

THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE: THE EVIDENCE FROM THE FIRST CONGRESS

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Despite the vast quantity of research devoted to understanding religion and the American Founding, the original meaning of the First Amendment's Free Exercise Clause remains a matter of significant dispute. In academic literature and in Supreme Court opinions, two leading interpretations have emerged. One side understands the Free Exercise Clause to grant religious individuals and institutions exemptions from generally applicable laws that incidentally burden religious exercise, absent a compelling state interest in the law's enforcement. Initially adopted by the Supreme Court in 1963 in *Sherbert v. Verner*,¹ the exemption interpretation received its leading originalist defense in 1990 by distinguished law professor (and now federal appellate judge) Michael McConnell.² Justice Sandra Day O'Connor later adopted Judge McConnell's arguments in her dissenting opinion in the 1997 case, *City of Boerne v. Flores*.³

The other interpretation of the Free Exercise Clause denies that the First Amendment encompasses such exemptions. The

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1. 374 U.S. 398 (1963). In *Sherbert*, the Court adopted the exemption interpretation apart from concerns about the Free Exercise Clause's original meaning. *See id.*

2. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Non-originalist defenses of the exemption interpretation include: Steven L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991) [hereinafter Gordon, *Free Exercise on the Mountaintop*]; James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65 (1997); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Steven D. Smith, *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805 (1996); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995).

3. 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting).

non-exemption interpretation, first articulated by the Court in 1878 in *Reynolds v. United States*,⁴ was revived for most free exercise issues in the 1990 case, *Employment Division v. Smith*.⁵ Justice Antonin Scalia, *Smith*'s author, has vigorously championed this position, with the concurrence of numerous academic commentators.⁶ In *Smith*, Justice Scalia defended his interpretation without referring to the Founders,⁷ but in *Boerne* he mounted a direct critique of exemptions on historical grounds.⁸ Advocates of both the exemption and the non-exemption interpretations of the Free Exercise Clause thus appeal to the Founders and purport to embrace the original understanding of the Free Exercise Clause. It would seem that both sides cannot be correct.

In an effort to help resolve the debate among both scholars and Justices over the most accurate interpretation of history, this Article gathers and examines the relevant evidence available from the First Congress regarding the Clause's original

4. 98 U.S. 145 (1878).

5. 494 U.S. 872 (1990). For Judge McConnell's response to *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For discussions of *Smith*, including the extent to which it overturned *Sherbert*, see CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH 187-90 (2000); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005); Gordon, *Free Exercise on the Mountaintop*, *supra* note 2.

6. Academic critics of the exemption interpretation of the Free Exercise Clause include: MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) [hereinafter *Hamburger, An Historical Perspective*]; Philip A. Hamburger, *More is Less*, 90 VA. L. REV. 835 (2004) [hereinafter *Hamburger, More is Less*]; Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1994) [hereinafter *West, The Right to Exemptions*].

7. See McConnell, *supra* note 5, at 1116-17; see also Gordon, *Free Exercise on the Mountaintop*, *supra* note 2, at 93, 114.

8. *Boerne*, 521 U.S. at 537-44 (Scalia, J., concurring).

meaning.⁹ This Article contends that the drafting of the Free Exercise Clause sheds almost no light on the text's original meaning. In drafting what would become the Second Amendment, however, the First Congress directly considered and rejected a constitutional right to religious-based exemption from militia service. When it considered conscientious exemption, moreover, no member of Congress suggested that such an exemption might be part of the right to religious free exercise. The records of the First Congress therefore provide strong evidence against the exemption interpretation of the Free Exercise Clause. Although some scholars have taken note of the possible relevance of the drafting of the Second Amendment to free exercise jurisprudence, its significance has been underappreciated.¹⁰ Recent scholarship on the topic has overlooked the Second Amendment debate altogether.¹¹ Likewise, in *Boerne*, neither

9. One could, of course, consider other historical evidence. For example, Professor Bradley argues that judicially-mandated religious free exercise exemptions are inconsistent with antebellum judicial interpretation, at both the state and federal levels, of constitutional guarantees of the free exercise of religion. See Bradley, *supra* note 6. Professor Hamilton reports that latter eighteenth-century sermons reveal that the religious leaders of the day did not envision a society that would permit religion-based exemptions from generally applicable laws. See Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387 (2002). For a different type of argument based on history, see Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996).

10. Professors Bradley and Hamburger, the leading critics of the exemption approach from an historical standpoint, mention the drafting of what would become the Second Amendment only in passing. See Bradley, *supra* note 6, at 268; Hamburger, *An Historical Perspective*, *supra* note 6, at 928. Other scholarship that has noted the possible relevance to interpreting the Free Exercise Clause of the drafting of what would become the Second Amendment includes: WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 54–55 (1976); Marshall, *supra* note 6, at 376 n.95; West, *The Right to Exemptions*, *supra* note 6, at 395–400.

11. Recent scholarship that attempts to ascertain the original meaning of the Free Exercise Clause but fails to examine the drafting of the Second Amendment includes: NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005); 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 15–25 (2006). Professor Michael Malbin's oft-cited pamphlet, *supra* note 6, may have discouraged scholars from investigating the records of the First Congress to ascertain the original meaning of the Free Exercise Clause. The opening paragraph of Malbin's chapter on the Free Exercise Clause begins:

The meaning of the free exercise clause is still unclear. After reading the congressional debates, we can guess that its purpose may have had something to do with the relationship between conscientious belief and its expression, but we are not given enough material to be more precise than that. For this, we shall have to look at the contemporary historical record.

Justice O'Connor nor Justice Scalia considered the records related to the drafting of the Second Amendment in their description of historical evidence.

Part I of this Article reviews the different originalist arguments articulated by Justices O'Connor and Scalia in their opposing opinions in *Boerne*. Part II begins the Article's review of the records of the First Congress. Through a detailed examination of the drafting of what would become the Free Exercise Clause, Part II shows why almost no conclusions can be drawn about the Clause's original meaning from those records. Part III examines the insufficiently explored drafting of what would become the Second Amendment, documenting Congress's consideration and rejection of a right of conscientious exemption from militia service. That Congress both rejected religious exemptions from militia service and appears to have considered such an exemption entirely without reference to what would become the First Amendment strongly suggests that the members of the First Congress did not understand the Free Exercise Clause to grant religious individuals exemptions from generally applicable laws.

I. THE ORIGINALIST TURN IN FREE EXERCISE JURISPRUDENCE:
THE O'CONNOR-MCCONNELL, SCALIA-HAMBURGER DISPUTE

After turning to the Founders to guide its first substantive interpretation of the Free Exercise Clause,¹² the Supreme Court's twentieth-century free exercise jurisprudence developed mostly without originalist arguments.¹³ In *Cantwell v. Connecti-*

MALBIN, *supra* note 6, at 19. Malbin then proceeded to deduce conclusions about the original meaning of the Free Exercise Clause from an investigation of the adoption of Article XVI of the 1776 Virginia Declaration of Rights and Jefferson and Madison's legislative efforts to establish religious freedom in Virginia from 1777 to 1785. His pamphlet, which was one of the first scholarly investigations of the subject, devoted almost no attention to the records of the First Congress for the purposes of understanding religious free exercise. His discussion of the drafting of what would become the Second Amendment was limited to one brief footnote. *See id.* at 39 n.4.

12. *Reynolds v. United States*, 98 U.S. 145, 162–64 (1878).

13. For a discussion of the Court's use of history in First Amendment religion clause jurisprudence, see Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 567–71 (2006). A notable exception to the general absence of historical arguments in free exercise jurisprudence between 1950 and 1997 is *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), in which Chief Justice Burger cited James Madison to strike down a Tennessee constitutional provision that barred religious ministers from holding certain political offices. *Id.* at 623–26. Free exercise cases before

cut,¹⁴ the 1940 case that incorporated the Free Exercise Clause against the states, and in *Sherbert v. Verner*,¹⁵ the precedent-setting case that governed free exercise jurisprudence from 1963 until 1990, the Court did not attempt to discover the text's original meaning. In *Smith*, similarly, the Court dismantled much of *Sherbert's* balancing test without relying on historical arguments.¹⁶ In 1993, Justice David Souter called for a reconsideration of *Smith*, in part because that case failed to consider the original meaning of the Free Exercise Clause.¹⁷ Justice Souter labeled the absence of history in the Court's free exercise jurisprudence "curious," and noted that the matter stood in "stark contrast" to the Court's Establishment Clause jurisprudence.¹⁸ In 1997, in her dissenting opinion in *Boerne*, Justice O'Connor heeded Justice Souter's call for an originalist reconsideration of *Smith*.

A. Justice O'Connor's Originalist Defense of Exemptions

The *Boerne* case was brought to the Court by Patrick Flores, the Catholic Archbishop of San Antonio.¹⁹ Archbishop Flores had filed a lawsuit against the city of Boerne, Texas after local zoning authorities, relying on an historical preservation ordinance, denied the archdiocese a building permit to enlarge a church.²⁰ Archbishop Flores challenged the permit denial under the Religious Freedom Restoration Act (RFRA),²¹ a 1993 federal

McDaniel that included passing references to the Framers include: *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961), and *Wisconsin v. Yoder*, 406 U.S. 205, 218 n.9 (1972).

14. 310 U.S. 296 (1940). It is impossible to know for certain why the Court eschewed attention to the Framers in *Cantwell*, but one reason suggests itself. In *Reynolds*, the Court interpreted the Free Exercise Clause in light of the Jeffersonian distinction between acts and opinions; specifically, the Court held that Congress was deprived of legislative power over opinions but maintained jurisdiction over actions. *Reynolds*, 98 U.S. at 164. The Connecticut statute under review in *Cantwell*, however, regulated solicitations, a type of action. 310 U.S. at 301. The Jeffersonian distinction between beliefs and actions, accordingly, did not clearly support the Court's decision.

15. 374 U.S. 398 (1963).

16. See *Employment Div. v. Smith*, 494 U.S. 872, 883–89 (1990); Gordon, *Free Exercise on the Mountaintop*, *supra* note 2, at 93.

17. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring).

18. *Id.* at 575. Judge McConnell made the same point in his 1990 *Harvard Law Review* article. McConnell, *supra* note 2, at 1413–14.

19. *Boerne*, 521 U.S. at 511–12.

20. *Id.*

21. 42 U.S.C. § 2000bb (2000).

law that attempted to overturn *Smith* and reinstitute the “*Sherbert* test” for free exercise jurisprudence.²² Under RFRA, generally applicable laws that had the effect of “substantially burden[ing] a person’s exercise of religion” were to be held unenforceable unless the government could demonstrate that the burden: “(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that . . . interest.”²³ In *Boerne*, the Court ruled against Archbishop Flores by a vote of 6-3, striking down RFRA as applied to state governments.²⁴ Justice Anthony Kennedy’s majority opinion found that Congress had exceeded its authority under Section Five of the Fourteenth Amendment by attempting to make a substantive change in (as opposed to remedying a violation of) a constitutional right.²⁵

Unlike Justice Kennedy’s majority opinion, which relied on separation of powers arguments, Justice O’Connor’s dissent focused on the meaning of religious free exercise. Specifically, Justice O’Connor proposed to examine “the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause”—a type of inquiry, she pointed out, that “the Court in *Smith* did not undertake.”²⁶ Justice O’Connor did not, however, conduct an examination of the First Amendment’s text or its drafting in the First Congress. “Neither the First Congress nor the ratifying state legislatures,” she asserted, “debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment’s free exercise protection.”²⁷ She went so far as to say that “it is not exactly clear what the Framers thought the phrase [‘free exercise’] signified.”²⁸ Nonetheless, Justice O’Connor suggested that other sources that “supplement the legislative history”²⁹ could be consulted. Following closely Judge McConnell’s 1990 *Harvard Law Review* article, Justice O’Connor focused on the text of early American legal docu-

22. For a defense of Congress’s actions, see Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 895–97 (1994).

23. 42 U.S.C. § 2000bb-1 (2000).

24. *Boerne*, 521 U.S. at 536.

25. *Id.* at 519.

26. *Id.* at 548 (O’Connor, J., dissenting).

27. *Id.* at 550 (citing LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 173 (1972)).

28. *Id.*

29. *Id.* at 550.

ments (in particular, state constitutions adopted during the Founding period), the Founders' political practice, and the writings of the leading Founders (especially James Madison).³⁰ The evidence in these historical records, she concluded, "casts doubt on the Court's current interpretation [under *Smith*] of the Free Exercise Clause" and "reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion."³¹

1. Textual "Provisos" for Religious Exemptions

According to Justice O'Connor, state constitutions adopted during and after the American Revolution protected religious freedom by establishing a balancing test that allowed judges to grant exemptions from generally applicable but burdensome laws.³² She noted that "[b]y 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution,"³³ and that these state provisions "were typically longer and more detailed than the Federal [First Amendment] Free Exercise Clause."³⁴ She suggested, furthermore, that the state provisions "are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty," because "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."³⁵

Justice O'Connor discussed the free exercise clauses of four state constitutions—New York, New Hampshire, Maryland, and Georgia—as well as a similar provision in the Northwest Ordinance of 1787, a federal law enacted contemporaneously with the drafting of the Constitution and then reenacted by the

30. *Id.* at 549–64.

31. *Id.* at 549.

32. *Id.* at 552–53. Justice O'Connor argued that evidence of the exemption-granting balancing approach could also be found in the earliest colonial legal documents recognizing religious liberty. Evidence cited by Justice O'Connor includes charters and laws from colonial Carolina, Maryland, New Jersey, New York, and Rhode Island. *See id.* at 551–52.

33. *Id.* at 552–53 (citing McConnell, *supra* note 2, at 1455).

34. *Id.* at 553.

35. *Id.*; *see also* McConnell, *supra* note 2, at 1456.

First Congress.³⁶ To take just one example, New York's 1777 Constitution provided:

[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.³⁷

Justice O'Connor focused on the proviso, "*Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." She interpreted this text to set forth the condition for when religious exercise could be circumscribed legitimately—that is, that the state could burden religion only when necessary to prevent "acts of licentiousness" or "practices inconsistent with the peace or safety" of the state.³⁸ Were this not what the proviso meant, Justice O'Connor reasoned:

[T]here would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State." Such a proviso would have been superfluous.³⁹

The presence of provisos demarking the narrow conditions for when the state could burden religion signaled to Justice O'Connor that the Founders foresaw that generally applicable laws would burden religious exercise, and that they intended to exempt religious citizens from such laws in all but the most important cases.⁴⁰

Tracking Judge McConnell's article, Justice O'Connor derived further support for the judicial balancing approach to free exercise from the history of Virginia, whose legislature,

36. *Boerne*, 521 U.S. at 553–54 (O'Connor, J., dissenting). For a full discussion of state constitutional protections of religious free exercise from the time before the Constitution, see McConnell, *supra* note 2, at 1455–66.

37. N.Y. CONST. of 1777 art. XXXVIII, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 178 (William F. Swindler ed., 1978).

38. *Boerne*, 521 U.S. at 554 (O'Connor, J., dissenting) (quotation marks omitted).

39. *Id.* at 554–55.

40. *See id.* at 555.

she said, “may have debated the issue most fully.”⁴¹ According to Justice O’Connor, when Virginia drafted Article XVI of its 1776 Declaration of Rights, its legislature debated what standard should be used to grant exemptions from religiously burdensome laws.⁴² George Mason’s initial draft declared that “all men should enjoy the fullest toleration in the exercise of religion . . . unless, under colour of religion, any man disturb the peace, the happiness, or safety of society.”⁴³ Unhappy with Mason’s language, the young James Madison proposed: “all men are equally entitled to the full and free exercise of [religion] . . . unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.”⁴⁴ According to Justice O’Connor, “both Mason’s and Madison’s formulations envisioned that, when there was a conflict, a person’s interest in freely practicing his religion was to be balanced against state interests.”⁴⁵ If the right to reli-

41. *Id.* For a thorough discussion of the debate in Virginia, see McConnell, *supra* note 2, at 1462–63.

42. *Boerne*, 521 at 555–56 (O’Connor, J., dissenting).

43. *Id.* at 555. The full text of Mason’s initial draft was:

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, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

George Mason, Committee Draft of the Virginia Declaration of Rights, *reprinted in* 1 PAPERS OF GEORGE MASON 1725–1792, at 284–85 (Robert A. Rutland ed., 1970). For a comprehensive account of the drafting of Article XVI of the Virginia Declaration of Rights, see Daniel L. Dreisbach, *George Mason’s Pursuit of Religious Liberty in Revolutionary Virginia*, 108 VA. MAG. HIST. & BIOGRAPHY 5 (2000).

44. *Boerne*, 521 U.S. at 555–56 (O’Connor, J., dissenting) (emphasis removed). The full text of Madison’s initial revision was:

That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered.

Gaillard Hunt, *James Madison and Religious Liberty*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 163, 166–67 (1902).

45. *Boerne*, 521 U.S. at 556 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1462–63.

gious free exercise did not include exemptions from some generally applicable laws, she said, the Mason-Madison debate would have been “irrelevant.”⁴⁶ Although the Virginia legislature did not adopt any proviso, Justice O’Connor concluded that it “[p]resumably” intended to adopt a balancing standard that struck “some middle ground between Mason’s narrower and Madison’s broader notions of the right to religious freedom.”⁴⁷

2. *The Founders’ Exemption-Granting Practices and Rhetoric*

Justice O’Connor also found that the political practice of the colonies and the early American states “bears out” the conclusion that the Framers believed religion should be accommodated as extensively as possible.⁴⁸ Carolina, she said, interpreted its 1665 charter to allow Quakers to enter pledges in a book instead of swearing oaths when the Quakers found the latter objectionable.⁴⁹ Some colonies and, later, states with established churches and legally-enforced religious taxes allowed taxpayers to support their own church or exempted religious dissenters from religious assessments.⁵⁰ Some states exempted Quakers from military service on account of their religiously inspired pacifism.⁵¹ Although Justice O’Connor acknowledged

46. *Boerne*, 521 U.S. at 556 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1463.

47. *Boerne*, 521 U.S. at 557 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1463. Virginia adopted the following text, lacking a proviso, as Article XVI of its Declaration of Rights:

That Religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed 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.

Dreisbach, *supra* note 43, at 16.

48. *Boerne*, 521 U.S. at 557 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1466–71. For a recent discussion of religious-based exemptions from generally applicable laws in colonial America and during the Founding era, see Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006).

49. *Boerne*, 521 U.S. at 558 (O’Connor, J., dissenting) (internal quotation marks omitted) (quoting THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 56 (1986)). Justice O’Connor also noted that by 1789 almost every state had enacted oath exception legislation. *Id.* (citing ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 62 (1990)).

50. See *id.* at 559 (citing McConnell, *supra* note 2, at 1469).

51. See *id.* at 558 (citing McConnell, *supra* note 2, at 1468). Justice O’Connor also noted that the Continental Congress passed a resolution in July 1775 recognizing

that early American legislatures, rather than courts, granted exemptions based on religion, she reasoned,

these were the days before there *was* a Constitution to protect civil liberties—judicial review did not yet exist. These legislatures apparently believed that the appropriate response to conflicts between civil law and religious scruples was, where possible, accommodation of religious conduct. It is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded.⁵²

3. *The Founders' Authoritative Documents*

The practice of religious accommodation adopted in the Founding period's laws, Justice O'Connor said, was also expressed in authoritative documents setting forth the views of leading Founders.⁵³ Justice O'Connor placed particular emphasis on James Madison's *Memorial and Remonstrance*.⁵⁴ In the *Memorial*, Madison gave two reasons why the right to religious free exercise was "unalienable": (1) because a person's opinions "cannot follow the dictates of other[s]"; and (2) because religion entails "a duty towards the Creator" that is "precedent both in order of time and degree of obligation, to the claims of Civil So-

the legitimacy of religious-based conscientious exemption from military service. The resolution stated:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Id. at 558–59 (quoting Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 187, 189 (Worthington C. Ford ed., 1905)).

52. *Id.* at 559–60. For an elaboration of this argument, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693–94 (1991); Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 830–32 (1998) [hereinafter McConnell, *Freedom From Persecution*]. For a criticism of this argument, see Bradley, *supra* note 6, at 267–72; West, *The Right to Exemptions*, *supra* note 6, at 377–78. For further discussion of this point, see *infra* notes 61–68, 76–81, 156–61 and accompanying text.

53. See *Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting).

54. For Judge McConnell's discussion of Madison, see McConnell, *supra* note 2, at 1452–55.

ciety.”⁵⁵ Madison’s argument that duties to God were superior to duties to civil authorities was, according to Justice O’Connor, “consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.”⁵⁶ Justice O’Connor argued that statements by Thomas Jefferson⁵⁷ and George Washington⁵⁸ also supported this view.

4. Justice O’Connor’s Conclusions

From early American legal documents, the political practices of the Framers, and the authoritative statements of leading Founders, Justice O’Connor drew three general conclusions. First, “these early leaders accorded religious exercise a special constitutional status.”⁵⁹ Second, “all agreed that government interference in religious practice was not to be lightly countenanced.”⁶⁰ Third, “all shared the conviction that ‘true religion and good morals are the only solid foundation of public liberty

55. *Boerne*, 521 U.S. at 561 (O’Connor, J., dissenting) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON 1783–1787, at 184–85 (Gaillard Hunt ed., 1901)).

56. *Id.* at 561. For a competing interpretation of Madison’s *Memorial and Remonstrance*, see Vincent Phillip Muñoz, *James Madison’s Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 20–24 (2003).

57. Justice O’Connor pointed out that in 1808, Jefferson wrote that he considered “the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.” *Boerne*, 521 U.S. at 562 (O’Connor, J., dissenting) (quoting Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON 428, 428–29 (Andrew A. Lipscomb ed., 1904)). She also noted that Jefferson said he believed that “[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.” *Id.* (quotation marks omitted).

58. Justice O’Connor noted that as President, Washington wrote to a group of Quakers:

[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

Id. at 562 (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11, 11 (Edward F. Humphrey ed., 1932)). For a competing interpretation of Washington’s letter to the Quakers, see Vincent Phillip Muñoz, *George Washington on Religious Liberty*, 65 REV. POL. 11, 25–27 (2003).

59. *Boerne*, 521 U.S. at 563 (O’Connor, J., dissenting).

60. *Id.* at 564 (citing ADAMS & EMMERICH, *supra* note 49, at 31).

and happiness.”⁶¹ These significant historical sources, Justice O’Connor concluded, led to the finding that:

[T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer’s conduct is in tension with a law of general application.⁶²

B. Justice Scalia’s Originalist Response

Justice Scalia’s concurring opinion in *Boerne* took direct aim at Justice O’Connor’s dissent, contending that it misinterpreted and misapplied the evidence about the Founders.⁶³ Similar to how Justice O’Connor’s historical arguments tracked Judge McConnell’s 1990 *Harvard Law Review* article, Justice Scalia’s historical analysis was informed by an article published by distinguished church-state scholar Philip Hamburger.⁶⁴

Following Professor Hamburger’s critique of Judge McConnell’s article, Justice Scalia challenged Justice O’Connor’s interpretation of early American legal documents.⁶⁵ He concluded that even if the Framers conceived that generally applicable laws were subject to judicial challenge under state or federal free exercise clauses—which Justice Scalia said was questionable⁶⁶—Founding-era state constitutions demonstrated the constitutional legitimacy of generally applicable laws that indirectly burden religious exercise.⁶⁷ Justice Scalia cited New York’s Constitution of 1777 as an example.⁶⁸ Its proviso, to recall, stated that “the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”⁶⁹ According to Justice

61. *Id.* (quoting CURRY, *supra* note 49, at 219).

62. *Id.*

63. *Id.* at 537 (Scalia, J., concurring in part) (“The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent’s interpretation of the Free Exercise Clause.”).

64. See, e.g., *id.* at 538 (citing Hamburger, *An Historical Perspective*, *supra* note 6).

65. For Professor Hamburger’s discussion of Founding-era state constitutions, see Hamburger, *An Historical Perspective*, *supra* note 6, at 918–26.

66. *Boerne*, 521 U.S. at 538–39 (Scalia, J., concurring in part).

67. *Id.* at 539–40.

68. *Id.* at 539. For Professor Hamburger’s discussion of New York’s constitution, see Hamburger, *An Historical Perspective*, *supra* note 6, at 924–26.

69. N.Y. CONST. of 1777, art. XXXVIII, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 37, at 178.

Scalia, the text did not imply that a state could indirectly burden a religious practice only when such burdens were absolutely necessary to maintain peace or safety. "At the time these provisos were enacted," he argued, "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws."⁷⁰ Quoting Professor Hamburger, Justice Scalia continued: "[T]he disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."⁷¹ Exactly contrary to Justice O'Connor, Justice Scalia concluded that the provisos explicitly recognized the legitimacy of indirectly prohibiting religiously motivated illegal actions.

Justice Scalia also disputed Justice O'Connor's contention that the Framers' political efforts to accommodate religions should guide judicial interpretations of the Free Exercise Clause. Such accommodations, he pointed out, were made by legislative bodies, and that "legislatures sometimes (though not always) found it 'appropriate' to accommodate religious practices does not establish that accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause."⁷² "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable," Justice Scalia continued, "is not to say that it is constitutionally required."⁷³ Had the Framers understood religious exemptions to be constitutionally required, either by state constitutions or by the Federal Constitution,

it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, none exists.⁷⁴

70. *Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part).

71. *Id.* at 540 (quoting Hamburger, *An Historical Perspective*, *supra* note 6, at 918–19).

72. *Id.* at 541.

73. *Id.* (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)). For a more thorough elaboration of Justice Scalia's point, see Bradley, *supra* note 6, at 267–72. For an argument that the exemption interpretation does not fit "entirely comfortably" with the general structure of government created by the Constitution, see Tushnet, *supra* note 6, at 1697–99.

74. *Boerne*, 521 U.S. at 542–43 (Scalia, J., concurring in part) (citing McConnell, *supra* note 2, at 1504, 1506–11). For an elaboration of this argument, see Bradley, *supra* note 6, at 267–72.

Justice Scalia similarly dismissed Justice O'Connor's appeal to the writings of Madison and Washington.⁷⁵ "There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable)," Justice Scalia asserted, "as opposed to what was thought to be legislatively or even morally desirable."⁷⁶ Madison's *Memorial and Remonstrance*, he noted, made a legislative, not a judicial, argument.⁷⁷ In his letter to the Quakers, George Washington expressed a similar "wish and desire" that the Quakers be accommodated, but did not state that Quakers possessed a constitutional right to be exempt from military service.⁷⁸ "These and other examples offered by [Justice O'Connor's] dissent reflect the speakers' views of the 'proper' relationship between government and religion," Justice Scalia concluded, "but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship."⁷⁹

*C. The O'Connor-McConnell, Scalia-Hamburger Dispute
and Evidence Not Considered*

The Scalia-Hamburger non-exemption interpretation of the Free Exercise Clause accounts better for the considered historical evidence than the O'Connor-McConnell balancing approach.⁸⁰ Regarding the provisos in early American legal documents, Professor Hamburger argues convincingly that the early American state constitutions included "peace and safety" caveats to indicate that the state legitimately *could* curtail religiously motivated practices when they violated otherwise valid laws.⁸¹ Judge McConnell's interpretation of state constitution "peace and safety" provisos mistakenly assumes that the caveats withdrew exemptions only from those actions that invaded the rights of others.⁸² The texts of the provisos, however, are not that limited. Maryland's caveat, for example, states:

75. For Professor Hamburger's discussion of Madison, see Hamburger, *An Historical Perspective*, *supra* note 6, at 926–29.

76. *Boerne*, 521 U.S. at 541 (Scalia, J., concurring in part).

77. *Id.* at 541–42.

78. *Id.* at 542.

79. *Id.*

80. Judge McConnell, of course, disagrees. See McConnell, *Freedom From Persecution*, *supra* note 52, at 832–47.

81. See Hamburger, *An Historical Perspective*, *supra* note 6, at 917–21; see also Hamburger, *More is Less*, *supra* note 6, at 839–57.

82. See McConnell, *supra* note 2, at 1464.

[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless under colour of religion any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights.⁸³

If the O'Connor-McConnell interpretation is correct, Maryland's proviso should mention injury to others as the sole grounds for denying an exemption. Instead, the proviso also includes disturbing "the good order, peace or safety of the State" and infringing the "laws of morality." The free exercise provisos of the constitutions of New York and South Carolina similarly include "acts of licentiousness."⁸⁴ The broad language of these caveats belies the O'Connor-McConnell interpretation. Even if the caveats were included to indicate the grounds for denying exemptions, the realm of exemption ineligible activity would be far broader than Judge McConnell and Justice O'Connor recognize. Rather than indicating only that behavior that injures others is exemption ineligible, the sweeping coverage of the caveats would mean that almost all otherwise illegal behavior—actions that "disturb the good order, peace or safety of the State," that "infringe the laws of morality," and that "injure others"—would not be protected under the guarantee of religious freedom.⁸⁵

A more likely conclusion, however, is that Judge McConnell and Justice O'Connor fundamentally misread the intention behind the provisos. The caveats were not included to signal that the right to religious free exercise meant a presumptive right to exemptions for all but a narrow class of activity. Instead, their general, sweeping nature suggests that they were included to indicate that the right to religious free exercise *did not* grant religious individuals permission to break any law.⁸⁶

Justice Scalia's argument that what some state legislatures did at the time of the Founding does not dictate what is constitutionally required today is also persuasive.⁸⁷ The mere existence of some religious exemptions granted by the legislative

83. MD. DECLARATION OF RIGHTS of 1776, art. 33.

84. N.Y. CONST. of 1777, art. XXXVIII; S.C. CONST. of 1790, art. VIII, § 1.

85. See Hamburger, *An Historical Perspective*, *supra* note 6, at 918–19.

86. *Id.* at 918–21.

87. For a concurring opinion, see Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. J. 555, 560–61 (1998).

and executive branches at the time of the Founding does not imply that the Framers meant to include a constitutional right to exemptions enforced by the judiciary through the Free Exercise Clause.⁸⁸ As Professor Bradley points out, Judge McConnell assumes that the power to make religious exemptions passed from the legislature to the judiciary with the advent of judicial review,⁸⁹ a point for which Judge McConnell provides no support.⁹⁰ Justice O'Connor, following Judge McConnell, made the same assumption. Moreover, as Professor Bradley documents, no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions.⁹¹ Thus, early American courts themselves *did not* understand exemptions to pass from the legislature to the judiciary with the advent of judicial review.⁹²

Although Justice Scalia's arguments, bolstered by the work of Professors Hamburger and Bradley, may be sufficient to refute all of Justice O'Connor's arguments in *Boerne*, they do not exhaust the originalist case against exemptions. Justice Scalia responded only to Justice O'Connor's arguments, and she did not consider the records of the First Congress. Justice O'Connor bypassed the subject because, in her words, "[n]either the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise pro-

88. Regarding the relevance of legislatively-granted religious exemptions at the time of the Founding, Professor Hamburger writes: "[T]he issue whether an individual was understood to have a general constitutional right of religious exemption from civil laws is hardly the same issue as whether statutes or, occasionally, constitutions granted exemptions with respect to a few specific matters." Hamburger, *An Historical Perspective*, *supra* note 6, at 929.

89. See Bradley, *supra* note 6, at 267.

90. See *id.* at 267–72; see also Hamburger, *An Historical Perspective*, *supra* note 6, at 931–32 (discussing the Framers' understanding of the role of the judiciary); West, *The Right to Exemptions*, *supra* note 6, at 377–80.

91. See Bradley, *supra* note 6, at 276–95.

92. After an exhaustive survey of early American state court religious liberty cases, Professor Bradley comments:

It should be abundantly clear by now that the ratifiers, and succeeding generations of Americans, were hardly striving for "neutrality of effect" [exemptions]. Case after case recognized incidental, disproportionate burdens upon believers, particularly upon non-Protestants. Case after case held that, so long as neutrality of reasons was abided—provisionally, where that pertained to a certain class of actions—constitutional guarantees were not implicated.

Bradley, *supra* note 6, at 295.

tection.”⁹³ Justice O’Connor’s assertion is only partially true and by no means exhaustive. Read in isolation, the drafting of the Free Exercise Clause is unilluminating, as the next Part of this Article shows. When read in light of the drafting of what became the Second Amendment, however, the records of the First Congress provide strong evidence against the O’Connor-McConnell exemption interpretation—evidence that neither Justice O’Connor nor Justice Scalia discussed in their opinions in *Boerne*.

II. THE DRAFTING OF THE FREE EXERCISE CLAUSE

Although not decisive in itself, an examination of the drafting of the Free Exercise Clause is necessary to offer a complete account of the records of the First Congress. It is also necessary to frame the discussion of the drafting of what became the Second Amendment, the importance of which is explained in Part III of this Article.

A. Submitted Free Exercise Amendments

The genesis of the Bill of Rights as a whole, and the Free Exercise Clause in particular, lies in the Anti-Federalists’ criticisms of the proposed Constitution.⁹⁴ Regarding religious liberty, Anti-Federalists argued that the Constitution failed to protect the right of religious “free exercise”⁹⁵ and the right to worship according to the dictates of “conscience,”⁹⁶ terms they appear to

93. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997).

94. For a superb discussion of the role of the Anti-Federalists in the creation of the Bill of Rights, see ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 36–48 (1997).

95. See, for example, the Federal Farmer’s discussion of the rights “which ought to be established as a fundamental part of the national system.” *Letters from The Federal Farmer No. 4*, POUGHKEEPSIE COUNTRY J., Oct. 12, 1787, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 245, 250 (Herbert J. Storing ed., 1981). Perhaps the most articulate of the Anti-Federalists, he declared:

It is true, we [the people of the United States] are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact. There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property, and persons.

Id. at 249. The Federal Farmer also considered “trials by jury in civil causes” and “the cross examining [of] witnesses” as “essential.” *Id.*

96. For example, the Anti-Federalist “Centinel” said:

have used interchangeably.⁹⁷ Anti-Federalists clearly conceived of religious free exercise as an individual right⁹⁸ but, unfortunately, they did not define with precision what they meant by that right. The proposed amendments that emerged from the ratification struggle reflect the Anti-Federalists' lack of clarity.

Of the seven states that included amendments with their official notices of ratification, five submitted alterations concerning religion.⁹⁹ All five states' proposals included some version of the right to religious liberty, but none defined it. Virginia proposed:

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 con-

The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus*; and trial by jury for all crimes, except in case of impeachment: but there is 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; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent; and 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

Letters of Centinel No. 2, PHILA. INDEP. GAZETTEER, Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 143, 152.

97. McConnell, *supra* note 2, at 1488.

98. I disagree with Steven D. Smith, who argues that the original meaning of the Free Exercise Clause primarily involves a concern with federalism. Professor Smith does not consider the Anti-Federalists and how their concerns led to the adoption of the Bill of Rights. Ignoring the Anti-Federalists leads Smith to overlook how the terms "free exercise" and "liberty of conscience" were used to refer to the individual right of religious freedom, and thereby leads him to conclude, mistakenly, that the Free Exercise Clause was concerned with federalism. See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 35–43 (1995).

99. The seven states that submitted amendments were Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island (belatedly). Massachusetts's proposed amendments did not address religion. I omit from discussion South Carolina's proposal, which sought to amend the No-Religious-Test Clause in Article VI to read, "no *other* religious test shall ever be required." (emphasis added). For a statement on the irrelevance of South Carolina's proposal, see JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 303 n.29 (2000).

science, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.¹⁰⁰

The same text was copied by North Carolina and Rhode Island.¹⁰¹ New York proposed:

That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.¹⁰²

New Hampshire proposed the most succinct amendment: "Congress shall make no laws touching religion, or to infringe the rights of conscience."¹⁰³ Additionally, the minorities that lost the ratification battle in Pennsylvania and Maryland circulated proposed amendments.¹⁰⁴

B. The Drafting of the Free Exercise Clause in the First Congress

On June 8, 1789, James Madison introduced on the House floor the following three amendments related to religious free exercise:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be es-

100. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 657–61 (Jonathan Elliot ed., 2d ed. 1888), *reprinted as Virginia Ratifying Convention, Proposed Amendments to the Constitution*, in 5 THE FOUNDERS' CONSTITUTION 15, 16 (Philip B. Kurland & Ralph Lerner eds., 1987).

101. *See, e.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242–46, 248–49 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 17, 18.

102. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 327–31 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 11, 12.

103. *Id.* at 326, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 11.

104. The Pennsylvania minority suggested:

The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the Constitution of the several states, which provide for the preservation of liberty in matters of religion.

MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 79 (2d ed. 2002). The Maryland minority offered the following: "[T]hat there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty." *Id.*

established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.¹⁰⁵

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.¹⁰⁶

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.¹⁰⁷

Madison did not copy any of the amendments proposed by the various states. Moreover, he proposed an amendment directed against the states, something that no state suggested or probably even contemplated.¹⁰⁸ Curiously, Madison did not propose the same language to apply against the states and the national government. For the national government he offered two separate provisions: no abridgment of civil rights on account of religion and no infringement of the “full and equal rights of conscience.” For the states he proposed only the non-violation of the “equal rights of conscience.” Juxtaposing the two proposals might suggest that Madison thought the non-abridgement of civil rights was not a part of the “equal rights of conscience.” If it were, then the text directed at the national government would have been redundant; he would not have needed to stipulate the non-abridgement of civil rights in addition to the protection of the “full and equal rights of conscience,” because the latter would have encompassed the former.

Such an inference, however, is doubtful. As I have discussed elsewhere, Madison considered the denial of civil rights on account of religion a *prima facie* violation of religious liberty.¹⁰⁹ He might not have proposed the non-abridgement of civil rights in his state amendment because doing so would surely have doomed it. At the time, several states abridged civil rights on ac-

105. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

106. *Id.*

107. *Id.* at 452.

108. Most Anti-Federalists were concerned about potential encroachments on individual rights by the new national government and, accordingly, did not seek amendments to the Constitution to protect individuals from state governments. See also HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 68–69 (1981); McConnell, *supra* note 2, at 1484 n.381.

109. Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 27 (2003).

count of religion, including the right to hold office.¹¹⁰ Proposing an amendment to apply against the states was audacious in itself; an amendment that would have made a widespread state practice immediately unconstitutional probably would not have had any chance of being ratified. Why Madison proposed the non-abridgement of civil rights on account of religion in addition to the protection of the “full and equal rights of conscience” in his federal amendment is a bit of a mystery. Regardless, the point quickly became moot as a House committee immediately eliminated the civil rights non-abridgement provision.¹¹¹

Madison’s proposed amendments were sent to a committee consisting of one representative from each of the eleven states represented in the First Congress. The committee, on which Madison himself sat, made the following changes to Madison’s original drafts:

The civil rights of none shall be abridged on account of religious belief or worship, ~~nor no shall any national religion shall~~ be established *by law*, nor shall the full and equal rights of conscience be ~~in any manner, or on any pretext,~~ infringed.¹¹²

[N]o State shall *infringe* ~~violate~~ the equal rights of conscience¹¹³

No records of the committee’s proceedings exist, so one can only speculate about why the committee made the revisions it did. As mentioned, the committee eliminated the non-abridgement-of-civil-rights provision, perhaps because it

110. According to John K. Wilson, the following state constitutions included religiously-based limitations on holding public office: Delaware (1776), Maryland (1776), New Jersey (1776), North Carolina (1776), Pennsylvania (1776), Georgia (1777), South Carolina (1778), Massachusetts (1780), and New Hampshire (1784). Vermont, which became a state in 1791, also adopted a constitution (1777) with religious limitations on holding office. John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 J. CHURCH & ST. 753, 764 (1990).

111. Judge McConnell interprets “full and equal rights of conscience” to imply that “the liberty of conscience is entitled not only to equal protection, but also to some absolute measure of protection apart from mere governmental neutrality” — that is, exemptions. McConnell, *supra* note 2, at 1481. If Judge McConnell is correct, then the subsequent elimination of “full” by the First Congress could also be interpreted to imply the elimination of exemptions, an extrapolation that he resists. *Id.* at 1482. Judge McConnell’s attempt to draw a meaningful implication from the initial inclusion of the word “full,” and then his denial that the word’s subsequent exclusion has a meaningful implication, seem to be a stretch. Little can be drawn from the word’s original inclusion or its subsequent elimination.

112. 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1834).

113. *Id.* at 783.

thought the clause redundant. The committee also eliminated the seemingly unnecessary words “full and” before the “equal rights of conscience” in the amendment directed toward the national government, and replaced “violate” with “infringe” in the state amendment, making the language of the national and state amendments parallel to each another.

On August 15, 1789, the full House considered the amended text:

[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.¹¹⁴

The debate that ensued concentrated on the text relating to what would become the Establishment Clause;¹¹⁵ nothing of substance was said about what would become the Free Exercise Clause. The House made the following changes:

*Congress shall make no laws touching no religion, or infringing shall be established by law, nor shall the equal rights of conscience be infringed.*¹¹⁶

Two days later, on August 17, the House considered the amendment directed at the states. Thomas Tudor Tucker of South Carolina objected on the grounds that “[i]t will be much better . . . to leave the State Governments to themselves, and not to interfere with them more than we already do.”¹¹⁷ Madison responded that he conceived the state amendment to be

the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.¹¹⁸

114. *Id.* at 757.

115. For an account of the House proceeding regarding the Establishment Clause, see Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 623–31 (2006).

116. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1834).

117. *Id.* at 783.

118. *Id.* at 784. That Madison proposed protection for the “right of conscience” against state governments is further evidence against Steven D. Smith’s position that the original meaning of the Free Exercise Clause pertains to federalism. Madison’s proposal, which the House voted to adopt, only makes sense if the “right of conscience” belongs to individuals and, accordingly, could be protected against state encroachment. *Cf.* SMITH, *supra* note 98, at 35–43.

Samuel Livermore of New Hampshire suggested making the amendment an “affirmative proposition,”¹¹⁹ to which the House agreed, and which resulted in the following changes:

~~No State shall infringe~~ the equal rights of conscience, ~~nor~~ the freedom of speech, or of the press, ~~nor of~~ and the right of trial by jury in criminal cases, *shall not be infringed by any State.*¹²⁰

In the final wording of the amendments that was sent to the Senate, the transposition was not made. No reason for the mistake is recorded.

On August 20, Fisher Ames of Massachusetts proposed and the House accepted the following revisions to the amendment directed at the national government:

Congress shall make no laws *establishing touching* religion, or *to prevent the free exercise thereof, infringing* or *to infringe* the rights of conscience.¹²¹

The reasons for the inclusion of “free exercise” in addition to “rights of conscience” is not clear, as no discussion of the matter is recorded in the House records. Immediately after the adoption of “free exercise,” debate ensued over the proposed religious exemption from military service included with what would become the Second Amendment. No evidence exists to suggest that any delegate connected an argument for or against exemptions to the just-adopted language of “free exercise,” which suggests that “free exercise” was not understood to grant religious individuals exemptions from generally applicable laws.¹²²

On August 21, the House resumed consideration of amendments. In the *House of Representatives Journal*, the text of the national amendment is different than that adopted the previous day, with the following changes reflected in the record:

Congress shall make no law establishing religion, or *prohibiting to prevent* the free exercise thereof, ~~or to infringe~~ nor shall the rights of conscience *be infringed.*¹²³

119. 1 ANNALS OF CONG. 784 (Joseph Gales ed., 1834).

120. *Id.*

121. *Id.* at 796.

122. *See infra* Part III.

123. H.R. JOURNAL (Aug. 21, 1789), reprinted in 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789–1791, at 159 (Linda Grant De Pauw ed., 1972).

The reasons for the changes, including the change from “to prevent” to “prohibiting,” are unclear. Possibilities include an unrecorded amendment or mistranscriptions in either the *Annals* or the final copy of the engrossed bill.¹²⁴

On August 24, the House sent the following version to the Senate:

Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.¹²⁵

No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.¹²⁶

On September 3, 1789, the Senate took up what would become the First Amendment. The Senate considered and defeated the following three motions to amend the House’s language:

Congress shall make no law establishing *one religious sect or society in preference to others* ~~religion, or prohibiting the free exercise thereof~~; nor shall the rights of conscience be infringed.¹²⁷

Congress shall *not make any law, infringing* ~~make no law establishing religion, or prohibiting the free exercise thereof~~; ~~nor shall~~ the rights of conscience ~~be infringed~~, *or establishing any religious sect or society*.¹²⁸

Congress shall make no law establishing *any particular denomination of religion in preference to another*, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.¹²⁹

The Senate then adopted the following change:

Congress shall make no law establishing religion or prohibiting the free exercise thereof, ~~nor shall the rights of Conscience be infringed~~.¹³⁰

124. McConnell, *supra* note 2, at 1483.

125. S. JOURNAL, 1st Cong., 1st Sess., at 63 (Aug. 25, 1789) reprinted in 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 136. On August 25, the Senate read the August 24 House resolution proposing articles of amendment to the Constitution.

126. *Id.* at 64 (Aug. 25, 1789).

127. *Id.* at 70 (Sept. 3, 1789).

128. *Id.*

129. *Id.*

130. *Id.*

Three of the four motions considered on September 3, including the one that was adopted, moved to eliminate either “free exercise” or “rights of conscience.” Although these motions may indicate that the Senate thought “free exercise” and “right of conscience” redundant, it is unclear why the Senate ultimately voted to keep “free exercise” and not “rights of conscience.” If a difference in meaning between the two phrases existed, it is not apparent from either the House or Senate debates. The Senate may have kept “free exercise” for no better reason than that “rights of conscience” came at the end of the amendment and thus was more convenient to remove.¹³¹ No further changes to what would become the Free Exercise Clause are recorded in the Senate’s deliberations.

On September 7, the Senate eliminated the amendment directed at the states.¹³² No reason was recorded, though given that Senators at the time were elected by state legislatures, it may be that the Senate thought it improper to adopt an amendment applied against the States.¹³³ On September 9, the Senate adopted the following text:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.¹³⁴

On September 24, 1789, a joint congressional committee reconciled the differences between the House and Senate versions and crafted what would become the First Amendment: “Con-

131. Cf. McConnell, *supra* note 2, at 1488–91. Despite repeatedly recognizing that the terms “liberty of conscience” and “free exercise of religion” were used interchangeably at the time, *id.* at 1482–83, 1488, 1495, and, therefore, that the adoption of the latter instead of the former may have been “without substantive meaning,” *id.* at 1488, Judge McConnell concludes that the adoption of “free exercise” instead of “rights of conscience” is “of utmost importance,” *id.* at 1489. Judge McConnell’s own evidence belies his conclusion. Moreover, even if Judge McConnell is right that “free exercise” protects religiously motivated conduct whereas “conscience” protects only beliefs, *id.* at 1488–89, his conclusion—that “free exercise” demands exemptions—does not necessarily follow, *id.* at 1490. “Free exercise” could be understood to protect religiously motivated actions without requiring exemptions by prohibiting, for example, state action that directly outlaws specific religious practices, such as the performance of the Catholic Mass.

132. S. JOURNAL, 1st Cong., 1st Sess., at 72 (Sept. 7, 1789) (rejecting the motion “to adopt the fourteenth article of the amendments proposed by the House of Representatives.”).

133. See McConnell, *supra* note 2, at 1484.

134. S. JOURNAL, 1st Cong., 1st Sess., at 77 (Sept. 10, 1789).

gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹³⁵

Ultimately, regarding the original meaning of the Free Exercise Clause, almost nothing can be ascertained from its drafting in the First Congress. No member of Congress articulated what he understood by the phrases “free exercise” or “rights of conscience.” Fisher Ames and some members of the House might have thought that these two phrases denoted different types of protection, because they included both phrases in their versions of the amendment.¹³⁶ If so, the record does not include their explanations of what the differences were. And if such differences did exist, the Senate may have made the point moot by quickly eliminating the text “rights of conscience.” The record of the drafting of the Free Exercise Clause reads like a markup session, the focus of which was to craft text that was not redundant or stylistically awkward. Nothing suggests that the First Congress engaged in a substantive discussion of the meaning of “free exercise.”

III. RELIGIOUS EXEMPTIONS AND THE DRAFTING OF THE SECOND AMENDMENT

Given the lack of helpful evidence from the drafting of the Free Exercise Clause, Justice O’Connor’s decision in *Boerne* to bypass the records of the First Congress would seem to be well founded. While debating what would become the Second Amendment, however, the First Congress directly addressed the question of religious exemptions from generally applicable laws. That discussion, which Justices O’Connor and Scalia passed over completely, contains evidence strongly suggesting that the First Congress did not understand the Free Exercise

135. A slight discrepancy exists between the *Journal of the House of Representatives*, the *Senate Legislative Journal*, and the September 24, 1789, Conference Committee Report, on the one hand, and the *Annals of Congress* on the other. The first three sources report the final language of the Free Exercise Clause to be, “or prohibiting the free exercise thereof,” whereas the *Annals* reports, “or prohibiting a free exercise thereof.” See H.R. JOURNAL (Sept. 24, 1789), reprinted in 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 228; S. JOURNAL, 1st Cong., 1st Sess., at 76 (Sept. 24, 1789); H.R. JOURNAL (Sept. 24, 1789) (Conf. Rep.), reprinted in 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 47; 1 ANNALS OF CONG. 948 (Joseph Gales ed., 1834) (emphasis added).

136. As noted, Judge McConnell emphasizes the difference between texts protecting religious “conscience” and religious “free exercise.” See *supra* note 131.

Clause to include a right to religious exemptions from generally applicable laws.

In addition to denouncing the Constitution's lack of protection for religious "free exercise," Anti-Federalists also decried the absence of conscientious exemptions from military service.¹³⁷ The criticism was sufficiently powerful that in ratifying the Constitution, Virginia, North Carolina, and Rhode Island submitted an amendment exempting conscientious objectors from bearing arms.¹³⁸

Recognition of the unique burden that military service placed on some religious believers was not unusual in the Founding period.¹³⁹ Delaware, Pennsylvania, New Hampshire, New York (for Quakers only), and Vermont included conscientious objection provisions in their constitutions.¹⁴⁰ The provisions were

137. STORING, *supra* note 108, at 97 n.2. The criticism was expressed with particular vigor in Pennsylvania, perhaps most colorfully by "Centinel" in response to the vesting of Congress with power to provide and call forth the militia in Article I, Section 8:

This section will subject the citizens of these States to the most arbitrary military discipline, even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent, and for any length of time, at the discretion of the future Congress . . . ; there is no exemption upon account of conscientious scruples of bearing arms; no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New-Hampshire, however incompatible with their interests or consciences;—in short, they may be made as mere machines as Prussian soldiers.

Letters of Centinel No. 3, PHILA. FREEMAN'S J., Nov. 14, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 154, 159–60. For other Pennsylvania Anti-Federalist criticisms, see *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 145, 164; *Essays of Philadelphiensis No. 2*, PHILA. INDEP. GAZETTEER, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 106, 107; *Letter by an Officer of the Late Continental Army*, PHILA. INDEP. GAZETTEER, Nov. 6, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 91, 94. Similar objections were made by Anti-Federalists in Maryland and New York. See *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 92, 97; *Address of the Albany Antifederal Committee*, N.Y. J., Apr. 26, 1788, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 122, 123; Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 79, 86.

138. See *infra* note 142 and accompanying text.

139. For a discussion of the history of religious exemptions from military conscription in America before the Founding period, see McConnell, *supra* note 2, at 1468–71.

140. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 339 (Richard L.

not exemptions *per se*, because an equivalent payment was required in lieu of military service. Nonetheless, they reveal that it was within the Framers' legal horizon to extend special privileges to individuals on account of the conscientious demands of religion.¹⁴¹

Among their proposed amendments to the Federal Constitution, Virginia, North Carolina, and Rhode Island submitted to Congress the following:

That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.¹⁴²

Minorities from the Pennsylvania and Maryland ratifying conventions also proposed amendments related to conscientious objection from military service.¹⁴³

Perry ed., 1959) (Delaware); *id.* at 330 (Pennsylvania); *id.* at 383 (New Hampshire); *id.* at 365 (Vermont). New York's constitution of 1777 gave exemptions only to "the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms." 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2637 (Francis Newton Thorpe ed., photo. reprint 2002) (1909).

141. The unique burden that military service placed on some religious believers was also recognized at the national level. In 1775, shortly before the outbreak of the Revolution, the Continental Congress included the following paragraph in its call for soldiers:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 51, at 187, 189.

142. 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 16 (Virginia); *id.* at 18 (North Carolina); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 100, at 335 (Rhode Island).

143. The minority in Pennsylvania proposed:

The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion.

1 THE DEBATES ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 532 (1993). Pennsylvania's constitution at the time included a provision exempting men "conscientiously scrupulous of bearing arms" from being compelled to do so, provided they paid an equivalent in lieu of service. SOURCES OF OUR LIBERTIES, *supra* note 140, at 330. During the Pennsylvania ratification debates, those opposed to ratification of the Constitution had argued that "[t]he rights of con-

As part of his attempt to quell Anti-Federalist opposition to the Constitution, James Madison proposed the following when he submitted amendments to the First Congress on June 8, 1789:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.¹⁴⁴

On August 17, the House debated the following amended text:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.¹⁴⁵

The ardent Anti-Federalist Elbridge Gerry immediately took exception to the provision, reading the language as granting the national government discretionary power to “declare who are those religiously scrupulous, and prevent them from bearing arms.”¹⁴⁶

After a brief discussion, the House brushed aside Gerry’s concern. James Jackson, a Revolutionary War hero, objected to the provision as “unjust,” because it did not specify that conscientious objectors were obligated to pay an equivalent in lieu of military service.¹⁴⁷ Madison’s original language had implicitly recognized the prerogative of the legislature to demand a payment in lieu of military service by including the words “in person,” but by August 17 “in person” had been eliminated.¹⁴⁸ William Smith of South Carolina immediately supported Jackson’s position, suggesting that the House adopt the proposed language submitted by Virginia and North Carolina, which in-

science may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms.” 1 THE DEBATES ON THE CONSTITUTION, *supra*, at 550.

The minority in Maryland proposed the following text: “That no person, conscientiously scrupulous of bearing arms in any case, shall be compelled *personally* to serve as a soldier.” *Address of a Minority of the Maryland Ratification Convention*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 97.

144. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

145. *Id.* at 778.

146. *Id.*

147. *Id.* at 779.

148. *Id.* at 778.

cluded an equivalent payment provision.¹⁴⁹ Roger Sherman and John Vining objected. Sherman said that those 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.”¹⁵⁰ Vining is recorded as stating that “he saw no use in it 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.”¹⁵¹

At this point, Egbert Benson of New York moved to eliminate the conscientious objector provision altogether. He is recorded as saying:

No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.¹⁵²

Benson’s statement contained three interrelated arguments. First, he asserted that exemptions should not be a constitutional right because they are not a part of the natural right to religious liberty.¹⁵³ The record does not include Benson’s explanation (if he offered one) about why he thought the right to religious liberty to be so limited. Whatever his reasoning, Benson clearly did not believe that conscientious objectors possessed a natural right to be exempt from military service. Second, be-

149. *Id.* at 779.

150. *Id.*

151. *Id.*

152. *Id.* at 780.

153. For a general discussion of the meaning of “natural rights” at the time of the Founding, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993). For a general discussion of what the Founders meant by the natural right of religious liberty, see Hamburger, *More Is Less*, *supra* note 6. Although he does not discuss Benson in particular, Hamburger’s explanation of how eighteenth-century religious dissenters understood the right of religious liberty to be unalienable and thus limited seems to capture Benson’s position. See *id.* at 839–48. For a discussion of how the Founders understood the protection of natural rights to be compatible with the imposition of civil obligations, including the duty of military service, see Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 *SUP. CT. REV.* 295, 305 (1992).

cause it was not a natural right, Benson thought exemptions should remain a matter of “discretion.” His comment suggests that if conscientious exemption was made into a constitutional right, the government, including the judiciary, could not address the matter in a discretionary manner—that is, rights of conscience could not be balanced against other competing governmental interests. Third, Benson feared that a constitutional right to conscientious objection would involve the judiciary “on every regulation . . . with respect to the organization of the militia.”¹⁵⁴ Clearly anticipating judicial review, he seems to have feared that lawsuits filed by conscientious objectors would lead to improper judicial oversight over the organization of the militia. Benson did acknowledge that the government could “indulge” conscientious objectors. But if such a privilege were to be extended, the matter properly belonged to the legislature. He appears not to have feared the insufficiency of discretionary legislative exemptions, remarking that “the legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of.”¹⁵⁵

Benson’s comments appear to have had some support within the House, although not a majority. Immediately after his statement, a motion was made to strike the exemption clause, but it failed by a vote of 22 to 24.¹⁵⁶ Three days later, the House again debated the provision. This time, Thomas Scott of Pennsylvania raised objections. He repeated Benson’s criticism that the matter was “a legislative right altogether,” and he added a different objection, that if religious objectors could neither be called to service nor be made to pay an equivalent, “a militia can never be depended upon.”¹⁵⁷ Recourse then would need to be made to a standing army,¹⁵⁸ an institution that some at the time thought was inimical to liberty.¹⁵⁹ Scott seemed to be par-

154. 1 ANNALS OF CONG. 780 (Joseph Gales ed., 1834).

155. *Id.* Benson’s explicit distinction between legislatively-granted exemptions and judicially-granted exemptions casts significant doubt on Judge McConnell’s assumption that “[i]f legislatures conceived of exemptions as an appropriate response to conflicts between law and conscience, there is every reason to suppose that the framers and ratifiers of the federal Constitution would expect judicially enforceable constitutional protections for religious conscience to be interpreted in much the same manner.” McConnell, *supra* note 5, at 1119.

156. 1 ANNALS OF CONG. 780 (Joseph Gales ed., 1834).

157. *Id.* at 796.

158. *Id.*

159. See STORING, *supra* note 95, at 84, 17 n.12.

ticularly vexed by the problem of draft-time conversions. With uncompensated exemptions available, “the generality of persons will have recourse to these pretexts to get excused from bearing arms.”¹⁶⁰ Scott said he did not mean to deprive those who were religiously scrupulous from “any indulgence the law affords,” but “to guard against those who are of no religion.”¹⁶¹

Representative Elias Boudinot of New Jersey is the only person recorded as responding to Scott. A Presbyterian and, later, president of the American Bible Society, Boudinot said he hoped “that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person.”¹⁶² “[B]y striking out the clause,” he continued, “people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.”¹⁶³ Responding directly to Scott’s concerns about the militia’s dependability, Boudinot asked rhetorically, “Can any dependence . . . be placed in men who are conscientious in this respect?”¹⁶⁴ Moreover, he asked, “[W]hat justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”¹⁶⁵ This latter point suggests that Boudinot thought that exemptions were not only prudent (given that conscientious objectors would likely make bad soldiers), but also necessary to meet the just demands of religious freedom. After Boudinot’s comments, the record includes the following: “Some further desultory conversation arose, and it was agreed to insert the words ‘in person’ to the end of the clause; after which, it was adopted.”¹⁶⁶

The restoration of Madison’s original “in person” is significant. The language, “but no person religiously scrupulous shall be compelled to bear arms in person” suggests that the House viewed exemptions from military service more as a privilege than a right. As Sherman and Vining recognized in the House debate on August 17, many of those who opposed bearing arms were equally scrupulous of getting substitutes or paying an

160. 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1834).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

equivalent.¹⁶⁷ If religious individuals were understood to possess a right not to serve in the military on account of conscientious objection, then for the same reason they also would seem to possess an equal right not to pay for an equivalent. The reinsertion of “in person” suggests that the House understood conscientious objection not to override a citizen’s civil obligations. Stated differently, “in person” indicates that the House thought the state legitimately could demand some actions that burdened religious individuals’ consciences. By restoring the words “in person,” the House rejected Boudinot’s hope that they “show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person.”¹⁶⁸

Even more significantly, on September 9, 1789, the Senate eliminated the conscientious objector provision altogether.¹⁶⁹ Unfortunately, there is no record of the Senate’s deliberations on this point. Regardless, the Senate’s elimination of the conscientious objector provision would seem to undermine Judge McConnell’s assertion that “[t]he significance of Boudinot’s position . . . is that he, with a majority of the House, considered exemption from a generally applicable legal duty to be ‘necessary’ to protect religious freedom.”¹⁷⁰ Congress as a whole *rejected* Boudinot’s position. The real significance of Boudinot’s position, then, would seem to be that it indicates that the First

167. According to Ellis West:

[T]he [military service] exemptions granted to conscientious objectors [in early America] were seldom, if ever, considered by them to be adequate or satisfactory because they were limited or conditional in nature. To avoid military service, the objectors had to secure a substitute or pay a fine or special tax. It is quite clear, moreover, that the lawmakers who imposed the fines or taxes considered them to be the equivalent to military service, and their amount was set accordingly. As a result, the exemptions were rejected by most Mennonites, Brethren, and Quakers, some of whom suffered imprisonment and loss of property for failure to serve, pay a fine/tax, or secure a substitute. Moreover, the lawmakers in the various states were quite aware that pacifists objected to paying a fine or tax in lieu of military service.

West, *The Right to Exemptions*, *supra* note 6, at 381 (footnotes omitted). Material cited by West includes: PETER BROCK, *PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR 199–200* (1968); RICHARD K. MACMASTER ET AL., *CONSCIENCE IN CRISIS: MENNONITES AND OTHER PEACE CHURCHES IN AMERICA, 1739–1789*, at 62–63 (1979); RICHARD K. MACMASTER, *LAND, PIETY, PEOPLEHOOD 256–57* (1985); R. R. RUSSELL, *Development of Conscientious Objector Recognition in the United States*, 20 *GEO. WASH. L. REV.* 409, 414 (1952).

168. 1 *ANNALS OF CONG.* 796 (Joseph Gales ed., 1834).

169. *S. JOURNAL*, 1st Cong., 1st Sess. 77 (Sept. 9, 1789).

170. McConnell, *supra* note 2, at 1501.

Congress *did not* consider exemption from a generally applicable legal duty to be necessary to protect religious freedom.

The following points can be taken from Congress's debates over the right to conscientious objection from military service. Several members of the First Congress understood the matter to be one of principle. A few articulated the opinion that the right of religious freedom itself demanded a constitutionally-recognized provision for exemptions from military service. Other House members rejected that argument, asserting instead that the matter was not one of natural or constitutional right, but only of legislative discretion. Congressman Egbert Benson spoke against conscientious exemptions, in part because they would necessarily lead to judicial review of legislative and executive actions. A majority in the House voted to allow conscientious objectors to abstain from military service in person, but they did not recognize a more general right to be exempt from civic obligations on account of their incompatibility with an individual's religious beliefs. Congress as a whole considered and rejected a constitutional right to exemption based on religion.

Most importantly and most tellingly, no evidence suggests that any member of the House connected the debate over conscientious objectors to the debate over the text that would become the Free Exercise Clause. On August 20, immediately preceding the Scott-Boudinot exchange discussed above, the House adopted the following text:

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.¹⁷¹

No evidence exists to indicate that Boudinot, whom Judge McConnell calls the "most eloquent defender" of the right to conscientious objection,¹⁷² ever suggested that this "free exercise" text protected conscientious objectors. That the House continued to debate a conscientious objector provision *after* it had adopted language protecting "free exercise" suggests that it did not consider "free exercise" to include the right to judicially granted exemptions from generally applicable laws. If it had, then the later debate over a conscientious objection provision would have been

171. 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1834).

172. McConnell, *supra* note 2, at 1500.

entirely superfluous.¹⁷³ The concurrent but separate discussions in the House over religious exemptions from military service on the one hand, and a right to religious free exercise on the other, suggest that the House did not understand religious free exercise to include exemptions from generally applicable laws.

That the right to “free exercise” did not include the right to judicially-granted exemptions from generally applicable laws is also suggested by the Anti-Federalists’ demand that a right to conscientious objection be recognized *in addition to* a right to religious free exercise. The states whose majorities proposed a conscientious objector amendment (Virginia, North Carolina, and Rhode Island) also proposed an amendment recognizing that “all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience.”¹⁷⁴ If these states thought that this language granted religious exemptions from burdensome laws, then they would not have needed to propose an additional conscientious objector amendment.¹⁷⁵

The state constitutions that included explicit conscientious objector provisions reflect this same point. As discussed above, the constitutions of Delaware, Pennsylvania, Vermont, New Hampshire, and New York (for Quakers only) included such provisions.¹⁷⁶ Yet the constitutions of Delaware, Pennsylvania, Vermont, and New York also explicitly protected the “free exercise” of religion, and New Hampshire’s 1784 Constitution protected the “rights of conscience.”¹⁷⁷ For example, Article II of the Declaration of Rights of Pennsylvania’s Constitution of 1776 stated:

173. *But see id.* at 1501 (attempting to explain why conscientious objectors “were not protected under the free exercise clause without need for a separate provision”). For a response to Judge McConnell’s arguments on this point, see West, *The Right to Exemptions*, *supra* note 6, at 398–400.

174. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 101, at 18.

175. The minority in Maryland, similarly, proposed both an exemption from bearing arms for those “conscientiously scrupulous” of doing so and also a separate amendment that stated “all persons be equally entitled to protection in their religious liberty.” *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 97.

176. SOURCES OF OUR LIBERTIES, *supra* note 140, at 330 (Pennsylvania), 339 (Delaware), 365 (Vermont), 383 (New Hampshire); THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 140, at 2637 (New York).

177. SOURCES OF OUR LIBERTIES, *supra* note 140, at 329 (Pennsylvania), 338 (Delaware), 365 (Vermont), 382 (New Hampshire); THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 140, at 2637 (New York).

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding And 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.¹⁷⁸

Article VIII of the same document stated:

Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.¹⁷⁹

If the right of religious “free exercise” was understood to include exemptions from generally applicable but religiously burdensome laws, there would have been no need for an additional constitutional provision to safeguard conscientious objectors. The debates in the First Congress mirror the general understanding that is reflected in the state constitutions of the time: the right of religious “free exercise” was something separate from and did not include the right to exemptions from generally applicable laws.

CONCLUSION

On the current Supreme Court, Justices Stevens and Kennedy previously have signaled their agreement with Justice Scalia’s non-exemption interpretation of the Free Exercise Clause.¹⁸⁰ Justice Souter’s and Justice Breyer’s previous opinions suggest that they favor Justice O’Connor’s exemption interpretation.¹⁸¹ Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito have not announced a clear position on the issue. Given that Chief Justice Roberts and Justices Thomas and Alito tend to be receptive to originalist arguments, the future of First Amendment free exercise jurisprudence may be determined by the Court’s use of history. If originalism is to guide free exercise

178. 5 THE FOUNDERS’ CONSTITUTION, *supra* note 100, at 71.

179. *Id.* at 72.

180. Both Justice Stevens and Justice Kennedy joined Justice Scalia’s majority opinion in *Employment Div. v. Smith*, 494 U.S. 872, 873 (1990).

181. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

jurisprudence, all the available evidence from the First Congress ought to be considered.

This Article has argued that the First Congress's consideration of a conscientious objector provision in the context of the drafting of the Second Amendment reveals that its members did not understand religious exemptions to be included in the First Amendment's Free Exercise Clause. Those who advocated for the inclusion of religious exemptions in the Second Amendment never suggested that the First Amendment's right to religious free exercise included exemptions. Congress as a whole, moreover, rejected religious exemptions for what became the Second Amendment. The presence of "free exercise" protections, combined with the recognition of religious exemptions from militia service in the state constitutions of the time, further supports the conclusion that the right to religious free exercise was not understood to include exemptions. Both provisions would have been unnecessary if the former was understood to include the latter.

Thus, the evidence available from the First Congress suggests that Justice Scalia's conclusion in *Smith* and *Boerne*—that the Free Exercise Clause does not include a right to religious exemptions—is the interpretation most consonant with the original meaning of the Free Exercise Clause as it was understood by the First Congress.