How the Founders' Natural Law Theory Illuminates the Original Meaning of Free Exercise

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Other Views:

- Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), *available at* https://chicagounbound.uchicago.edu/journal_articles/8713/.
- Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr60&div=38&id=&page=.
- Brief for Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, Fulton v. City of Philadelphia, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144684/20200602142513866_19-123%20CCJ%20tsac.pdf.
- Planned Parenthood v. Casey, 505 U.S. 833 (1992), *available at* https://www.oyez.org/cases/1991/91-744.

In *Fulton v. City of Philadelphia*, the Supreme Court will consider whether Philadelphia's 2018 policy of excluding Catholic Social Services from continued participation in the placement of children in need of foster homes violates the First Amendment of the Constitution.[1] The case raises questions about the meaning of the free exercise of religion.

Catholic Social Services (CSS) is one of more than two dozen private entities that contract with the city to serve children in need. The entities are private contractors who are charged with recruiting and certifying foster homes, which involves engaging in intimate home studies. CSS will do home studies for single parents regardless of sexual orientation. But it will not certify unmarried cohabiting couples of any sexual orientation or same-sex married couples because such arrangements are inconsistent with its religious beliefs concerning marriage and family.

The city has argued that CSS and affiliated foster parents have engaged in invidious discrimination against LGBTQ persons under the "guise of religion." The City of Philadelphia claims that its Fair Practices Ordinance (FPO) forbids any contractor from denying or interfering with public accommodations based on a range of protected characteristics, including sexual orientation. Petitioners reply that CSS is an institution with a two-hundred-year career of serving the city's children in need of foster care, and that the city's actions have harmed children and Catholic foster parents in part by violating of their religious liberty.

I. Free Exercise of Religion and the *Smith* Standard

Petitioners in this case contend that the Supreme Court's 1990 decision in *Employment Division v. Smith* should be overturned, but that they should win even under *Smith*. *Smith* held that the government does not violate the Free Exercise Clause when its laws burden religion, but only if those laws are neutral and generally applicable.[2] A law that singles out religious practice or discriminates among religions is subject to strict scrutiny.[3] Petitioners allege that the city violated *Smith*'s standards of neutrality and general applicability for two main reasons. First, they contend that there is a history of statements by city officials that suggest intentional targeting of CSS for its faith. In *Masterpiece Cakeshop*, the Court held that public statements of animus toward religious persons were evidence of a lack of neutrality.[4] Second, petitioners contend that the city itself does not consistently abide by the FPO, since it sometimes

1 No. 19-123 (U.S. argued Nov. 4, 2020).

2 Employment Division v. Smith, 494 U.S. 872 (1990).

3 *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that city ordinance prohibiting animal sacrifices violated the Free Exercise Clause because there was evidence the city council targeted religious practice).

4 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

discriminates on the basis of disability and race in placing children in foster homes.[5] *Smith* and *Church of Lukumi v. Hialeah* both indicated, and a number of circuit courts have held, that when a policy treats secular and religious conduct differently when they implicate the same governmental interest, or when it grants exemptions for secular but not religious reasons, then it is not generally applicable, and strict scrutiny applies.[6]

Regarding the first contention, petitioners point out that Commissioner Cynthia Figueroa told CSS in a meeting that it "should be following the teachings of Pope Francis rather than the . . . Archbishop of the Diocese," and that "times have changed" and "it's not 100 years ago."[7] In questioning the Archbishop's interpretation of the Catholic Faith and advocating the Pope's allegedly more progressive interpretation of Catholic doctrine, these statements are arguably an example of what James Madison called an "arrogant pretension" to civil competence over religious doctrine.[8] They at least arguably cross the line between civil and ecclesiastical authority, according to the Court's own Establishment Clause precedent.[9] But the city's defense—that Commissioner Figueroa is Catholic and invoked Pope Francis in the spirit of trying to find common ground—is not implausible. Moreover, these statements do not seem to be blatantly disparaging like those made against Jack Phillips in *Masterpiece Cakeshop*.[10]

With regard to general applicability, the city defends its inconsistent exemptions by distinguishing between two stages of the foster parent process: the pool stage, in which they argue no exceptions are granted to its nondiscrimination policy, and the placement stage, in which it sometimes does make exceptions. The latter decisions, the city emphasizes, are for the best interest of the child. Yet this distinction is not persuasive. The reason that the pool stage seeks to identify healthy homes is precisely to ensure the well-being of foster children. The placement stage thus does not introduce a distinct governmental interest. In other words, the constant object of both stages is the best interest of the child.[11] There is no non-arbitrary reason the city refuses to grant a religious exemption to the nondiscrimination rule for religious reasons at the stage concerned with the well-being of children in general when it already does so for secular reasons at the stage concerned with the well-being of children in particular. Both stages concern the same governmental interest, and therefore disparate treatment of religious and secular reasons for exemption from the FPO should trigger strict scrutiny. This inconsistent exemption scheme will likely doom the policy because it requires the application of strict scrutiny under *Smith*, and even if the interest asserted is compelling, the means used are not the least restrictive available.

II. The Debate Over the Original Meaning of the Free Exercise Clause

But is *Smith* sound precedent? If not, should it be overruled? *Fulton* raises these important questions, even as the petitioners argue that they should prevail under current law.

Employment Division v. Smith set off a firestorm and a bipartisan political backlash that led to the passage of the Religious Freedom Restoration Act, which reinstated stronger religious freedom protection. In spite of pressure to reverse course, in *Boerne v. Flores*, the Court upheld *Smith* and struck down the part of RFRA that applied it to the states.[12] In *Boerne*, Justices Sandra Day O'Connor and Antonin Scalia debated the original meaning of the Free Exercise Clause.[13]

Their exchange was another flashpoint in the rich scholarly debate inaugurated by Michael McConnell's landmark essay arguing that the Framers had a "freedom-protective" view of religious liberty that would have required exemptions from generally applicable laws. Philip Hamburger responded in defense of a nonexemption interpretation of free exercise, touching off the debate that continues to the present.[14]

5 Sometimes the city will not place children with parents with disabilities or of a certain race depending on the specific needs or circumstances of the child. Such discrimination may be justified, but petitioners claim it shows that the city is willing to make exceptions to a strict non-discrimination rule if it thinks the reasons are important enough, and that it does not consider religious reasons to be as important as secular reasons.

6 *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), Ward v. Polite, 667 F.3d 727 (6th Cir. 2012). For a discussion, see Brief for The Rutherford Institute as Amicus Curiae Supporting Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144798/20200603150655788_19-123.amicus.Rutherford.final.pdf.

7 Joint App. at 186, 188, 366, *Fulton*, No. 19-123.

8 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in Writings 32 (Jack N. Rakove ed. 1999).

9 As the Court pointed out in *Kedroff v. Saint Nicholas Cathedral*, the First Amendment protects a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). *See also* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012).

10 Still, the remarks suggest at least an implicit bias against traditional Catholic beliefs. Hence, as Philip Hamburger has pointed out, the deeper problem than overt malice toward religion is one of systemic administrative bias against religious persons, in which policies are the product of the determinations of unelected bureaucrats in a rationalist and scientist endeavor, who therefore tend to be indifferent or hostile to and insulated from meaningful input from and accountability to religious minorities. *See* Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144805/20200603151951198_NCLA%20amicus%20brief%20Fulton%20v%20City%20of%20Philadelphia%2019-123.pdf.

11 A point that Justice Thomas suggests in oral argument.

12 521 U.S. 507 (1997).

13 *See id.* at 548 (O'Connor, J., dissenting) (arguing that *Smith* was wrongly decided based on the original understanding of the Free Exercise Clause); *id.* at 537 (Scalia, J., concurring in part) (responding to Justice O'Connor's claim that "historical materials support a result contrary to the one reached in [*Smith*]").

14 *See* Twelfth Annual Rosenkranz Debate & Luncheon, Federalist Society 2019 National Lawyers Convention, *available at* https://fedsoc.org/conferences/2019national-lawyers-convention#agenda-item-twelfth-

Professor McConnell's argument draws a distinction between a narrow Lockean understanding of religious freedom as merely a nondiscrimination principle and a broader understanding of religious liberty that includes a right to exemption from at least some generally applicable laws, even if they only incidentally burden free exercise. In McConnell's view, Thomas Jefferson adopted a version of the Lockean view, which was "extraordinarily restrictive for his day."[15]

In contrast, McConnell argues, the principles Madison articulated in the *Memorial and Remonstrance Against Religious Assessments* are more consonant with the freedom-protective view. Madison's language suggests that religious duty is prior to civil law such that the believer's view of his religious duty determines the scope of constitutionally protected religious freedom that is otherwise in accord with public peace. McConnell argues that Madison's view is the one the Framers in general adopted. He says the "most direct evidence" for this interpretation of original meaning is in the language of state constitutions and bills of rights adopted in the years following 1776, since "it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states."[16]

McConnell recounts that state constitutional provisions protecting free exercise of religion often included a proviso that the protected conduct must be "peaceable," i.e., it must not disturb the peace and safety of the state. According to McConnell, the provisos are "the most revealing and important feature of the state constitutions," since they show free exercise was not confined merely to belief, but also extended to external actions—otherwise the provisos would not have been necessary at all.[17] In short, the state constitutional language guaranteed free exercise, *in spite of* generally applicable laws regulating peaceful conduct.

In his reply to McConnell, Professor Hamburger argues that the nonexemption view is actually the original public meaning of the Free Exercise Clause. Hamburger disputes McConnell's reading of key individual Founders like Madison who, on Hamburger's view, affirmed a nonexemption approach. And he maintains that the provisos actually implied there was no free exercise right to exemption. Hamburger argues that this is the case because the provisos did not limit the *extent* of free exercise but its *availability*. In other words, for Hamburger, the state constitutional language guaranteed free exercise *provided citizens obeyed generally applicable laws*. For Hamburger, the class of actions that would count as non-peaceful was much broader than McConnell lets on; he maintains that for the Founders "every breach of law is against peace."[18] In subsequent discussion, scholars have staked out positions along the spectrum between McConnell's freedom-protective and Hamburger's nonexemption positions.[19]

In one recent contribution to the debate, Professor John C. Eastman suggests that the McConnell-Hamburger debate looked in the wrong place for evidence of original public meaning. Instead of looking to state constitutional language, originalists should look to the language of *state ratifying convention proposals* for amendments to the federal Constitution. None of those proposals, Eastman points out, came with public peace provisos. For example, New York proposed "That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience."[20] From the lack of any proviso in the language in this and most other state proposals, Eastman infers that the federal right to free exercise is an "unqualified" right.[21]

III. Another Look at the Historical Meaning of Free Exercise

A. How the Founders' Natural Law Theory Informs the Meaning of Free Exercise

The *Fulton* petitioners' call for revisiting *Smith* is welcome because the Court in that case didn't inquire into the original meaning of the Free Exercise Clause. While a comprehensive inquiry into original meaning cannot be attempted here, the Free Exercise Clause discussion can be illuminated by placing it in the larger context of the Founders' natural law theory. As is evident in the Declaration of Independence and across the Founders' writings, natural rights were grounded in the "Laws of Nature," that is, the natural law.[22] As James Wilson put it, "Order, proportion, and fitness pervade the universe. Around

annual-rosenkranz-debate-luncheon (debate between Profs. McConnell and Hamburger over whether "The Free Exercise Clause guarantees a constitutional right of religious exemption from general laws when such an exemption would not endanger public peace and good order.").

15 Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1452 (1990), *available at* https://chicagounbound.uchicago.edu/journal_articles/8713/.

16 *Id.* at 1456.

17 *Id.* at 1462.

18 Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 918 (1992), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr60&div=38&id=&page=.

19 For scholarly critiques of *Smith* in the spirit of McConnell's work, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 16; John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment (2016); Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, The Public Discourse, *available at* https://www.thepublicdiscourse.com/2015/04/14844/. For scholarly arguments in the spirit of Hamburger, see Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 American Pol. Sci. Rev. 369, 374 (2016).

20 The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 12 (Neil H. Cogan ed. 1997).

21 *See* Brief for Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners, *Fulton*, No. 19-123 (June 3, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144684/20200602142513866_19-123%20CCJ%20tsac.pdf.

22 For a discussion of Jefferson's theistic natural law theory, see generally Kody W. Cooper & Justin B. Dyer, *Thomas Jefferson, Nature's God, and the Theological Foundations of Natural-Rights Republicanism*, 10 Politics & Religion 662 (2017).

us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made."[23] This order, proceeding from God and known by human reason, is the natural law, and it is the transcendent criterion of the moral validity of all human laws. As Alexander Hamilton put it, "the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensibly, obligatory upon all mankind, prior to any human institution whatever."[24]

For the Founders, the content of natural law, manifest in the consciences of persons with a functioning power of reason, consisted of a set of natural duties. These included the duty of self-preservation, the duty of maintenance and care of one's household and family (and therefore the right to acquire and possess property, the reciprocal rights and duties between spouses, parents and children, etc.), duties connected to social peace related to not injuring or offending one's fellows, and spiritual duties to pursue truth and to honor God.[25]

Some scholars claim that the Founders derived duties from rights. They argue that the Founders assumed, in the spirit of Thomas Hobbes, that in a state of nature persons have natural rights prior to any obligations, and that obligations are the mere creation of the social contract.[26] Such narratives have the story exactly backwards. The Founders believed the natural right to free exercise of religion was grounded in the natural duties connected to the good of religion. Madison wrote that religion is antecedent to civil law; it is "the duty which we owe to our Creator and the manner of discharging it."[27] For Madison, the rights of conscience that the civil authority was bound to respect flowed from a prior duty to God that transcended civil competence and the fundamental equality of persons as natural rights-bearers. This prior duty grounded a fundamental feature of religious freedom: the equal right of every person to worship according to the dictates of his or her own conscience. In his letter to the Danbury Baptists, Jefferson also tethered the meaning of the right to free exercise to moral duty:

> Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[28]

Jefferson harbored heterodox views of Christianity and shared Enlightenment skepticism of divine revelation; Wilson held more recognizably orthodox Christian beliefs; Madison and Hamilton were somewhere in between. Yet they all expressed principles consonant with classical Christian natural law theory, namely, that natural rights are tethered to the moral law and teleologically oriented toward genuine human flourishing.

The Founders would therefore have rejected liberal neutrality and indifferentist understandings of the good life. But they also denied to the civil authority—both federal and state—competence to coerce citizens to accept its judgment as to the content and meaning of revelation. They believed religion was essential to the public good in a constitutional republic. Even the more disestablishmentarian Jefferson rhetorically asked, "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"[29] Jefferson, Madison, and their allies among religious dissenters like the Baptists insisted that state establishments were actually corruptive of religion. On the other hand, various Founders espoused a civic republican argument that the state had a role in supporting religion for its utilitarian value in promoting virtue. But even defenders of a plural establishment like Patrick Henry would have maintained that church and state were institutionally and functionally separate and that the maintenance of religious exercise was primarily the purview of civil society. Moreover, virtually no Founders wanted a *national* religious establishment.

Hence, most Founders agreed on a common set of principles: liberty of conscience, or the freedom of belief; free exercise, or the right to put those beliefs into practice; religious equality, or nondiscrimination; institutional separation of church and state; and disestablishment at the federal level.[30] George Washington spoke for most Founders when he said he saw these principles as compatible with government encouragement and support for religion. As he put it in his Farewell Address,

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of

23 1 Collected Works of James Wilson 464 (Kermit L. Hall & Mark David Hall eds. 2007).

24 Alexander Hamilton, *The Farmer Refuted &c.* (Feb. 23, 1775), Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-01-02-0057.

25 For an able scholarly discussion of the Founders' natural law theory, see Thomas G. West, The Political Theory of the American Founding (2017).

26 *See, e.g.*, Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 Sup. Ct. Rev. 49 (1982). In addition to my critique of this view of the Founders, I also challenge this reading of Hobbes in Kody W. Cooper, Thomas Hobbes and the Natural Law (2018).

27 Madison, *supra* note 8, at 30.

28 Thomas Jefferson, *Letter to the Danbury Baptist Association* 258 in 36 The Papers of Thomas Jefferson (Barbara B. Oberg ed. 2009).

29 Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII.

30 *See* Witte and Nichols, *supra* note 19, at 41-63.

> refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[31]

While Washington and John Adams were more willing than Jefferson to support religion through things like presidential proclamations of days of prayer, they were all in agreement that free exercise of religion was harmonious with the performance of one's social duties, like truth telling in courts of law.

Washington explicitly underspecified the good and natural duty of "religion" for both principled and pragmatic reasons. Not only was this position a deduction from natural law and natural rights philosophy, but it was also a recognition that the United States was in fact marked by a pluralism of publicly reasonable religious practices. The principles of liberty of conscience, nondiscrimination, institutional separation, federal disestablishment, and de facto pluralism provided the conditions for robust free exercise as well as social peace and civic unity. It made possible civic friendship among Protestant sects and even between Protestants and non-Protestants.[32]

The upshot is that the Founding understanding of the free exercise of religion was rooted in the precepts of natural law. The Founders understood positive law to be grounded in the natural moral law, which included natural duties to God. Accordingly, the North Carolina state ratifying convention echoed Madison's language: the manner of discharging the natural duty of religion was to be directed by "reason and conviction" rather than "force or violence."[33] The language of reason and conviction is important—it suggests both an objective and subjective component that are not without some tension. Subjectively, religion must be an individual's own conscientious conviction. Objectively, reasonable pursuits of religion will abide by the precepts of natural law.

The immediate legal deductions from the dictates of natural law, such as criminal laws proscribing murder, theft, slander, and the like, were essential to the protection of natural rights and would set the standard of reasonable conduct that diverse religious practitioners would be expected to adhere to. In the same way, the positive law translated natural rights into the civil rights of persons and citizens. As Thomas G. West puts it, for the Founders, securing protection against "intentional injuries to life, liberty, and property" was the "government's single most important domestic policy."[34] In other words, civil enactments reflective of the first precepts of natural law, and their enforcement, were the essential constituents of peace and good order. Accordingly, James Wilson, echoing Anglican theologian Richard Hooker, held that the natural law is the "mother of . . . peace."[35]

As Wilson explains further, it isn't sufficient for the natural law to be promulgated by God to the consciences of men and women. The natural law must be translated into positive law with credible authoritative threats of sanction for their breach, because of the ineradicable spark of passion and therefore dangerous potential in man for evil:

> Without laws, what would be the state of society? The more ingenious and artful the twolegged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life: he would become a prey to all the distractions of licentiousness and war.[36]

Wilson intimates here what Madison memorably stated: men are not angels. The Founders thus accepted the axiom from classical Christian philosophy that human beings are dangerous animals insofar as their unruly passions are ungoverned by reason (a disorder in the powers of the soul that the scholastics sometimes referred to under the general term "concupiscence"). Laws rooted in natural law and combined with credible threats of sanction for noncompliance are therefore the necessary supports of public peace and the antidote to licentiousness and war.

In this light, consider the proviso of the New York Constitution of 1777 (South Carolina's 1790 Constitution used similar language):

> free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *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.[37]

"Licentiousness" referred to disordered acts of will. In Shakespeare, for example, the licentious man makes his own will the "scope of

31 George Washington, *Farewell Address, 19 September 1796*, Founders Online, National Archives, https://founders.archives.gov/documents/Washington/99-01-02-00963.

32 As Pope Leo XIII recounted a century later:

> [A]t the very time when the popular suffrage placed the great Washington at the helm of the Republic, the first bishop was set by apostolic authority over the American Church. The well-known friendship and familiar intercourse which subsisted between these two men seems to be an evidence that the United States ought to be conjoined in concord and amity with the Catholic Church. And not without cause; for without morality the State cannot endure—a truth which that illustrious citizen of yours, whom We have just mentioned, with a keenness of insight worthy of his genius and statesmanship perceived and proclaimed.

Longinqua, Encyclical of Pope Leo XIII On Catholicism In The United States (1895), *available at* http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_06011895_longinqua.html. How could the Pope suggest that the American experiment sought to create interreligious civic amity in an overwhelmingly Protestant country with a dark history of discrimination against Catholics? It was because he perceived that the Founders tethered the principles already outlined and the underspecified conception of good of religion to "morality," i.e., the moral law, without which, as in the Catholic natural law tradition, Americans believed "the State cannot endure." *Id.*

33 The Complete Bill of Rights, *supra* note 20, at 12.

34 West, *supra* note 25, at 151.

35 Collected Works of James Wilson, *supra* note 23, at 465.

36 *Id.* at 505; *cf. id.* at 690, 704.

37 The Complete Bill of Rights, *supra* note 20, at 26.

justice."[38] Similarly, Locke distinguished between liberty, which was a condition of enjoyment of all of one's natural rights within the bounds of the moral law, and license, which equated liberty with power and which the Founders associated with Hobbes.[39] For the Founders, acts of licentiousness were behaviors flowing from unruly passions as opposed to "sober reason."[40] "Licentiousness" thus often referred to overt violations of precepts of natural law in disturbance of the peace, as distinct from acts of ordered liberty. The term included a range of behaviors, such as rioting,[41] theft,[42] slander and libel,[43] trespasses of frontiersmen on people of other nations,[44] movements to break up states and form new ones,[45] and resistance to paying taxes on whiskey,[46] to name just some.[47] Blackstone included sexual activity outside of man-woman wedlock as a form of licentiousness.[48]

With regard to the latter, the Founders saw the man-woman union of marriage as of a piece with their natural law philosophy. In John Witherspoon's words, marriage is "part of natural law" and "holds a place of first importance in the social compact."[49] Hence it was commonplace for the law to sanction behaviors destructive of marriage, like adultery. In New York, adultery was grounds for divorce, but New York sought to deter it by making it unlawful for the adulterer to remarry. There was opposition to this law—but notably the opponents made their protest *in the name of chastity*, believing that, by punishing adulterers in this way, they would simply flout the marriage norm and engage in open licentiousness with a "pernicious influence on public morals."[50]

Given that they grounded religious freedom in the duties that arose from natural law, the Founders rejected out of hand any notion that religious freedom could become a shield for exemption from laws regulating licentious conduct or laws promoting virtue. If that happened, the natural right to religious freedom would then become twisted in subversion of the very precepts of natural law it was grounded upon.

This does not mean that the Founders were averse to any religious accommodations or exemptions. But those exemptions were granted for behaviors that did not contravene fundamental moral norms, or they were granted in a way that avoided subversion of the moral norm. Take for instance Washington's example of the religious duty undergirding oaths to tell the truth in courts of law. The underlying moral norm here is the requirement to tell the truth, and the governmental has a compelling interest in sanctioning false testimony. Quakers often sought exemptions from oath-swearing based on their interpretation of Christ's words on the subject, and indeed they were granted an exemption in Carolina in 1669. But the accommodation didn't relieve them of the duty of truth telling in courts of law. Rather, they were "allowed to enter pledges in a book in lieu of swearing."[51] The Founders incorporated this reasonable accommodation into the Constitution itself for such conscientious objections—without forswearing the need to foster loyalty to the constitutional order—by allowing elected officials to bind themselves to uphold it "by Oath or Affirmation."[52]

The example of exemptions from military service confirms the point. Washington addressed the Quakers' desire for exemption from military service:

> The liberty enjoyed by the People of these States, of worshipping Almighty God agreable [sic] to their Consciences, is not only among the choicest of their *Blessings,* but also of their *Rights*—While men perform their social Duties faithfully, they do all that Society or the State can with propriety demand or expect; and remain responsible only to their Maker for the Religion or modes of faith which they may prefer or profess.
>
> Your principles & conduct are well known to me—and it is doing the People called Quakers no more than Justice to say, that (except their declining to share with others the burthen of the common defence) there is no Denomination among us who are more exemplary and useful Citizens.[53]

38 William Shakespeare, Timon of Athens act 5, sc. IV.

39 John Locke, *Two Treatises of Government*, Second Treatise, Ch. 2, § 6; *cf.* Hamilton, *The Farmer Refuted*, *supra* note 24.

40 Hamilton, *The Farmer Refuted*, *supra* note 24, at n.2.

41 *Pennsylvania Assembly: Reply to the Governor* (Feb. 11, 1764), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Franklin/01-11-02-0013.

42 *To George Washington from Major General Philip Schuyler* (Aug. 29, 1776), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Washington/03-06-02-0134.

43 *From John Jay to Silas Deane* (Dec. 5, 1781), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Jay/01-02-02-0275.

44 *From James Madison to Richard Henry Lee* (Nov. 14, 1784), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Madison/01-09-02-0241.

45 *Abigail Adams to Thomas Jefferson* (Nov. 24, 1785), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Adams/04-06-02-0151.

46 *From John Adams to George Washington* (Nov. 22, 1794), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Adams/99-02-02-1598.

47 Some forms of conduct identified as licentious were more controversial. For example, some believed that the "African slave trade" was a form of licentiousness. *See An Address from the Quakers to George Washington, the Senate, and the House of Representatives in* 4 The Papers of George Washington, Presidential Series 265–269 n.1 (Dorothy Twohig ed. 1993).

48 1 William Blackstone, Commentaries *438.

49 John Witherspoon, *Queries, and Answers Thereto, Respecting Marriage*, *in* 4 The American Museum, or Repository 315-16 (1788) (quoted in West, *supra* note 25, at 222).

50 *New York Assembly. Remarks on an Act Directing a Mode of Trial and Allowing of Divorces in Cases of Adultery* (Mar. 28, 1787), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Hamilton/01-04-02-0066.

51 Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 56 (1987).

52 U.S. Const., art VI.

53 *From George Washington to the Society of Quakers* (Oct. 13, 1789), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Washington/05-04-02-0188.

Clearly, Washington understood the natural right of free exercise of religion to be in essential harmony with the moral norm that all citizens must contribute their share to the common defense. As New York's constitution put the moral norm, "it is the Duty of every Man who enjoys the Protection of Society to be prepared and willing to defend it."[54] When state legislatures faced the reality that some conscientious objectors would rather die than fight, they sometimes accommodated them with an exemption. But they accommodated them in a way that still required the exempted to shoulder a share of the burden of common defense through an alternative means. Hence, New Hampshire's Constitution provided, "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent."[55]

B. Implications of the Founders' Theory for the Modern Free Exercise Debate

From this evidence, we can draw the initial conclusion that Hamburger's nonexemption view is close to the mark insofar as it recognizes that the liberty of conscience protected by the Free Exercise Clause was not a license to make one's own will the standard of justice.

Eastman's suggestion that the language of the First Amendment reflects the "unqualified" state ratifying convention proposals and entails a free exercise right to be "free from government influence" is thus potentially misleading.[56] In light of the evidence presented so far, it seems unlikely that religious liberty was understood by the state ratifying conventions to be *unqualified* at the federal level, if that means untethered from the moral law. More likely, the unqualified language of the Free Exercise Clause was to be read in connection with the Establishment Clause. In the House debate over the language of the clauses, Madison said he "apprehended the meaning of the words to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[57] If Madison was correct and the joint aim of the religion clauses was principally an unqualified proscription of the legal establishment of a national church, it would make sense for the language of the Free Exercise Clause to be unqualified, and yet this would not indicate that individuals have a general free exercise right to be free from government interference.[58] Moreover, Eastman's account suggests that Congress's police power over federal territories was limited by an unqualified individual right to free exercise, which is incompatible with the Founders' understanding of religious liberty as grounded in natural law.

On the other hand, the foregoing account of free exercise as grounded in natural law indicates that the freedom-protective view is correct insofar as it recognizes that the "scope of religious liberty is defined by religious duty."[59] But how broad is the scope of religious duty for the Founders? *At a minimum* it includes the following: First, freedom of conscience and the right to exercise one's individual convictions in the action of worship. Second, the right to act on religious reasons when carrying out one's natural moral obligations (which can ground or color the exercise of one's other civil liberties, such as speaking or publishing freely about the religious reasons for one's political convictions). Third, the right to put into action one's individual convictions about one's religious duties; this right *may* trump civil law in matters on which the natural law is indifferent, e.g., matters of *determinatio* and/or *mala prohibita*.[60] While more could be said about the scope of religious duty, it is impossible to define that scope with precision because the good of religion—and therefore the scope of religious duty—is underspecified. Matters of *determinatio*, in which legislative prudence is called for and religious exemptions may be appropriate, inhabit a sphere that is similarly underspecified.

This account is open on the question of the constitutionality and prudence of the proper *locus* for religious exemption claims: legislatures or courts. But judicially crafted exemptions are at least not antithetical to original meaning.[61] Moreover, it is well known that the modern policymaking process is increasingly removed from the give and take of democratic politics that the Founders envisioned, and placed in the hands of an insulated bureaucratic and administrative elite. An originalist approach, therefore, might be supple enough to permit judicial exemptions to meet current challenges presented by the fact that religious minorities have a more difficult time influencing policymaking.

The Founders' view can be further illuminated by what it is *not*. As Phillip Muñoz has persuasively argued, however broad the Founders' approach to the scope of religious freedom was, it is *not* that offered by recent advocates of what he calls "autonomy exemptionism." This Rawlsian approach—given expression by both secular and religious philosophers including Martha Nussbaum and Charles Taylor—untethers free exercise from religious duty and reduces it to subjective self-expression and authenticity. As Muñoz points out, this approach inverts the teleological, God-directed religious freedom of the Founders into anthropocentric freedom to find one's own meaning as an autonomous being.[62]

54 The Complete Bill of Rights, *supra* note 20, at 183.

55 *Id.*

56 *See* Brief for Center for Constitutional Jurisprudence as Amicus Curiae, *supra* note 21.

57 *Id.* at 60.

58 For an argument that the Establishment Clause was originally understood principally as forbidding the establishment of a national church, *see* Donald L. Drakeman, Church, State, and Original Intent (2009).

59 McConnell, *supra* note 15, at 1453.

60 As Thomas Aquinas teaches, the positive law is grounded in the natural law in two ways: by deduction and by determination. That murder is a felony is a deduction from the moral precept forbidding murder. But how should murderers be punished? This is a question that admits of a range of legitimate answers within the scope of prudence, i.e., the field of *determinatio*. Within this sphere of human activity, the law can create *mala prohibita*, i.e., render behavior that is intrinsically indifferent (like driving on the left side of the road) criminal just in virtue of the law.

61 *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55 (2020).

62 Muñoz, *supra* note 19.

Radical autonomous individualism was given jurisprudential expression in *Planned Parenthood v. Casey* in Justice Anthony Kennedy's famous line: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[63] The autonomous-individualist account of liberty of conscience radically expands the freedom of conscience beyond duties toward God to the more amorphous quest for meaning and dignity, untethered from the natural moral law and what the Founders would have considered religion, even under its broadest definition. In this way, the autonomous-individualist account of liberty effectively erases the distinctiveness of *religious* liberty that the Founders saw fit to set apart for special protection in the First Amendment. On this view, religious exercise has no more claim to special solicitude than any other conscientious practices framed under a practically reasonable pursuit of a plan of life. As this view of liberty spreads, the traditional religious person's lifestyle becomes more marginal, and selective indifference toward traditional religion on the part of civil authorities becomes more likely. Hence, during the COVID-19 pandemic, several jurisdictions treated religious gatherings as less important than gatherings to produce television and film, and churches as less essential than liquor stores and cannabis dispensaries.[64]

According to philosophers and jurists who subscribe to autonomous individualism, the state should foster the autonomous search for authentic meaning by providing what political philosopher John Rawls called the "social bases of self-respect."[65] Rawls ranked self-respect—the sense of one's own value and the worthiness of one's plan of life—as a crucially important good. Hence, self-esteem or the "lively sense" of one's worth as a person becomes an urgent priority of the liberal state.[66] The autonomous self then demands to be shielded from laws restrictive of those autonomous pursuits of self-discovery or self-creation. Failure to provide such exemptions or strike down such restrictions becomes an affront to the self-respect—the very dignity—of persons. This is one way to understand Justice Kennedy's gay rights jurisprudence, in which the threat of traditional morals legislation to the dignity of homosexuals is thematic.[67] If this account is correct, it goes some way in explaining the rise of zero-sum conflicts between religious traditionalist claims to free exercise rights and LGBTQ claims to a right to be free from dignitary harms.

In sum, the original understanding of free exercise of religion is narrower than some exemptionists claim insofar as subjective claims of religious liberty were thought to be cabined by objective moral law. On the other hand, it is broader than some nonexemptionists claim because religious duties were also grounded in the moral law in a way that civil authority must respect, since its own authority derives from that same moral law. Hence, on an originalist view, a key question in the *Fulton* case is not particularly difficult to answer. The free exercise of religion at least includes the freedom to believe, as the Founding generation did, that marriage is a man-woman union, that it is optimal for children to be raised by a mother and a father, that love of God and neighbor requires one to provide needy children with homes informed by these ideals, and that civil authorities act unjustly when they prohibit individuals and institutions from acting on these beliefs.

We should not dismiss Justice Scalia's worry in *Smith* that an exemptionist approach risks courting anarchy inasmuch as it risks permitting citizens to cloak their unlawful conduct in the garb of religious motivation or meaning. This worry is sharpened in a time in which Americans disagree about the most basic questions of existence and morality. But when the law reflects that moral dissensus about conduct by permitting individuals to choose whether to engage in the conduct, that does not necessarily trigger conflicts in which religious freedom is at stake. Justice Scalia's worries about the unworkability of greater judicial scrutiny have arguably proven to be exaggerated in RFRA cases. Moreover, there are good reasons to think that robust religious accommodation is a good idea when LGBTQ antidiscrimination rules conflict with religious traditionalists' exercise of traditional moral duties.

IV. Religious Accommodation and Social Peace

By way of conclusion, I argue that a ruling for the petitioners in *Fulton* would help foster social peace.[68] Today, this country is much more religiously diverse than it was at the Founding. While Christian affiliation has been on the decline for several years, about two-thirds of the country still identify as Christian (Protestants roughly double Catholics). The percentage of those who identify as "nothing in particular" has increased in recent years to 17%. The next largest groups include Agnostic (5%) and Atheist (4%). The smallest groups include 2% who identify as Jewish, 1% Muslim, 1% Buddhist, 1% Hindu, and 3% Other.[69] It is a testament to the American experiment in religious toleration that such a religiously diverse polity has endured so long. It is also apparent that religious affiliation is *not* what most deeply cleaves American culture. Neither is the divide primarily between the religious and the irreligious since less than 10% of the country identifies as agnostic or atheist (those who do not identify with a traditional religious sect are not necessarily irreligious).

63 505 U.S. 833, 851 (1992).

64 The Court recently granted partial injunctive relief to churches in California claiming that its COVID-19 lockdown amounted to unconstitutional disparate treatment. *See* South Bay United Pentecostal Church et al. v. Newsom, 592 U.S. __ (2021), *available at* https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf.

65 John Rawls, A Theory of Justice 62 (1971).

66 John Rawls, Justice as Fairness: A Restatement 59 (Erin Kelly ed. 2001).

67 *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); U.S. v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

68 On this point, I agree with Douglas Laycock, who makes a similar argument in Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners, *Fulton*, No. 19-123, *available at* https://www.supremecourt.gov/DocketPDF/19/19-123/144811/20200603161528534_19-123%20Christian%20Legal%20Socy%20Brief.pdf.

69 *In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Research Center (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

Rather, as James Davison Hunter pointed out many years ago, the more salient cultural divide cuts across religious and secular lines: between the Orthodox and the Progressive. The Orthodox see morality as anchored in transcendent, fixed, and unchanging principles and attached to an external authority. In contrast, both nonreligious and religious Progressives see morality as unfolding through the flow of history and defined by a spirit of rationalism and subjectivism (and therefore religious Progressives believe sacred texts should be reinterpreted as moral understanding progresses). This fundamental metaphysical-moral divide over first principles continues to play out in our culture wars.[70]

Recent political science research suggests that the ideological identities of conservative and liberal (which correspond more or less to Orthodox and Progressive views of morality)—as well as a range of identities like race, ethnicity, gender, and even geography—have increasingly sorted along the lines of *political party*. Such polarization makes our party system very different from previous party systems, in which political coalitions were much more socially heterogenous. It also means that partisanship is now, in the words of political scientist Lilliana Mason, a "mega-identity," such that a single vote can be a signaling device for all the identities encompassed under it.[71]

When one combines this sort of social sorting with the psychological tendencies and pathologies associated with in-group and out-group dynamics, it is a recipe for political dysfunction, gridlock, and the decline of social and political stability. When these identities are increasingly lumped together and segregated, the rival team's mega-identity is more and more perceived as antithetical to one's own. One sign of this, as documented by Alan Abramovitz and Steven Webster, is the drastic increase in negative partisanship in recent decades. They look at data that asks voters to rank the opposite political party based on a "feelings thermometer"—1 being cold/negative and 100 being warm/positive. In 1980, respondents rated voters for the opposite party a 45; by 2016, that number had dropped to 29.[72] In other words, voters are more motivated by fear, resentment, and even hatred of the opposite political party than by love of their own.[73]

In such a state of affairs, it is no surprise that when one perceives a personal or institutional social signaling of any one identity associated with the rival mega-identity, it can trigger the perception of a threat to one's entire identity. Hence, our polarized party system exacerbates perceptions of dignitary harm in cases like *Fulton*, even when there is no such intention of animus or hatred, nor even an identity (Roman Catholic, gay) that can in reality be subsumed under a party label. As Professor Andrew Koppelman explains, baseline assumptions of invidious motives are spurious: "Many on each side think that their counterparts are evil and motivated by irrational hatred—either hatred of gay people or hatred of conservative Christians. That is . . . dangerous and false."[74] Just so, in the facts of the *Fulton* case we have seen no evidence of such motives. CSS will conduct home studies for anyone regardless of sexual orientation. It will not conduct home studies for persons living contrary to its conception of marriage, including cohabiting opposite-sex couples and same-sex married couples. Because CSS's actions do not intentionally discriminate against gay persons *just because* of their sexual orientation, it cannot be claimed that they are driven by irrational hatred toward LGBTQ persons. Such actions *would* be unjust, but CSS is acting from a bona fide belief about the nature and meaning of marriage over which Americans continue to have deep disagreement.

One could argue that an originalist attempt to discern whether the Free Exercise Clause includes a right to religious exemption (legislative, judicial, or otherwise) from neutral and generally applicable laws is a nonstarter in such a state of affairs. On this view, the Founders' vision simply could not foresee the degree of religious pluralism that characterizes our polity today. In my view, the Founders indeed would see the metaphysical and moral dissensus that marks the polity today as a radical challenge—but they would see it as a challenge which could be addressed in part through robust religious accommodation.

In *Federalist* 10, Madison famously argued that a free republic could not, consistent with its commitment to liberty, coerce its citizenry to adopt "the same opinions, the same passions, the same interests."[75] Such an endeavor would run up against human nature. Given the imperfection of the human intellect, as well as human concupiscence and therefore the tendency to disordered self-love—not to mention different natural gifts that naturally lead to differentiation in wealth—Americans would be marked by a diversity of opinion. Hence, Madison believed that a modern republic could flourish with some degree of dissensus.

Yet in the 1790s, Madison came to embrace the nascent Democratic-Republican party as an engine for the cultivation of greater civic unity. Madison argued that it would be desirable that "a consolidation should prevail in [the] interests and affections [of the people]." He outlined the benefits to civic health that would ensue: with greater mutual affection, political differences would be attended with more moderation, presidential elections would be less acrimonious, and the people would be able to come together to jealously guard the "public liberty."[76] One way of reading the evidence is that the Madison of the 1790s was essentially different than the Madison of 1788. But there is another possibility: perhaps Madison always believed that a healthy pluralism of lifestyle, opinion, and interest *presupposed* a more basic metaphysical-moral unity in common affirmation of the Declaration's principles of natural law and natural rights.

70 James Davison Hunter, Culture Wars 44 (1992). For a recent discussion, see Jason Willick, *The Man Who Discovered 'Culture Wars'*, Wall St. J., May 25, 2018, https://www.wsj.com/articles/the-man-who-discovered-culture-wars-1527286035.

71 Lilliana Mason, Uncivil Agreement: How Politics Became Our Identity (2018); *see also* Ezra Klein, Why We're Polarized (2020).

72 As quoted in Klein, *supra* note 71, at Ch. 1.

73 *See also* Brief for Christian Legal Society et al., *supra* note 68, at 15-19.

74 Andrew Koppelman, Gay Rights v. Religious Liberty? The Unnecessary Conflict 2 (2020).

75 The Federalist No. 10 (James Madison).

76 James Madison, *Consolidation*, Nat'l Gazette (Dec. 3, 1791), Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Madison/01-14-02-0122.

If correct, then today's culture wars, rooted in metaphysical-moral dissensus, constitute a radical challenge to Madisonian constitutionalism.

One Madisonian solution to this problem would be a reinvigoration of federalism. The argument goes that, in our polarized era, returning greater authority to states and localities to pursue their respective visions of justice and the common good would de-escalate the stakes of national politics and thereby help facilitate social peace. An argument in this spirit is often made for overturning *Roe v. Wade* and its progeny. On this view, by constitutionalizing a particular solution to the divisive and difficult moral and political question of abortion, the Court exacerbated social and political discord that could be better diffused through the give and take of legislative debate and compromise.

There is much to recommend this argument. But there is an important difference between the case of abortion and the case of religious liberty. There is no evidence that the 14th Amendment was originally understood to establish a substantive due process right to contract abortions against state police powers.[77] On the other hand, there is substantial evidence that the right to free exercise of religion was understood to be a limitation on the federal government, and on the states after it was incorporated through the 14th Amendment.[78] In the former case, the most that could be plausibly said for the abortion-rights advocate, apart from Court-created precedents and the reliance interests they created, is that the Constitution is silent on abortion and therefore permits states to proscribe or permit it as the people of each state see fit.[79] In the latter case, the antidiscrimination advocate cannot claim that the Constitution is silent about the substantive right to free exercise of religion as a reason for broad judicial deference to states and localities when they infringe upon free exercise rights under the banner of antidiscrimination.

The constitutionalization of abortion rights has arguably poisoned our national politics precisely because many citizens and scholars (including many prochoice liberals) found it preposterous that the elaborate legislative prescriptions of the *Roe* and *Casey* Courts were "a common mandate rooted in the Constitution."[80] On the other hand, the tradition of the prime importance of religious free exercise and toleration in the United States is historically undeniable. The *Fulton* case is an example of how modern bureaucrats sometimes evince chronological snobbery or even outright historical ignorance about the robust role and protection of religion in public life afforded by our Constitution. This case therefore is an opportunity for the Court to perform a bit of civic education. The Court should make it clear that, as long as the Constitution remains our fundamental law, religious reasons for action are protected by the First Amendment because such protection is *actually mandated* by the text, logic, structure, and historical understanding of the Constitution.

Constitutionalizing a robust religious free exercise accommodation in this case could go some way in making clear that traditional religious persons cannot be treated as second-class citizens in places in which they are a political minority through policies that create or reinforce the perception that they are mere factious partisans hellbent on imposing their invidious bigotry under the "guise of religion," as Philadelphia suggested of CSS. On the other hand, such an accommodation would not result in LGBTQ persons experiencing discrimination in accessing goods, services, and other public accommodations; such discrimination is qualitatively different from merely encountering a civic group that declines to publicly and formally affirm conduct to which it conscientiously objects.

In short, accommodations in this area could go some way toward, in Koppelman's words, "end[ing] this war."[81] Such arrangements could then begin to foster Madison's vision of increased mutual affection and amicability between LGBTQ persons and religious traditionalists in that each could mutually recognize the interests they do share, including a principled moral consensus on natural rights, protected by the constitutionally-enshrined negative liberties to live out their lives unmolested by the state. It would not be a panacea, of course. For many people, the Constitution's commitment to limited government will always remain an obstacle to social justice. To others, the fears and resentments are already deeply entrenched. Still others will continue to find it in their partisan interests to stoke these passions. And undoubtedly, political partisans would attack such a decision as itself politicized. But the law is a tutor, and in the long run, it may help de-escalate social conflict in this area by lessening the fear and resentment that are rending the polity.

77 *See* Justin Dyer, Slavery, Abortion, and the Politics of Constitutional Meaning (2013).

78 Although incorporation is usually considered take place via the Due Process Clause of the 14th Amendment, many scholars and jurists think the Privileges or Immunities Clause is the proper vehicle for incorporation. For a powerful argument that the Privileges or Immunities Clause is the proper vehicle of incorporation, see Justice Thomas's concurrence in *McDonald v. Chicago,* 561 U.S. 742 (2010).

79 I say this is the *most* that could be said because an argument can be made that permissive abortion laws actually violate the Equal Protection Clause. For an argument along these lines, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 Notre Dame L. Rev. 329, 342-46 (1993).

80 *Casey*, 505 U.S. 833. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973); Lucas A. Powe, The Supreme Court and the American Elite 278 (2009).

81 Koppelman, *supra* note 74, at 3.