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**Founding Principles, Secular Skeptics, and Religious Freedom:  
Review of Kathleen A. Brady, *The Distinctiveness of Religion in American Law:  
Rethinking Religion Clause Jurisprudence***

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**Abstract**

*This review essay evaluates Kathleen Brady's provocative and original defense of the idea that religion remains special in modern liberal democracies, and deserves special constitutional treatment. While warmly commending this work, this essay also queries the author's non-originalist reading of original sources, her non-theological account of religious arguments, and her neglect of valuable international human rights sources in support of religious freedom for all.*

**Keywords:** Kathleen Brady; First Amendment; religious arguments; religious freedom; James Madison; John T. Noonan, Jr.

American religious freedom is under attack today in political, popular, and academic realms alike. The academic attack is the main focus of this important new book by our distinguished colleague, Kathleen Brady. A number of smart legal scholars, she shows, have challenged the idea that religion is special or deserving of special constitutional or legislative protection. Even if this idea existed in the eighteenth-century founding era – and that is now sharply contested, too – it has become obsolete in our post-establishment, post-modern, and post-religious age, these critics argue. Religion is just too dangerous, divisive, and diverse in its demands to be accorded special protection. Freedom of conscience claimants unfairly demand the right to be a law unto themselves, to the detriment of general laws and to the endangerment of other people's fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization – religious or not. Religious liberty claims are too often proxies for political or social agendas that deserve no more protection than any other. Religion, these critics thus conclude, should be viewed as just another category of liberty or association, with no more preference or privilege than its secular counterparts. Religion should be treated as just another form of belief and expression that must play by the rules of rational democratic deliberation just like

everyone else. To accord religion any special protection or exemption is plain discrimination against the non-religious. To afford religion a seat at the table of public deliberation or a role in the implementation of government programs is a recipe for religious self-dealing contrary to the establishment clause. We cannot afford these traditional constitutional luxuries any longer.

Enter Kathleen Brady with her learned, lithe, and lively engagement with the foundations and fundamentals of American religious freedom. In tightly written and exquisitely documented prose, she makes the case for the distinct nature of religion and for the special protection of religious freedom. She documents neatly the rise of neutrality/equality jurisprudence in the last generation of Supreme Court case law and its wide appeal to courts and commentators alike. She notes that, nonetheless, both Congress and the Supreme Court have recently given or allowed special protections to religious freedom in some instances. But she worries that this might well represent the last gasp of an old regime that will eventually die out in our post-modern age if a strong case for special treatment of religion cannot be made out in universally accessible and acceptable terms.

In impressive fashion, Brady rehearses the various arguments proffered by modern courts and commentators in favor of religious freedom, and in particular in favoring religion over non-religion. First, because of the nature of *religious belief*: Religious beliefs are deeply and intensely held, have compelling force, and will cause special psychic harm if they are violated at the expense of human dignity. Religious beliefs are integral to personal life, self-identity, definition, and direction. Religion is uniquely based on faith, not reason, while law is based on reason, not faith. Religious beliefs are ultimate, while secular beliefs are less weighty. Second, because of the essential interactions between *religion, law, and the state*: Religion is a buffer that protects individuals from state power. Religion cultivates values and virtues that are essential to democracy. Religion is an especially, if not uniquely valuable, human activity that provides individuals, society, and the state with a range of goods. Religion and state operate in different spheres and worlds that cannot invade the other, and government is incompetent to interfere in or judge religious matters. Third, because of the importance of *religious freedom* in the protection of other liberties: Religious freedom is a special aspect of personal liberty. Religious freedom, in the form of separation of religion and state, ensures no battles among religion for government approval or benefits, and no bending of state power to do the will of religion. Religious freedom is a prophylactic against civic harm since religious believers will disobey the law if it is contrary to religious commands. Religious freedom deserves special protection because the American founders and the First Amendment text say so, by uniquely foreclosing government benefits for religion under the establishment clause and uniquely protecting religious beliefs and believers under the free exercise clause.

Brady ultimately finds each of these arguments wanting, because they have secular equivalents or because they are too self-serving, sectarian, or antiquarian to convince the modern secularist or skeptic. Religious freedom and its special protection by and from government, she says, requires a more universally accessible and

convincing argument. Brady thinks that this more universal argument can be found in the insights of the eighteenth-century American founders. She appeals to them not as an originalist, but because she thinks the founders offered enduring teachings about religion that can still appeal to the religious and secular alike in our post-modern day. In Brady's formulation, James Madison and the founders treated religion as a unique human relationship with a transcendent or ultimate source and end of reality that provides answers to the ultimate questions of being, telos, suffering, finitude, and death. Religion entails and demands unique forms of reverence, obedience, and surrender. Religion provides an avenue to fulfillment and liberation beyond anything available on earth. And religion is ultimately latent in every human being, even if only fully realized or formally exercised by some. The founders adumbrated these arguments, Brady states, and these have been elaborated by many religious and philosophical traditions to this day. Even the bitterest skeptic and strongest anti-religious nihilist can see the power of these arguments, she thinks, and the uniqueness of religion and the necessity of religious freedom as a consequence.

From these insights about religion, Brady argues, the founders developed "principles" and "values" of religious freedom that they built into the new constitutional laws of their day. There is a notable shift in analysis here, as Brady moves from a highly abstracted version of the founders' teachings on religion to a close molecule-by-molecule analysis of their teachings on religious freedom principles and their manifestation in the new constitutional laws of religious freedom. She reduces the founding religious freedom principles to four: (1) liberty of conscience, (2) equality and plurality of faiths, (3) separation of church and state, but some (4) cooperation of government and religion. These principles form the bedrock of American religious freedom jurisprudence still today, she says – and one might add, they have strong analogues in the European Court of Human Rights of late, as well as in international human rights instruments beginning with the 1948 Universal Declaration of Human Rights, Articles 18 and 26.

Having laid out this argument for the uniqueness of religion, and for the special principles devised by the founders for its protection, Brady then works out her theory of religious accommodation and free exercise exemptions for religion. As the First Congress already saw, the principle of liberty of conscience requires judicially enforceable rights to exemption for religious claimants, both individuals and groups, who are substantially burdened in the exercise of their religion. Brady thinks these claims need be anchored in the Free Exercise Clause of the Constitution, not just in statutes, and that claimants need to meet both traditional tests of sincerity and more recent tests of substantiality of burden on their religion to press their case. She offers a fine-tuned analysis of the Supreme Court decisions, including such recent cases as *Hosanna-Tabor*, *Holt*, *Reed*, and *Hobby Lobby* to vindicate her position.

This is a big and bold argument, judiciously and generously phrased, fair-minded and foresightful, wide ranging in its use of sources, and pulsing with good will. Brady takes strong positions, and is not afraid to criticize others, but does so with exemplary scholarly restraint and craft. In a field riven with high emotions and sharp rhetoric of

late, a sober, careful, and cogent book like this is especially welcome. There are three further comments I would make about her analysis – one historical, one philosophical, and one comparative.

First, there is a delicate dance in this non-originalist resort to the original sources of the founders. This move is not unlike the moves made by neo-Thomists who plunder the *Summa Theologica* or neo-Calvinists who plunder the *Institutes* for modern-day arguments – or what federal judge and legal scholar John Noonan does with James Madison’s “insights” in his memorable *The Lustre of our Country*. Rather like Noonan, for whom she clerked, Brady turns to Madison especially among other founders to find arguments about why religion is distinctive and deserving of special treatment.

This move will likely generate a number of questions for readers. Is this a faithful representation of the founders’ views on religion, and of religious freedom? Why the pronounced shift in the mode of reading them when moving from their definition of religion to their delineation of religious liberty principles? Shouldn’t there be better reason for turning to the founders’ generation than that they provided clever and interesting arguments that might still be convincing today? And what of the 200 years plus of constitutional tradition thereafter? Are the four founding principles of religious freedom that Brady adduces comprehensive? Will the skeptics of originalism be any more convinced by this non-originalist rendering of original sources? What does one say to the critic who dismisses Madison, Jefferson, and other founders as a bunch of white, elite, self-interested males, trading on Western Christian premises that no longer obtain, or to the nihilist or atheist who says that matters of ultimate concern and reverence are just our imaginations and fears run wild?

This leads to a second point. Do advocates for religious freedom like Brady cede too much of the methodological, let alone confessional, turf by distinguishing so easily between religious and nonreligious (sectarian and secular) arguments, and insisting that the argument for special religious freedom protection must convince the skeptic, agnostic, and anti-religious or at least be different from anything they can argue as well? Brady is not convinced by the textual argument which says that while the nonreligious gets ample constitutional protections elsewhere in the First Amendment, the religious gets special protections and disabilities under the Free Exercise Clause. But couldn’t the argument be turned around, especially given the generous definitions of religion under free exercise and statutory jurisprudence? Couldn’t one say to the so-called “secularist” opponents of special religious freedom that a good number of their views have religious qualities as well?

To be sure, this argument can prove too much. If every philosophical argument is ultimately or fundamentally religious, even self-described nonreligious or secular arguments, then ultimately there’s nothing special about religion, and no special protection that the traditionally religious can claim. And, indeed, if Free Exercise Clause jurisprudence returns to a stricter scrutiny regime than what’s available under the Free Speech Clause, perhaps more self-professed secularists and atheists might start making free exercise arguments, too, perhaps undercutting the special qualities of free

exercise protection. I don't have an easy answer to this worry. But I do worry about having to defend religious freedom in a way that the bitterest skeptic and most cynical non-religionist will be convinced – knowing that they have already made a faith-like leap against religion that no rational argument can rebut.

Third, one important argument for the special protection for religious freedom missing from Brady's analysis is that protection of religion and religious freedom has proved critical to the protection of many other human rights.<sup>1</sup> Even in post-modern liberal societies, religions help to define the meanings and measures of shame and regret, restraint and respect, responsibility and restitution that a human rights regime presupposes. They help to lay out the fundamentals of human dignity and human community, and the essentials of human nature and human needs upon which human rights are built. Moreover, religions stand alongside the state and other institutions in helping to implement and protect the rights of a person and community— especially at times when the state becomes weak, distracted, divided, or cash-strapped. Religious communities can create the conditions and sometimes prototypes for the realization of civil and political rights of speech, press, assembly, and more. They can provide a critical sometimes the principal means of education, health care, child care, labor organizations, employment, and artistic opportunities, among other things. And they can offer some of the deepest insights into duties of stewardship and service that lie at the heart of environmental care.

Because of the vital role of religion in the cultivation and implementation of human rights, many social scientists and human rights scholars have come to see that providing strong protections for religious beliefs, practices, and institutions enhances, rather than diminishes, human rights for all. Many scholars now repeat the American founders' insight that religious freedom is "the first freedom" from which other rights and freedoms evolve. For the religious individual, the right to believe often correlates with freedoms to assemble, speak, worship, evangelize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to practice religion collectively implicates rights to corporate property, collective worship, organized charity, religious education, freedom of press, and autonomy of governance. Those who argue that American religious freedom is a dispensable and dangerous cultural luxury might well be playing right into the hands of those who would wish to subvert human rights and freedoms altogether.

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<sup>1</sup> Brian J. Grim and Roger Finke, *The Price of Religious Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (2011); John Witte, Jr., and M. Christian Green, *Religion and Human Rights: An Introduction* (2012).