil rights and privileges can be found in Sections 2 and 3 of the 1776 Delaware Declaration of Rights:

> SECT. 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . .
>
> SECT. 3. That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state . . . .

Del. Decl. of Rights, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 5.

53 Van Orden v. Perry, 545 U.S. 677, 726 (2005) (Stevens, J., dissenting).

54 *Id.* at 726–27.

55 N.J. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1310, 1313 (emphasis added).

persons whatever shall have the free exercise of their religion."[56] Article XXXVIII of New York's 1777 Constitution, similarly, extends "*to all mankind*" "the free exercise and enjoyment of religious profession and worship, without discrimination or preference."[57] Justice Stevens was simply mistaken when he concluded that the Founding-era states limited "free exercise" rights to Christians.[58] His mistake, one suspects, was due in part to a lack of careful attention to the texts of these Founding-era documents and, in part, to an assumption that because some state declarations limited "equal rights and privileges" to Christians, they also limited free exercise rights. To repeat, the Founders distinguished natural rights from acquired civil rights. When they recognized the natural right to religious freedom in state declarations of rights and protected it constitutionally, they did so for all individuals.

II. The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty

Thus far I have attempted to demonstrate that the Founders shared a general understanding of religious liberty as a natural right possessed by all individuals. The recognition of natural rights is the foundation of the Founders' social compact political philosophy of government, but it is not the whole of that theory. As noted, five states (Delaware, Pennsylvania, North Carolina, Vermont, and New Hampshire) identified the right to worship God according to conscience as a particular type of natural right—an "unalienable" natural right—and the three other state declarations of rights adopted language consistent with that idea.[59] Understanding what the Founders meant by "unalienable" unlocks a key component of their constitutional protection for religious freedom; it also reveals in what sense the Founders thought religion to be special.

To unpack the Founders' concept of inalienability requires that we review, step by step, the basic features of their natural rights social compact theory of government. This is perhaps more easily done by closely examining one state's declaration of rights than by reviewing them all. In what follows, I analyze the first five articles of New Hampshire's 1784 Bill of Rights, though any of the other states' declaration of rights would have been suitable for the purpose.

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56 Ga. Const. of 1777, *reprinted in* 1 Constitutions, *supra* note 27, at 377, 383 (emphasis added).

57 N.Y. Const. of 1777, *reprinted in* 2 Constitutions, *supra* note 20, at 1328, 1338 (emphasis added).

58 The one Founding-era state that Justice Stevens could have cited to support his interpretation of the Founders as parochial Christians is South Carolina. Its constitution of 1778, an outlier among the early state constitutions, did not recognize the right of religious liberty and, in Article XXXVIII, explicitly established the Christian Protestant religion. *See* S.C. Const. of 1778, *reprinted in* 2 Constitutions, *supra* note 20, at 1620, 1626.

59 *See supra* note 27 and accompanying table.

A. *The Founders' Social Compact Theory I—Natural Equality & Natural Rights*

The first two articles of the 1784 New Hampshire Bill of Rights read as follows:

> [I.] All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.
> II. All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.[60]

Article I begins with the fundamental principle of American constitutionalism—that all men are by nature free and equal.[61] It goes without saying that the meaning of equality (and how devoted the Founders actually were to it) has generated no shortage of political and scholarly controversy.[62] Thomas Jefferson, whatever his personal failings, may have captured the Founders' common understanding of equality at the end of his life when writing about the meaning of the Declaration of Independence. "May it be to the world," Jefferson said of the Declaration:

> [W]hat I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government. . . . The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.[63]

Horses are not born with saddles on their back, but most of us think it legitimate that men break horses, saddle them, and ride them for their own purposes. A good owner should treat his steed humanely, of course, but men legitimately may use horses in ways that primarily benefit the owner. Men also may govern horses without consent because of the species inequality between mankind and animals; horses are incapable of rational consent.[64] Jefferson's point is that no similar inequality exists among men. No man may legitimately rule another man as a man may rule an animal because all men,

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60 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1280.

61 HARRY V. JAFFA ET AL., CRISIS OF THE STRAUSS DIVIDED: ESSAYS ON LEO STRAUSS AND STRAUSSIANISM, EAST AND WEST 234–39 (2012).

62 *See, e.g.*, Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–5 (1987). For a discussion of and response to scholars who deny the Founders were truly devoted to the equality of all men, see THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 1–36 (1997).

63 Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), *in* THE PORTABLE THOMAS JEFFERSON 585 (Merrill D. Peterson ed., 1977).

64 Of course, not everyone agrees with the idea of species inequality. *Cf.* Peter Singer, *Speciesism and Moral Status*, 40 METAPHILOSOPHY 567, 567–81 (2009).

by nature, have an equal title to exercise dominion over their own life and liberty.[65] "All men are created equal" means that no man is, by nature, the rightful ruler of any other man.[66]

Though less well known than Jefferson, James Wilson, a signer of the Declaration and one of President Washington's appointees to the inaugural Supreme Court, articulated the same understanding of equality. In his *Lectures on Law*, which I quote at length, Wilson states:

> When we say, that all men are equal; we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. In all these respects, there is, and it is fit for the great purposes of society that there should be, great inequality among men. . . .
>
> . . . .
>
> 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. With regard to all, there is an equality in rights and in obligations; there is that "jus aequum," that equal law, in which the Romans placed true freedom. The natural rights and duties of man belong equally to all. Each forms a part of that great system, whose greatest interest and happiness are intended by all the laws of God and nature. These laws prohibit the wisest and the most powerful from inflicting misery on the meanest and most ignorant; and from depriving them of their rights or just acquisitions. By these laws, rights, natural or acquired, are confirmed, in the same manner, to all; to the weak and artless, their small acquisitions, as well as to the strong and artful, their large ones. If much labour employed entitles the active to great possessions, the indolent have a right, equally sacred, to the little possessions, which they occupy and improve.

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65 Harry V. Jaffa, perhaps the twentieth century's most thoughtful interpreter of the American Founding, explains the Declaration's teaching about equality as follows:

> There is only one respect however in which "all men" (meaning all human beings) are held to be equal. That is in what John Locke calls "dominion." By nature, no man is the ruler of another. There is no natural difference between one human being and another, such as there is between the queen bee and the workers or drones. Nor is there any such difference between one human being and another, as there is between any man, and any dog or horse or chimpanzee, by reason of which the one is the ruler and the other is the ruled. Jonathan Swift to the contrary notwithstanding, men ride horses by self-evident natural right. The "enslavement" of the horse by his rider is not against nature, and is therefore not unjust. But the enslavement of one human being by another violates that same order of nature which justifies the rider of the horse.

Harry V. Jaffa, *Thomas Aquinas Meets Thomas Jefferson*, 33 INTERPRETATION 177, 179 (2006).

66 Being born "equally free and independent," of course, does not mean being born without parents, or undermine the rightful rule and responsibility of parents for their children. For a discussion of the compatibility of the liberal principle of natural equality and the rightful rule of parents over children, see Thomas G. West, *Locke's Neglected Teaching on Morality and the Family*, 50 SOCIETY 472–76 (2013). Natural equality means that among mature adults no person by nature or divine grant rightfully exercises authority over another person.

> As in civil society, previous to civil government, all men are equal; so, in the same state, all men are free. In such a state, no one can claim, in preference to another, superiour right: in the same state, no one can claim over another superiour authority.[67]

For the Founders, the equal freedom and independence of men is the foundation of our natural rights.

The Founders' idea of natural rights involves an authority to do freely things an individual is able to do and the reciprocal immunity from being coerced on account of those activities.[68] It captures the individual's legitimate ungranted authority to do or not to do something, e.g., to exercise religion or not. The concept presupposes the individual's competence to judge for himself whether to exercise the right. It also presumes, as Harvey Mansfield, Jr., notes, "that the thing to which one has a right is possible to do. One cannot have a right to an impossible condition, such as immortality . . . ."[69] Adam Seagrave nicely captures this limitation in his definition of natural rights: "*[A] basis for moral claims residing within or deriving from the individual*."[70]

The three natural rights recognized in Article II of the New Hampshire Bill of Rights—life, liberty, and property—are nearly always recognized within the American natural rights tradition. The natural rights to life and liberty reflect the fact that every man possesses dominion over his own life, which, again, is to say that no other man possesses such authority by nature. The natural right to property follows from a man's rightful freedom to labor and to enjoy the fruits of his labor.[71]

Life, liberty, property, and other natural rights are *natural* in the twofold sense that men possess them on account of their human nature and that they exist in the state of nature, i.e., independently of political society. Such

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67 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 636–38 (Kermit L. Hall & Mark David Hall eds., 2007).

68 Mark Blitz helpfully defines the concept of rights as follows:

> A right is an authority to reflect, prefer, choose, use, proceed, and act that we justly possess. As an authority, it is not a mere privilege or opportunity. As an authority to reflect, prefer, choose, use, proceed, and act, a right is freedom of self-direction, not a particular outcome or a bare state of being unobstructed. As justly possessed or deserved, a right is not something stolen or usurped. An inalienable right is an authority one cannot give up, unlike a fleeting possession. It is not something one keeps only at another's sufferance. The individual natural rights with which we are endowed, therefore, are individual authorities to reflect, prefer, choose, use, proceed, and act that always belong to us.

MARK BLITZ, CONSERVING LIBERTY 15 (2011).

69 Harvey C. Mansfield, Jr., *Responsibility Versus Self-Expression*, *in* OLD RIGHTS AND NEW 96, 97 (Robert A. Licht ed., 1993).

70 S. ADAM SEAGRAVE, THE FOUNDATIONS OF NATURAL MORALITY 73 (2014).

71 For discussions of the Founders' understanding of the natural right to property, see JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26–58 (3d ed. 2008); Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43, 65–68 (1960); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–74 (2003).

rights, accordingly, are not granted by the state or any human authority.[72] In the Founders' political thought, legitimate political authority is constituted to recognize and protect natural rights.[73]

B. The Founders' Social Compact Theory II—Consent & the Ends of Government

Article III of the 1784 New Hampshire Bill of Rights states:

> III. When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void.[74]

Political authority is necessary because individuals tend to fail to respect the natural limits of their own natural liberty and violate the natural rights of others.[75] To better secure their natural rights, accordingly, men "surrender" their natural authority to protect their own rights for civil protections of their rights.[76]

Our natural freedom and equality mean that legitimate government can only be instituted via consent, as stated in Article I of the New Hampshire Bill of Rights.[77] But this does not mean that any government or governmental provisions that receive the consent of the people are legitimate. Consent is a necessary but not sufficient condition for legitimate government. Legitimate governments arise via consent, but what secures their legitimacy is that they actually secure the "general good," understood as the rights of the naturally free and independent individuals who form the social compact.[78] As stated

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72 *Cf.* MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC 73–78 (1996).

73 Consider Article 1 of the 1776 Pennsylvania Constitution, which begins:

> WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man . . . .

PA. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1540; *see also* 2 JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON 1053–83 (Kermit L. Hall & Mark David Hall eds., 2007).

74 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1280.

75 Consider Madison's argument in *Federalist 10* of the naturalness and inevitability of factious behavior. THE FEDERALIST No. 10 (James Madison).

76 *See* Muñoz, *supra* note 7 (manuscript at 5).

77 For a penetrating discussion of the Founders' understanding of the relationship between the idea of human equality and the principle of government by consent, see Harry V. Jaffa, *Equality, Liberty, Wisdom, Morality and Consent in the Idea of Political Freedom*, 15 INTERPRETATION 3, 3–28 (1987).

78 In his essay, *Property*, James Madison writes,

> This term ["property"] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.* In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar

in Article III of the 1784 New Hampshire Bill of Rights, when individuals enter society, they surrender some of their natural rights. But if government fails to protect those rights, "the surrender is void."[79]

Specifically, individuals surrender their natural executive powers to judge violations of their rights and, correspondingly, to use force to protect and restore their rights. Through this mutual surrender and recognition of one another's rights, naturally free and independent individuals become fellow citizens and members of one society. As citizens, individuals still retain some residual authority to protect their natural rights. A citizen, for example, can defend himself—that is to say, he can invoke his natural executive power—when his life is threatened and no recourse to civil authority is possible. But in the main, individuals "surrender" their natural executive power in exchange for civil protections that better secure their rights as a whole. The mutual recognition of one another's rights and their mutual consent to form one civil and political association allows naturally free and independent individuals to become fellow citizens in a single society governed by the rule of law, the primary aim of which is to protect natural rights.

C. The Founders' Social Compact Theory III—Inalienable Rights

Authority over every right, however, is not transferred. Article IV of the 1784 New Hampshire Bill of Rights states:

> IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.[80]

The concept of inalienability has a precise meaning in the Founders' social compact constitutionalism. Inalienable rights are, as the name suggests, those rights that cannot be alienated—that is, those over which individuals cannot (and, hence, do not) grant the state authority. Such rights cannot be alienated because another cannot exercise them on our behalf or because such a transfer would always run contrary to self-interest.[81]

> value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights . . . . Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

James Madison, *Property*, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

79 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1280.

80 *Id.* at 1280–81.

81 Jean Yarbrough, *Jefferson and Property Rights*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 65, 66 (Ellen Frankel Paul & Howard Dickman eds., 1989).

In his Virginia Statute for Religious Liberty, Jefferson identifies religious opinions as inalienable on the grounds that the nature of belief formation prevents us from delegating authority over them. Because opinions follow evidence alone, he says, we cannot consent to follow the dictates of others.[82] In his *Notes on the State of Virginia*, Jefferson arrives at the same conclusion by reference to religious obligations:

> But our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[83]

In his *Memorial and Remonstrance*, James Madison also emphasizes our duties to God in his account of the inalienable character of religious free exercise.[84] Each individual must fulfill his own obligations to God, Madison argues, because the duty itself is "to render to the Creator such homage and such only as he believes to be acceptable to him."[85] The personal character of religious obligation—the worshipper himself must be sincere in his worship and personally believe such worship is warranted by the Creator—makes religious free exercise an inalienable right. As Madison states,

> 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.[86]

Following the social compact theory articulated by the leading framers such as Jefferson and Madison and accepted by the Founders generally (as reflected in the early Founding-era state declarations of rights), the Founders protected the inalienable right of religious free exercise primarily by limiting governmental jurisdiction over it.[87] In the Founders' social compact constitutionalism, government acquires only the authority granted to it by the people. When they said the rights of conscience are "unalienable," they meant that authority over the rights of conscience is not, and cannot be, granted to the government. Delaware (1776), Pennsylvania (1776), and Vermont (1777) articulated this point with precision in their declarations of rights, which all stated:

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82 For an elaboration of Jefferson's argument on this point, see MUÑOZ, *supra* note 10, at 85–87.

83 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (1853).

84 For further discussion of this point, see Muñoz, *supra* note 7 (manuscript at 4). *See also* MUÑOZ, *supra* note 10, at 29–32.

85 James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT 582, 583 (Vincent Phillip Muñoz ed., 2013).

86 James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 82, 82.

87 For an elaboration of this point, see Muñoz, *supra* note 7 (manuscript at 7).

> [N]o authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[88]

The natural right of religious free exercise remains "unalienated," and thus individuals retain what they possessed prior to and outside of civil society. Political authority created to govern society, accordingly, lacks sovereignty over the rights of conscience.

Article V of the 1784 New Hampshire Bill of Rights specifies the meaning of this lack of sovereignty:

> V. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.[89]

We tend to speak broadly about "the natural right of religious liberty" as I myself have done in this Article. The Founders were more precise. What is inalienable is the right to worship God according to conscience. From the government's absence of sovereignty over worship according to conscience, the Founders derived an immunity for all persons ("no subject")[90] from punishment ("shall be hurt, molested, or restrained in his person, liberty or estate")[91] on account of religious exercises, beliefs, or affiliation ("for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion")[92] with certain limitations ("provided he doth not disturb the public peace"),[93] which we shall discuss below in Part III.

The absence of governmental authority to punish individuals on account of religious worship, beliefs, or affiliation is the very core of the Founders' understanding of religious freedom. Texts that recognize and protect freedom of religious worship and/or belief were authored by every state that drafted a new constitution between 1776–1786 except Virginia and South Carolina.[94] In its 1776 Declaration of Rights, Virginia recognized "all men are equally entitled to the free exercise of religion, according to the dictates

88 Del. Decl. of Rights (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 5; PA. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1541; VT. CONST. of 1777, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 75; *see also*, Muñoz, *supra* note 18, at 14–15.

89 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 27, at 1281.

90 *Id.* Note the universal language of "no subject," which covers citizens and noncitizens of every denomination or lack thereof.

91 *Id.*

92 *Id.*

93 *Id.*

94 Muñoz, *supra* note 18, at 12–17.

of conscience";[95] the state then passed specific legal rules to protect religious free exercise when it adopted Jefferson's Statute in 1786, as reflected in Table 2 below.

TABLE 2—STATE PROVISIONS PROTECTING FREEDOM OF AND FROM WORSHIP, 1776–1786

	Freedom of Worship and Belief	**Freedom from Compelled Worship**
Va. 1786 (VSRF)[96]	VSRF: no man . . . shall be enforced restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion.	VSRF: no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.
N.J. 1776[97]	XVIII. That no person shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience.	XVIII. [N]or [shall any person], under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment.
Del. 1776[98]	*SECT 2. and that no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner controul the Right of Conscience in the Free Exercise of Religious Worship.*	*SECT 2. and that no Man ought or of Right can be compelled to attend any religious Worship or maintain any Ministry contrary to or against his own free Will and Consent.*
Pa. 1776[99]	*II. And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship*	*II. no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent.*
Md. 1776[100]	*XXXIII. wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice.*	*XXXIII. nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry.*

95 Va. Decl. of Rights (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 3.

96 Va. Act for Establishing Religious Freedom (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 84–85.

97 N.J. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1313.

98 Del. Decl. of Rights and Fundamental Rules, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 70.

99 PA. CONST. of 1776, Decl. of Rights, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 71.

100 MD. CONST. of 1776, Decl. of Rights, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 70.

N.C. 1776[101]	XXXIV. all persons shall be at liberty to exercise their own mode of worship.	XXXIV. neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment.
Ga. 1777[102]	Art. LVI. All persons whatever shall have the free exercise of their religion.	
N.Y. 1777[103]	XXXVIII. the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.	
Vt. 1777[104]	*III. no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case, interfere with, or in any manner controul, the rights of conscience, in the free exercise of religious worship.*	*III. no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience.*
S.C. 1778		
Mass. 1780[105]	*II. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments.*	*III. And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid [Protestant teachers of piety, religion, and morality], at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.*
N.H. 1784[106]	*V. no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion.*	

Italicization indicates that the text appears in a declaration of rights. All other text appears in state constitutions with the exception of Virginia, the text of which is taken from Jefferson's 1786 Statute for Religious Liberty.

101 N.C. Const. of 1776, *reprinted in* 5 The Founders' Constitution, *supra* note 31, at 71.

102 Ga. Const. of 1777, *reprinted in* 1 Constitutions, *supra* note 27, at 383.

103 N.Y. Const. of 1777, *reprinted in* 2 Constitutions, *supra* note 20, at 1328, 1338.

104 Vt. Const. of 1777, *reprinted in* 5 The Founders' Constitution, *supra* note 31, at 85.

105 Mass. Const. of 1780, *reprinted in* 1 Constitutions, *supra* note 27, at 957.

106 N.H. Const. of 1784, *reprinted in* 2 Constitutions, *supra* note 27, at 1281.

As can be seen in Table 2, some states included additional text explicitly recognizing freedom *from* compelled worship. Prohibitions against compelled worship follow the same logic as freedom of worship: jurisdiction over religious worship as such is not granted to the state; worship as such, accordingly, remains beyond the state's sovereignty; the state, therefore, may not prohibit or mandate forms or religious worship. As Madison says in his *Memorial and Remonstrance*, "[t]he Religion then of every man must be left to the conviction and conscience of every man."[107] Madison does not leave individuals' freedom from coerced worship in doubt:

> [W]e cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom [of religious exercise] be abused, it is an offense against God, not against man: To God, therefore, not to man, must an account of it be rendered.[108]

Lacking jurisdiction over religious exercises as such, the state lacks authority to prohibit or compel them. In this way, the Founders held religious freedom to protect both believers and non-believers.[109]

As I have argued in more detail elsewhere, the absence of state sovereignty over religious worship means judges lack authority to balance the inalienable elements of the natural right of religious liberty against other state interests.[110] The act of balancing allows for the regulation, superintendence, and even infringement of rights under certain circumstances (usually when a "compelling state interest" is pursued) with certain conditions (that constraints are as minimal as possible). But as the inalienable elements of the natural right to religious liberty remain beyond the state's jurisdiction, they are immune from direct state regulation, superintendence, and infringement. The state, in other words, can never have a "compelling interest" to regulate or infringe them. And if the state lacks such authority, so do judges, who are agents of the state and whose authority is completely derived from it. Judges cannot balance the inalienable elements of the rights of religious liberty, because the act of balancing itself assumes an authority that neither the state as a whole nor judges (as state agents) possess.

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107 Madison, *supra* note 85, at 582.

108 *Id.* at 583.

109 It might appear that the state of Massachusetts deviated from the Founding consensus on this point. Article II of its 1780 Declaration of Rights invests the state legislature with power, "to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid [Protestant teachers of piety, religion, and morality], at stated times and seasons." MASS. CONST. of 1780, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 957. But then, as if the drafters knew they were about to go a step too far, the article immediately limits this power: "if there be any on whose instructions they can conscientiously and conveniently attend." *Id.* Article III of the 1780 Massachusetts Declaration of Rights comes close to authorizing compelled religious worship, but it does not actually do so. *Id.*

110 Muñoz, *supra* note 7 (manuscript at 5).

III. The Boundaries of the Natural Right of Religious Free Exercise

To say that the Founders recognized elements of the natural right of religious free exercise as inalienable and understood those elements to remain outside the sovereignty of the state is not to say that they held every religiously motivated action to be beyond criminal or civil law. We sometimes think of rights, or at least natural rights, as categorical protections or absolute immunities and believe they are not susceptible to state limitation or prohibition. Regarding the non-alienated elements of the natural right of religious free exercise, those descriptions are true in one sense (as just discussed above), but not in another. In the Founders' understanding, natural rights have natural limits. To speak a bit more precisely, the Founders understood the natural right of religious liberty to be categorical but not unbounded. Understanding the legitimate boundaries of the natural right of religious free exercise helps to explain more precisely what specific types of state action it was understood to prohibit.

I have frequently used the cumbersome modifier "as such" following "religious worship." "As such" is intended to convey the distinction between outlawing a practice *on account of its religious character* as opposed to a general prohibition that happens to outlaw a religious practice. A municipal ordinance that prohibits all religious worship services on Saturdays is an example of the former; an ordinance that requires traffic control for all gatherings that generate a thousand vehicles might be an example of the latter.

An often-used example may be helpful. Take the Aztec religious practice of human sacrifice. Would its prohibition be consistent with the Framers' unalienable natural right understanding? The answer, clearly, is yes. The Founders did not understand the right of religious liberty to include the freedom to do anything as long as it is religiously motivated. They understood the natural boundaries of natural rights to be established by the law of nature.[111]

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111 Compare to Philip Hamburger, who emphasizes self-interest in his account of the Founders' understanding of the law of nature:

> Being equally free [by nature], individuals did not have a right to infringe the equal rights of others, and, correctly understood, even self-preservation typically required individuals to cooperate—to avoid doing unto others what they would not have others do unto them. In this way, the assumptions about humans and, particularly, human liberty in the state of nature—that individuals in the state of nature were equally free and that such individuals should seek to preserve their liberty—were considered to be foundations upon which humans could reason about cooperative behavior for the preservation of that liberty. These assumptions could, in fact, be used to justify rules that bore a striking resemblance to some of the social duties of traditional morality. . . . Thus, Americans derived social obligations from enlightened self-interest . . . and therefore could talk about natural law both as a law of human nature and as the foundation of moral rules.

Hamburger, *supra* note 52, at 924 (footnote omitted).

In his *Lectures on Law*, James Wilson offers perhaps the most developed account of how nature establishes both the grounds for and limits of our rightful liberty. It is worth quoting him at length:

> Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those, for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon 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. Every man has a sense of the impropriety of restraining or interrupting it. Those who judge wisely, will use this liberty virtuously and honourably: those, who are less wise, will employ it in meaner pursuits: others, again, may, perhaps, indulge it in what may be justly censured as vicious and dishonourable. Yet, with regard even to these last, while they are not injurious to others; and while no human institution has placed them under the control of magistrates or laws, the sense of liberty is so strong, and its loss is so deeply resented, that, upon the whole, more unhappiness would result from depriving them of their liberty on account of their imprudence, than could be reasonably apprehended from the imprudent use of their liberty. . . .
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> . . . .
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> The laws of nature are the measure and the rule; they ascertain the limits and the extent of natural liberty.[112]

"In a state of natural liberty [the state of nature]," Wilson writes later in his *Lectures on Law*, "every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature . . . ."[113] The law of nature, he further explains, has two basic maxims, both of which are made known to us through our reason and common sense: that no man should injure another man and that lawful engagements voluntarily made should be faithfully fulfilled.[114]

The Founders often expressed the natural law boundaries on the exercise of natural rights in terms of respecting the equal rights of others. As Jefferson stated in a private letter, "No man has a natural right to commit

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112 1 WILSON, *supra* note 67, at 638–39. For discussions of the founding generation's understanding of the inherent limitations to the exercise of natural liberty and the natural limits on natural rights, see Hamburger, *supra* note 52.

113 2 WILSON, *supra* note 73, at 1056. For further discussion of the Founders' understanding of the natural law boundaries on natural rights with particular reference to James Wilson, see Hadley Arkes, *On the Dangers of a Bill of Rights: A Restatement of the Federalist Argument*, *in* 1 TO SECURE THE BLESSINGS OF LIBERTY 120, 125–35 (Sarah Baumgartner Thurow ed., 1988).

114 1 WILSON, *supra* note 67, at 498; 2 WILSON, *supra* note 73, at 1062. Wilson defines "injury" as follows: "An injury is a loss arising to an individual, from the violation or infringement of his right." *Id.* at 1087.

aggression on the equal rights of another."[115] The young Alexander Hamilton made the same point in his 1775 *Farmer Refuted* essay. Hamilton explicitly rejects the Hobbesian notion that the possession of natural rights implies that men are perfectly free from all restraints of law and government in the state of nature and that moral obligation only arises with the agreement to enter into civil society. "Good and wise men, in all ages," Hamilton writes,

> have embraced a very dissimilar theory. They have supposed, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature . . . .[116]

Hamilton identifies God as the author of, and authority behind, the law of nature, but he does not conclude that only those people who have access to divine revelation or God's prophets are subject to the law. God endowed man with rational faculties, Hamilton says, through which he can discern both his interests and his duties. The law of nature, therefore is

> binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original.[117]

"Hence, in a state of nature," Hamilton concludes, "no man had any *moral* power to deprive another of his life, limbs, property or liberty . . . ."[118]

Even though it makes some sense to envision the law of nature as limiting natural rights, the Founders did not understand it to reduce or contract natural rights.[119] Rather, the law of nature sets the boundaries of the exercise of a natural right. The scope of any natural right, in other words, does not extend to actions that violate another's rights. The saying, "you have no right to do wrong," captures this meaning insofar as "wrong" is defined in terms of violations of the natural moral law consisting, primarily, of the natural rights of others.[120]

The law of nature and natural rights were understood to be consistent with one another since both shared the foundation of human equality. All men being naturally free and equal in their natural rights was understood to mean that no man had a moral right to exercise his liberty in a manner that

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115 Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), *in* 11 THE WORKS OF THOMAS JEFFERSON 533, 534 (Paul Leicester Ford ed., 1905).

116 ALEXANDER HAMILTON, *The Farmer Refuted* (1775), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 19, 20 (Morton J. Frisch ed., 1985) (Blackstone's original referred to "force" rather than authority; Hamilton additionally altered Blackstone's original punctuation).

117 *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *41).

118 *Id.*

119 For a helpful discussion of this point, see Hamburger, *supra* note 52, at 944–49.

120 *See* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1246 (2012).

infringed the equal freedom of another.[121] One Founding-era Vermont minister stated the matter as follows:

> [A]ll have, most certainly, an equal right to freedom and liberty by the great law of nature. No man or number of men, *has* or *can* have a right to infringe the natural rights, liberties or privileges of others . . . ."[122]

Jefferson, to give just one further example, wrote:

> Of Liberty then I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will, within the limits drawn around us by the equal rights of others. I do not add "within the limits of the law," because law is often but the tyrant's will and always so when it violates the right of an individual.[123]

To return to our Aztec example: a law that prohibits murder, when applied to a religiously motivated killing such as ritual human sacrifice, does not violate the Founders' understanding of the natural right of religious free exercise because the exercise of natural rights does not include the violation of others' natural rights, including the right to life. No religious free exercise right exists to sacrifice another human person, regardless of a religious motivation for such action.

The natural law boundaries of the natural right of religious free exercise are reflected in the text of several Founding-era state declarations of rights. After declaring that no individuals should be "hurt, molested, or restrained" on account of religious worship, profession, sentiments, or persuasion, Article V of the 1784 New Hampshire Bill of Rights adds the boundary proviso, "provided he doth not disturb the public peace, or disturb others, in their religious worship."[124] As can be seen in Table 3 below, six other Founding-era states had similar provisions in their declarations of rights (Maryland and Massachusetts) or constitutions (New Jersey, North Carolina, Georgia, New York).

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121 For a discussion of this point, including multiple citations to Founding-era writers, see Hamburger, *supra* note 52, at 922–30.

122 *Id.* at 927 (quoting PETER POWERS, JESUS CHRIST THE TRUE KING AND HEAD OF GOVERNMENT 10 (1778) (an election sermon before the General Assembly of Vermont)). Elisha Williams said much the same thing nearly forty years earlier:

> This natural freedom is not a liberty for every one to do what he pleases without any regard to any law, for a rational creature cannot but be made under a law from its Maker: But it consists in freedom from any *superiour power on earth*, and not being under the will or legislative authority of man, and having only the law of nature (or in other words, of its Maker) for his rule.

ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), *reprinted in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 51, 56 (Ellis Sandoz ed., 2d. ed. 1998).

123 Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), *in* THOMAS JEFFERSON: POLITICAL WRITINGS 224, 224 (Joyce Appleby & Terence Ball eds., 1999).

124 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 27, at 1281.

TABLE 3—BOUNDARY PROVISIONS ON RELIGIOUS FREE EXERCISE[125]

	Protection for Religious Free Exercise	Boundary Provision
Va. 1786 (VSRF)[126]	VSRF: [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.	
N.J. 1776[127]	XVIII. That no person shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience	XIX. [A]ll persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government . . . shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[128]
Del. 1776[129]	*SECT 2. [T]hat no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner controul the Right of Conscience in the Free Exercise of Religious Worship.*	
Pa. 1776[130]	*II. And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.*	

125 TABLE 3 is adapted from one appearing in Muñoz, *supra* note 18, at 14–15 tbl.3.

126 Va. Act. For Establishing Religious Freedom (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 85.

127 N.J. CONST. of 1776, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1313.

128 Whether the limiting provision in Article XIX was meant to apply to the provisions of Article XVIII is not without ambiguity.

129 Del. Decl. of Rights and Fundamental Rules, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 70.

130 PA. CONST. of 1776, Decl. of Rights, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 71.

Md. 1776[131]	*XXXIII. [W]herefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice . . . .*	*XXXIII. [U]nless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights . . . .*
N.C. 1776[132]	XXXIV. [A]ll persons shall be at liberty to exercise their own mode of worship	XXXIV. *Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.
Ga. 1777[133]	ART. LVI. All persons whatever shall have the free exercise of their religion	ART. LVI. [P]rovided it be not repugnant to the peace and safety of the State . . . .
N.Y. 1777[134]	XXXVIII. [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . .	XXXVIII. *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.
Vt. 1777[135]	*III. [N]o authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall in any case, interfere with, or in any manner controul, the rights of conscience, in the free exercise of religious worship . . . .*	
Mass. 1780[136]	*II. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments . . . .*	*II. [P]rovided he doth not disturb the public peace, or obstruct others in their religious worship.*

131 MD. CONST. of 1776, Decl. of Rights, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 70, 71.

132 N.C. CONST. of 1776, *supra* note 101, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 71.

133 GA. CONST. of 1777, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 383.

134 N.Y. Const. of 1777, *reprinted in* 2 CONSTITUTIONS, *supra* note 20, at 1328, 1338.

135 VT. CONST. of 1777, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 31, at 85.

136 MASS. CONST. of 1780, *reprinted in* 1 CONSTITUTIONS, *supra* note 27, at 957.

N.H. 1784[137]	*V. [N]o subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion . . . .*	*V. [P]rovided he doth not disturb the public peace, or disturb others, in their religious worship.*

Italicization indicates that the text appears in a declaration of rights. All other text appears in state constitutions with the exception of Virginia, the text of which is taken from Jefferson's 1786 Statute for Religious Liberty.

The meaning of these boundary provisos has been a matter of significant dispute. Michael McConnell has interpreted them to provide a balancing standard for religious liberty exemptions.[138] Consistent with McConnell's interpretation, Article V of the New Hampshire Bill of Rights should be construed to afford religious citizens exemptions from generally applicable laws in all cases except when an exemption would "disturb the public peace, or disturb others, in their religious worship,"[139] a standard he suggests would, in many cases, favor exemptions.[140]

As I have argued elsewhere, if McConnell's reading were correct and the Founders understood religious liberty primarily to require exemptions from generally applicable laws, we would expect balancing-standard provisos to accompany free exercise text in every relevant Founding-era declaration of rights or constitution.[141] That provisos are not present in the Delaware, Pennsylvania, and Vermont Declarations of Rights, not to mention Jefferson's Virginia Statute, would seem to cast some doubt on the coherence of McConnell's reading.

A more fundamental reason, however, can be given for provisos' presence and absence. They were included to communicate the natural law limits on the natural right of religious free exercise. As discussed above, the Founders did not understand religious liberty (or any other natural right) to be without boundaries. The exercise of natural rights was always understood not to include actions that interfered with the ability of others to exercise their natural rights. Strictly speaking, boundary provisos were not needed, because natural rights are, by nature, bounded. The Founders' understanding of natural rights does not include, under religious free exercise, the liberty to disturb the public peace or act licentiously regardless of whether boundary provisos are textually specified. From the perspective of the Founders' natural rights social compact theory, the boundary provisos were superfluous. This helps to explain why some states included them but other states did not. And it must be remembered that early Founding-era declarations of rights were not simply constitutional law akin to the Federal Constitution's Bill of Rights.[142] One of their primary purposes was to educate the newly independent Americans about their natural rights, including the limits of

137 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 27, at 1281.

138 McConnell, *supra* note 8, at 1461–66.

139 N.H. CONST. of 1784, *reprinted in* 2 CONSTITUTIONS, *supra* note 27, at 1281.

140 McConnell, *supra* note 8, at 1464–66.

141 Muñoz, *supra* note 18, at 13–17.

142 *See supra* notes 19–25 and accompanying text.

those rights. To interpret the boundary provisions as precise rules of constitutional law is to fail to read them in light of their proper historical context.

Conclusion

The argument that I have made can be summarized as follows:

1. The Founders acknowledged and recognized a natural right of religious free exercise as demonstrated in the early Founding-era state declarations of rights.
2. The Founders understood the natural right of religious worship according to conscience to be "unalienable"; therefore, they held that the state lacked sovereign authority over religious exercises as such.
3. The absence of sovereignty over religious exercises as such led the Founders to declare two specific core religious liberty immunities from state power:
   a. No individual could be punished (in the Founders' language, "hurt, molested, or restrained") on account of religious opinions, profession, or observances as such.
   b. No individual could be compelled to embrace, profess, or observe religious beliefs or practices.
4. The absence of state sovereignty over the right to religious worship according to conscience also precludes judicial balancing of this and all other non-alienated elements of the rights of religious liberty.
5. The Founders understood natural rights to have natural limits. An individual's exercise of his natural rights does not extend to interference with other individuals' natural rights.

Religious worship according to conscience understood as a natural "unalienable" right is the foundational political principle that animated the Founders' thinking on matters of church and state. Whatever other disagreements the Founders had about church-state matters—including about the propriety of government funding of religion—they appear to have agreed on the existence of the "unalienable" natural right of worship according to conscience.

The Founders' common understanding of religious freedom is that individuals do not alienate authority over religious worship to the state upon becoming members of the social compact. This, primarily, is how the Founders understood religion to be special. Authority over religious worship is not granted to the state; state actors, accordingly, possess no legitimate authority to prescribe, proscribe, otherwise regulate, or balance against other interests, religious worship as such. For the same reason, state authorities possess no legitimate authority to punish individuals for their lack of religious worship. In the Founders' understanding, the nature of individuals' duty to embrace, profess, and observe religion according to conviction and conscience renders these aspects of our natural liberty inalienable.

I have suggested that the Founders' understanding of the inalienable character of religious worship does not translate into a right of exemption

from general laws but rather mandates a categorical limitation on state sovereignty. The Founders sought to protect religious freedom first and foremost by recognizing fixed and absolute limits on what governing authorities could do with regard to religious worship as such. Religious liberty is special because it places a categorical limit on governmental sovereignty.

One should not assume that the recognition and protection of the inalienable rights of religious worship capture the whole of the framers' political constitutionalism of religious freedom. To mention just one revealing example, the First Federal Congress rejected a right of conscientious exemption from militia service as part of the Bill of Rights. But those who argued against including such a provision as part of a constitutional amendment also suggested that exemptions from mandated militia service might be secured through ordinary legislation. When the First and Second Congresses then debated what would become the Militia Acts of 1792, Congress considered including religion-based exemptions legislatively.[143] Specific recognition and protections for the inalienable natural rights of religious freedom, in other words, were not necessarily understood by the Founders to be the whole of religious freedom.[144]

The inalienable character of the right to worship according to conscience is, however, what makes religion special within the framers' social compact constitutionalism. Our current debate over the extensiveness of exemptions largely fails to account for this element of our first freedom. If, as the Founders often said, the safeguarding of our rights depends on popular understanding of them, our inattention to our inalienable natural right to worship according to conscience may be what most threatens it.

143 Though they were ultimately not adopted, primarily for reasons related to federalism.

144 Muñoz, *supra* note 7 (manuscript at 6, 8).