Maybe strict scrutiny can be salvaged from its Warren Court roots, but only if we get clear about the purposes and aims of political authority. This account might be that because government is limited, the rights of liberty are necessary to the achievement of human goods. This would involve an assessment of the *weight* of an interest (denoting its importance amid a hierarchy of ends of government), the *occurrence* of an interest, and the *centrality* of an interest (as a core function of government, an overall assessment of core and peripheral purposes). What we would need is discourse and deliberation about the *ends*—not interests—of government and the need for political authority to foster the common good. One aspect of that good is freedom of religion, as we have been so admirably reminded in Brady's book.

FREE EXERCISE EXEMPTIONISM AND THE EVAPORATION OF THE INALIENABLE CHARACTER OF RELIGIOUS LIBERTY

VINCENT PHILLIP MUÑOZ
Tocqueville Associate Professor of Political Science, Concurrent Associate Professor of Law, University of Notre Dame

There is much to admire in Kathleen Brady's *The Distinctiveness of Religion in American Law*. First and foremost, the book thoroughly engages the current church-state scholarly literature. Brady seems to have read nearly every recent publication on the subject, which is no small task. For those new to the field or those looking to get caught up on current academic thinking about religious liberty and American constitutional law, *The Distinctiveness of Religion in American Law* is a good place to start.

The book also serves as an excellent example of what Jack Balkin calls "living originalism,"[31] though Brady does not describe it as such. Brady takes the founders seriously, attempting to understand their underlying principles. She is not slavish toward them, however, nor does she defer to their original intentions or even to the original meaning of the First Amendment's Religion Clauses. One certainly may dispute whether living originalism is the best method (or, even, a proper method) for interpreting the Constitution, but if one is going to adopt it, *The Distinctiveness of Religion in American Law* offers a distinctive example of how to do living originalism well.

The book has other virtues, but let me mention just one more: Brady's attempt to answer the charge of sectarianism. "Religious faith is not inscrutable," she writes, "to those without religious commitments. It is also not silly or outdated. It is something rooted in our nature as humans" (93). I am not one of the critics she is attempting to persuade, but I think she offers them as good of an argument as can be made. It too often is simply presumed that faith is opposed to reason. That is not true; at least, it need not be true. Reason may not confirm the truth of any particular faith—it may not even *confirm* the truth of faith at all—but reason does not demonstrate the falsity or irrationality of all faith. Brady is exactly right when she concludes that "we must leave open the possibility that the religious commitments many people hold refer to something true about the world and about human ends and purposes. Any other assumption . . . would not fit with human capacities and human realities" (99). I would add that any other assumption also does not fit with epistemological or philosophical reality.

31 Jack M. Balkin, *Living Originalism* (Cambridge, MA: Belknap Press of Harvard University Press, 2011).

https://doi.org/10.1017/jlr.2018.8 Published online by Cambridge University Press

Though Brady does not claim to be an originalist, she sets forth an understanding of the original meaning of the Free Exercise Clause. Here I think Brady stumbles, because she fails to understand the founders' underlying principles of religious liberty. Brady assumes the accuracy of Michael McConnell's conclusions, that through the Free Exercise Clause the founders meant to grant religious believers a presumptive right of exemption from burdensome laws.[32] It is hard to blame her for relying on McConnell's arguments, as he is perhaps the nation's most respected church-state originalist. But in assuming that the First Amendment constitutionalizes exemptionism, she has been led astray.

This is a big argument, of course, which I cannot repeat here.[33] But let me attempt to illustrate the central point by way of a brief discussion of the early founding-era state declarations of rights, the documents that most clearly reveal the founders' shared conception of religious liberty. Eight of the first fourteen states (including Vermont, which became a state in 1791 but drafted a bill of rights in 1777) adopted a declaration of rights between 1776 and 1786. These eight pre-1787 state declarations reveal that the founders held religious liberty to be a natural right that belongs to all individuals.[34] Five states—Delaware, Pennsylvania, North Carolina, Vermont, and New Hampshire—explicitly identified religious worship according to conscience as a natural and inalienable right. Three states—Virginia, Maryland, and Massachusetts—did not. But Maryland and Massachusetts included natural-rights language elsewhere in their declarations of rights and adopted text protecting religious liberty that was consistent with, if not suggestive of, the inalienable natural rights understanding. Virginia would recognize religious liberty as inalienable and "of the natural rights of mankind" in 1786, when it adopted Jefferson's Statute for Religious Freedom.

As I have written elsewhere, the concept of inalienability has a precise meaning in the founders' social compact constitutionalism.[35] Inalienable rights are, as the name suggests, those rights that cannot be alienated—that is, those over which individuals cannot (and, hence, do not) grant the state authority. Such rights cannot be alienated because another cannot exercise them on our behalf or because such a transfer would always run contrary to self-interest.

In the founders' social compact constitutionalism, government acquires only the authority granted to it by the people. When they said the rights of conscience are "unalienable," they meant that authority over the rights of conscience is not, and cannot be, granted to the government. Delaware (1776), Pennsylvania (1776), and Vermont (1777) articulated this point with precision in their declarations of rights, which all stated that "no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship."[36] The natural right of religious

32 Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1409–1517; Michael W. McConnell, "Free Exercise Revisionism and the *Smith* Decision," *University of Chicago Law Review* 57, no. 4 (1990): 1109–53.

33 See Vincent Phillip Muñoz, "The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress," *Harvard Journal of Law and Public Policy* 31, no. 3 (2008): 1083–1120; Philip Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60, no. 4 (1992): 915–48; Bradley, "Beguiled."

34 For further discussion of this point, see Vincent Phillip Muñoz, "Church and State in the Founding-Era State Constitutions," *American Political Thought* 4, no. 1 (2015): 1–38. See also Muñoz, "The Original Meaning of the Free Exercise Clause."

35 Vincent Phillip Muñoz, "If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty," *Notre Dame Law Review* 91, no. 4 (2016): 1387–417.

36 Philip B. Kurland and Ralph Lerner, *The Founders' Constitution*, reprint ed. (Chicago: University of Chicago Press, 2000). The full text is now available online at http://press-pubs.uchicago.edu/founders/. For the Delaware

https://doi.org/10.1017/jlr.2018.8 Published online by Cambridge University Press

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

Inalienable rights cannot legitimately be balanced with other rights. As I suggest in a recent article,

> This lack of sovereignty means that legislators lack authority to prohibit that which belongs to the natural right of religious liberty. It also means that judges—who, too, are agents of the state—lack authority to balance elements of the natural right to religious liberty against other state interests. The act of balancing itself assumes jurisdiction: The "balancer" places the competing free exercise right and state interests on a scale. Even if the scale is tilted toward religious freedom (as McConnell would have it), the act of weighing assumes an authority that the founders deny. In this context, Madison's use of the word "cognizance" [in his Memorial and Remonstrance] is telling. A state that must remain non-cognizant of the natural right of religious liberty cannot make it the subject of legislative or judicial balancing. As we shall discuss momentarily, this does not mean that all laws that incidentally burden religious interests are unconstitutional but, rather, that the state may never legitimately exercise direct sovereignty over elements of the natural right to religious liberty.[37]

This inalienable rights jurisdictional approach corresponds to the language of the First Amendment's Free Exercise Clause. The text imposes an absolute ban on Congress; it can "make *no law* . . . *prohibiting* the free exercise" of religion. Unlike the Fourth Amendment's protection against "unreasonable searches and seizures," or the Fifth Amendment's protections against deprivations of life, liberty, and property "without due process of law," the First Amendment affords no constitutional space for "reasonable" prohibitions of religious free exercise if "due process" is afforded or, to use modern terminology, "compelling state interests" are pursued. The categorical character of the Free Exercise Clause comports with the idea that the state lacks jurisdiction over the non-alienated right to religious liberty and, therefore, that the state can never directly prohibit any element of it.

In Brady's account of the founding, the *inalienable* character of the right to religious liberty evaporates. Her interpretation, it seems to me, transforms the inalienable right to religious liberty into an *interest* or *value*, one that must be balanced against other competing political interests and values. There might be good reasons for so transforming our understanding of religious liberty, but it represents a break from the founders' natural rights constitutionalism, not an application or a proper understanding of it. Because Professor Brady does not understand herself to be departing from the founders' constitutionalism, she does not make an argument for doing so. That is regrettable, because she otherwise has much of interest and value to say.

Declaration of Rights and Fundamental Rules (1776), see Amendment I (Religion), Document 26. For the Pennsylvania Constitution of 1776, see Amendment I (Religion), Document 30. For the Vermont Constitution of 1777, see Amendment I (Religion), Document 35. In the print version of the *The Founders' Constitution*, Amendment I is located in Volume 5.

37 Vincent Phillip Muñoz, "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion," *American Political Science Review* 110, no. 2, (2016): 369–81, at 373.

https://doi.org/10.1017/jlr.2018.8 Published online by Cambridge University Press