COMPELLED SUBSIDIES AND ORIGINAL MEANING

Jud Campbell*

"Almighty God hath created the mind free, and manifested his supreme will that . . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."

–Thomas Jefferson, *A Bill for Establishing Religious Freedom*[1]

ABSTRACT

The rule against compelled subsidization of speech is at the forefront of modern First Amendment disputes. Challenges to mandatory union dues, laws preventing discrimination on the basis of sexual orientation, and the federal "contraceptive mandate" have all featured variants of the anti-subsidization principle, reasoning that the government cannot compel people to support the objectionable activities of others. But the literature currently fails to evaluate modern compelled-subsidy doctrine in terms of the original meaning of the First Amendment. This Essay takes up that task.

Approaching any question of original meaning requires a willingness to encounter a constitutional world that looks very different from our own. And that is especially true when it comes to the First Amendment. In certain contexts, some Founders argued that compelled subsidies violated their rights. But these were contested arguments. The challenge, then, is to situate Founding Era ideas in a historical frame that may bear little resemblance to modern law. Such a frame, this Essay argues, indicates that rights of expression and religious exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged arguments against compelled subsidies. Rather than providing determinate answers, the Founding-Era conception of rights encouraged active debate about the boundaries of governmental power. Compelled-subsidy doctrine thus sits in a precarious position—within the bounds of reasonable historical argument but also deeply novel in its modern rigidity and judicial enforceability.

---

* Assistant Professor of Law, University of Richmond School of Law. The author thanks the editors of the *First Amendment Law Review*, the participants at its annual symposium, and the participants at the Stanford Constitutional Law Center Works-In-Progress Conference for helpful comments. He also thanks Andrew Hemby and Danny Zemel for valuable research assistance.

[1] THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM, *reprinted in* 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950) (emphases omitted).

INTRODUCTION

Compelled-subsidy doctrine generally prevents the government from forcing individuals to pay for the speech activities of others. The Supreme Court has held, for instance, that non-union employees have a First Amendment right against being legally obliged to fund a union's political advocacy.[2] The underlying logic of this principle is hardly obvious,[3] but scholars and judges usually frame it in terms of conscience.[4] Perhaps not surprising, then, concerns over compelled subsidies frequently come up in religious freedom debates as well.[5]

The constitutional basis for compelled-subsidy doctrine, however, is deeply contested. "It is simply not true," Robert Post insists, "that First Amendment concerns are implicated whenever persons are required to subsidize speech with which they disagree."[6] Indeed, legally compelled funding of potentially objectionable speech is routine. "[E]ach of us must pay taxes that will in part go to spread opinions many of us disbelieve and abhor," William Baude and Eugene Volokh point out,

---

[2] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977). Public employees now have a right against funding union bargaining activities as well. *See* Janus v. Am. Fed. of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018).

[3] *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 25–26, 35 (2016); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Mktg. Ass'n, 2005 SUP. CT. REV. 195, 228.

[4] *See, e.g.*, James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 1971 (2016); Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 380–82 (2011).

[5] For example, claims bought under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a)–(b) (2012), often rely on objections to supporting the activities of others. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2518–19 (2015) ("[R]eligious objections to being made complicit in the assertedly sinful conduct of others . . . now represent an important part of courts' religious liberties docket."). These types of religious accommodation claims are generally no longer viable under the Free Exercise Clause because of the Supreme Court's decision in Emp't Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990), which held that individuals do not have a Free Exercise right against the enforcement of neutral, generally applicable laws. Drawing on a similar anti-subsidization rationale, a group of scholars has asserted a constitutional *limit* on religious accommodations that impose burdens on third parties. Forcing individuals to support religious-freedom claims of others, they argue, is a type of compelled subsidy. *See* Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 881, 885 (2018) ("Citizens who bear costs so that others may observe their faith can rightfully complain that their liberty of conscience has been implicated."); *see also* Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 379 (2014) ("Applying RFRA to exempt such employers from the Mandate thus violates the Establishment Clause prohibition of permissive accommodations that shift the material costs of accommodation from believers to nonadherents and other third parties.").

[6] Post, *supra* note 3, at 197; *see also* Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087 (2005); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018).

concluding that "requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all."[7] And while scholars have also taken the opposite view,[8] nearly everyone agrees that the Supreme Court's jurisprudence in this area is mercurial and undertheorized.[9]

Largely unexplored, however, is the historical basis for compelled-subsidy doctrine.[10] In fact, this area of law seems to rest almost entirely on an appeal—repeated over and over in Supreme Court opinions[11]—to Thomas Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."[12] This reliance has led some scholars to refer to the rule against compelled subsidies as "the Jeffersonian proposition."[13]

This Essay investigates whether compelled-subsidy doctrine is defensible in terms of the First Amendment's original meaning—an inquiry of interest to nearly all interpreters.[14] In short, my argument is that rights of expression and religious

---

[7] Baude & Volokh, *supra* note 6, at 171.

[8] *See, e.g.*, Schwartzman, *supra* note 4, at 380–82.

[9] *See, e.g.*, Kathleen M. Sullivan & Robert C. Post, *Colloquy, It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 365–67 (2007) (statement of Kathleen M. Sullivan describing "doctrinal instability and incoherence" in compelled-subsidy doctrine).

[10] For two of the most thorough explorations of the doctrine, see Klass, *supra* note 6, and Baude & Volokh, *supra* note 6. Neither of these works discusses Founding Era history, other than brief mentions of Jefferson. *See* Klass, *supra* note 6, at 1114; Baude & Volokh, *supra* note 6, at 184–85.

[11] *See, e.g.*, Janus v. Am. Fed. of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2464 (2018); Teachers v. Hudson, 475 U.S. 292, 305 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977); Machinists v. Street, 367 U.S. 740, 790 (1961) (Black, J., dissenting). Jefferson's quotation is often paired with Madison's contemporaneous opposition to religious establishments, and particularly his statement: "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland et al., eds., 1973); *see, e.g.*, *Abood*, 431 U.S. at 234 n.31 (citing both Madison and Jefferson). The explicit anti-establishment focus of Madison's quotation may account for why the quotation is often either heavily abridged, *see, e.g.*, *Teachers*, 475 U.S. at 305, or omitted in later speech-related opinions, *see, e.g.*, *Janus*, 138 S.Ct. at 2464; Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 572 (2005) (Souter, J., dissenting); Keller v. State Bar of Cal., 496 U.S. 1, 10 (1990).

[12] JEFFERSON, *supra* note 1, at 545.

[13] *See* Schwartzman, *supra* note 4, at 319; Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365, 374 (2006).

[14] *See, e.g.*, Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 676 (1999) ("[N]o one doing constitutional theory takes the extreme *non*-originalist position."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding is relevant . . . .").

exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged constitutional arguments against compelled subsidies. This may seem odd to modern readers, but the idea flows from a Founding Era conception of rights that was often less determinate (and less judicially enforceable) than how we typically view constitutional rights today.[15] In particular, rights at the Founding were generally subject to regulation in promotion of the public good, and the First Amendment itself "left unresolved whether certain restrictions . . . promoted the public good."[16] The rigidity of modern compelled-subsidy doctrine, by comparison, reflects a libertarian turn in our understanding of rights and, relatedly, a view of rights as more determinate, judicially enforceable limits on governmental power.[17]

This Essay proceeds in three Parts. It begins in Part I with a preliminary but important point: Compelled-subsidy doctrine's reliance on Jefferson is profoundly misplaced for a variety of methodological and historical reasons. Part II then describes how the Founders generally approached questions of rights, focusing particularly on historical understandings of *natural rights*—including the rights of conscience, religious exercise, and expression—and how those rights circumscribed governmental power. Part III shows how this general framework accounts for what might otherwise appear to be contradictory historical evidence about the constitutionality of compelled subsidies.

Overall, the argument against compelled subsidies was *available* at the Founding, and thus in some sense can be understood as consistent with claims of original meaning. But it also was neither dispositive nor judicially cognizable. The Founding Era conception of rights thus leaves modern compelled-subsidy doctrine in a precarious position: within the bounds of available historical argument but also deeply novel in its modern rigidity and judicial enforceability.

I. RECONSIDERING JEFFERSON

Compelled-subsidy doctrine flows from a basic axiom of modern First Amendment law: the government cannot force

---

[15] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) [hereinafter Campbell, *Natural Rights*]; Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569 (2017) [hereinafter Campbell, *Judicial Review*]; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2017) [hereinafter Campbell, *Republicanism*].

[16] Campbell, *Natural Rights*, *supra* note 15, at 256.

[17] *See* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 35 (2018) ("[T]he presumptive absolutism that characterizes the modern frame [for evaluating American constitutional rights is] an artifact of the second half of the twentieth century.").

people to express a particular view or idea.[18] Indeed, constitutional protections in this field are especially robust because, as the Supreme Court has explained, "[w]hen speech is compelled . . . individuals are coerced into betraying their convictions."[19] Compelling individuals to speak, in other words, may force them to violate their consciences.[20] Consequently, even when the government otherwise has authority to compel speech, the First Amendment provides a right of exemption for objectors.[21] Compelling a person to *subsidize* the speech of other private speakers," the Court has explained, "raises similar First Amendment concerns."[22]

Although it has never attempted a historical defense of compelled-subsidy doctrine, the Supreme Court routinely invokes Thomas Jefferson's famous line that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[23] That reliance, this Part argues, is deeply problematic. It begins by explaining why Jefferson's statement does not support a right against compelled subsidies. The Part then explains how Jefferson's ideas about religious freedom were not widely held at the Founding and are thus an unreliable guide to the First Amendment's original meaning.

A. The Fallacy of the Jeffersonian Proposition

Compelled-subsidy doctrine's reliance on Jefferson is off the mark. First and foremost, Jefferson was not asserting a conscience-based right against compelled subsidies, and certainly not one enforceable as a matter of constitutional law. Rather, Jefferson proposed a wholesale denial of *any* governmental authority over religious matters.[24] Faithfully adhering to Jefferson's ideas, rather than selectively quoting one

---

[18] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[19] Janus v. Am. Fed. of State, Cty., & Mun. Emps., 138 S. Ct. 2488, 2464 (2018).
[20] *See, e.g.*, Schwartzman, *supra* note 4, at 380–82.
[21] *See Barnette*, 319 at 642; *see also* Wooley v. Maynard, 430 U. S. 705, 714 (1977).
[22] *Janus*, 138 S. Ct. at 2464.
[23] JEFFERSON, *supra* note 1, at 545. *See, e.g.*, *Janus*, 138 S. Ct. at 2464, Teachers v. Hudson, 475 U.S. 292, 305 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977); Machinists v. Street, 367 U.S. 740, 790 (1961) (Black, J., dissenting).
[24] JEFFERSON, *supra* note 1, at 545. Mark Storslee makes a similar observation about James Madison's argument in the famous *Memorial and Remonstrance*. *See* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 UNIV. CHI. L. REV. (forthcoming 2019) ("[Madison's] argument was not based on the idea that any undesired cost associated with religion should be prohibited. . . . Tax support schemes were objectionable because they effectively deprived all citizens—those who gave to churches willingly and those who did not—of the freedom to 'render to the Creator such homage, and such only, as [they] believe[d] to be acceptable to him.'").

line in the preamble of his proposal, would lead to a radically different approach to modern doctrine.[25]

But the problem is deeper. Jefferson firmly rejected the idea of constitutionally required religious accommodations, making him a perplexing (and certainly unwitting) progenitor of modern conscience-based rights against compelled subsidies. As Michael McConnell points out, "Jefferson espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not."[26] Jefferson was concerned about individual conscience, to be sure, but his *approach* to addressing that concern was a sweeping denial of governmental power over the field of religion—while remaining opposed to mandatory rights of religious accommodation. Relying on Jefferson to support a conscience-based right thus turns history on its head.

Moreover, even if reliance on Jefferson were internally consistent, Jefferson explicitly *disclaimed* that his argument was legally binding. The Bill for Religious Freedom—effectively a legislative resolution—straightforwardly announced that it had "no effect in law."[27] Indeed, Justice Scalia emphasized this fact when he presented a historical case against rights of religious accommodation under the Free Exercise Clause. Historical evidence about "what was thought to be legislatively or even morally desireable" during the 1780s religious freedom debates in Virginia, he wrote in *City of Boerne v. Flores*, do not necessarily "describe what was constitutionally required (and judicially enforceable)."[28] The exact same point applies to reliance on the Jeffersonian proposition in the context of compelled subsidies.

It hardly needs mentioning that picking out an isolated statement in a preamble and then extending that statement well beyond its historical context is not a sound approach to constitutional interpretation. For instance, the preamble of the Bill for Religious Freedom also declares that "to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy,"[29] leading some scholars to conclude that the First Amendment's Speech and Press Clauses originally barred sedition

---

[25] Modern doctrine provides for challenges to the *application* of compelled subsidy laws against those who object to the enforcement of the laws *against them*. It is not a way of "facially" challenging the laws themselves.

[26] McConnell, *supra* note 14, at 1451.

[27] JEFFERSON, *supra* note 1, at 546.

[28] 521 U.S. 507, 541 (1997) (Scalia, J., concurring in part). In this passage, Justice Scalia was discussing James Madison's *Memorial and Remonstrance Against Religious Assessments*, but the argument plainly applies just as much to the Bill for Religious Freedom.

[29] JEFFERSON, *supra* note 1, at 546.

prosecutions.[30] Granted, this inference has rhetorical force today.[31] But it also turns out to be a fallacious way of understanding constitutional history.[32] And that is because the inference attributes far, far too much weight to a single line in the preamble of a single state bill that by its own terms had "no effect in law."[33]

In fact, Justice Scalia is not the only proponent of compelled-subsidy doctrine who has nonetheless decried reliance on Jefferson with respect to other aspects of First Amendment law. "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history," then-Justice Rehnquist wrote in dissent in *Wallace v. Jaffree*, "but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor [of a wall of separation between church and state] for nearly 40 years."[34] Jeffersonian sound bites, Rehnquist implies, are not a reliable guide to constitutional meaning.

Recent developments in constitutional theory reinforce this point. For several decades, interpreters have gravitated toward arguments about original meaning of the Constitution's words and phrases—usually in reference to a provision's *legal* meaning, *public* meaning, or some blend of the two—and away from selectively quoting the intentions of particularly revered Framers (or, in Jefferson's case, non-Framers).[35] On this view,

---

[30] *See* ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH 31 (1920).

[31] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

[32] *See* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) ("[The Framers of the First Amendment] did not intend to give free rein to criticism of the government that might be deemed seditious libel . . . ."); Campbell, *Natural Rights*, *supra* note 15. Indeed, even "Jefferson was quite willing to impose limitations on political expression." Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L. Q. 683, 685 (1998).

[33] JEFFERSON, *supra* note 1, at 546.

[34] 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Although the Supreme Court has previously described Jefferson, along with his political ally James Madison, as playing "leading roles" in the "drafting and adoption" of the First Amendment, Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 13 (1947); Abingdon Sch. Dist. v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring) (describing Jefferson and Madison as the "architects" of the First Amendment), Rehnquist noted that "Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States." *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

[35] Some scholars emphasize a search for original *legal* meaning. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 n.16 (2015); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015); John F. Stinneford, *The Original Meaning of "Cruel"*, 101 GEO.GEORGETOWN L. J. 441, 464

the views of one man—even an iconic man like Jefferson—make little difference. What matters, instead, is the meaning of the Constitution to a broader audience.[36]

Moreover, even if Jefferson's isolated statement were good evidence of the First Amendment's original meaning, it would likely *undermine* modern doctrine. Nowadays, First Amendment law strictly separates compelled subsidies for *private* speech, which are constitutionally proscribed, and compelled subsidies for *governmental* speech, which raise no First Amendment problem at all.[37] The latter principle is crucial given the ubiquity of viewpoint-based governmental speech—supported, of course, through compulsory taxes.[38] Without exempting governmental speech, compelled-subsidy doctrine would founder. But this exemption for governmental speech has no grounding in the Jeffersonian proposition. To be sure, Jefferson was objecting to a proposed scheme that would have required Virginians to fund private ministers—not government-run religious services. But Jefferson's objections did not turn on this aspect of the funding scheme. Indeed, it seems likely that direct governmental propogation of religious views would have

(2017); *cf.* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (endorsing a version of originalism that looks to original common law rules and common law methods). Others focus more on original *public* meaning. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); Vasan Kesavan & Michael S. Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1120 (2003). For a discussion of how these inquiries can overlap, see, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 968–70 (2009); *cf.* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1758 (2015) ("For all of the attention given to the difference between 'original public meaning' originalism, and originalism based on the understandings of the framers and ratifiers, no one has identified nontrivial examples of actual constitutional interpretation that turn on the distinction.").

[36] These arguments might not be determinative on their own. Jefferson's claim, after all, was enshrined (with some revisions) in the Act for Establishing Religious Freedom—an official act of the Virginia General Assembly in 1786 that was reprinted in newspapers in several other states. *See, e.g.*, PENN. PACKET (Phila.), Feb. 2, 1786, at 3. But as this Part shows, the arguments in the Act did not reflect the dominant understanding of religious freedom at the time.

[37] *See* Schwartzman, *supra* note 4, at 370. For illustrations of the modern doctrine, see, e.g., Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("Our compelled-subsidy cases have consistently respected the principle that compelled support of a private association is fundamentally different from compelled support of government. Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.") (quotation marks and alteration omitted); Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.").

[38] *See generally* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011) (discussing the "governmental speech" exception to general First Amendment principles).

aggravated the constitutional problem for Jefferson. Again, whatever the merits of modern doctrine, its apparent reliance on Jefferson is self-defeating.

Scholars occasionally also point out that Jefferson was talking about *religious* freedom, and not rights of conscience more generally.[39] According to William Baude and Eugene Volokh, "Jefferson was specifically talking about the propagation of *religious* opinions, which is regulated by a separate constitutional provision—the Establishment Clause."[40] This critique, however, strikes me as less persuasive. To be sure, Jefferson was talking about religious freedom, and he certainly saw unique harms in religious dogmatism. Yet many of the ideas in his proposed Bill for Religious Freedom were rooted in broader freedoms of thought and opinion.[41] He was explicating principles of natural law[42] and natural rights[43]—not a religion-focused Establishment Clause, which Virginia then lacked.

In the end, however, the fact that Jefferson was relying on natural-rights principles, rather than a state-level ban on religious establishments, further undermines modern reliance on Jefferson. Understanding why requires a closer look at the actions of the First Congress when it considered whether to propose constitutional amendments (later known as the "Bill of Rights.").[44]

---

[39] My reference here assumes that religious objections are a variant of "rights of conscience" more generally. Importantly, however, that was not the dominant linguistic practice at the Founding, see McConnell, *supra* note 14, at 1483–84 (noting the interchangeable usage of "liberty of conscience" and "free exercise of religion" at the Founding), and even today rights of "conscience" can be defined in various ways, see Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1489–94 (discussing other definitions of "conscience").

[40] Baude & Volokh, *supra* note 6, at 184–85 (emphasis in original) (footnote omitted); *see also* Klass, *supra* note 6, at 1114 ("Jefferson's statement . . . concerns only the compelled subsidization of religious activities . . . ."); *cf.* Schwartzman, *supra* note 4, at 323 n.13 (arguing that Jefferson's point, though made in the context of religious assessments, is not properly limited to that context).

[41] *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1955).

[42] That is, the dictates of reason—notwithstanding the fact that Jefferson couched these ideas in terms of divine will.

[43] JEFFERSON, *supra* note 1, at 546–47 ("[T]he rights hereby asserted, are of the natural rights of mankind."). Jefferson was drawing on a long tradition of philosophers who viewed the right to religious belief as inalienable. *See, e.g.*, FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE: IN TWO TREATISES 185 (Knud Haakonssen ed., Liberty Fund Inc. 2004) (1726); JOHN LOCKE, *A Letter Concerning Toleration*, *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 246 (Ian Shapiro ed., 2003) (arguing from natural-rights principles that "nobody ought to be compelled in matters of religion either by law or force"); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 82 (Oxford Univ. Press 2008) (1690) ("[I]n bare naked *Perception* the Mind is, for the most part, only passive; and what it perceives, it cannot avoid perceiving.") (emphasis in original).

[44] *See* GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 5 (2018).

B. The Idiosyncracy of Jefferson

By the time Congress proposed the amendments in 1789, Americans had articulated two competing views about the relationship between the inalienable right of conscience and various aspects of religious establishments, including religious assessments. The dominant view seems to have been that religious establishments did not necessarily violate rights of conscience.[45] Indeed, state constitutions generally treated rights of conscience (or free exercise) distinctly from their allowance or disallowance of religious establishments.[46] But a competing approach to religious freedom—championed most famously by Jefferson and Madison in their fight against religious assessments in Virginia—saw a fundamental opposition between conscience rights and religious assessment schemes. So which of these understandings of religious freedom prevailed when Congress debated and passed the First Amendment?

Debates and votes in the House of Representatives (our only direct source of evidence[47]) comport with the view that rights of conscience were not inherently incompatible with religious establishments. In other words, Jefferson's arguments in the Bill for Religious Freedom apparently did *not* shape how the members of the First Congress thought about religious freedom.[48] Evidence demonstrating this point begins with the structure of Madison's initial proposal.

When Madison proposed amendments on June 8, 1789, he insisted on adding protection for the natural rights of expressive freedom and religious conscience against the federal *and state* governments alike.[49] Madison's proposed Establishment

---

[45] My point here is, of course, not that *any* state establishment scheme would necessarily comport with free exercise. One can imagine an obvious violation of free-exercise rights if a state forced everyone to worship at a particular church. Rather, my point is that the dominant understanding of free exercise rights was not inherently incompatible with more tolerant forms of religious establishments—contrary to Jefferson's innovative argument in the mid-1780s. *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 353 (noting the innovative nature of Jefferson's position).

[46] *See* Wesley J. Campbell, *Religious Neutrality in the Early Republic*, 24 REGENT U. L. REV. 311, 323 [hereinafter Campbell, *Religious Neutrality*] ("[Establishment-related] provisions . . . were often in separate sections and generally did not affect the scope of free exercise protections.").

[47] Because the Senate proceedings were closed to the public, records of Senate debates (with rare exception) do not exist.

[48] My methodology is a comparison of the logic of the Jeffersonian argument to the logic of the various proposals and arguments considered in the First Congress. For a different methodology, arguing more broadly that Jefferson's Bill for Religious Freedom had very little influence on the Founders, see Mark David Hall, *Madison's Memorial and Remonstrance and Jefferson's Statute for Religious Liberty, and the Creation of the First Amendment*, 3 AM. POL. THOUGHT 32 (2014).

[49] *See* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: LEGISLATIVE HISTORIES 10 (Charlene B. Bickford & Helen E. Veit eds., Johns

Clause, by contrast, banned only the creation of "any *national* religion,"[50] without a comparable limit on *state* authority. Thus, although Madison wanted speech and press freedoms and the "equal rights of conscience" to be protected in the federal Constitution against both federal *and state* action, only the federal government would be federally barred from creating an established church.

Madison's proposal reveals a simple but crucial point: Contrary to Jefferson's arguments in the Bill for Religious Freedom, the natural rights of expressive freedom and religious conscience did not necessarily ban religious establishments. Otherwise, the language of Madison's proposed amendments made no sense: for one thing, the Establishment Clause would have been superfluous (since a recognition of the inalienable right of conscience would already have deprived the government of authority to establish a religion), and for another, the Establishment Clause's apparent limitation to the federal government would have been unjustified, so long as *states* were also federally bound to respect rights of conscience. "It is indeed stressing the obvious," Joseph Snee concludes, "that, in [Madison's] mind at least, . . . the establishment of a religion by law is not per se an infringement of the equal rights of conscience."[51]

Madison's colleagues apparently agreed. Although the House of Representatives revised his language, it kept the basic substance and structure of the initial proposal: Protection of expressive and religious freedom against the federal *and state* governments, coupled with an anti-establishment rule to limit

---

Hopkins Univ. Press 1986) ("The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on an pretext infringed. The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."); *id.* at 11 ("No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."). For a more thorough presentation of the drafting history of the First Amendment, see Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J. L. & PUB. POL'Y 1083, 1102–09 (2008). For identification of religious and expressive freedom as natural rights, see, e.g., James Madison, Notes for Speech in Congress (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979) ("*[N]atural rights*, retained—as Speech, Con[science]"); Proposal by Roger Sherman to House Committee of Eleven (July 21–28, 1789), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 83–84 (Neil H. Cogan ed., 1997) ("[C]ertain natural rights which are retained" include the "right[] of conscience" and the right "of Speaking, writing and publishing . . . with decency and freedom."). *See generally,* Campbell, *Natural Rights*, *supra* note 15.

[50] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 49, at 10 (emphasis added).

[51] Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371, 384.

only federal power.[52] Nobody so much as hinted that the extension of religious and expressive freedom rights against state governments might threaten state religious establishments, notwithstanding the fact that Jefferson's prior arguments against religious assessments proceeded explicitly from natural-rights principles.[53] In other words, nobody in the House of Representatives seems to have interpreted Madison's 1789 proposal in light of Jefferson's arguments several years earlier.

Nor is it likely that members of the House of Representatives simply overlooked such a startling implication for state religious establishments. Madison's colleagues were acutely aware of the political need to protect state religious establishments. In debates over the proposed amendments, Representatives Peter Silvester of New York and Benjamin Huntington of Connecticut each voiced concerns that the proposed language—"no religion shall be established by law"—would be misconstrued in ways that might obstruct the operation of state religious establishments.[54] It went without saying that entirely dismantling state religious establishments was a complete non-starter.[55] Samuel Livermore of New Hampshire then suggested language that carried the day: "[C]ongress shall make no laws touching religion, or infringing the rights of conscience."[56] With that change, representatives apparently

---

[52] Their proposed third and fourth amendments read: "The Third. Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed. The Fourth. The Freedom of Speech and of the Press . . . shall not be infringed." 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 49, at 36. Meanwhile, the proposed fourteenth amendment read: "No State shall infringe . . . the rights of conscience, nor the freedom of speech, or of the press." *Id.* at 39.

[53] For debates in the House of Representatives over the Establishment Clause, see 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES: FIRST SESSION, JUNE–SEPTEMBER 1789 1254, 1257, 1260–62 (Charlene B. Bickford et al. eds., John Hopkins Univ. Press 1992).

[54] *Id.* at 1260 (Silvester); *id.* at 1261–62 (Huntington).

[55] *See* Muñoz, *supra* note 49, at 1104 ("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."). Muñoz's qualifier "probably" is unnecessary.

[56] *Id.* at 1262. To be clear, I am not attempting to explicate the meaning of the Establishment Clause, or, particularly, whether it permits or forbids governmental support of religion. One scholar has proposed that "limitations [in state constitutions] on religious establishments imposed a prohibition beyond or different from taxpayer funding of religion." Vincent Philip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1, 26 (2015). This Essay does not enter that debate. Rather, my point is that the recognition of the natural rights of religious and expressive freedom (as the House of Representatives proposed to extend against state governments) did not of their own force forbid state measures, like religious assessments, that Jefferson and Madison had previously argued were categorically incompatible with the inalienable right of conscience. In other words, the First Congress's decision to extend rights of religious and expressive freedom against state governments, combined with the First Congress's desire not to disturb existing state laws (like religious assessment schemes in New England), demonstrates

thought that state religious establishments were sufficiently guarded against federal interference. And when it came time to debate the proposal to protect religious and expressive freedom against *state* infringement, nobody said anything that suggested any threat to state establishments of religion.[57]

Of course, the Senate ended up deciding not to endorse the House's proposed amendment that would have limited *state* governments.[58] But we do not know why.[59] Senate records from this period are sparse. The only recorded opposition to the amendment came in the House of Representatives when Thomas Tudor Tucker of South Carolina objected 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."[60] He never suggested that the amendment would have had any particular impact on state religious establishments.

Of course, none of this is to deny the historical importance of the Bill for Religious Freedom to the broader cause of disestablishment. But records from the House of Representatives indicate that Jefferson's earlier arguments were not on the minds of the framers of the First Amendment.

In sum, the Supreme Court's myopic reliance on the Jeffersonian proposition as a guide to the First Amendment's original meaning is profoundly flawed. But debunking this historical mythology does not prove that compelled subsidies are consistent with the original meaning of the First Amendment. Far from it. For that inquiry, we must step back into the eighteenth century and try to comprehend the meaning of the First Amendment in its own time.

---

that those rights had a more limited reach than what Jefferson and Madison had previously argued in Virginia. Whether religious assessments constituted an "establishment" of religion makes no difference for purposes of this Essay.

[57] CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1291–92.

[58] *See* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 49, at 39 n.19.

[59] *See* Muñoz, *supra* note 49, at 1108 ("No reason [for the Senate's rejection of the amendment] 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."). Interestingly, Justice Brennan posited that the "amendment was defeated in the Senate by the forces Madison feared most, those who wanted the states to retain their systems of established churches." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 537 (1986). Brennan, however, seems to have mistakenly relied on a source that said nothing of the sort. *See* IRVING BRANT, JAMES MADISON, THE FATHER OF THE CONSTITUTION 271 (1950) (discussing the Senate's rejection of a state-restraining amendment).

[60] CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, 1292.

II. NATURAL RIGHTS AT THE FOUNDING

The key to a historical understanding of the First Amendment—as I have argued elsewhere and summarize in this Part—is to step back from a search for the meaning of particular rights and instead try to appreciate how the Founders thought about rights more generally.[61] Indeed, the Founders thought very differently about rights than we do today.

For most Americans now, a constitutional "right" is a legally enforceable privilege or immunity—something that the government has to provide us (e.g., our "right" to a jury trial) or something that the government cannot take away (e.g., our "right" to possess personal firearms for self-defense).[62] But American elites in the late eighteenth century understood their "rights" differently. For the Founders, rights were divided into two categories: natural rights and positive rights. And unless we approach the task of constitutional interpretation on their terms rather than on ours, the First Amendment's original meaning will remain elusive.

Natural rights were all the things that we could do simply as humans, without the intervention of a government. As Thomas Paine once put it, "[a] natural right is an animal right, and the power to act it, is supposed . . . to be mechanically contained within ourselves as individuals."[63] Eating, walking, thinking, and praying, for instance, were all things that individuals could do without a government, so they were all natural rights. Meanwhile, positive rights were defined explicitly in terms governmental authority.[64] The rights to a jury trial and to habeas corpus, for instance, were positive rights because they were procedures provided by the government.

---

[61] What follows in this Part is mostly derivative of my earlier work, and the text is based on a short summary of that work in Jud Campbell, *What Did the First Amendment Originally Mean?*, RICH. L. MAG. (2018). The innovative moves in this Essay are limited to Parts I and III.

[62] *See* Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 311 (2000) ("I believe [a view of rights as 'trumps'] is the dominant view of rights in the contemporary political culture (though I do not know how one would prove that)."). Pildes nonetheless argues that this common conception of rights inaccurately describes modern rights jurisprudence, *see* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998) ("Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the kinds of reasons government can invoke when it acts in certain arenas."). I largely agree. *See* Campbell, *Natural Rights*, *supra* note 15, at 315–16.

[63] THOMAS PAINE, *Candid and Critical Remarks on Letter 1, Signed Ludlow*, PA. J. & WKLY ADVERTISER, June 4, 1777, *reprinted in* 2 THE COMPLETE WRITINGS OF THOMAS PAINE 274 (Philip S. Foner ed., Citadel Press 1945).

[64] The notion of "positive" rights, then, is contrasted with "natural" rights. It does not refer to the common distinction between "positive" and "negative" rights.

With these definitions in view, the Founders had no need to write out long lists of which types of rights were natural and which were positive. The distinction, to them, was obvious. Thinking, believing, speaking, writing, publishing, and worshiping, for instance, were all things that people could do without a government, so they were readily recognizable as natural rights. When James Madison introduced amendments in the first Congress, for instance, he only mentioned in passing that the freedoms of speech and conscience were among the "natural rights, retained."[65] Madison's audience easily understood his point. Expression and religious belief are innate human capacities, so they are clearly natural rights.

We still have not quite arrived at the original meaning of the First Amendment. For that, we need to understand how natural rights constrained governmental power. Surely the First Amendment imposes some limits on Congress. (It starts, after all, with "Congress shall make no law . . . .")[66] What were those limits?

For the Founders, natural rights were rooted in a philosophical system called social-contract theory.[67] According to this theory, the proper scope of governmental authority is discoverable by first imagining our situation as if there were no government and then considering why we would come together and agree to form a political society through an agreement known as a social contract (or "social compact").[68] The political society would then agree to a constitution that created a government and granted it certain powers.

Although some ancillary features of social-contract theory were contested, virtually every American political leader in the late 18th century agreed about its core features.[69] Most importantly, the Founders recognized two crucial limitations that social-contract theory imposed on governmental power to restrict natural rights.[70] First, natural rights could be restricted only when the people themselves consented to the restriction, either in person or through their political representatives.[71] This principle was a rallying cry for American colonists advocating

---

[65] James Madison, Notes for Speech in Congress (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson et al. eds., 1979) (italics omitted).
[66] U.S. CONST. amend. I.
[67] Campbell, *Republicanism*, *supra* note 15, at 87–88.
[68] *Id.* at 88–89. The term "social compact" is more historical, but it is avoided in this Essay to prevent confusion with the separate notion of "compact" frequently invoked in historical debates over the nature of the federal union.
[69] *Id.* at 98 ("[A]lthough American elites spoke in radically different ways . . . they widely agreed on the substance—that retained natural rights could be regulated in the public interest by the people or their representatives.").
[70] *Id.* at 92–93.
[71] *Id.* at 92–93, 97–98.

for independence rather than submitting to British taxation when they had no representation in parliament.[72] Second, the government could restrict natural rights only when doing so promoted the public good—that is, the aggregate happiness and welfare of the entire political society.[73] Individuals entering a political society, John Locke explained in his widely read *Second Treatise*, surrender "as much . . . natural Liberty . . . as the Good, Prosperity, and Safety of the Society shall require."[74]

As a general matter, therefore, the concept of natural rights helped define who could restrict individual liberty (i.e., a representative legislature) and why they could do so (i.e., to promote the public good). But natural rights were not a set of determinate legal privileges or immunities that the government could not abridge. Natural rights, it bears emphasis, could be restricted by law to promote the good of the society. "[T]he right to speak and act," American patriot James Otis explained at the onset of the colonial conflict, "is limited by the law—Political liberty consists in a freedom of speech and action, so far as the laws of a community will permit, and no farther."[75] Effectively, this put the legislature—not judges—in primary control over how far to restrict expression and how far to extend rights of religious freedom. The idea of natural rights, in other words, was primarily philosophical, not legal.

At the same time, the Founders also appreciated that certain regulations of expression and religious exercise were not in the public interest and were therefore beyond the scope of legislative power.[76] The famous "rule against prior restraints"—prohibiting the government from requiring pre-approval of publications—is one example in the context of expression.[77] Another is that well-intentioned criticisms of the government could not be punished.[78] (Deliberate efforts to mislead the public were an entirely different matter.) Meanwhile, the Founders widely agreed the government could not punish individuals or deprive them of basic civil privileges on the basis of their religious

---

[72] *Id.* at 98.
[73] *Id.* at 93–94.
[74] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 130 (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 156 (Ian Shapiro ed., 2003).
[75] *Freeborn American*, BOS. GAZETTE & COUNTRY J., Mar. 9, 1767, *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO 95, 95 (Leonard W. Levy ed., 1996).
[76] Campbell, *Natural Rights*, *supra* note 15, at 291 ("Governmental powers recognized at common law were presumptively acceptable, while common-law limits on those powers (such as the rule against prior restraints) recognized presumptively unjustified abridgments of natural rights.").
[77] *Id.* at 289–90.
[78] *Id.* at 280–87.

views.[79] The First Amendment thus prevented temporary legislative majorities from abandoning these settled principles.

How much further the First Amendment went, though, was up for debate precisely because the Founders often disagreed about exactly what restrictions of expression promoted the public good. This conflict was especially clear in the late 1790s as Americans clashed over the constitutionality of the federal Sedition Act.

Members of the Federalist Party—the party of President John Adams—argued that maintaining a republican government required punishing those who falsely and maliciously criticized the government.[80] "[E]very individual is at liberty to expose, in the strongest terms, consistent with decency and truth all the errors of any department of the government," Federalist jurist Alexander Addison wrote.[81] But this hardly implied constitutional protection for deliberately misleading the public. "Because the Constitution guaranties the right of expressing our opinions, and the freedom of the press," Federalist congressman John Allen asked rhetorically, "am I at liberty to falsely call you a thief, a murderer, an atheist?"[82] Stopping the spread of lies, Federalists insisted, was essential to maintaining a well-informed electorate and, thus, a republican government.

In response, Jeffersonian-Republican opponents of the Sedition Act did not even try to defend the notion that all speech is beneficial. "It may perhaps be urged, and plausibly urged, that the welfare of the community may sometimes, and in some cases, require certain restrictions on [an] unlimited right of enquiry," Elizabeth Ryland Priestley admitted.[83] The problem for Republicans, however, was the prospect of governmental abuses of power. Authority to punish sedition, Priestley explained, "once conceded, may be extended to every [opinion] which insidious despotism may think fit to hold out as dangerous."[84] In other words, Republicans still assessed questions of free speech in terms of the public good, but they worried that Federalists were pursuing their own narrow partisan

---

[79] My point here is not to make any effort to settle the precise boundaries of this right. Rather, it is indisputable that Americans widely accepted basic principles of religious freedom embodied in, for instance, the Toleration Act. 1 W. & M., ch. 18.
[80] Campbell, *Natural Rights*, *supra* note 15, at 283.
[81] ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY, ON THE PROCEEDINGS OF SUNDRY OF THE OTHER STATES IN ANSWER TO THEIR RESOLUTIONS 42 (Philadelphia, Zachariah Poulson, Jr. 1800).
[82] 8 ANNALS OF CONG. 2097 (1798) (statement of Rep. John Allen).
[83] Elizabeth Priestley, *On the Propriety and Expediency of Unlimited Enquiry*, *in* THOMAS COOPER, POLITICAL ESSAYS 62, 63 (Philadelphia, Thomas Cooper ed., 2d ed. 1800).
[84] *Id.* at 63–64.

interests rather than the general welfare and that these abuses of power would stifle useful public debate.[85]

In sum, the founders thought the First Amendment required Congress to infringe expressive and religious freedom only in promotion of the public good, while also guaranteeing more specific legal rules that had long protected these rights. The Amendment, in other words, stood for a general principle—one that left room for considerable debate about how it should be applied in practice—and also for the entrenchment of more specific settled rules. The First Amendment thus shaped debate about expressive and religious freedom while also standing as a bulwark against constitutional backsliding. The Amendment was not simply a counter-majoritarian limit on legislative power. However, once the people agreed on core principles, the legislature could not turn back.

This process of accumulating and refining constitutional limits over time through political means is mostly foreign to Americans today. Rights in the modern sense are counter-majoritarian constraints on legislative power, so it seems strange that their scope could somehow depend on political decisions. For modern Americans, judges have that job.[86]

For people born and raised in the tradition of the customary British constitution, however, the logic of recognizing constitutional limits through political rather than judicial means made perfect sense. "A customary law carries with it the most unquestionable proofs of freedom," explained James Wilson, a delegate to the Constitutional Convention and later a Supreme Court justice.[87] Politicians do abuse power, of course. But for the Founders, once legislators—acting on behalf of the people—agreed on a constitutional principle, and once that settlement remained in place for considerable time, the principle became binding.[88] "[L]ong and uniform custom," English jurist Richard Wooddeson noted in 1792, "bestows a sanction, as evidence of universal approbation and acquiescence."[89] It was, in other words, as if the people themselves had spoken.

The First Amendment fit within this familiar tradition. Well-established principles about expressive and religious

---

[85] For more detailed analysis of Republic concerns, emphasizing Republican fears of political bias in the enforcement of a Sedition Act, see Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517 (2019).

[86] *See generally* Greene, *supra* note 17 (assessing American views of rights, including the development of those views).

[87] JAMES WILSON, *Municipal Law*, *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 549, 569 (Kermit L. Hall & Mark David Hall eds., 2007).

[88] Campbell, *Natural Rights*, *supra* note 15, at 290–92.

[89] RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE: TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND 46 (London, T. Payne & Son 1783).

freedom would limit Congress, and judges and juries could enforce those settled boundaries of governmental authority. But otherwise the First Amendment would leave the task of defining the public good to the people and their representatives. For the founders, judges could not create new limits on governmental authority.[90]

III. COMPELLED SUBSIDIES

This Part considers historical evidence regarding compelled subsidies in light of the general framework just laid out. My argument is that Founding Era rights of expression and religious exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged constitutional arguments against compelled subsidies. This Part begins by applying the theory in Part II to the problem of compelled subsidies. Next, it shows how that theory maps onto available historical evidence.

A. Applying a Natural Rights Framework

From the standpoint of social-contract theory, compelled subsidies plainly infringe natural liberty. Forcing someone to do something—particularly something that itself does not violate the natural rights of others—clearly implicates the general principle that the government may not restrict natural liberty unless doing so promotes the public good.

Indeed, the expansive breadth of natural rights meant that the Founders had no need to engage in the extensive categorization efforts that abound in modern rights jurisprudence—defining, for instance, what activities count as "speech" or what activities count as "religious."[91] This is not to say that inquiries of this sort were necessarily *irrelevant* at the Founding. People back then, for example, could invoke natural-rights premises to argue that government had authority over non-religious issues but not over religious concerns.[92] But this was merely an *argument*—and one that relied on a series of contestable premises and conclusions about the effects of

---

[90] For discussions of the limited nature of Founding Era judicial review, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–42 (1893); Christopher R. Green, *Clarity and Reasonable Doubt in Early State—Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 172–83 (2015); John McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 880–904 (2016).

[91] Campbell, *Natural Rights*, *supra* note 15, at 287 n.188; *see also* Greene, *supra* note 17, at 38 (noting how, under the modern approach to rights, "analysis is weighted toward threshold interpretive questions").

[92] *See, e.g.*, MADISON, *Memorial and Remonstrance*, *supra* note 11.

governmental power vis-à-vis religion. Someone else might just as easily argue using entirely different categories—perhaps a narrower category (e.g., *non-harmful* religious views) or a broader one (e.g., thoughts). In other words, terms like "speech" and "religion" were not references to fixed categories of natural rights with clearly delineated boundaries.[93] Nor did the First Amendment suggest anything of the sort. (If it had, the Ninth Amendment would have immediately dispelled that suggestion.)[94] In this sense, a constitutionally grounded argument against compelled subsidization was readily available at the Founding—either under the First Amendment or under general principles of social-contract theory.

Nonetheless, this threshold inquiry about the scope of rights was far less significant back then for the simple reason that the public good took priority. Forcing individuals to subsidize objectionable activities—whether related to speech, religion, or anything else—did not necessarily violate fundamental law. To be sure, any compelled subsidy—whether in the form of taxes, personal services, or otherwise—*implicated* the general principles of social contract theory, but compelled subsidies were not therefore categorically disallowed. Consequently, the Founders had no need to analyze whether compelled subsidies for speech operated as abridgments of "speech" within the meaning of the First Amendment.[95] Outside the more determinate limits on governmental authority set by fundamental positive rights,[96] natural rights of all sorts—speech-related or not—enjoyed the same basic protections under fundamental law.

Natural rights at the Founding thus did not impose fixed limits on governmental power to compel people to turn over money or resources. In their famous protests against taxation without representation, for instance, the American colonists invoked their "unalienable" natural right of property,[97] but this

---

[93] *See* Campbell, *Natural Rights*, *supra* note 15, at 269–70 (noting the fluidity of terminology and categories).

[94] U.S. CONST. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see* Campbell, *Natural Rights*, *supra* note 15, at 307. As argued elsewhere, the enumeration of retained natural rights in the text of a constitution or bill of rights had no effect on the judicial enforceability of those rights. *See* Jud Campbell, *Judicial Review*, *supra* note 15, at 572–76. The same thing was *not* necessarily true of positive rights. *See id.* at 577 ("By the late 1780s, however, enumerating rights was not always just a declaratory exercise. Constitutional enumeration also had come to provide an avenue for recognizing the fundamentality of positive rights not supported by custom.").

[95] *Cf.* Baude & Volokh, *supra* note 6, at 172–94 (extensively analyzing whether being compelled to give money that is used for speech is an abridgment of "speech" within the meaning of the First Amendment).

[96] *See* Campbell, *Natural Rights*, *supra* note 15; *see* discussion, *supra* note 79, and accompanying text.

[97] *See* Campbell, *Republicanism*, *supra* note 15, at 98.

argument hardly suggested a general protest against any governmental authority to tax, nor did it suggest any exemption from taxes based on conscientious objections. Rather, the taxing authority was circumscribed by axioms of social-contract theory, which required representative consent and pursuit of the public good.[98] The same principles straightforwardly applied to any other compulsory payments.

B. Compelled Subsidies at the Founding

So far, this Part has proceeded deductively—taking the framework outlined in Part II and applying it to the problem of compelled subsidies. A more inductive approach, focused on how particular Founders viewed the constitutionality of compelled subsidies for speech, is not feasible for the simple reason that no such controversies are known. But, debates over legally compelled payments did arise with respect to another natural right mentioned in the First Amendment: free exercise.

Evidence from religious-freedom disputes reinforces that compelled subsidies could implicate natural-rights concerns. At the same time, however, recorded debates indicate that these natural rights against compelled subsidization were subject to legislative regulation, without any suggestion of judicial oversight.[99]

This Part focuses on two sources of evidence: First, debates in the First Congress over whether those who religiously objected to bearing arms should have to make an "equivalent" payment in lieu of militia service, and, second, religious-assessment provisions in various state laws and constitutions.

1. "Equivalents"

As the First Congress convened in 1789, several state constitutions or declarations of rights accommodated individuals who religiously objected to militia service. But there was often a catch. As New Hampshire's 1783 constitution put it, "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, *provided he will pay an equivalent*."[100] Several other states had comparable provisions,[101]

---

[98] *Id.*

[99] Outside of this particular context, some early commentators endorsed a judicial check on extreme abuses of legislative authority, where there was manifest disregard for the public good. *See* Campbell, *Judicial Review*, *supra* note 15, at 573–74.

[100] N.H. CONST. of 1783, Part I, art. XIII, *reprinted in* THE COMPLETE BILL OF RIGHTS 277 (Niel Cogan ed., 2d ed. 2015) (emphasis added).

[101] *See, e.g.*, N.Y. CONST. of 1777, § XL, *reprinted in* THE COMPLETE BILL OF RIGHTS 277 (Niel Cogan ed., 2d ed. 2015) ("That all such of the Inhabitants of this State, being of the People called Quakers, as from Scruples of Conscience may be averse to the bearing of Arms, be therefrom excused by the Legislature; and do pay to the State such Sums of Money in Lieu of their personal Service, as the same may, in the

and when the ratifying conventions in Virginia, North Carolina, and Rhode Island met, they each recommended a federal constitutional amendment providing "[t]hat 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*."[102] (This practice was also known as paying for a "substitute.")

Madison responded to these proposals by including in his original draft of the Second Amendment a concluding provision that "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."[103] Notably, Madison's proposal—unlike those submitted by Virginia, North Carolina, and Rhode Island—seemed to make the issue of equivalents a matter of legislative discretion, not constitutional command.[104] The committee that initially revised Madison's proposals reported—perhaps at the behest of Roger Sherman of Connecticut[105]—a slightly different version, potentially broadening the scope of the accommodation: "no person religiously scrupulous shall be compelled to bear arms."[106]

The removal of "in person" from Madison's initial proposal did not go unnoticed. When the amendment came up for debate in the full house, James Jackson of Georgia "moved to amend the clause, by inserting at the end of it 'upon paying an equivalent to be established by law.'"[107] Conscientious objectors, in other words, would have to compensate the government for their refusal to bear arms.

Judgment of the Legislature, be worth."); PENN. CONST. of 1776, Declaration of Rights, § VIII, *reprinted in* THE COMPLETE BILL OF RIGHTS 585 (Niel Cogan ed., 2d ed. 2015) ("That ever member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: 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 maner assented to, for their common good."). Delaware had an equivalent provision to Pennsylvania's. *See* Delaware Declaration of Rights of 1776, § 10.

[102] *See* Muñoz, *supra* note 49, at 1111 (emphases added) (citing 5 THE FOUNDERS' CONSTITUTION 16, 18 (Philip B. Kurland & Ralph Lerner eds., 1987).

[103] CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, 1285.

[104] *See* McConnell, *supra* note 14, at 1500.

[105] The removal of "in person" also appears in a committee draft attributed to Roger Sherman, *see* THE COMPLETE BILL OF RIGHTS 264 (Niel Cogan ed., 2d ed. 2015), and as noted below, Sherman was a leading opponent of requiring Quakers to pay an equivalent.

[106] *House Comm. of Eleven Report* (July 28, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS 264 (Niel Cogan ed., 2d ed. 2015).

[107] CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1286.

Jacksons's proposal impliciated the problem of compelled subsidies. Many Quakers, after all, did not simply object to bearing arms *in person*. They were, as Roger Sherman quickly pointed out, "equally scrupulous of getting subsitutes or paying an equivalent; many of them would rather die than do either one or the other."[108] John Vining of Delaware echoed this claim.[109] To be sure, the funds were not to be used for speech or religious exercise. But they do implicate the conscience-based logic of modern compelled-subsidy doctrine. As Sherman and Vining emphasized, Quakers conscientiously objected to paying an equivalent because of the way that the funds would be used.[110]

From the standpoint of natural rights, however, such accommodations—although preferable, when possible—were not absolutely required. "No man can claim this indulgence of right," Egbert Benson of New York insisted, arguing against a specific, constitutionally ossified protection for religious dissenters.[111] A few days later, Thomas Scott of Pennsylvania echoed Benson's point. Recognizing a right against being compelled to bear arms, Scott argued, would also bar the government from collecting "an equivalent." He was not against such a right as an "indulgence by law." But Scott stressed the countervailing challenges of administering an accommodation regime, the importance of maintaining viable militias, and concerns that atheists might take advantage of the law to avoid militia service. Consequently, Scott "conceive[d] it is a matter of legislative right altogether"—not the sort of thing that ought to be enumerated in the Constitution.[112]

---

[108] *Id.* at 1286–87.

[109] *Id.* at 1287 ("[He] hoped the clause would be suffered to remain as it stood, because 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."). For purposes of this paper, what matters is the *perception* of Quaker beliefs among members of the First Congress—not the *actual* beliefs. On that issue, there is some debate about the extent to which Quakers and others objected to the payments of equivalents. *See* Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1606 n.6 (2005).

[110] *See House Comm. of Eleven Report* (July 28, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS 264 (Niel Cogan ed., 2d ed. 2015); CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1286.

[111] CONG. REG. [Philadelphia], Aug. 17, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1287. Benson's reference to "right" in a non-discretionary sense indicates that he was referring to the lack of any determinate legal immunity (i.e., a fundamental positive right); he was not, on my reading, saying anything about natural rights, except by implication denying that those rights translated in this context into determinate legal immunities. *See* Campbell, *Natural Rights*, *supra* note 15 (distinguishing between natural rights and fundamental positive rights).

[112] GAZETTE OF THE U.S. (Phila.), Aug. 22, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1308–09.

Elias Boudinot of New Jersey then defended the proposed accommodation regime, emphasizing practical and ethical problems with forcing individuals to violate their consciences. "What dependence can be placed in men who are conscientious in this respect?" he asked, noting that "[i]n forming a militia we ought to calculate for an effectual defence, and not compel characters of this description to bear arms."[113] People who would "rather die than use [arms]," Boudinot was suggesting, would not be very good soldiers. Plus, compelling people to violate their consciences would violate principles of "justice."[114]

At the end of the discussion (the rest of which was not recorded), the House of Representatives voted to add "in person" to the conscientious-objector provision,[115] ensuring that conscientious objectors would not have to bear arms but also, by implication, accepting that they could be forced to pay an equivalent. The Senate later rejected the entire clause, though no records survive explaining why.[116]

Only two years later, the topic of equivalents resurfaced in debates over a proposed bill to regulate state militias. Again, the issue was not exactly compelled subsidies for *speech*. But the payments were to be used in a way that implicated natural rights, so they provide the best available evidence of how the members of the First Congress viewed mandatory payments that potentially abridged First Amendment rights. Once again, the leading view was to exempt Quakers from militia service but nonetheless require them to pay an equivalent.

The debate began when Aedanus Burke of South Carolina spoke out in favor of exempting Quakers not only from militia service but also from any attendant fines or payments for non-service. "[I]t was not consonant with the principles of justice to make those conscientiously scrupulous of bearing arms pay for not acting against the voice of their conscience," he insisted.[117] Nobody was supposed to "suffer[ ] on account of his conscientious scruples," Burke explained, "and yet we are going to make a respectable class of citizens pay for a right to a free exercise of their religious principles: It was contrary to the constitution; it was contrary to that sound policy, which ought to direct the house in establishing the militia."[118]

Responding, once again, to the argument against equivalents was James Jackson of Georgia. Determining who

---

[113] *Id.* at 1309.
[114] *Id.*
[115] *Id.*
[116] Muñoz, *supra* note 49, at 1116.
[117] GEN. ADVERTISER (Phila.), Dec. 23, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 115.
[118] *Id.*

genuinely objected to militia service was a fools errand, he stated: "Who was to know . . . what persons were really conscientiously scrupulous?" If Quakers and others like them were not even required to pay an equivalent, Jackson implored, "it was laying the axe to the root of all militia."[119] "[O]peration of this privilege," he asserted when debate resumed the following day, "would . . . make the whole community turn Quakers."[120]

But Jackson's argument was deeper. He also emphasized the undergirding prinicples "of the social compact."[121] Those principles, he noted, required equal treatment as well as reciprocal recognition of social duties. Requiring Quakers to pay for their non-service, Jackson insisted, was not a special tax on their religion. "[I]t is an equivalent for personal service due to society. . . . [A]ll should pay it for the benefit of society; some *may* pay it in personal service—those averse to this mode *should* pay it in money."[122] Jackson, in other words, was arguing against equivalents from within the framework of social-contract theory, invoking the undergirding principle of impartial treatment.

Once again, John Vining and Roger Sherman were outspoken in favor of religious accommodations. Conscientious objectors, Vining argued, could be required to pay a fine "applied to a civil use, in which case even the persons scrupulous of bearing arms could make no reasonable objection."[123] Exempting them from militia service while forcing them to pay toward militia expenses, however, was "not granting them any kind of privilege: it is like inviting them to a splendid banquet, and shutting them out; saying 'walk in gentlemen,' and yet taking care to keep the door bolted within."[124] Sherman similarly argued against forcing Quakers to pay an equivalent toward militia costs, proposing instead that Congress might lay a general capitation tax that exempted members of the militia, thus addressing Jackson's concerns about unequal burdens while also accommodating religious objections.[125] Madison stated his

---

[119] *Id.*

[120] GAZETTE OF THE UNITED STATES (Phila.), Dec. 29, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES: THIRD SESSION, DECEMBER 1790–MARCH 1791 160 (Charlene B. Bickford et al. eds., 1996).

[121] GEN. ADVERTISER (Phila.), Dec. 24, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 120, at 123. This is a different newspaper report of the same speech by Jackson on December 22, 1790.

[122] *Id.* at 123.

[123] PENN. PACKET (Phila.), Dec. 28, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 120, at 141. This, too, is a different newspaper report of the debates in the House of Representatives on December 22, 1790.

[124] *Id.*

[125] GAZETTE OF THE UNITED STATES (Phila.), Dec. 29, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 163.

sympathy for this view but—sensing the prevailing mood—noted that granting religious accommodations without requiring an equivalent was politically "impracticable."[126]

Eventually the House decided to leave the issue to the discretion of each state rather than set a uniform national rule for militia exemptions.[127] But the debate revealed two points relevant to compelled subsidies. First, although some representatives argued that forcing religious objectors to pay an equivalent would violate the Constitution, and others thought that *not* forcing them to pay an equivalent would violate the basic terms of the social contract, the dominant view was somewhere between these poles. The issue was, in short, understood as one within legislative discretion. Certainly nobody suggested that judges would step in to decide the matter under the Free Exercise Clause.

Second, although Congress ended up leaving the issue to the states, the debate revealed a nuanced perspective on how compelled payments might implicate constitutional principles. Interestingly, most members of the First Congress who spoke treated compelled payments as somehow less offensive to religious freedom than compelled militia service, even though representatives on both sides of the issue apparently understood Quakers to be just as opposed to paying an equivalent as to directly serving in the militia.[128] This poses something of a puzzle.

Perhaps some people silently agreed with William Giles of Virginia that compelled subsidies were categorically different than compelled conduct. "He was in favor of exempting every many from doing that, which his general conduct evinced was contrary to his conscience," Giles explained, "but it cannot be said that it is against the conscience of a Quaker to hold and possess property."[129] In other words, because only *money* was at stake, equivalents posed no threat to conscience. (Decades later, Massachusetts Justice Thoephilus Parsons famously restated this

---

[126] *Id.* at 162; *see also id.* at 164 ("[Madison] said he should acquiesce in an equivalent—tho he would prefer a gratuitous exemption.").
[127] *See* Militia Act of 1792, § 2, 1 Stat. 271 (1792) ("[A]ll persons who now are or may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty . . . .").
[128] *See, e.g.*, remarks of James Jackson, DUNLAP'S AM. DAILY ADVERTISER (Phila.), Jan. 5, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 177 ("Quakers . . . pray not for exemption only, but to be exempted without the payment of an equivalent. It will afford them no redress, nor given them any satisfaction."); remarks of Roger Sherman, PENN. PACKET (Phila.), Dec. 31, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 149 ("As to their being obliged to pay an equivalent, gentlemen might see that this was as disagreeable to their consciences as the other.").
[129] GAZETTE OF THE UNITED STATES (Phila.), Dec. 29, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 163.

view, writing that a compelled-subsidy claim "seems to mistake a man's conscience for his money.")[130]

Yet nobody except Giles articulated such an absolutist approach during debates in the First Congress.[131] Most representatives, it seems, thought that being forced to pay for objectionable activities at least *implicated* principles of religious freedom—even though such compulsion was not categorically barred by the First Amendment. Although no speaker explicitly resolved this paradox, my suspicion is that the general preference for allowing Quakers not to bear arms *in person* but nonetheless requiring *payments* proceeded from policy-based rationales—exactly the type of assessments of the general welfare that social-contract theory demanded. As several members noted, for instance, requiring Quakers to pay an equivalent would help stem potential problems with fraudulent claims while avoiding the counterproductivity of including pacifists in the militia.[132]

In sum, evidence from the First Congress comports with the general approach to rights laid out in Part II. Members of the House—both in discussing the proposed Second Amendment and in later debates over the militia bill—seemed to think both that compelled subsidies could at least *implicate* rights of conscience and that those duties were not necessarily violations of the First Amendment.

2. Religious Establishments

Objections to compelled subsidies for religion could easily arise in the context of religious establishments. And, once again, the way that the Founders responded to this problem reveals a diversity of approaches, bolstering the thesis that the Founders had a less categorical or legalistic approach to rights than we generally do today.

Many states guaranteed a right against compelled subsidization of religion as part of the state's guarantee of free exercise.[133] "[N]o man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent," Delaware's

---

[130] Barnes v. Inhabitants of the First Parish in Falmouth, 6 Mass. (6 Tyng) 401, 408 (1810); *see also* Campbell, *Religious Neutrality*, *supra* note 46, at 342–43 (discussing the *Barnes* case).

[131] Of course, newspaper reports of congressional proceedings were not necessarily comprehensive.

[132] *See supra* Part III.B.1; GAZETTE OF THE UNITED STATES (Phila.), Aug. 22, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 53, at 1308–09.

[133] Many states did not use the term "free exercise," but they each had (in some form) a statutory or constitutional guarantee of religious exercise.

Declaration of Rights stated.[134] These provisions did not necessarily disallow religious assessment schemes, but they did ensure that opt-out provisions accommodated people who preferred not to fund a particular religion.[135]

Some state protections, though, were less generous with respect to opt-outs. Georgia and New Hampshire, for instance, each protected only a right against compelled subsidization of religious instructors of other denominations.[136] Parishoners did not have a choice about whether to financially support pastors of their own denomination. Meanwhile, Massachusetts permitted individuals to earmark their payments for "the support of public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends;

---

[134] Delaware Declaration of Rights of 1776, § 2, *reprinted in* THE COMPLETE BILL OF RIGHTS 15 (Niel Cogan ed., 2d ed. 2015); *see also* N.J. CONST. of 1776, art. XVIII, *reprinted in* THE COMPLETE BILL OF RIGHTS 24 (Niel Cogan ed., 2d ed. 2015) ("nor shall any Person within this Colony ever be obliged to pay [toward religion] contrary to what he believes to be Right, or has deliberately or voluntarily engaged himself to perform."); N.C. CONST. of 1776, § XXXIV, *reprinted in id.* at 29 ("neither shall any Person, on any Pretence whatsoever, be compelled to attend any Place of Worship, contrary to his own Faith or Judgment; nor be obliged to pay for the purchase of any Glebe, or the building of any House of Worship, or for the Maintenance of any building of any house of worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all Persons shall be at Liberty to exercise their own Mode of Worship."); PENN. CONST. of 1776, Declaration of Rights, art. II, *reprinted in* THE COMPLETE BILL OF RIGHTS 31 (Niel Cogan ed., 2d ed. 2015) ("[N]o man ought to 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."); S.C. CONST. of 1778, *reprinted in* THE COMPLETE BILL OF RIGHTS 38 (Niel Cogan ed., 2d ed. 2015) ("No Person shall, by Law, be obliged to pay towards the Maintenance and Support of a religious Worship that he does not freely join in, or has not voluntarily engaged to support."); VT. CONST. of 1777, ch. I, § 3, *reprinted in* THE COMPLETE BILL OF RIGHTS 39 (Niel Cogan ed., 2d ed. 2015) ("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 Minister contrary to the Dictates of his Conscience."); Virginia Bill for Religious Freedom of 1786, *reprinted in* THE COMPLETE BILL OF RIGHTS 48 (Niel Cogan ed., 2d ed. 2015) ("That no many shall be compelled to frequent or support any religious worship, place or ministry whatsoever."). New York's Constitution guaranteed "free Exercise and Enjoyment of religious Profession and Worship" but did not make any statements about religious assessments. *See* N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* THE COMPLETE BILL OF RIGHTS–25 (Niel Cogan ed., 2d ed. 2015).

[135] *See, e.g.*, Maryland Declaration of Rights of 1776, § 33, *reprinted in* THE COMPLETE BILL OF RIGHTS 17 (Niel Cogan ed., 2d ed. 2015) (permitting the legislature to "lay a general and equal tax for the support of the Christian religion, leaving to each individual the power of appointing the payment over of the money collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county").

[136] GA. CONST. of 1777, art. LVI, *reprinted in* THE COMPLETE BILL OF RIGHTS 16 (Niel Cogan ed., 2d ed. 2015); N.H. CONST. of 1783, Part I, Art. VI, *reprinted in* THE COMPLETE BILL OF RIGHTS 22 (Niel Cogan ed., 2d ed. 2015); *see also* GA. CONST. of 1789, art. IV, § 5, *reprinted in* THE COMPLETE BILL OF RIGHTS 16 (Niel Cogan ed., 2d ed. 2015) ("All persons shall have the free exercise of religion; without being obliged to contribute to the support of any religious profession of their own.").

otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said monies are raised."[137]

Although not always clear, these protections against compelled subsidization seem to have been *part of*—and not merely *supplementary* to—the right of free exercise. Georgia's Constitution of 1789, for example, stated that "All persons shall have the free exercise of religion; without being obliged to contribute to the support of any religious profession of their own," indicating that the second clause (against some compelled subsidies) clarified the first clause (guaranteeing free exercise).[138]

Once again, Founding Era evidence shows that compelled subsidies could implicate not just property rights but also rights of conscience, depending on how the money was used. State constitutional provisions further point against any widespread acceptance of William Giles's argument in the First Congress that rights of property were entirely separate from rights of conscience.[139] Nonetheless, the diversity among these clauses also indicates the lack of any fixed, rigid rule against forced subsidization that abridged individual conscience.

IV. CONCLUSION

It is long past time for the Supreme Court to reconsider its reliance on Thomas Jefferson's famous statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[140] Not only does evidence from the First Congress disprove that the framers of the First Amendment were relying on Jefferson but current doctrine is not even consistent with his actual views. Plus, modern constitutional interpreters of nearly all stripes now focus on some form of original *meaning*—not superficial reliance on isolated statements of particularly revered "Founding Fathers." As a foundation for modern law, the Jeffersonian proposition needs to go.

---

[137] MASS. CONST. of 1780, Part I, art. III, *reprinted in* THE COMPLETE BILL OF RIGHTS 21 (Niel Cogan ed., 2d ed. 2015).

[138] GA. CONST. of 1789, art. IV, § 5, *reprinted in* THE COMPLETE BILL OF RIGHTS 16 (Niel Cogan ed., 2d ed. 2015). Along similar lines, the Delaware Declaration of Rights of 1776 coupled the right against compelled subsidization of ministers with a right against "be[ing] compelled to attend any religious worship"—a right that clearly fell within the scope of the more general guarantee of "the free exercise of religious worship" guaranteed in the same provision. Delaware Declaration of Rights of 1776, § 2 *reprinted in* THE COMPLETE BILL OF RIGHTS 15 (Niel Cogan ed., 2d ed. 2015).

[139] *See* Campbell, *Religious Neutrality*, *supra* note 46.

[140] JEFFERSON, *supra* note 1, at 545.

A broader survey of Founding Era ideas about rights of religious and expressive freedom reveals that modern compelled-subsidy doctrine sits in an uneasy tension with original meaning. On the one hand, the Founders generally thought that compelling people to furnish money could at least *implicate* rights of conscience. But on the other hand, legal protections against compelled subsidies were left almost entirely to legislative judgment, without the judicial oversight that defines our modern approach to constitutional rights. Looking back to Founding Era debates about compelled subsidies thus reinforces an important but often neglected point: The Founders understood the entire concept of rights very differently than Americans do today.