

# “RELIGIOUSLY SCRUPULOUS”: FREEDOM OF CONSCIENCE AT THE FOUNDING

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When we think of freedom of conscience at the founding, we most often think of the degree to which our nation’s constitutions and laws sought to protect an individual right to practice one’s religion or to hold views contrary to the mainstream of society. And the founding era documents are rich with discussions of that sort, a small sampling of which are addressed in Part I.

But there is at the founding also the view that the philosophical underpinnings of the individual right to freedom of conscience serve a broader function than the mere protection of individual rights. As I explore in Parts II and III below, the philosophical foundation for the individual right is also the “self-evident” premise on which the entire edifice of republican (small “r”) government is based, and the means for its preservation. This article aims to explore all three aspects of the Founders’ views on the freedom of conscience.

## PART I: ACCOMMODATING THOSE WHO ARE “RELIGIOUSLY SCRUPULOUS”

The phrase, “religiously scrupulous,” is a bit foreign to our modern ears. The word “scrupulous” is, today, generally synonymous with “meticulous,” and is most often used to describe someone who has a strong attention to detail. “Scrupulous” does have more of a moral sense to it than “meticulous,” but even still, it fits awkwardly with the word “religiously,” which in modern grammar would be considered an adverb to the adjective (or predicate adjective) “scrupulous,” perhaps heightening the degree of scrupulousness sought to be conveyed. He’s not just a scrupulous man, he is really, really scrupulous—a *religiously* scrupulous man.

Anyone who has spent much time toiling in the vineyards of the writings of our nation’s Founders, however, will recognize that for them, the phrase

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had a different meaning, even a different grammatical structure. “Religiously” was not a mere adverb to the adjective “scrupulous.” It was, instead, and oddly, more like the object of a preposition in adverbial form, or perhaps an adjective. It meant that someone was scrupulous of, or conscientious about, his religious faith, or meticulously attendant to the duties compelled by his religion. In other words, he had *religious* scruples.

The most famous use of the phrase at the time of the founding was in discussions about the obligations of citizens to keep and bear arms for the common defense, in which many of our nation’s Founders recognized that some citizens—Quakers, most obviously—could not be compelled to take up arms because their religious faith prevented it. They were “religiously scrupulous” of bearing arms, it was said, and for that reason should not be compelled to take up arms.<sup>1</sup> Similarly, the original proposal for the Constitution’s Oath Clause, introduced right at the outset of the convention in May 1787, was modified very near the end of the convention to permit an affirmation as an alternative for those who were “religiously scrupulous” of taking oaths,<sup>2</sup> which is to say, those whose understanding of their religious duty prevented them from taking an oath.<sup>3</sup>

That was the first constitutionally-mandated religious accommodation,<sup>4</sup> which would later be expanded in the First Amendment’s Free Exercise of

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1. James Madison’s initial proposal for what eventually became the Second Amendment included this phrase, for example: “but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.” 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

2. The Oath Clause as originally proposed provided “that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–22 (Max Farrand ed., Yale Univ. Press 1911). June and July saw much discussion about whether an oath to support the Federal Constitution should also be required of state government officers, *id.* at 1:122, 194, 203, 207, 227, and 2:84, 87, but on August 30, the phrase “or affirmation” was added after the word “oath” without any recorded discussion, *id.* at 2:461, 468, indicating general agreement about the need to accommodate those whose religious faith prevented the taking of an oath.

3. The ban on the taking of oaths is rooted in a couple of biblical passages, including the following (from the King James version of the Bible in common use at the time): *James* 5:12 (“But above all things, my brethren, swear not, neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and your nay, nay; lest ye fall into condemnation.”); *Matthew* 5:34-37 (“But I say unto you, Swear not at all, neither by heaven, for it is God’s throne, Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.”).

4. An interesting side note: this was an accommodation of those whose view of their *religious* duty forbade the taking of oaths; it was not an accommodation of atheists, as is so often claimed today. *See, e.g., Do I Have to Say ‘So Help Me God’ During My Enlistment/Officer Oath?*, MIL. ASS’N OF ATHEISTS AND FREETHINKERS, <http://militaryatheists.org/about/faqs/do-i-have-to-say-so-help-me-god-during-my-enlistment-oath/>.

Religion Clause. Both, as well as the debate over an early draft of what became the Second Amendment and the extensive debate in Virginia over Patrick Henry's proposed religious assessment bill, reflected the view that government cannot compel religious believers to do things contrary to their religious beliefs, or forbid them from doing things their religion requires. Rather, if the religious faith of some requires certain conduct or prohibits certain conduct, government needs to accommodate those religious beliefs, wherever possible.

James Madison's *Memorial and Remonstrance* is perhaps the most famous example.<sup>5</sup> Madison defined religion as "the duty [that] we owe to our Creator." Because beliefs cannot be coerced, he added, the "[r]eligion . . . 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." Madison wrote that liberty of conscience is inalienable by its nature because one's opinions "cannot follow the dictates of other men," and it involves "a duty towards the Creator." Implicitly articulating the notion of inalienable rights in the Declaration of Independence, he continued: "This duty [towards the Creator] is precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and "therefore, that in matters of Religion no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."<sup>6</sup>

Alexander Hamilton espoused the same view. In his essay, "The Farmer Refuted," he wrote: "Good and wise men, in all ages, . . . have supposed, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever."<sup>7</sup>

The debate in Congress over what would become the Second Amendment followed this line of thinking. Madison's first proposal included the phrase, "but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."<sup>8</sup> That, and the other amendments he had proposed, were referred to the Committee of the Whole House,<sup>9</sup> and then

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5. 8 JAMES MADISON, A MEMORIAL AND REMONSTRANCE (JUNE 20, 1785), in THE PAPERS OF JAMES MADISON 295, 295 (Robert A. Rutland & William M. E. Rachal eds., Chicago: The University of Chicago Press 1973), *republished by Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (last visited Jan. 29, 2019).

6. *Id.*

7. Alexander Hamilton, *The Farmer Refuted &c.*, [23 February] 1775, FOUNDERS.ARCHIVES.GOV, <https://founders.archives.gov/documents/Hamilton/01-01-02-0057> (last visited Mar. 20, 2020).

8. 1 ANNALS OF CONG., 451 (1789) (Joseph Gales ed. 1834).

9. *Id.* at 468.

subsequently to a select committee (known as the Committee of Eleven) comprised of one member from each state, namely, James Madison from Virginia, John Vining from Delaware, Abraham Baldwin from Georgia, Roger Sherman from Connecticut, Edanus Burke from South Carolina, Nicholas Gilman from New Hampshire, George Clymer from Pennsylvania, Egbert Benson from New York, Benjamin Goodhue from Massachusetts, Elias Boudinot from New Jersey, and George Gale from Maryland.<sup>10</sup> The Committee of Eleven made its report to the House on July 28, 1789,<sup>11</sup> and its report was taken up by the Committee of the Whole House beginning on August 13, 1789.<sup>12</sup> The third clause of the fourth of the propositions that were contained in the report of the Committee of Eleven (which would eventually become the Second Amendment) was taken up on August 17, 1789, and as the *Annals of Congress* reflect, the Committee had dropped the “in person” phrase from the “religiously scrupulous” accommodation clause initially proposed by James Madison.<sup>13</sup> The Committee’s proposal, instead, included the following language: “but no person religiously scrupulous shall be compelled to bear arms.”<sup>14</sup> This broader accommodation drew an objection from Representative James Jackson, who thought it unjust that “one part would have to defend the other in case of invasion.”<sup>15</sup> He therefore proposed to add, “upon paying an equivalent,” while Representative William Smith of South Carolina proposed that the religious objector be “excused provided they found a substitute.”<sup>16</sup>

Other members of that Congress thought that these were not adequate accommodations. Representative Roger Sherman, for example, noted: “It is well known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other.”<sup>17</sup> And Representative John Vining added that he “saw no use [in the exception] if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.”<sup>18</sup> Representative Egbert Benson’s motion to drop the Religious Accommodation Clause

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10. *Id.* at 690–91. Rhode Island did not participate in the convention, and North Carolina did not have a delegate appointed to the committee.

11. *Id.* at 699.

12. *Id.* at 730.

13. *Id.* at 778.

14. *Id.*

15. *Id.* at 779.

16. *Id.*

17. *Id.*

18. *Id.*

altogether was then defeated,<sup>19</sup> and the religious accommodation language was included in the report that the Committee of the Whole House made to the House itself.<sup>20</sup>

When the House itself took up the matter three days later, the same debate was again joined.<sup>21</sup> Representative Thomas Scott objected to the Religious Accommodation Clause, and Representative Elias Boudinot responded with a two-pronged counter, one grounded in expediency (“Can any dependence . . . be placed in men who are conscientious in this respect?”) and the other grounded in justice (“what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”).<sup>22</sup> The House of Representatives ultimately approved the provision with the accommodation for the “religiously scrupulous” in place, after restoring the “in person” component of Madison’s original language.<sup>23</sup>

The entire Religious Accommodation Clause was deleted in the Senate (Article V of the proposed Amendments that had been approved by the House),<sup>24</sup> but the precise reason is not known because the Senate debates were not recorded.<sup>25</sup> We also do not have any recorded debate from the House and Senate conference committee, but we do know from the Annals that the House receded from its disagreement over the Senate’s language for all of the proposed amendments (including the deletion of Religious Accommodation Clause from the Second Amendment), provided that the Senate accept House amendments to what became the First and Sixth Amendment.<sup>26</sup> Nevertheless, given the strength of the arguments that had repeatedly been advanced in the House previously, we can speculate that the advocates of that religious accommodation may well have thought it adequately protected by the final “Free Exercise” language in the First Amendment, approval of which the House made a condition on its agreement to the Senate’s language for, *inter alia*, the Second Amendment.

The extent to which the Free Exercise Clause required the federal government (and, through incorporation via the Fourteenth Amendment, the

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19. *Id.* at 779–80.

20. *Id.* at 795–96.

21. *Id.*

22. *Id.* at 796.

23. *Id.*; H.R. JOURNAL, 1st Cong., 1st Sess. 85 (1789).

24. S. JOURNAL, 1st Cong., 1st Sess. 63–64, 71 (N.Y. 1789).

25. One member of the Senate, William Maclay of Pennsylvania, did keep a diary of the proceedings, but he was ill during the time and also preoccupied with the dispute over the location of the new capital; his diary does not contain any reference to the debates over the amendments. *See id.*

26. 1 ANNALS OF CONG., 948 (1789) (Joseph Gales ed. 1834).

state governments) to afford an accommodation to the “religiously scrupulous,” and whether any governmental interest was sufficiently strong to overcome that mandate, was ultimately worked out via the compelling interest test adopted by the Supreme Court in *Sherbert v. Verner*.<sup>27</sup> A government policy (in that case, access to unemployment benefits) that worked a substantial burden on a person’s sincerely held religious beliefs could only be upheld if the policy was narrowly tailored to further a compelling governmental interest. To be sure, even that strict test did not give as much credence to the claims of religious conscience as did Madison in his *Memorial and Remonstrance*, for a duty toward the Creator that “is precedent, both in order of time and in degree of obligation, to the claims of Civil Society”<sup>28</sup> would not, in that formulation, give way even to compelling claims of civil society. And it certainly did not give as much credence to the claims of the “religiously scrupulous” as did those who advocated in the first Congress to exempt the “religiously scrupulous” from military service, for it is hard to imagine a governmental interest more compelling than military service in a fledgling new republic still being targeted by salivating hostile powers abroad.

Nevertheless, even that somewhat watered-down test was discarded in the 1990 case of *Employment Division v. Smith*, in which Justice Antonin Scalia, writing for the majority of the Supreme Court, held that the Free Exercise Clause did not require the government to exempt religious believers from laws that posed even a substantial burden on their exercise of religion, as long as the laws were of general applicability and furthered a conceivable legitimate governmental interest.<sup>29</sup> And despite Congress’s efforts to counteract the Supreme Court’s rejection of the *Sherbert* compelling interest test by overwhelming majorities, first with the Religious Freedom Restoration Act of 1993<sup>30</sup> and then, after the Supreme Court held that law to be unconstitutional in *City of Boerne v. Flores*,<sup>31</sup> by the Religious Land Use and Institutionalized

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27. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

28. *Id.*; Madison, *supra* note 5, at 295.

29. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

30. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 1031-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (codified at 42 U.S.C. §§ 2000bb–2000bb-4). The bill was introduced in the House of Representatives by Congressman Chuck Schumer, and a parallel bill was introduced in the Senate by Senator Ted Kennedy. Religious Freedom Restoration Act, H.R. 1308, 103rd Cong. (1993); Religious Freedom Restoration Act, S. 2969, 102nd Cong. (1992). The House bill passed unanimously, the Senate bill passed with only three negative votes, and it was signed into law by President Bill Clinton.

31. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Persons Act of 2000,<sup>32</sup> the rational basis test of *Employment Division* rather than the strict scrutiny test of *Sherbert* remains controlling, much to the detriment of those who are “religiously scrupulous.”<sup>33</sup>

There has, of course, been much ink spilled in challenging or defending Justice Scalia’s opinion in *Smith*.<sup>34</sup> I have taken issue with the opinion myself, most recently in the pages of the *Journal of Markets & Morality*, a peer-reviewed journal published by the Acton Institute for the Study of Religion & Liberty.<sup>35</sup> My point here is not to regurgitate all of those arguments, but rather to lay the foundation adequately for the discussion of the broader function that religious duty served for the Founders.

## PART II. RELIGIOUS DUTY AS FOUNDATION FOR REPUBLICAN GOVERNMENT

I am a lector in my church, and I served as lector the Sunday before I was scheduled to attend the conference at which the outline of this article was delivered. As it happened, the New Testament reading that day was from the letter of St. Paul to Philippians, Chapter 2, which included these verses:

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32. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc).

33. In *City of Boerne*, the Supreme Court did suggest that Congress could impose the higher strict scrutiny standard on itself (that is, on the federal government), and the Court expressly so held in *Gonzales v. O Centro Espirita Beneficenteuniao do Vegetal*, 546 U.S. 418, 429–30 (2006), applying RFRA’s compelling interest test, rather than the deferential rational basis test of the Free Exercise Clause (as interpreted by *Smith*), to religious liberty defenses to enforcement of federal drug laws. That is why some more recent cases, such as *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688 (2014), use the compelling interest strict scrutiny standard. The Court has also subjected to strict scrutiny laws that target religious practice, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993), and, most recently, laws that are applied with an evident bias against religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1728–30 (2018). Moreover, a number of states have adopted so-called “mini-RFRAs,” imposing that higher test on themselves, but most have not, resulting in much less protection for religious liberty claims in those states. See, e.g., *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071, 1076 (9th Cir. 2015) (assessing a Free Exercise challenge to a Washington State pharmacy board requirement that licensed pharmacists carry all contraceptive drugs, including abortifacients, under mere rational basis review). It thus remains the case that, as a matter of federal constitutional law, the highly deferential rational basis test from *Smith*, rather than the strict scrutiny test from *Sherbert*, applies to state laws that substantially burden religious exercise, unless the laws specifically target religion.

34. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

35. John C. Eastman, *The Religious Wars in Twenty-First-Century America*, 21 J. OF MKTS. & MORALITY 23, 23–48 (2018).

Have among yourselves the same attitude that is also yours in Christ Jesus,  
 Who, though he was in the form of God,  
 did not regard equality with God something to be grasped.  
 Rather, he emptied himself,  
 taking the form of a slave,  
 coming in human likeness;  
 and found human in appearance,  
 he humbled himself,  
 becoming obedient to death, even death on a cross.<sup>36</sup>

With the upcoming conference closer to the front of my mind than it should have been while I was standing at the lectern, those verses brought to the forefront of my mind the hierarchy around which our republic is based, as set out in the Declaration of Independence. To be sure, the Declaration's language about "unalienable rights" retains the focus on individual rights akin to that described in Part I above, but that claim is actually derivative of the earlier claim in paragraph two of the Declaration, namely, that "all men, [all human beings], are created equal."<sup>37</sup> And it was in regard to the earlier claim that St. Paul's verses offered insight.

Let me make the connection more explicit. The Declaration of Independence speaks about all men being created equal. That is a patently false statement, if one considers only the normal metrics by which one might judge equality. We are not equal in strength, or intellect, or physical appearance, or talents, or in any of the countless ways those things might be measured. This is so manifestly clear that Senator John Pettit of Indiana was able to claim during Senate debate over the Kansas-Nebraska Act, with a great degree of credibility, that the principle of equality articulated in the Declaration of Independence was not a self-evident truth, as Jefferson had claimed, but a "self-evident lie."<sup>38</sup> In this, he was merely following the path set out by his ideological predecessor, John C. Calhoun, who had likewise argued that the "self-evidence truth" articulated by Jefferson in the Declaration was false.<sup>39</sup> And once he exposed the "lie," Calhoun was then able to advance

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36. *Philippians* 2:5–8.

37. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

38. CONG. GLOBE, 33rd Cong., 1st Sess. 1518 (1854).

39. *Id.*, 1st Sess. 1518 (1854); JOHN C. CALHOUN, Speech on the Oregon Bill (June 27, 1848), in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 539, 566 (Ross M. Lence ed., 1992).



the claim that slavery was a positive good,<sup>40</sup> beneficial to the slaves themselves who were, after all, inferior beings, according to Calhoun.

But Jefferson's claim *is* true if human beings, as a class, are different from something else. And here, St. Paul's formulation offers profound insight, for through it we recognize that all human beings are "slaves" in relation to God. Even Jesus Christ, who "emptied himself" of his divinity to become fully human, took on "the form of a slave" because, in his human capacity, "equality with God" was not "something to be grasped."<sup>41</sup> And being unequal to God the Creator, we each owe to God our obedience, just as Christ in his human form "humbled himself, becoming obedient to death, even death on a cross."<sup>42</sup>

The hierarchy thereby acknowledged by St. Paul is the same one that allowed Jefferson, in the Declaration of Independence, to assert as a self-evident truth that "all men are created equal."<sup>43</sup> In other words, as "slaves"—not one to another, but in contrast to God—we are all "created equal." We are all *created* equal in contradistinction to the being who created us. The very act of creation establishes an inherent hierarchy between God and man, and in that hierarchy each human being owes a duty to the Creator because we are, like Christ, taking on the form of a slave; we owe to that Creator an obedience, a duty, much like a slave owes obedience to his master.

It is in that sense, that hierarchical sense, that all human beings are created equal. No human being has the right to rule another human being in the way that God has a right to rule each human being, and each human being has a duty of obedience to God. It is the recognition of that hierarchy that makes the claim of human equality self-evidently true. And from that self-evident truth flow certain corollaries that lead through a series of logical steps to the nature of legitimate government. If it is true that there is such a hierarchy built in to our human nature, then the superintending authority to which we all owe obedience is also the source of rights that each of us has one against another, what Jefferson described in the Declaration as "unalienable rights," including (but not limited to) the right to life, to liberty, and to the pursuit of happiness (or to property, to resort to John Locke's formulation, from which Jefferson borrowed). And once you take that as the necessary corollary of this hierarchical structure, then the purpose of government necessarily flows from that understanding of those inalienable rights that preexist government. The

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40. CONG. GLOBE, 24th Cong., 2nd Sess. 159 (1837); JOHN C. CALHOUN, Speech on the Reception of Abolition Petitions (Feb., 1837), in SPEECHES OF JOHN C. CALHOUN: DELIVERED IN THE CONGRESS OF THE UNITED STATES FROM 1811 TO THE PRESENT TIME 224, 227–28 (1843).

41. *Philippians* 2:6–7.

42. *Id.* at 2:8.

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

purpose of government is in fact, as Jefferson states in the Declaration, to secure those inalienable rights. And the nature of the government designed to do that must be formed in recognition of the basic equality that gives rise to the government in the first place, which means ultimately that the government has to be grounded on the consent of the governed.

So right there, at the very foundation, a “religiously scrupulous” claim is the cornerstone of the claim of legitimacy for government itself. That idea—the American idea, one might say—also brings with it recognition that this is not a claim of absolute liberty, for it is rooted in a hierarchy with a Creator, to whom the created owe a duty of obedience.

It is here important to note that the Founders did not claim in paragraph one of the Declaration of Independence that human beings have the right to alter or abolish their government whenever they want, or more broadly to do whatever we want. Rather, the Founders claimed legitimacy for their cause based on “the Laws of Nature and of Nature’s God”, the same sources from which we learn or have revealed to us the duty that we can infer from the Equality Clause itself. That means individuals cannot exercise liberty to the point that it crosses over into licentiousness, for that would be denying the duty we have to those higher authorities. Or to put it in the words of one Founder, Samuel West: “where licentiousness begins, liberty ends.”<sup>44</sup> Jefferson, who is probably the most libertarian-leaning of the Founders, recognized this as well. He said at one point that “[t]he moral law of our nature . . . [is] the moral law to which man has been subjected by his creator.”<sup>45</sup> These statements, and many more like them from the founding era, all recognize that there is a duty to a higher authority that preexists the duties one owes to government. Remember, the Declaration of Independence was itself an act of treason according to the laws of England, so if the only duty one owes is to government (which is to say, to the laws of man), divorced from any claim of higher authority, then the signers of the Declaration of Independence would have deserved to be treated like traitors.

That is why the Declaration begins with an appeal, not to the laws of England, but to the laws of nature and of nature’s God. It is that claim, that appeal to the higher moral law, which makes the Declaration a legitimate separation from the prior allegiances and which allows us to render unto God,

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44. Samuel West, *On the Right to Rebel Against Governors*, THE HISTORY CARPER (May 29, 1776) <http://www.historycarper.com/1776/05/29/on-the-right-to-rebel-against-governors/> (last visited Sept. 16, 2019); see also Sandra Day O’Connor, *Liberty, Not Licentiousness*, LIBERTY: A MAG. OF RELIGIOUS LIBERTY, Nov./Dec. 1997, <http://libertymagazine.org/article/liberty-not-licentiousness>.

45. THOMAS JEFFERSON, OPINION ON FRENCH TREATIES (1793), reprinted in 3 THE WRITINGS OF THOMAS JEFFERSON, 228 (Lipscomb & Bergh eds., 1904).

that which is God's, reserving to Caesar (i.e., human government) only that which is Caesar's.<sup>46</sup> And note, that which is Caesar's is not an equal distribution of shares with that which is God's; Jesus did not make that statement as a way of dividing up the territory of sovereignty between two equal and competing sovereigns. "That which is Caesar's" is the residual, which can only be accommodated after the duty owed to "that which is God's" is fulfilled.<sup>47</sup>

All of this is built into the Declaration of Independence, if one simply reads that document with the care it requires. So when we speak about those who are "religiously scrupulous," we are also recognizing that the claims of the "religiously scrupulous" are in fact our claims as well, for they are the cornerstone of government by consent, the purpose of which is to secure for equal human beings the inalienable rights with which they are endowed by their Creator.

A similar idea is reflected in the Constitution's Oath Clause—the misunderstood Oath Clause. Most people think that the Oath Clause, which requires every government officer to swear by oath or affirmation to support and defend the Constitution, was a bow toward those who don't have religious beliefs. But the exact opposite is true. The Oath Clause was modified to accommodate those whose religious scruples did not allow them to take an oath. In fact, in many of the early states, those who would not take an oath, or for whom the taking of an oath was pointless because they did not believe in a higher superintending authority, were not allowed to testify in court.<sup>48</sup> Atheists were not allowed to testify in court because the mere punishment for perjury was thought to be insufficient to ensure that their testimony would be true. Something more was needed, something that was more profound and long lasting—everlasting, one might say. Taking an oath and then violating it by testifying falsely in court did not matter much for those who did not believe in an afterlife, or fear everlasting punishment. It mattered greatly for those who did. So, the Oath Clause was not designed to give a pass to those who did not believe in God. It was designed to accommodate those whose particular understanding or belief in God forbade them from taking an oath. And the Founders accommodated adherents to the religious sects holding such beliefs by allowing them to simply affirm. But the same potential consequences existed whether the promise was made by oath or affirmation.

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46. *Matthew* 22:21.

47. *Id.*

48. See generally *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 42 Am. L. Reg. (New Series) 373, 395–99, 395 n.41 (1903).

It was the threat of eternal punishment for testifying falsely, and that sanction helped guarantee to the extent possible that the testimony would be truthful.

We also have the interesting debate about the freedom of conscience, discussed above, which occurred during discussions over what became the Second Amendment rather than during the discussions involving what became the Free Exercise Clause in the First Amendment. The Free Exercise Clause debate was more about which branch of government was going to be dealing with religion. More about that in a moment, because that is more relevant to my concluding point, namely, that freedom of conscience is not just about the religious believer himself, or the foundation of our regime on the front end, but also the means of preserving free government on the back end. The debate over the First Amendment helps us understand that point. But the debate over conscience itself occurs most vividly in context of the Second Amendment,<sup>49</sup> which may seem an odd place for it.

During the discussion of what would become the Second Amendment—that is, the right of the people to keep and bear arms—there was a concern raised that the language might impose some obligation on those who were “religiously scrupulous” of bearing arms. As noted above, a proposed amendment to exempt those who were “religiously scrupulous” to bearing arms was not ratified, not because they thought that Government should be able to impose obligation to bear arms on those who had religious scruples against doing so, but because it was so well understood that such religious beliefs needed to be accommodated. What gave rise to the religious scruple was a duty believed to be owed to a higher authority, which no legitimate and earthly authority could therefore impose upon even in the context of what we would now describe as a rather compelling interest, taking up arms for the defense of a community against what may be a foreign attack threatening the nation’s very existence. The proposal to allow the “religiously scrupulous” to meet their shared duty for the defense of the nation by an alternative of paying somebody to stand in their stead was ultimately deemed insufficient because that alternative did not remotely address the concern of those who had religious scruples on the question. Whether such individuals are forced to bear arms themselves or forced to pay somebody else to bear arms for them is not going to exonerate them from the duty they believe they owed to this higher authority.

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49. It was not called First Amendment and Second Amendment then, of course. What we know today as the First Amendment was actually the third one on the list proposed; the first two did not get adopted at the time. One of them still has not been adopted, but the other is now the Twenty-Seventh Amendment, adopted some 200 years after it was first proposed.

Let us put this in modern jurisprudential terms. There is a compelling interest, survival of the nation. Allowing for a substitute was an alternative narrowly tailored to further that interest with the least intrusion possible on the religious conscience of those “religiously scrupulous” of bearing arms. Yet that accommodation was still not going to be sufficient because the duty that was owed to the higher authority was so profound that no legitimate government could impose on it. So even the modern strict scrutiny test rejected in *Smith*, or the strict scrutiny test that Congress sought to reimpose with the Religious Freedom Restoration Act, would have been considered by our Founders to be insufficient to protect the freedom of conscience that was owed to the higher authority by those who were “religiously scrupulous” in this context. Now no government can probably survive if that were to be the rule against the backdrop of a multiplicity of religious claims; that is probably why the Court in *Sherbert* moved to a somewhat lesser “strict scrutiny” threshold. But even there, one can see just how significant freedom of conscience was and how it is tied back to the very notion of inalienable rights. If rights are inalienable because they come from a higher authority than government, then so, too, are the duties one owes to that higher authority, that Creator, superior to any claims of government. We thus have to understand that all of those inalienable rights necessarily flow from the higher duties owed to the Creator.

### PART III. RELIGION AND VIRTUE AS ESSENTIAL TO THE PERPETUATION OF REPUBLICAN GOVERNMENT

As we have seen, religious liberty is necessary both for individuals exercising the duty their conscience indicates they owe to their Creator, and for the establishment of societies based on the immutable truth of human equality. But beyond that, religious liberty is critically necessary to the preservation and perpetuation of republican government. As noted by Montesquieu,<sup>50</sup> on whose writings our Founders so heavily relied,<sup>51</sup> the type of education that must be adopted depends on the nature of the regime in which the education is going to be utilized.<sup>52</sup> In a despotic form of government, he tells us, the people need to be educated in obedience and fear of their despot

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50. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (J. V. Prichard ed., Thomas Nugent trans., Lonang Institute 2005) (1748).

51. Michael Warren, *Charles Secondat, Baron de Montesquieu*, AMERICA'S SURVIVAL GUIDE, <http://www.americassurvivalguide.com/montesquieu.php> (last visited Apr. 4, 2019).

52. DE SECONDAT, *supra* note 50.

in order to keep them under control.<sup>53</sup> But, in a republican form of government, more than any other, he says, the people must be educated in moral virtue. Because if a people are not capable of governing themselves individually, they could not possibly be capable of governing themselves collectively. Our Founders frequently acknowledged the wisdom of Montesquieu's observation. The importance of fostering virtue in the people is evident in many of the original state constitutions, for example. The Massachusetts Constitution of 1780 says that it is a duty of the legislature to provide for religious exercise, because "the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality."<sup>54</sup> The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776 provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles . . . ."<sup>55</sup> The Pennsylvania Constitution of 1776 went even further, asserting that:

Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged . . . .<sup>56</sup>

It is also evident in the Northwest Ordinance, adopted by the Continental Congress while the Constitution was being drafted and readopted by the very first Congress formed under that Constitution. That organic law provides: "religion, morality, and knowledge, being necessary to good government and the happiness to mankind schools in the means of education shall forever be encouraged."<sup>57</sup>

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of *The Federalist Papers*:

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53. *Id.*

54. MASS. CONST. OF 1780, pt. I, art. III, reprinted in 3 *THE FEDERAL AND STATE CONSTITUTIONS* 1889-90 (Francis Newton Thorpe ed., 1909).

55. VA. CONST. OF 1776, BILL OF RIGHTS, § 15 (Thorpe, National Humanities Institute through 1999).

56. PA. CONST. OF 1776, art. II, § 45 (Lillian Goldman Law Library through 2008).

57. An Act to Provide for the Government of the Territory Northwest of the River Ohio (July 13, 1787), in 32 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, 340 (Worthington Chauncey Ford ed., 1906), recodified at 1 Stat. 51-52 n. (a) (1789).

Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.<sup>58</sup>

Some might object and contend that a society does not need religion in order to have virtue. But George Washington had a decidedly different view. In his farewell address—a fatherly message of wisdom to his fellow citizens as he was departing from his long life of service to the country—Washington wrote that:

[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>59</sup>

All of these statements recognize, in one way or another, that the inculcation of moral virtue, with heavy reliance on religion, is necessary for perpetuating the institutions of self-government, for guaranteeing success in this experiment of republican self-government.

The debate in the First Congress over what became the First Amendment bolsters this understanding. At the outset of that debate, James Madison proposed an amendment that would prohibit the establishment of a national religion.<sup>60</sup> Objection was made by Representative Sylvester that Madison's language was not protective enough of religion in the states, for there may be other ways in which the national government might interfere with the support of and collaboration with religion by the states.<sup>61</sup> Accordingly, the Congress ultimately settled on the phrase, "no law *respecting* an establishment of religion," capturing quite succinctly both aspects of the concern that the

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58. THE FEDERALIST NO. 55 (James Madison).

59. George Washington, Farewell Address (1796), *reprinted in* GEORGE WASHINGTON; A COLLECTION 521 (William B. Allen ed., Liberty Fund 1988).

60. 1 CONG. REG. 427 (1789), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 59–61 (Neil H. Cogan ed., 1997) ("nor shall any national religion be established").

61. *Id.*

federal government might interfere with religion.<sup>62</sup> No national church, and nothing that would otherwise interfere with existing state establishments of or support for religion, was allowed.

In other words, the First Amendment's Establishment Clause was not understood to ban government support of religion; it was, rather, a ban on a one-size-fits-all codification of an established church at the national level. The Establishment Clause did not prevent the states from encouraging non-sectarian prayer in public schools or from fostering aid to religion more broadly. Such prohibitions result from an error in interpretation suggested in dicta by the Supreme Court more than 150 years after the Amendment was ratified but which has subsequently been treated as constitutional gospel. Justice Hugo Black noted for the Court in *Everson v. Board of Education* that "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another," erroneously applying the clause to the states and erroneously treating aid on a non-sectarian basis as problematic.<sup>63</sup> Before that, the clause had never been understood as applying to the states, and it certainly had not been understood as prohibiting aid to all religions. But the dicta metastasized over the years into the full-blown exclusion of religion from the common schools and from the public square more broadly.

Regarding the schools, the Court in *Engel v. Vitale* invalidated a New York statute that instructed schools to open school each day with a non-sectarian prayer.<sup>64</sup> And in *Lee v. Weisman*, the Court invalidated the long-standing tradition of including non-sectarian prayers in school graduation exercises.<sup>65</sup> Neither of these actions by the state governments would have been understood by the Founders to violate the Establishment Clause.

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62. U.S. CONST. art. I; *see also* 1 ANNALS OF CONG., 757 (1789) (JOSEPH GALES ED. 1834).

63. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (emphasis added).

64. *Engel v. Vitale*, 370 U.S. 421, 423–24 (1962).

65. *Lee v. Weisman*, 505 U.S. 577, 584, 586–87 (1992). The actual prayer, delivered by a local rabbi, was the very definition of non-sectarian. In its entirety, it read:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN.



The same is true with the Court's "public square" jurisprudence. The public display of the Ten Commandments or of a nativity scene in a courthouse is unconstitutional, the Court held in *McCreary County, Kentucky v. ACLU of Kentucky*<sup>66</sup> and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,<sup>67</sup> respectively. Neither of those actions by the state governments would have been understood by the Founders to violate the Establishment Clause, either.

Why is the original understanding of the First Amendment so important, and the Court's error so devastatingly consequential? Because the states were the repository of the police power, which is the power to foster the health, safety, welfare, and morals of the people, though more recently "morals" has been dropped from the description.<sup>68</sup> The Founders all thought that fostering the morals of the people could not be done, or at least could not be done adequately, without reliance on religion. And they wanted the states to be free to determine for themselves the form that any collaboration with religion might take. In order to foster a morally virtuous citizenry as necessary to free government, they thought it necessary to foster religion. The consequences of not getting these questions right are profound, and as we are seeing in our modern society that has, because of court decisions, been deprived of the public affirmation of God, there is a loss of civility and an egocentric culture that makes it difficult to even recognize, much less foster, a common good.

So when we explore the theoretical foundation for protecting the conscience rights of those who are "religiously scrupulous," we find that the theoretical foundation for those claims is the same foundation and cornerstone for the establishment of republican governments in general, and also the means for the success and perpetuation of those governments. That is the understanding held by our nation's Founders, and based on it, they not only created truly republican forms of government, but they proved by their success in those experiments in self-government that such was not only possible but immensely valuable to the citizenry. Perhaps we should reacquaint ourselves with their wisdom in these matters, as a first step in addressing what ails us now.

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*Id.* at 582.

66. *McCreary Cty. v. ACLU*, 545 U.S. 844, 881 (2005).

67. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989).

68. Compare *Lochner v. New York*, 198 U.S. 45, 53 (1937) (describing the police powers as those which "relate to the safety, health, morals, and general welfare of the public"), with *Gonzales v. Oregon*, 546 U.S. 243, 300 (2006) (Scalia, J. dissenting) (quoting *Gonzales v. Raich*, 545 U.S. 1, 30, n. 38) (describing the "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens"), and *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (rejecting moral disapproval of conduct as a legitimate basis for government action).