NATURAL RIGHTS, NATURAL RELIGION, AND THE FREE EXERCISE CLAUSE: AN ESSAY FOR MICHAEL KENT CURTIS

Steven J. Heyman[*]

In path-breaking works of constitutional history, Michael Kent Curtis has explored the ways that natural rights theory provided a foundation for the First Amendment freedoms of speech and press and the Fourteenth Amendment rights of American citizenship. In this Essay, I show that the Free Exercise Clause also was deeply influenced by natural rights theory, as well as by the closely related ideas of natural law and natural religion. Eighteenth-century Americans held that religion was rooted in reason. It followed that individuals had an inalienable right to use their own minds to form religious beliefs and to worship in accord with them. But the same natural law that protected religious liberty also enjoined individuals to respect the rights of others. After sketching this founding-era history, I discuss its implications for how we should approach the issue that arises in cases like Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission *(2018). I argue that, as a general rule, the right to religious liberty should not be interpreted to mandate exemptions from general laws that are intended to protect the civil rights of other people, such as same-sex couples who seek goods and services in places of public accommodation.*

TABLE OF CONTENTS

* Professor of Law, Chicago-Kent College of Law, Illinois Tech. A.B. 1979, J.D. 1984, Harvard. This Article is a revised version of a talk I presented at a conference entitled Preserving American Democracy: Exploring Modern Democracy Through the History and Development of First Amendment Jurisprudence and Election Law, which was held (in-person and via Zoom) at Wake Forest University School of Law on January 28, 2022.

INTRODUCTION

It is a real honor to take part in this symposium celebrating the career of Michael Kent Curtis. I first met Professor Curtis at a conference three decades ago, shortly after we both had begun to teach law. I greatly value his friendship, and I have always been in awe of the depth of his learning and the passion that he brings to his teaching and scholarship.

Even before he joined the legal academy, Curtis had established himself as one of the leading constitutional historians in the United States. In an extended debate with Raoul Berger,[1] and then in a 1986 book entitled *No State Shall Abridge*,[2] Curtis mounted a thoroughly convincing case that the Fourteenth Amendment was intended to incorporate the Bill of Rights. This book is now widely recognized as the standard account of the subject. Fourteen years later, in a path-breaking work called *Free Speech, "The People's Darling Privilege*," Curtis demonstrated how our nation's understanding of the First Amendment has been shaped not merely by courts and judges but also

1. *See* Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) (criticizing RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Michael Kent Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983); Michael Kent Curtis, *Still Further Adventures of the Nine Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517 (1984).

2. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE].

by a strong popular tradition that was committed to ensuring broad protection for freedom of expression.[3]

An important theme that runs through both books is the role that natural rights theory has played in American constitutional history. In *No State Shall Abridge*, Curtis shows that the Republicans who adopted the Reconstruction Amendments were steeped in the tradition of antislavery constitutionalism.[4] That tradition held that our nation was founded on the principles of the Declaration of Independence, which proclaimed that all men are created equal and are endowed with inalienable rights.[5] The great defect in the original Constitution was that it allowed the continuing existence of slavery, an institution that was at war with those principles.[6] The goal of the Reconstruction Amendments was to abolish slavery and to secure to all Americans the fundamental rights of national citizenship—rights that included these inalienable rights of nature as well as the other rights secured by the Bill of Rights.[7] In *Free Speech*, Curtis stresses the vital role that the First Amendment plays in the democratic process.[8] But he also makes clear that Americans have long regarded speech and thought as "inherent human right[s]."[9]

In this Essay, I will argue that the natural rights tradition also provides a key to understanding the intellectual origins of the Free Exercise Clause of the First Amendment.[10] In Part I, I will discuss how eighteenth-century Americans understood religion and religious liberty. The following three Parts will show how this view was reflected in the American Revolution and the first state constitutions; in the struggle over religious freedom that took place in Virginia during the 1780s; and in the adoption of the Free Exercise Clause itself. Finally, in Part V, I will explore the implications that this history might have for our current debates over whether religious believers are entitled to demand exemptions from general laws that are meant to protect the civil rights of other people.

Before I begin, let me say a word about the appropriate role of original meaning in constitutional interpretation. In my view,

---

3. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 12 (2000) [hereinafter CURTIS, FREE SPEECH].

4. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 6–9, 42–46.

5. *Id.* at 41.

6. *Id.* at 31–32, 38.

7. *Id.* at 73.

8. CURTIS, FREE SPEECH, *supra* note 3, at 3.

9. *Id.* at 19.

10. The First Amendment's Religion Clauses declare that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

constitutional provisions do not necessarily have clear and definite meanings that were fixed at the time they were adopted. Instead, the Constitution is the charter and the framework of our national community. As that community evolves over time, so does the meaning of the Constitution. Moreover, some constitutional provisions were meant to secure the fundamental rights that belong to us as human beings and citizens, including the freedoms of thought, belief, and expression that are guaranteed by the First Amendment and the rights of liberty, equality, due process, and citizenship that are enshrined in the Fourteenth. [11] Our interpretation of these provisions should evolve in tandem with our developing understanding of those basic rights, as well as with our expanding view of who is entitled to recognition as a full and equal member of the community.

For these reasons, I do not subscribe to an originalist approach to constitutional interpretation. But I nevertheless believe that an inquiry into original meaning can have great value. First, in recent decades, originalism has become an increasingly powerful force in the American legal community. Many scholars, lawyers, and judges do subscribe to this approach, including several current members of the Supreme Court. [12] Second, even if one believes, as I do, that constitutional meaning develops over time, the original meaning provides a starting point for that development. And finally, as I will try to show, the views of those who adopted a constitutional provision sometimes can provide great insight when translated into our own context.

I. NATURAL RELIGION AND RELIGIOUS LIBERTY IN EIGHTEENTH-CENTURY THOUGHT

A. The Concept of Natural Religion and Its Relationship with Religious Liberty

So let us begin with the founding era. During this period, the overwhelming majority of Americans were Christians.[13] American ideas about religious liberty owed a good deal to Christian thought and especially to the Evangelical view that religion involves an inviolable relationship between the believer and God that the state

11. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 73.

12. *See, e.g.*, John O. McGinnis, *It's Now the Barrett Court*, CITY J. (Oct. 27, 2020), https://www.city-journal.org/barret-appointment-supreme-court-power-shift [https://perma.cc/S8RW-5XEJ] (discussing "the originalist camp" within the Court).

13. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466 (1990).

may not invade.[14] This has led some prominent scholars to argue that the original understanding of the Free Exercise Clause should be seen primarily in light of Christian thought.[15] By contrast, I am going to argue that the most commonly accepted rationale for religious liberty during this era derived from the ideas of natural rights, natural law, and natural religion.

Now of course *natural rights* and *natural law* are familiar terms.[16] But what about *natural religion*—what was that all about?

Eighteenth-century thinkers used that term to refer to what human beings can know about God and religion through the use of natural reason rather than through sources of divine revelation like the Bible.[17] According to those thinkers, there are three basic truths that can be known through the use of reason: that God exists and created the world; that people ought to love, worship, and obey God; and that God has established the law of nature, which specifies the duties that one owes to God, to oneself, and to other people.[18] These basic truths were the central principles of natural religion.[19]

At this point, we should distinguish between the two different versions of natural religion that were prevalent at the time.[20] The first was Deism, which in its pure form held that religion should be based on reason alone and not on revelation.[21] Although this view had some following in eighteenth-century America, it was far more common to regard the teachings of reason and revelation as complementing one another.[22] According to this mainstream form of natural religion, human beings are capable of using reason to discern the basic principles of religion and morality, but God may choose to

---

14. *See, e.g.*, THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977) [hereinafter BUCKLEY, VIRGINIA]; JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY 4–7 (2010); McConnell, *supra* note 13, at 1437–43.

15. *See* BUCKLEY, VIRGINIA, *supra* note 14; RAGOSTA, *supra* note 14, at 4–7; McConnell, *supra* note 13, at 1437–43. For another important work that emphasizes the role of Christian thought, see STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM (2014).

16. *See* Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. PA. J. CONST. L. 1, 23 (2021) [hereinafter Heyman, *Reason and Conviction*].

17. For an in-depth exploration of the eighteenth-century conception of natural religion, see *id.* at 10–56.

18. *Id.* at 6–7.

19. *Id.*

20. *See* William Warren Sweet, *Natural Religion and Religious Liberty in America*, 25 J. RELIGION 45, 51 (1945).

21. *Id.*

22. *Id.* at 51, 54.

employ revelation to reinforce those principles and to disclose further spiritual truths.[23] This was a central tenet of what was known as rational Christianity.[24]

In both its Deistic and its mainstream forms, the idea of natural religion was deeply intertwined with a commitment to liberty of conscience.[25] Because religion is founded on reason, individuals must be free to use their own minds to discern the truth about religious matters. It follows that religious liberty is a natural and inalienable right.

B. Natural Religion in Lockean Thought

These ideas of natural religion, natural law, and natural rights were central to the intellectual world of eighteenth-century Americans.[26] First and foremost, they found these ideas in the works of John Locke. In *An Essay Concerning Human Understanding*, Locke explored what human beings are capable of knowing and how they come to know it—questions that are especially important with regard to religious knowledge.[27] In an approach that is characteristic of natural religion, Locke begins with our experience of living in the world.[28] Whatever else I may be unsure of, I have an intuitive awareness of my own existence as an intelligent being.[29] Beginning with this fact, I can use reason to discern that there must be a first cause that is ultimately responsible for the existence of intelligent beings as well as the world in which they live.[30] Reason also tells me that only an intelligent being could have brought about the "order, harmony, and beauty which is to be found in Nature."[31]

In these ways, Locke formulates versions of the traditional cosmological and teleological arguments for the existence of God. Locke then argues that because we are finite beings who owe our existence to an eternal being who is perfectly wise, benevolent, and powerful, we have a duty to love, honor, and obey that being.[32] Finally, Locke maintains that we are capable of using reason to discern the basic moral rules that God has established to govern our

---

23. *Id.* at 47, 51.

24. Heyman, *Reason and Conviction*, *supra* note 16, at 46–47.

25. Sweet, *supra* note 20, at 49.

26. A fuller account of the history discussed in Parts II–IV may be found in Heyman, *Reason and Conviction*, *supra* note 16.

27. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689) [hereinafter LOCKE, HUMAN UNDERSTANDING].

28. *See id.* bk. IV, ch. IX, § 3, at 618–19.

29. *See id.*

30. *See id.* bk. IV, ch. X, §§ 4–6, at 620–21.

31. *Id.* § 10, at 624.

32. *See id.* bk. IV, ch. XIII, § 3, at 651.

conduct[33]—rules that Locke calls "the Law of Nature and Reason."[34] In addition to our duties toward God, this law prescribes (1) the duties we owe to ourselves and (2) the duties we owe to one another.[35] As Locke explains in the *Second Treatise of Government*, the former category includes a duty to preserve one's own life, while the latter includes a duty not to harm others but to treat them as free and equal persons who belong to the natural community of mankind.[36]

In the *Second Treatise*, Locke uses these principles to develop an account of the natural rights to life, liberty, and property.[37] And in *A Letter Concerning Toleration*, he maintains that individuals also are entitled to freedom in religious matters.[38] For Locke, this position follows not only from the Christian duty to treat everyone with charity and goodwill but also from "the genuine Reason of Mankind."[39] "All the Life and Power of true Religion," he explains, "consists in the inward and full perswasion of the mind," and so it would be not only wrong but self-defeating to compel individuals "to quit the Light of their own Reason; to oppose the Dictates of their own Consciences;" and to "blindly" accept whatever religion their rulers seek to impose on them.[40] In this way, his defense of religious liberty is intimately connected with his conception of natural religion.

For Locke, "Natural Religion" lies at the core of all reasonable religion.[41] "The common light of nature" makes clear that "the best worship" of God consists not in particular ceremonies but rather in

33. *See, e.g.*, *id.* bk. IV, ch. III, § 18, at 549; JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 6, at 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (student ed.) (1698) [hereinafter LOCKE, GOVERNMENT].

34. LOCKE, GOVERNMENT, *supra* note 33, bk. II, § 96, at 332.

35. *See* JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE qu. V, fol. 59–61, at 167–69 (Robert Horwitz et al. eds. & trans., Cornell Univ. Press 1990). As the editors note, this work was composed in Latin "no later than 1664" and was first published, with an English translation, in 1954. *Id.* at 29–30.

36. *See* LOCKE, GOVERNMENT, *supra* note 33, bk. II, §§ 4, 6, 128, 171–72, at 269–71, 352, 381–83.

37. *See, e.g.*, *id.* bk. II, §§ 4, 6, 123, at 269–71, 350.

38. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 2d ed. 1690), *reprinted in* A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1 (Mark Goldie ed., Liberty Fund 2010), http://oll.libertyfund.org/titles/locke-a-letter-concerning-toleration-and-other-writings [https://perma.cc/DKR2-MQRX] [hereinafter LOCKE, TOLERATION].

39. *Id.* at 7–11.

40. *Id.* at 13–15.

41. LOCKE, HUMAN UNDERSTANDING, *supra* note 27, bk. III, ch. IX, § 23, at 490.

living "a good life" that is characterized by piety, virtue, and obedience to "the law of nature."[42]

But while Locke places a high value on natural religion, he does not repudiate traditional religion in favor of Deism.[43] To begin with, he holds that people must have recourse to revelation, which is accepted through faith, in order to determine what outward forms of worship are most acceptable to God.[44] Revelation also has some important advantages when it comes to promoting virtue, both by making clear what right conduct consists of and by assuring individuals that this conduct promotes their own interests since it will be rewarded in another life.[45] But it does not follow that revelation supersedes reason. Instead, for Locke, the content of reason and revelation are substantially the same.[46] Moreover, one must use reason to determine whether a teaching actually deserves to be accepted as a revelation in the first place.[47] In the end, Locke envisions a harmony between reason and faith, or between natural and revealed religion.[48] This synthesis of traditional Christianity and Enlightenment ideals is what gave the Lockean approach the great power that it had in eighteenth-century Britain and America.[49]

C. Natural Religion and Toleration in English Law

The concept of natural religion also played a pivotal role in two landmark English cases involving religious diversity and toleration. In a 1744 decision called *Omichund v. Barker*,[50] an Indian merchant sued an English colonial official for financial fraud.[51] The defendant moved to dismiss the complaint on the ground that the plaintiff was incapable of giving testimony since as a Hindu he could not follow the

---

42. JOHN LOCKE, A THIRD LETTER FOR TOLERATION ch. 1 (1692), *reprinted in* 5 THE WORKS OF JOHN LOCKE 139, 156–157 (London, Rivington, 12th ed. 1824), https://oll.libertyfund.org/titles/locke-the-works-vol-5-four-letters-concerning-toleration [https://perma.cc/Z3M6-DG5K].

43. *See id.* at 156.

44. *See id.*

45. *See* JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY AS DELIVERED IN THE SCRIPTURES ch. XIV, at 147–59, 161–63 (John C. Higgins-Biddle ed., Clarendon Press 2000) (1695).

46. *See id.* ch. II, at 13–14; *id.* ch. III, at 19–21; *id.* ch. XIV, at 159.

47. *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 27, bk. IV, ch. XVIII, §§ 6, 8, 10, at 693–95.

48. *See id.* bk. IV, ch. XVIII, § 10, at 695.

49. For a deeper examination of Locke's views on religion and religious freedom, see Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705 (2018).

50. Omichund v. Barker (1744) 22 Eng. Rep. 339; 2 Eq. Ca. Abr. 397, 397–98.

51. *Id.*

usual practice of swearing on the New Testament.[52] Rejecting this contention, the judges held that individuals were entitled to swear in the manner prescribed by their own religions since the practice of making oaths was not unique to Christianity but instead "follows from the Principles of Natural Religion."[53]

The concept of natural religion also featured three decades later in a decision known as the *Sheriff's Case*.[54] To fund the construction of a new city hall, the electors of London concocted a scheme under which they would elect Protestant dissenters from the Church of England to municipal office, and then would proceed to fine them when they were unable to serve because they were barred from holding office by a 1661 statute called the Corporation Act.[55] In 1767, the dissenters' challenge to this practice came before the House of Lords, which held that the scheme was unlawful.[56] In the principal opinion, William Murray, Lord Mansfield, who was the Chief Justice of the Court of King's Bench, declared that nothing is "certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian Religion, more iniquitous and unjust, more impolitic, than Persecution. It is against Natural Religion, Revealed Religion, and sound Policy."[57] This view, Mansfield added, was embodied in the Toleration Act of 1689, which relieved many Protestant dissenters of the existing criminal penalties for nonconformity to the established church.[58]

The concept of natural religion can be found not only in Lockean theory and English jurisprudence but also in many other areas of eighteenth-century thought, including treatises on the law of nature

---

52. *Id.* at 339–40; 2 Eq. Ca. Abr. at 400.

53. *Id.* at 347; 2 Eq. Ca. Abr. at 408 (Lord Hardwicke, L.C.).

54. The fullest account of the case, together with two of the leading opinions, appears in the appendices to PHILIP FURNEAUX, LETTERS TO THE HONOURABLE MR. JUSTICE BLACKSTONE, CONCERNING HIS EXPOSITION OF THE ACT OF TOLERATION, AND SOME POSITIONS RELATIVE TO RELIGIOUS LIBERTY (London, T. Cadell, 2d ed. 1771), https://hdl.handle.net/2027/osu.32437121564914 [https://perma.cc/N6T8-H373]. *See id.* at 223 (Furneaux's explanation of the background); *id.* at 235 (Justice Foster's argument in Court of Judges Delegates (1762)); *id.* at 249 (Lord Mansfield's speech in House of Lords (1767)). Mansfield's speech is also printed in *Hansard's Debates*. *See* 16 T.C. HANSARD, THE PARLIAMENTARY HISTORY OF ENGLAND 316 (1813), https://play.google.com/books/reader?id=EZg9AAAAcAAJ&hl=en&pg=GBS.PA315 [https://perma.cc/DRQ4-WAE5].

55. *See* FURNEAUX, *supra* note 54, at 223–34; Corporation Act 1661, 13 Car. II, Stat. 2, c. 1 (Eng.).

56. *See* FURNEAUX, *supra* note 54, at 249 (speech of Lord Mansfield).

57. *Id.* at 278.

58. *See id*. at 265–66; Toleration Act 1688, 1 W. & M. c. 18 (Eng.).

and nations;[59] the moral philosophy of Scottish Enlightenment thinkers like Frances Hutcheson and Adam Smith, who emphasized the role of moral sentiments,[60] as well as rationalist thinkers like Richard Price;[61] works of Deist[62] and Christian theology;[63] and even the writings of Sir Isaac Newton.[64] These diverse strands came together in the radical Whig tradition that shaped eighteenth-century American political thought and laid the groundwork for the Revolution.[65] Two leading writers in this tradition, John Trenchard and Thomas Gordon, summarized the ideas that I have outlined when they wrote:

> Reason is the only Guide given to Men in the State of Nature, to find out the Will of God . . . . [Reason allows human beings to distinguish between good and bad.] It discovers a First Cause, the Maker, Contriver, and Preserver of all Things; and therefore it teaches Submission to his Will, Admiration of his Wisdom and Power, and Thankfulness for his Goodness and Mercy. . . . It shews that, as to political Privileges, all Men are born equal; and consequently, that he who is no better than others, can have no Right to command others, [except by their own consent].

---

59. For example, Samuel Pufendorf devoted an entire chapter of his handbook on natural law to the subject of natural religion. *See* SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE ch. 4 (Ian Hunter & David Saunders eds., Andrew Tooke trans., Liberty Fund 2003) (1673), https://oll.libertyfund.org/titles/pufendorf-the-whole-duty-of-man-according-to-the-law-of-nature-1673-2003 [https://perma.cc/U7S6-E2NY].

60. *See, e.g.*, 1 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY chs. 9–10 (photo. reprt. 2008) (Glasgow, R. & A. Foulis 1755), https://archive.org/details/systemmoralphilo01hutc/page/n6 [https://perma.cc/XR5L-9AVE]; ADAM SMITH, THE THEORY OF MORAL SENTIMENTS pt. II, sec. ii, ch. 3, §§ 11–12, at 106–07; pt. III, ch. 2, §§ 3–13, at 132–41 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

61. *See, e.g.*, RICHARD PRICE, A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS ch. VI, at 109, 113; ch. VII, at 138–44; ch. X, at 232–69 (D.D. Raphael ed., London, Clarendon Press 1974) (3d ed. 1787).

62. For a seminal work, see EDWARD, LORD HERBERT OF CHERBURY, DE VERITATE (Meyrick H. Carré trans., J.W. Arrowsmith Ltd. 1937) (1624).

63. *See, e.g.*, JONATHAN MAYHEW, SEVEN SERMONS (photo. reprt. 2015) (Boston, Rogers & Fowle 1749), http://name.umdl.umich.edu/N05074.0001.001 [https://perma.cc/K4X8-622Z]; John Tillotson, *Of the Great Duties of Natural Religion, with the Ways and Means of Knowing Them*, *in* SEVERAL DISCOURSES sermon I, at 8 (Ralph Barker ed., London, Ri. Chiswell 1697), http://name.umdl.umich.edu/A62632.0001.001 [https://perma.cc/5UUN-F2M4].

64. *See* Heyman, *Reason and Conviction*, *supra* note 16, at 51–52.

65. For a classic account of this tradition, see CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN (1959). For the tradition's impact on American thought, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (enlarged ed. 1992).

* * * * *

> Were we not *rational Creatures*, we could not be *religious Creatures*, but upon a Level with *Brutes*, to whom God has made no Revelation of himself, because they want Reason to discern it, and to thank him for it. *Revelation* therefore presupposes *Reason*, and addresses itself to *Reason*; and God himself, by persuading us, as he does in his Word, by the Voice of *Reason*, appeals to our *Reason*. . . . The Devotion which he requires must be *free*, *rational*, and *willing*; and where it is not so, it is *Folly* or *Hypocrisy*.[66]

II. NATURAL RIGHTS, NATURAL LAW, AND NATURAL RELIGION IN THE AMERICAN REVOLUTION AND THE FIRST STATE CONSTITUTIONS

During the eighteenth century, these interlocking ideas of natural rights, natural law, and natural religion became so deeply engrained in American political and religious culture that they were regarded as "self-evident."[67] So it is hardly surprising that they were the ideas that Americans appealed to in 1776 when they broke with Great Britain.[68] In the Declaration of Independence, they asserted "that all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights, [including] Life, Liberty and the pursuit of Happiness."[69] In addition to being a classic statement of individual rights, this assertion has vital significance for issues of

---

66. 2 JOHN TRENCHARD & THOMAS GORDON, THE INDEPENDENT WHIG NO. XXXV, at 25, 27–28 (London, J. Peele, 7th ed. 1743), https://oll.libertyfund.org/titles/gordon-the-independent-whig-4-vols-1720-1743 [https://perma.cc/543Z-BHN3]. In *Free Speech*, Curtis traces the radical Whig commitment to religious liberty back through the writings of John Locke and Algernon Sidney in the late seventeenth century to the Levellers during the English Civil War. *See* CURTIS, FREE SPEECH, *supra* note 3, at 24–28, 35–37. The Levellers held that "conscience [is] subject only to reason," and so the people would not "impower or entrust [their] representatives . . . to make any Lawes, Oaths, or Covenants, whereby to compell by penalties or otherwise any person to anything in or about matters of faith, Religion or Gods worship or to restrain any person from the profession of his faith, or exercise of Religion according to his Conscience." *Id.* at 27 (quoting WILLIAM WALWYN, THE COMPASSIONATE SAMARITAN, *in* 3 TRACTS ON LIBERTY IN THE PURITAN REVOLUTION 61, 71 (William Haller ed., 1979), and the Levellers' *Agreement of the People*, *in* THE LEVELLER TRACTS, 1647–1653, at 323–24 (William Haller & Godfrey Davis eds., 1964)).

67. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION ch. I, doc. 5 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/v1ch1s5.html [https://perma.cc/89YQ-EWTD].

68. *Id.*

69. *Id.*

political authority. As the quotation from Trenchard and Gordon suggests, to declare that all human beings are created equal is to say that, in a political sense, no one is naturally superior or subordinate to anyone else.[70] Thus, Americans were not inherently subject to the crown or the people of Great Britain but were entitled to assume a "separate and equal station" among the peoples of the world.[71] This was a right that they claimed under "the Laws of Nature and of Nature's God"—an expression that was part and parcel of natural religion.[72]

Natural religion also provided a rationale for the protections of religious freedom that Americans incorporated into their new state constitutions. The clearest example can be found in Article 16 of the Declaration of Rights that Virginia adopted on the eve of independence.[73] This provision, which was penned by George Mason and James Madison,[74] declared

> [t]hat 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.[75]

Although this provision made reference to Christian ideals, it primarily invoked the core idea of natural religion: that religious

---

70. *See supra* text accompanying note 66. In this respect, Trenchard and Gordon echo Locke's position that "there [is] nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection." LOCKE, GOVERNMENT, *supra* note 33, bk. II, § 4, at 269. Thomas Jefferson put the point in more colorful terms when he told a correspondent that "the general spread of the light of science has . . . 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." Letter from Thomas Jefferson to Roger Chew Weightman, Mayor, District of Columbia (June 24, 1826), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/98-01-02-6179 [https://perma.cc/JQ65-C4Z9].

71. THE DECLARATION OF INDEPENDENCE, *supra* note 67.

72. *Id.*

73. VA. DECLARATION OF RIGHTS of 1776, art. 16, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 67, Bill of Rights, doc. 2, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss2.html [https://perma.cc/44P8-J77U].

74. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 17–18.

75. VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16.

beliefs "can be directed only by reason and conviction."[76] Other state constitutional guarantees reflected the same view, asserting that religion is a matter of "reason," "conscience," and "understanding."[77]

III. THE BATTLE OVER RELIGIOUS FREEDOM IN 1780S VIRGINIA

To gain further insight into the views of the founding generation, let us turn to the struggle over religious freedom that was waged in Virginia during the 1780s. In colonial Virginia, the Church of England was established by law, and individuals generally were required to attend services in their parish churches and to pay taxes to support them.[78] This system was overturned by the adoption of Article 16 of the Declaration of Rights.[79] The Anglican church in Virginia then went into serious decline due to a lack of funds and other problems.[80]

In 1784, Patrick Henry championed a bill to impose a tax for the support of Christian teaching and worship in the commonwealth.[81] In contrast to the colonial approach, the revenue from this General Assessment Bill would not have been reserved for the Anglican church alone.[82] Instead, each taxpayer would have been allowed to designate the particular "society of Christians" to which his or her payment would be directed.[83] In effect, this bill would have made

---

76. *Id.*

77. *E.g.*, DEL. DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* THE FOUNDERS' CONSTITUTION, *supra* note 67, Bill of Rights, doc. 4, https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss4.html [https://perma.cc/6JZD-N2U2] ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings."); N.H. CONST. of 1784, pt. I, arts. IV–V, https://lonang.com/library/organic/1784-nhr/ [https://perma.cc/MYH8-234X] ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ."); PA. CONST. of 1776, Declaration of Rights art. II, https://avalon.law.yale.edu/18th_century/pa08.asp [https://perma.cc/RQ9V-7JP8] ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . .").

78. *See* THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM 1 (2013) [hereinafter BUCKLEY, ESTABLISHING].

79. VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16.

80. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 43–45.

81. *See id.* at 76. For the text, see *A Bill Establishing a Provision for Teachers of the Christian Religion, Va.* (1784), *in* THE SACRED RIGHTS OF CONSCIENCE 252, 252 (Daniel L. Dreisbach & Mark David Hall eds., 2009) [hereinafter General Assessment Bill].

82. General Assessment Bill, *supra* note 81.

83. *Id.* at 253.

Christianity in general—rather than any particular sect—the established religion of the state.

Henry's bill was on the verge of passage when Madison successfully moved to postpone the vote in order to permit the people to express their views.[84] During the summer of 1785, the proposal encountered a strong wave of public opposition.[85] The General Assembly then quietly allowed the bill to die.[86] Early the following year, with Madison's leadership, the legislature adopted Thomas Jefferson's Bill for Establishing Religious Freedom, which provided

> [t]hat no 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.[87]

It is widely agreed that the defeat of the General Assessment Bill and the passage of Jefferson's bill provide essential background for understanding the intellectual origins of the Free Exercise Clause, which Congress proposed only a few years later.[88] But there is a sharp dispute over how these events should be interpreted. According to the traditional view, they reflected the triumph of Enlightenment ideals such as freedom of thought and belief and separation of church and state—ideals which are often characterized in secularist terms.[89] In recent years, however, some scholars have advanced a revisionist interpretation.[90] They observe that the defeat of the General Assessment Bill was primarily owing to political mobilization by the

---

84. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 108–09.

85. *See id. at* 113–17.

86. *See* BUCKLEY, ESTABLISHING, *supra* note 78, at 79–80.

87. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 155–63; VIRGINIA, ACT FOR ESTABLISHING RELIGIOUS FREEDOM, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 67, Amendment I (Religion), doc. 44, http://press-pubs.uchicago.edu/founders/documents/amendI_religions44.html [https://perma.cc/7D6E-4N38]. This language appears in identical form in Jefferson's draft of the bill, although (as I will explain below) the legislature amended that draft in some other respects. *See* A BILL FOR ESTABLISHING RELIGIOUS FREEDOM, VA. (June, 18 1779), *reprinted in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 [https://perma.cc/54XJ-Q86A] [hereinafter Jefferson Bill].

88. *See* McConnell, *supra* note 13, at 1476–82.

89. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 11–13 (1947); Reynolds v. United States, 98 U.S. 145, 163–64 (1878).

90. *See, e.g.*, BUCKLEY, VIRGINIA, *supra* note 14, at 143, 175–82; McConnell, *supra* note 13, at 1437–41.

Evangelical Christian community, and they contend that the events in Virginia should be understood to reflect the views of that community.[91]

In this Part, I wish to offer a third interpretation. I will argue that the central justification for the rejection of Henry's proposal and for the adoption of Jefferson's came neither from secularist nor from Christian thought but rather from the theory of natural religion and natural rights that we have been discussing. This is the rationale that provided common ground among the three groups who prevailed in this contest: Evangelicals, rationalist Episcopalians, and Enlightenment liberals like Madison and Jefferson.[92]

In exploring this issue, the most valuable evidence may be found in the various petitions against the General Assessment Bill that were presented to the General Assembly in 1785. The best known is the *Memorial and Remonstrance against Religious Assessments*,[93] which Madison drafted that summer at the behest of George Mason, George Nicholas, and other prominent liberals.[94] The attack that Madison leveled against the bill begins as follows:

> [W]e hold it for a fundamental and undeniable truth, "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." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.[95]

Shortly thereafter, Madison advanced a related argument:

> If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one

---

91. *See, e.g.*, BUCKLEY, VIRGINIA, *supra* note 14, at 143, 175–82; McConnell, *supra* note 13, at 1437–41.

92. *See, e.g.*, BUCKLEY, VIRGINIA, *supra* note 14, at 143, 175–82; McConnell, *supra* note 13, at 1437–40.

93. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *reprinted in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/THW5-WP3B] [hereinafter MADISON, MEMORIAL].

94. *See Editorial Note* for *id.* at paras. 1, 4, 5.

95. *Id.* § 1 (quoting VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16).

> than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered.[96]

These two passages clearly rely on the theory of natural religion and natural rights. Elaborating on the Declaration of Rights, Madison asserts that religion is a matter of "reason and conviction"; that individuals must be free to form their own beliefs in accord with "the evidence" as it appears to "their own minds"; and that liberty of conscience is a natural and inalienable right that belongs to all individuals on an equal basis.[97]

In common with the Declaration of Rights and Locke's *Letter Concerning Toleration*, Madison also defends religious liberty in Christian terms.[98] For instance, he maintains that efforts to establish religion by law tend to undermine "the purity and efficacy" of Christianity as well as to stir up "discord" and "animosities," in contrast to the "Christian forbearance, love and charity" that the Declaration calls for.[99] Similarly, he contends that those who enjoy "the light of [Christian] revelation" should desire that it spread to "the whole race of mankind"—a goal that would be subverted by the adoption of laws that effectively discourage non-Christians from immigrating to the state.[100] In ways like this, Madison criticizes the General Assessment Bill from a Christian perspective. But his principal arguments focus on the nature of human beings and on their capacity to use reason to form their own religious beliefs and to discern their duties to God—arguments that sound in natural religion.

Remarkably, the same thing is true of the memorial that was submitted by the Presbyterians, who were one of the largest and most influential Evangelical groups in the commonwealth.[101] Some of their objections to the General Assessment Bill were rooted in Christian

---

96. *Id.* § 4 (quoting VA. DECLARATION OF RIGHTS, *supra* note 73, arts. 1, 16).

97. *Id.* §§ 1, 4 (quoting VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16).

98. *See supra* text accompanying note 39 (discussing Locke); *supra* text accompanying notes 75–76 (discussing Virginia Declaration art. 16).

99. MADISON, MEMORIAL, *supra* note 93, §§ 7, 11.

100. *Id.* § 12.

101. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 13, 138–39, 143; *Memorial of the Presbytery of Hanover, Virginia* (Aug. 13, 1785), *in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 81, at 304 [hereinafter Presbyterian Memorial].

thought. For example, they maintained that the bill was unnecessary because history showed that Christianity flourished most greatly when it was "left to its native excellence and evidence to recommend it, under the all directing providence of God, and free from the intrusive hand of the civil magistrate."[102] But the Presbyterians' main line of attack on the bill—like that of Madison—was founded on the claims that "[r]eligion is altogether personal," and that in entering civil society, "[w]e never resigned to the control of government, our [unalienable] right of determining for ourselves [in religious matters]; and acting agreeably to the convictions of reason and conscience, in discharging our duty to our Creator."[103]

The petitions that garnered the most signatures were probably the work of Baptists.[104] In contrast to the memorials written by Madison and the Presbyterians, the Baptist petitions denounced the bill primarily on Christian grounds.[105] The Baptists asserted that at the outset of the common era, Christ "not only supported and maintained his Gospel in the world for several hundred years without the aid of Civil Power, but against all the powers of the Earth."[106] The legal establishment of Christianity that began under the Roman Emperor Constantine in the fourth century had served only to corrupt the church and to promote "Error, Superstition, and Immorality."[107] Moreover, "Christ the head of the church has left plain Directions concerning Religion, and the manner of supporting its Teachers which

---

102. Presbyterian Memorial, *supra* note 101, at 305. Likewise, in opposing a bill that would have granted special privileges to the Protestant Episcopal Church (the successor to the previously established Church of England), the Presbyterians declared that as "the subjects of Jesus Christ," they regarded it as "an invasion of the Divine Prerogative" for "civil rulers" to "exercise . . . spiritual powers" by making laws with regard to church government. *Id.* at 306.

103. *Id.* at 304–05. On the use of natural religion in this petition, see Rhys Isaac, *"The Rage of Malice of the Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 139, 149–50 (Merrill D. Peterson & Robert C. Vaughan eds., 2003).

104. For a good example of these petitions, see *Petition Against the Bill [from Westmoreland Cnty., Va.]* (Nov. 2, 1784), *in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 81, at 307 [hereinafter Westmoreland Petition]. On their authorship, see BUCKLEY, VIRGINIA, *supra* note 14, at 148–49, 149 n.12; Isaac, *supra* note 103, at 150–51.

105. *See,* BUCKLEY, VIRGINIA, *supra* note 14, at 176, 178, 180–81; McConnell, *supra* note 13, at 1439–40.

106. Westmoreland Petition, *supra* note 104, at 307.

107. *Id.* at 308.

should be by free Contributions" rather than coercive taxation.[108] For all these reasons, the Baptists contended that it would be "contrary to the spirit of the Gospel" for the legislature to pass Henry's bill.[109] At the same time, however, they also asserted that to do so would contravene the Declaration of Rights, because the bill would violate the natural freedom and equality of non-Christians by granting exclusive benefits to Christians.[110]

After defeating the General Assessment Bill, the same political coalition secured the passage of Jefferson's Bill for Establishing Religious Freedom.[111] Like Madison, Jefferson was a statesman who appreciated the need to muster as much support for his position as possible, and so he took care to incorporate language that would strongly appeal to Christians. For instance, he wrote that "the holy author of our religion" (a term that they naturally would take to refer to Christ) had chosen to propagate it by reason rather than by coercion, and that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[112]

But Jefferson's primary arguments were rooted in natural religion. Thus, he averred "that Almighty God hath created the mind free"; that God intended that true religion should spread "by its influence on reason alone"; "that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds"; and "that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate."[113] It followed that individuals should be immune from all coercion in matters of religion and should "be free to profess, and by argument to maintain, their opinions" on that subject.[114] Finally, the bill declared "that the rights hereby asserted are of the natural rights of mankind, and that if any act [of legislation] shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."[115] In the course of its deliberations on the bill, the General Assembly excised some of

108. *Id.*

109. *Id.* at 307.

110. *Id.* at 307–08.

111. *See* BUCKLEY, VIRGINIA, *supra* note 14, at 155–63; Jefferson Bill, *supra* note 87.

112. Jefferson Bill, *supra* note 87, pmbl.

113. *Id.*

114. *Id.*, enacting cl.

115. *Id.*, final para.

Jefferson's most rationalist language,[116] but the main thrust of his position survived intact.[117]

In conclusion, the political forces that prevailed in Virginia during the mid-1780s consisted of Enlightenment liberals, rationalist Episcopalians, and Evangelicals. These groups espoused diverse theological and philosophical views. Yet from a political and constitutional perspective, what united them was more important than what divided them. Although the documents that we have just examined had different emphases, there was a good deal of overlap, and even instances of borrowing, between them.[118] And the one document that all these groups came together to support was Jefferson's Bill for Establishing Religious Freedom, with its strong affirmations—which were central to natural religion—that "Almighty God hath created the mind free" and that all human beings have an inalienable "natural right" to pursue "truth" in religious matters by means of "free argument and debate."[119]

---

116. The deleted language is marked in italics in Jefferson Bill, *supra* note 87.

117. As Madison wrote to Jefferson, who was then serving as the American ambassador to France, the changes that were made "somewhat defaced the composition," but they "did not affect the substance" of the bill—a bill which the two men believed had "in this Country [that is, Virginia] extinguished forever the ambitious hope of making laws for the human mind." Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0249 [https://perma.cc/FA4U-XWDJ].

118. For instance, the three petitions asserted in similar terms that Christianity had flourished under divine providence without the support of human laws and had been corrupted as a result of establishment. *See* MADISON, MEMORIAL, *supra* note 93, §§ 6–7; Presbyterian Memorial, *supra* note 101, at 305; Westmoreland Petition, *supra* note 104, at 307–08. Likewise, all three contended that the General Assessment Bill would wrongfully discriminate against non-Christians. *See* MADISON, MEMORIAL, *supra* note 93, § 4; Presbyterian Memorial, *supra* note 101, at 305; Westmoreland Petition, *supra* note 104, at 308. The Presbyterian document essentially summarized Madison's arguments that religion is an unalienable right that neither the whole society nor the legislature has been authorized to regulate. *Compare* Presbyterian Memorial, *supra* note 101, at 304–05, *with* MADISON, MEMORIAL, *supra* note 93, §§ 1–3; *see also* Isaac, *supra* note 103, at 149–50 (suggesting that the Presbyterians and Madison influenced one another during the course of the controversy). Finally, the Baptist petition directly incorporated some language that appeared in Jefferson's bill, such as the assertion that "to compel a man to furnish Contributions of money for the propagation of Opinions which he disbelieves and Abhors is sinfull and Tyranical." Westmoreland Petition, *supra* note 104, at 308; *cf.* Jefferson Bill, *supra* note 87, pmbl.

119. Jefferson Bill, *supra* note 87, pmbl., enacting cl., and final para.

IV. THE ADOPTION OF THE FREE EXERCISE CLAUSE

In contrast to Jefferson's bill and Article 16 of the Virginia Declaration, the Free Exercise Clause of the First Amendment did not articulate the premises on which it was based.[120] And unfortunately, the debates on this provision in Congress and the state legislatures were sparse.[121] In my view, however, there are good reasons to believe that the clause was informed by the same principles of natural rights and natural religion that lay at the heart of those two earlier documents.

First, the Antifederalists often invoked these principles during the ratification struggle when they asserted that the Constitution was defective because it failed to protect religious freedom and other essential rights. As one Pennsylvanian put it, that document—in contrast to his own state's constitution—contained "no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding."[122]

Second, this same conception of religious liberty was articulated in the constitutional amendments that were recommended by a number of the state ratifying conventions.[123] Drawing on the natural rights/natural religion language of its own bill of rights,[124] Virginia proposed that the Constitution be amended to declare:

> 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 have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.[125]

---

120. U.S. CONST. amend. I.

121. In fact, the most extensive discussion about protecting religious liberty in the Bill of Rights arose not in connection with the First Amendment but rather in a debate on whether the Second Amendment should provide that "no person religiously scrupulous shall be compelled to bear arms." CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 182–84 (Helen E. Veit et al. eds., 1991) (House debate of Aug. 17, 1789). On this debate, see *infra* text accompanying notes 159–61.

122. CENTINEL NO. 2 (Oct. 1787–Apr. 1788), *reprinted in* 2 THE COMPLETE ANTIFEDERALIST § 2.7.55, at 152 (Herbert J. Storing & Murray Dry eds., 1981).

123. These proposals are collected in THE COMPLETE BILL OF RIGHTS § 1.1.2, at 12–13 (Neil H. Cogan ed., 2d. ed. 2015).

124. *See supra* text accompanying notes 74–76.

125. *Virginia Proposal*, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 123, § 1.1.2.8, at 13.

The same language was endorsed by North Carolina and Rhode Island[126]—both of which (unlike Virginia) refused to ratify the Constitution until it was amended to protect religious liberty and other rights.[127] The New York proposal also followed Virginia's.[128] Although New York omitted the prefatory language about reason and conviction, the proposal clearly affirmed that liberty of conscience was "an equal, natural and unalienable right."[129] New Hampshire's recommendation displayed the greatest economy of language, providing simply that "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience."[130] Notably, none of the religious-liberty amendments proposed by the state ratifying conventions (or by the Antifederalist minorities in other states[131]) made any reference to Christianity.[132] Instead, to the extent that they indicated the basis and character of this liberty, they used the language of natural rights and natural religion.[133]

Finally, the congressional deliberations over the Bill of Rights also suggest that religious freedom was understood in these terms. In early 1789, Madison was elected to the First Congress with crucial support from Virginia Baptist leaders after he assured them that he believed that the Constitution should be amended to protect liberty of conscience and other fundamental rights.[134] On June 8, he introduced a draft of the Bill of Rights in the House of Representatives.[135] In an extensive speech, he argued that the

---

126. *See North Carolina Proposal*, *in id.* § 1.1.2.5, at 12; *Rhode Island Proposal*, *in id.* § 1.1.2.7, at 13.

127. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 6–7 (2005).

128. *New York Proposal*, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 123, § 1.1.2.4, at 12.

129. *Id.*

130. *New Hampshire Proposal*, *in id.* § 1.1.2.3, at 12.

131. *See id.* § 1.1.2, at 12 (setting out the proposals of the minorities in Maryland, Massachusetts, and Pennsylvania).

132. Indeed, when the Virginia ratifying convention incorporated language from Article 16 of the Declaration of Rights into its proposed amendment to the Federal Constitution, the convention chose to omit that article's assertion "that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other." *Compare Virginia Proposal*, *quoted supra* text accompanying note 125, *with* VA. DECLARATION OF RIGHTS, *quoted supra* text accompanying note 75, art. 16.

133. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 123, § 1.1.2, at 12–13.

134. *See* Letter from James Madison to George Eve (Jan. 2, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-11-02-0297 [https://perma.cc/AN3R-EYTU]; RAGOSTA, *supra* note 14, at 169–70.

135. HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION (June–Aug. 1789), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 67,

Constitution should be amended to protect the same sorts of rights that were found in many of the state constitutions.[136] Chief among those rights were the "natural right[s]" that the people "retained" when they delegated "particular powers . . . to be exercised by the Legislature."[137] Madison's notes for the speech indicate that these inalienable rights included liberty of conscience.[138] Of course, this position is fully consistent with the views that he took in 1776, when he helped draft Article 16 of the Virginia Declaration of Rights, and in 1785–86, when he authored the *Memorial and Remonstrance Against Religious Assessments* and shepherded Jefferson's bill through the General Assembly.[139] As I have explained, each of these documents defended the rights of conscience primarily in terms of natural religion and natural rights.[140] A natural rights perspective can also be found in a draft report of the House committee that was appointed to consider a federal bill of rights—a report which listed "the rights of conscience in matters of religion" first among the "natural rights which are retained by [the people] when they enter into society."[141]

V. RELIGIOUS EXEMPTIONS FROM CIVIL LAWS

A. The Founding-Era View

Now let us consider what implications this history may have for the question of whether the Free Exercise Clause exempts individuals from generally applicable laws that conflict with their religious beliefs. In recent decades, some scholars have argued for a broad right to exemption by drawing on the revisionist view that stresses the role that Evangelicals played in the founding-era struggles for religious liberty. A leading example is Professor Michael W. McConnell, whose article, *The Origins and Historical Understanding of Free Exercise of Religion*, appeared in the *Harvard Law Review* in

---

Bill of Rights, doc. 11, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html [https://perma.cc/XF22-BW2L].

136. *See id.*

137. *Id.*

138. *See* James Madison, Notes for Speech in Congress (June 8, 1789), *in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-12-02-0125 [https://perma.cc/KMB9-5N3H].

139. *See* VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16; MADISON, MEMORIAL, *supra* note 93, § 4.

140. *See supra* text accompanying notes 73–76 (Article 16); *supra* text accompanying notes 93–97 (*Memorial and Remonstrance*); *supra* text accompanying notes 113–17 (Jefferson's bill).

141. Roger Sherman's Proposed Committee Report § 2 (July 21–28, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 121, at 268.

1990.[142] McConnell's account of the original meaning has exerted considerable influence and has been relied on by several Justices of the Supreme Court.[143]

Remarkably, the strongest direct evidence that McConnell adduces for his position comes not from Evangelical writers but from Madison's *Memorial and Remonstrance*.[144] As we have seen, this document draws on Article 16 of the Virginia Declaration to contend that everyone is entitled to freely exercise religion in accord with reason, conviction, and conscience.[145] Madison then presents two arguments for holding that this right is an "unalienable" one. The first argument is that the opinions of individuals depend "only on the evidence contemplated by their own minds" and so "cannot follow the dictates of other men."[146] The second is that "what is here a right towards men, is a duty towards the Creator."[147] As Madison explains:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[148]

McConnell takes this passage to mean that when individuals enter into the social contract, they do not—and indeed cannot—give up their freedom to act in accord with their own religious beliefs.[149]

---

142. McConnell, *supra* note 13, at 1453.

143. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1889–1900, 1904–09 (2021) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the judgment) (extensively citing McConnell's historical scholarship); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 574–76 (1993) (Souter, J., concurring in part and in the judgment) (referring to McConnell's account as "strong").

144. *See* McConnell, *supra* note 13, at 1453.

145. *See* MADISON, MEMORIAL, *supra* note 93, § 1; VA. DECLARATION OF RIGHTS, *supra* note 73, art. 16.

146. MADISON, MEMORIAL, *supra* note 93, § 1.

147. *Id.*

148. *Id.*

149. *See* McConnell, *supra* note 13, at 1453. In an analysis that appears to follow McConnell's, Justice Sandra Day O'Connor interpreted this passage of the

But that could hardly be what Madison meant, for it would give individuals a sweeping right to disobey civil laws on religious grounds. For example, no one who had a conscientious objection to paying taxes could be compelled to do so. This claim to exemption would apply to all civil laws (or at least to all that did not merely reflect the law of nature), and it would be absolute, for the *Memorial* asserts that "Religion is *wholly* exempt" from civil authority.[150]

McConnell offers no evidence that Madison took such an extreme and unsustainable position on religious exemptions. Instead, if we examine the quoted passage closely, it becomes clear that Madison was not addressing the issue of religious exemptions at all.[151] Instead, his contention was that the state has no authority to impose taxes *for religious purposes* on anyone because religion and civil society are two distinct realms.[152] On this strict separationist view—which was also held by Evangelicals[153]—the state should concern itself only with civil affairs and must leave religious matters to individuals and the churches they voluntarily form.[154] This separate-spheres view cuts *against* the notion that the state's laws must carve out exceptions for religious believers. And this interpretation of Madison's position is reinforced by his argument that the General Assessment Bill violates the fundamental principle of equality before the law, not only by favoring Christians over non-Christians, but also by "granting . . . peculiar exemptions" to two sects that objected to compulsory support for religion.[155] In short, the view that Madison expresses in the *Memorial* holds (1) that the state should have no authority within the religious sphere and (2) that within the civil realm, everyone should be treated alike.[156]

I do not mean to suggest that during this period the issue of religious exemptions was a simple or straightforward one. In some contexts, religious minorities made claims that many people found persuasive. For example, the constitutions of several states exempted conscientious objectors from military service if they paid an

---

Memorial the same way. *See* City of Boerne v. Flores, 521 U.S. 507, 560–61 (1997) (O'Connor, J., joined by Breyer, J., dissenting).

150. MADISON, MEMORIAL, *supra* note 93, § 1 (emphasis added).

151. *See id.*

152. *See* McConnell, *supra* note 13, at 1438.

153. *See, e.g.*, Westmoreland Petition, *supra* note 104, at 308.

154. *See* McConnell, *supra* note 13, at 1442–43.

155. MADISON, MEMORIAL, *supra* note 93, § 4; *see supra* text accompanying note 96 (quoting this section of the MEMORIAL). For McConnell's attempt to explain this passage, see McConnell, *supra* note 13, at 1454–55.

156. In this regard, Madison's position dovetailed with that of Locke, who contended that the state's jurisdiction extended only to "Civil Interests" and not "to the Salvation of Souls," and that civil laws should accord every individual "*the same Rights that are granted to others*." LOCKE, TOLERATION, *supra* note 38, at 12–13, 57–58.

equivalent amount.[157] When the Federal Constitution was sent out to the states for ratification, three conventions urged that it be amended to include a similar provision.[158] After considerable debate, the House of Representatives narrowly approved a clause that provided that "no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."[159] Ultimately, however, this provision was rejected by the Senate and was not included in the Bill of Rights.[160] As one opponent of the provision put it, although he hoped that the legislature would "always possess humanity enough" to accommodate religious objectors in this regard, they had no "natural right" to an exemption, and so the issue "ought to be left to the discretion of the government."[161]

As this discussion indicates, it cannot be said that at the time of the founding there was an accepted, general principle that religious liberty required exemption from civil laws. Instead, the problem of exemptions was a difficult and contested one, which was addressed in particular contexts such as military service.[162] One facet of the historical understanding is clear, however: religious liberty did not entitle individuals to violate laws that were enacted to protect the rights of others.[163] McConnell himself recognizes this point.[164] And it also follows from the natural rights view that we have discussed. On that view, the same law of nature that gives you a right to religious liberty forbids you to use that liberty in a way that invades the rights of other people.[165]

---

157. *See* 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, 1110–11 (2008).

158. *See id.*

159. *See* CREATING THE BILL OF RIGHTS, *supra* note 121, at 38 (House resolution), 182–84 (House debate). The vote in favor of this provision was 24 to 22.

160. *See id.* at 39 n.13.

161. *See id.* at 184 (statement of Rep. Benson).

162. *See, e.g.*, Muñoz, *supra* note 157, at 1110.

163. In the words of the Maryland Declaration of Rights, religious freedom did not extend to conduct that "disturb[s] the good order, peace or safety of the state" or that "injure[s] others, in their natural, civil or religious rights." MD. CONST. of 1776, art. XXXIII (Yale Law School, The Avalon Project), https://avalon.law.yale.edu/17th_century/ma02.asp [https://perma.cc/X7ES-B7CR].

164. *See* McConnell, *supra* note 13, at 1464 (acknowledging that it was accepted that "a believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side").

165. *See, e.g.*, LOCKE, TOLERATION, *supra* note 38, at 20.

B. Religious Exemptions from Modern Civil Rights Laws

Now let us see what this history might mean for religious exemptions today. This is a complex problem that arises in a wide variety of situations. Here, I want to focus on an issue that has stirred a great deal of debate and that came before the Supreme Court a few years ago in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[166] Suppose that a baker or a florist refuses on religious grounds to bake a cake or to arrange flowers for a same-sex wedding, and that the couple then pursues a remedy under a state civil rights law that bans discrimination based on sexual orientation and thus requires businesses to serve same-sex couples on the same terms as opposite-sex couples. In a case like this, is the provider entitled to an exemption from the antidiscrimination law under the Free Exercise Clause or the principle of religious liberty that it embodies? What light does the history that we have explored shed on this question?

As we have just seen, during the founding era it was axiomatic that the right to religious freedom did not authorize believers to violate the rights of others.[167] Of course, those rights included the natural rights that people established civil society to protect, such as life, liberty, property, and religious freedom itself.[168] In addition, the rights of others included the positive rights that people attained as members of civil society.[169] As Locke explained, when individuals enter into the social contract, they agree to give up some of their natural liberty.[170] In return, they gain not only legal protection for their natural rights but also the benefits that come from participating in the economic and social life of the community.[171]

Civil rights laws seek to ensure that all individuals are able to participate in this common life in a way that accords with their status as free and equal persons and members of society. That is the goal of federal and state laws that ban discrimination in employment, housing, and education.[172] And it is also the goal of public-accommodations laws.[173] Toward the end of Reconstruction, Congress passed the Civil Rights Act of 1875, which made it unlawful to deny individuals access to inns, public transportation, and places of amusement on the basis of race, color, or previous condition of

166. 138 S. Ct. 1719 (2018).

167. *See supra* text accompanying notes 163-65.

168. *See* McConnell, *supra* note 13, at 1461–62.

169. *See infra* text accompanying notes 170-71.

170. *See* LOCKE, GOVERNMENT, *supra* note 33, bk. II, §§ 128–30, at 352–53.

171. *See id.* § 130, at 353.

172. *See, e.g.*, Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; Fair Housing Act of 1968, 42 U.S.C. §§ 3601–06; Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–88.

173. *See, e.g.*, Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C. § 12182(a).

servitude.[174] In the *Civil Rights Cases* of 1883,[175] the Supreme Court struck down this law on the ground that even after the adoption of the Thirteenth and Fourteenth Amendments, the right of equal access to public accommodations was a matter for state rather than federal legislation. Many states then enacted laws banning racial discrimination in this context.[176] Over time, these laws have expanded to cover a wide variety of businesses and bases of discrimination.[177] Many states and localities now prohibit discrimination based on sexual orientation and gender identity[178]—a development that derives strong support from the Supreme Court's decisions in cases like *Romer v. Evans*,[179] *Lawrence v. Texas*,[180] and *Obergefell v. Hodges*,[181] which affirm the freedom, equality, and dignity of LGBTQ people.[182]

This discussion suggests a way to think about cases like *Masterpiece Cakeshop*. Of course, the right to religious liberty means that individuals are entitled to form their own beliefs about marriage and to live out those beliefs in their personal lives. But when they choose to operate businesses that are open to the public, their activity becomes a part of the economic and social life of the community—a sphere in which everyone has a right to equal treatment. This is the

174. An Act to Protect All Citizens in Their Civil and Legal Rights, ch. 114, § 1, 18 Stat. 335, 335–36 (1875).

175. 109 U.S. 3 (1883).

176. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1357–67, 1374–83 (1996).

177. For an overview, see Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL'Y & L. 331 (2006).

178. *See, e.g.*, *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/T44M-SBFB] (last visited Aug. 24, 2022).

179. 517 U.S. 620 (1996).

180. 539 U.S. 558, 558–59 (2003).

181. 576 U.S. 644 (2015).

182. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, also bans discrimination in public accommodations, although this statute is limited to racial discrimination and covers a narrower range of businesses. The adoption of this law did not pose a direct challenge to the Court's holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), for that decision involved the Thirteenth and Fourteenth Amendments, *see supra* text accompanying note 175, while Title II was based on the Court's expansive modern interpretation of the Commerce Power and was upheld on that basis, *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

right that public-accommodations laws are designed to protect.[183] It follows that when the state enforces these laws in wedding-service cases, it generally should not be compelled to grant exemptions to providers who object to same-sex marriage on religious grounds, for the principle that we have derived from the founding-era history holds that religious liberty does not authorize one to violate the rights of others.[184]

No doubt there should be some exceptions to this general conclusion. For example, no one may be required to participate in a religious ceremony against their will, for that would violate their own right to free exercise.[185] For this reason, public-accommodations laws should not extend to singers or others who take part in the ceremony itself. On the view I have presented, however, religious liberty should not be understood to mandate exemptions for bakers, florists, limo drivers, bridal-shop owners, bed-and-breakfast proprietors, and others who are not present at the celebration and who provide services that have no inherent religious significance. To mandate broad religious exemptions would conflict not only with the rights to which LGBTQ people are entitled, but also with our nation's ongoing struggle to become a community that is based on mutual recognition and respect among all of its members.[186]

---

183. *See* Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 83–89 (2015) [hereinafter Heyman, *Same-Sex Marriage*].

184. *See* McConnell, *supra* note 13, at 1464.

185. *See, e.g.*, Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 586–87 (2014) (quoting Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989)) ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'"); Lee v. Weisman, 505 U.S. 577, 591, 599 (1992) (holding that this principle was violated by the inclusion of prayers in public school graduation ceremonies).

186. In some situations, it may be appropriate to balance competing rights. Consider a personal trainer whose religious beliefs forbid her to work with clients of the opposite sex. Those beliefs relate to the trainer's own moral conduct and are not based on any negative judgment about the status or rights of the persons she declines to work with. In this situation, it may be reasonable to grant her a religious exemption from a law against sex discrimination, for to do so would impose only a slight burden on males who seek to engage a personal trainer (assuming that there is no shortage of trainers available), whereas requiring her to comply with the law would impose a substantial burden on her religious practice. In my view, however, we should not employ balancing of this sort in the case of a wedding-service provider who refuses to serve same-sex couples. An individual should never have a right to demand that he be relieved of the obligation to comply with a law that protects the rights of others simply because he believes (whether on religious or other grounds) that they are not entitled to those rights. Cases like *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018), come within this principle, for in such cases the provider's refusal to serve same-sex couples is based on a belief that gay and lesbian people have

On this subject too, I find myself in agreement with Professor Curtis, who a decade ago in this journal made a powerful case against legal exemptions for religious opponents of same-sex marriage.[187] After reciting the principle of human rights and equality set forth in the Declaration of Independence, Curtis observed that

> [m]ost of us now understand [this] principle to include all people . . . . Our nation's story has been a story of efforts to expand the promise of American life to more and more people, including blacks, women, people of different religious faiths, of different national origins, and now, haltingly, gays. Expansion has never been easy or linear. Often the efforts have met fierce resistance. Objections to expanding protection for civil rights of blacks and women (as well as arguments in favor of protecting these groups) were often religious and justified by citations to the Bible.[188]

In spite of these objections, Curtis continued, federal and state laws against race and gender discrimination generally did not make exceptions for religiously motivated conduct.[189] Doing so would have undermined the purpose and efficacy of those laws by sending a "message . . . that discrimination is wrong and illegal except when it is right and legal" because it is supported by a religious belief that endorses the very system of subordination that those laws seek to eradicate.[190] "As a matter of principle," he concluded, "discrimination based on sexual orientation should be as disfavored as racial or gender discrimination," and so it would be improper to carve out an exception from civil rights laws for LGBTQ people alone.[191]

In 2018, the issue of wedding-service providers came before the Supreme Court in *Masterpiece Cakeshop*.[192] Justice Anthony M. Kennedy's majority opinion articulated a view that generally accords with the positions that Curtis and I have endorsed.[193] "Our society," Kennedy declared, "has come to the recognition that gay persons and

---

neither the capacity nor the human right to marry (in the only way that is consistent with their sexual orientation). For a fuller discussion of the wedding-service provider issue, *see* Heyman, *Same-Sex Marriage*, *supra* note 183, at 100–25.

187. Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 176–77 (2012).

188. *Id.* at 178 (citations omitted).

189. *Id.* at 176.

190. *Id.* at 202–03.

191. *Id.* at 200.

192. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

193. *Id.* at 1727.

gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[194] Although the First Amendment protects the right to hold and articulate "religious and philosophical objections to gay marriage," "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[195] Instead of deciding the case on the basis of these general principles, however, the majority overturned a judgment against the baker on the ground that Colorado administrators had displayed an impermissible hostility toward his religious views.[196] As a result, the substantive issue that I have discussed in this section—how to resolve the conflict between the religious liberty of wedding-service providers and the equality rights of same-sex couples—remains an open one.[197]

CONCLUSION

In this Essay, I have shown that the Free Exercise Clause was deeply informed by the ideas of natural rights, natural law, and natural religion that were pervasive in the intellectual world of eighteenth-century Americans. In many ways, of course, our own intellectual world is far removed from theirs. We no longer conceive of the world as the founding generation did, and so it would be a mistake to try to apply concepts like natural rights and natural religion in a straightforward way to the issues that we face today.[198] Yet I believe there is much we can derive from this history. As Curtis has observed, "[c]ommunities naturally appeal to historic common values, and battles over history are one aspect of our struggle to define ourselves as a community."[199] In the case of the Free Exercise

194. *Id.*

195. *Id.*

196. *See id.* at 1729–32.

197. The Court currently is considering whether a website designer constitutionally can be compelled to create a site for a same-sex wedding. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (Feb. 22, 2022) (No. 21-476), *granting cert. to* 6 F.4th 1160 (10th Cir. 2021). When the Justices granted certiorari in this case, however, they deliberately chose not to revisit the problem of how the Free Exercise Clause should apply in such situations, and instead limited review to the question of "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment," 142 S. Ct at 1106—a fascinating problem that I will not try to tackle here.

198. For an exploration of how these ideas might be translated into a contemporary context, see Steven J. Heyman, *Transforming Natural Religion: An Essay on Religious Liberty and the Constitution*, 48 BYU L. REV. (forthcoming 2023). A draft of this article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066760.

199. CURTIS, FREE SPEECH, *supra* note 3, at 17.

Clause, these "historic common values" include the notions that individuals are reasonable beings who must be free to develop and live out their own religious beliefs, but that they must use this freedom in a way that respects the rights of others as well as their status as free and equal members of a democratic society.[200] These values do not offer easy answers to contemporary issues, but they do provide a framework within which to debate them. In this way, the natural rights tradition still has much to teach us.

200. *See, e.g.*, LOCKE, TOLERATION, *supra* note 38, at 20.