NO AID, NO AGENCY

Steven K. Green*

ABSTRACT

Over the past three decades, members of the Supreme Court have demonstrated increasing hostility to the Establishment Clause's rule against funding religion, first enunciated in 1947. Over the years, the Court has not only narrowed the rule to allow for government aid to flow to religious schools and faith-based charities, it has more recently declared that to enforce that rule may amount to discrimination against religion. This Article argues that a key reason for the decline in the no-aid principle rests on the weakness of the rationale underlying that rule: that funding of religion coerces the conscience of taxpayers. The taxpayer conscience rationale, though valid historically as basis for the clause's prohibition on government funding of religion, no longer makes sense. And because the taxpayer conscience rationale is wanting, so too is the *Flast v. Cohen* rule permitting taxpayer standing to challenge government disbursements to religious entities. This Article then proposes an alternative basis for the no-aid principle, that being the concept that government has "no agency" over religious matters, a theory originally enunciated by James Madison. As explained, the no-agency theory is a structural or jurisdictional limitation on the power of government to finance inherently religious activity. If adopted, the no-agency rationale would restore needed credibility to the no-aid principle.

INTRODUCTION

To state the obvious, the Supreme Court's decisions prohibiting government financial aid to religious institutions have been controversial since the Court's first holding in *Everson v. Board of Education* in 1947.[1] There, a unanimous Court embraced the "no-aid" theory underlying the Establishment Clause despite a bare majority upholding the aid in question: state reimbursements for transportation costs for students to travel safely to parochial schools.[2] Speaking for the majority, Justice Hugo Black wrote: "The 'establishment of religion' clause of the First Amendment means at least this: . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form

* Fred H. Paulus Professor of Law and Director, Center for Religion, Law and Democracy, Willamette University. My thanks to Ira C. Lupu, Steven Smith, Mark Storslee, Micah Schwartzman, and Nelson Tebbe for their comments on earlier drafts of this Article.

[1] *See generally* 330 U.S. 1 (1947).

[2] *See id.* at 16–17.

they may adopt to teach or practice religion."[3] Justice Black reconciled the apparent inconsistency between his rhetoric and the ruling by asserting that the aid was a neutral "public welfare" benefit, generally available to students attending public and private schools and that in the end, "[t]he State contributes no money to the [parochial] schools."[4] The dissenters, in contrast, viewed the no-aid rule in absolute terms, with Justice Wylie Rutledge arguing that "[t]he prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."[5]

Conservative commentators—both political and religious—excoriated the Justices for their rhetoric,[6] as commentators did for later decisions affirming the principle of "no-aid separationism."[7] In addition to arguing that a no-aid stance was counter to the purpose of the First Amendment, the intent of its drafters, and the later historical practice, critics insisted that religious schooling, and then religion-based charities, provided essential services that benefitted the commonweal and were deserving of public support.[8]

Notwithstanding that criticism, the Court proceeded to reaffirm the bona fides of no-aid separationism in holdings through the mid-1980s.[9] Over the past thirty years, however, criticism of the no-aid rule has become more pronounced as new adjudicative theories have emerged to challenge the pedigree of no-aid separationism: neutrality, private choice, and more recently, non-discrimination. During that time

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[3] *Id.* at 15–16 (quoting U.S. CONST. amend. I).

[4] *Id.* at 17–18.

[5] *Id.* at 33 (Rutledge, J., dissenting).

[6] *See generally* WILFRID PARSONS, S.J., THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES (1948); JAMES M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); Edward S. Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949).

[7] *E.g.*, Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 289 (1999).

[8] *See* PARSONS, *supra* note 6, at 148–63; Corwin, *supra* note 6, at 17–21; Murray, *supra* note 6, at 24.

[9] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973) (holding that New York's financial aid programs for nonpublic elementary and secondary schools violated the Establishment Clause); Sloan v. Lemon, 413 U.S. 825, 835 (1973) (holding that Pennsylvania's tuition reimbursement program was unconstitutional because systems of state aid to nonpublic schools violated the Establishment Clause); Meek v. Pittenger, 421 U.S. 349, 372–73 (1975) (holding that Pennsylvania's provisions providing auxiliary services and textbook loans to nonpublic schools were impermissible aid); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 397 (1985) (finding that two programs in the Grand Rapids School District that provided classes to nonpublic school students with public funds violated the Establishment Clause); Aguilar v. Felton, 473 U.S. 402, 413 (1985) (finding that New York City's program that monitored and provided salaries of public school employees who also taught at parochial schools violated the Establishment Clause).

we have witnessed the dismantling of the no-aid rule resulting in, to use Professor Ira Lupu's phrase, the "lingering death of separationism."[10] That slow demise has been evident in a series of cases that began in the late 1980s and has continued until the present: *Bowen v. Kendrick*;[11] *Zobrest v. Catalina School District*;[12] *Rosenberger v. Rectors & Visitors of the University of Virginia*;[13] *Agostini v. Felton*;[14] *Mitchell v. Helms*;[15] *Zelman v. Simmons-Harris*;[16] *Trinity Lutheran Church v. Comer*;[17] and *Espinoza v. Montana Department of Revenue*.[18] Coupled with the erosion of no-aid jurisprudence has been the Court's tightening of the public's ability to challenge the government's disbursements of financial assistance to religious institutions, represented by the narrowing of jurisprudential "standing" requirements.[19] In the process, Justices have expressed outright hostility to the Court's own no-aid jurisprudence, with Justice Scalia once comparing the no-aid rule (enforced through the "Lemon test") to a "ghoul in a late-night horror movie,"[20] and Justice Thomas condemning the rule as having "a 'brooding omnipresence,'"[21] and of being "born of bigotry."[22]

The Court's retreat from the no-aid rule, if not complete disregard for it, was evident in *Mitchell v. Helms*, where the Court upheld myriad forms of public aid to religious (and public) schools, aid that had the potential of being diverted for religious uses.[23] The plurality, speaking through Justice Thomas, declared that:

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[24]

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[10] *See generally* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

[11] *See generally* 487 U.S. 589 (1988).

[12] *See generally* 506 U.S. 1 (1993).

[13] *See generally* 515 U.S. 819 (1995).

[14] *See generally* 521 U.S. 203 (1997).

[15] *See generally* 530 U.S. 793 (2000).

[16] *See generally* 536 U.S. 639 (2002).

[17] *See generally* 137 S. Ct. 2012 (2017).

[18] *See generally* 140 S. Ct. 2246 (2020).

[19] *See generally* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).

[20] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[21] *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., concurring) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

[22] Mitchell v. Helms, 530 U.S. 793, 829 (2000).

[23] *See id.* at 832–36.

[24] *Id.* at 810 (citation omitted) (citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–47 (1968)).

The "government itself is not thought responsible for any particular indoctrination" that might occur with the public aid.[25] Under such circumstances, Thomas wrote, it was "a mystery what the constitutional violation would be."[26]

This retreat can be seen in the more recent holdings in *Trinity Lutheran Church v. Comer*[27] and *Espinoza v. Montana Department of Revenue*.[28] In *Trinity Lutheran*, a seven-Justice majority overturned a state's refusal to provide a reimbursement grant to a church for renovating its physical property.[29] Rather than characterizing the state's refusal in terms of adherence to the no-aid rule, the majority held that the state had discriminated against the church in not providing the financial benefit.[30] The fact that the grant had a discrete and non-ideological application—to purchase playground resurfacing materials—no doubt ameliorated the concerns of moderate Justices Breyer and Kagan,[31] with the former characterizing the grant as falling under "a general program designed to secure or to improve the health and safety of children" that could not be diverted for religious uses.[32] Still, the Court majority all but ignored the obvious no-aid question raised by allowing a state to provide a direct monetary grant to a house of worship and the precedent that decision would set. The Court's disregard for the no-aid rule and its adoption of a non-discrimination principle in its stead led to Justice Sotomayor's impassioned dissent which excoriated the majority for its "silence" on the no-aid issue:

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[25] *Id.* at 809–10.

[26] *Id.* at 827. In her concurrence, Justice O'Connor called the plurality's opinion one of

> unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.

Id. at 837 (O'Connor, J., concurring).

[27] *See generally* 137 S. Ct. 2012 (2017).

[28] *See generally* 140 S. Ct. 2246 (2020).

[29] *Trinity Lutheran Church*, 137 S. Ct. at 2025.

[30] *Id.* at 2024.

[31] *See* Erwin Chemerinsky & Barry P. McDonald, *Eviscerating Healthy Church-State Separation*, 96 WASH. U. L. REV. 1009, 1010–11 (2019) ("[T]he seemingly innocuous facts of the *Trinity Lutheran* case itself, involving as it did funding for playground resurfacing, may have played a key role in the Court's decision.").

[32] *Trinity Lutheran Church*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment). Further assuaging the possible concerns of Justices Breyer and Kagan was the Court's footnote declaring that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3 (majority opinion).

> The Court today profoundly changes [the church-state] relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.[33]

In *Espinoza*, which considered a state constitutional provision prohibiting financial assistance to religion, the Court majority again subordinated the values embedded in the no-aid principle to those of the Free Exercise Clause.[34] There was no discussion about the merits of the no-aid principle or how it might advance religious freedom writ-large; instead, Chief Justice Roberts boldly declared that "we do not see how the [state] no-aid provision promotes religious freedom."[35] The concurring opinions of Justices Thomas and Alito went even further in dismissing the principle, with Thomas openly disputing that "the Establishment Clause prohibits the government from favoring religion or taking steps to promote it,"[36] and Alito tying the no-aid principle to a legacy of anti-Catholic animus.[37]

No doubt, the cumulative weight of the legal and policy arguments against no-aid separation has precipitated the demise of the principle. This Article offers an additional reason for the decline in no-aid separationism: the fundamental weakness of the rationale that has undergirded the no-aid principle since the Court embraced it in 1947. That rationale is, of course, that to use tax money to pay for religious activity infringes on the conscience rights of taxpayers. In tracing the historical background to the First Amendment in his *Everson* opinion, Justice Black noted how religious "dissenters were compelled to pay tithes and taxes to support government-sponsored churches."[38] As Justice David Souter later described the rationale, "[C]ompelling an individual to support religion violates the fundamental principle of freedom of conscience."[39] Accordingly, "[a]ny tax to establish religion is antithetical to the command 'that the minds of men always be wholly free.'"[40] This taxpayer conscience rationale has been so ubiquitous in court opinions and commentary that it has achieved a canonical status in First Amendment jurisprudence.[41] It finds its basis,

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[33] *Id.* at 2027 (Sotomayor, J., dissenting).

[34] *See generally* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[35] *Id.* at 2261.

[36] *Id.* at 2265 (Thomas, J., concurring).

[37] *Id.* at 2267–73.

[38] Everson v. Bd. of Educ., 330 U.S. 1, 10 (1947).

[39] Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting).

[40] *Id.* at 871 (quoting *Everson*, 330 U.S. at 12); *see also* Flast v. Cohen, 392 U.S. 83, 114 (1968) (Stewart, J., concurring) (declaring that people "have a clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . of [their] property for the support of any one establishment'").

[41] *See* Paul G. Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1,

as Justices Black and Rutledge asserted in their opinions, in the founding generation's reaction to the abuses associated with religious tax assessments. For Justices Black and Rutledge, that revulsion was exemplified in the writings of Thomas Jefferson and James Madison. Jefferson, Justice Rutledge noted, declared that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever";[42] Justice Black also cited to Jefferson's religious liberty bill: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[43] This "taxpayer conscience rationale" has been the animating force behind the no-aid theorem because, in the words of Erwin Chemerinsky and Barry McDonald, "deeply ingrained in the history of American religious freedom is a fight against coerced taxpayer funding of religious communities to protect rights of religious conscience and a healthy separation of church and state."[44]

To be sure, the idea that it violates rights of conscience to compel someone to pay for another's religion held saliency during the colonial and early national periods,

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9 (1961) ("It is clear also that the conscience of individuals should not be coerced by forcing them to pay taxes in support of a religious establishment or religious activities."); PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 14 (1964) ("[I]t is a violation of religious liberty to compel people to pay taxes to support religious activities or institutions."); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 267 (1968) (The Establishment Clause's "paramount purpose then, like its major concern today, was to safeguard freedom of worship and conscience—in a word, to protect religious liberty."); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) ("Establishment of religion, the Framers' generation thought, often had the effect of compelling conscience. . . . [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."); Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 318 (2011) ("A traditional argument against state financial support for religion is that such support violates taxpayers' freedom of conscience. Just as compelling religious speech or worship infringes on religious liberty so, too, does requiring citizens to pay for religious expressions they find objectionable."); Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 653 (2019) ("'Going beyond compulsory church attendance or required forms of worship, the Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.' In short, no reasonable person of that era would dispute that it violated freedom of conscience to be conscripted into financially supporting a religion not one's own.").

[42] *Everson*, 330 U.S. at 28 (Rutledge, J., dissenting) (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* 12 HENING, STATUTES OF VIRGINIA 84 (1823)).

[43] *Id.* at 13 (majority opinion) (quoting Thomas Jefferson, *supra* note 42, at 84).

[44] Chemerinsky & McDonald, *supra* note 31, at 1009; *see also* LAURENCE H. WINER & NINA J. CRIMM, GOD, SCHOOLS, AND GOVERNMENT FUNDING: FIRST AMENDMENT CONUNDRUMS 182 (2015) ("Compelling taxpayers to provide such subsidies that support religion, especially one not their own, and particularly when their subsidies are used for the religious education and indoctrination of children, violates freedom of conscience and is intrinsically inconsistent with the Establishment Clause.").

but it makes little sense as the animating theory for the no-aid principle in the twenty-first century (or in the twentieth century, for that matter). This Article argues that the tenuous logic, if not outright fallacy, of a conscience-based rationale for barring expenditures from general tax funds for religious activities has undermined the efficacy of the no-aid principle. Though many well-meaning separationists have convinced themselves that a tax-generated government expenditure in support of religious education violates their conscience rights, they have been deceived.[45] The primacy of the tax compulsion rationale of the no-aid principle has had the unintended consequence of forestalling the full development of other theories instructing against government financial support for religion: dependency; competition/divisiveness; manipulation/corruption; and, as this Article will discuss, the jurisdictional theory of no-agency.[46]

This Article proceeds as follows. Part I analyzes the origins of the "no compelled support of religion" argument for forbidding government financial support of religion. During the colonial and early national periods, tax assessments and distraint of property were the hallmarks of compulsion and infringed directly on conscience rights. Basing the idea of disestablishment and non-support for religion on protecting conscience made sense at that time. Part I argues, however, that while members of the founding generation conceived of conscience rights mostly in religious terms, they understood the notion of freedom of conscience more broadly. Part II then examines the modern development of a taxpayer conscience rationale for no-aid of religion and the arguments in favor and against that theory. As stated in the previous paragraph, this Article concludes that the arguments against recognizing a taxpayer conscience rationale are more compelling than those in its favor. That discussion then necessarily leads to an examination in Part III of taxpayer standing for Establishment Clause challenges, which concludes that it too lacks a defensible basis.[47]

Part IV then offers an alternative theory for prohibiting the application of public monies for inherently religious activities: a modified version of Madison's "no agency" principle. As scholars have recognized, Madison's no-agency theory is a jurisdictional principle, one that deprives the government of authority to act on religious matters.[48] Some scholars have asserted that the no-agency theory directs that the

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[45] *See generally* Leo Pfeffer, *Public Funds for Parochial Schools? No.*, 37 NOTRE DAME L. REV. 309 (1962).

[46] *See* Mitchell v. Helms, 530 U.S. 793, 870–72 (2000) (Souter, J., dissenting) (identifying alternative rationales for the no-aid principle).

[47] No doubt, the discussion in Part III will distress my fellow separationists, particularly those colleagues I worked with for a decade as legal director of Americans United for Separation of Church and State, where we regularly advanced the taxpayer conscience rationale. My purpose in this Article is to enhance the integrity of the no-aid principle, not to undermine it.

[48] *See generally* Jeffrey Sikkenga, *Government Has No "Religious Agency": James Madison's Fundamental Principle of Religious Liberty*, 56 AM. J. POL. SCI. 745 (2012).

government can take no position on religious matters, either pro or con, resulting in a form of governmental ambivalence toward religion or a position of strict neutrality toward religion.[49] A narrower conception of no-agency, advocated here, instructs that government cannot act with a religious purpose, either to advance or inhibit religion, but can otherwise act on religion (i.e., regulate) in ways similar to its authority to act on related secular entities.[50] While this conception may suggest allowing neutral, non-ideological aid to flow equally to religious and secular entities, it does not do so unqualifiedly. Here, no-agency includes an awareness of how public funds are being used (an awareness of the natural and probable consequences of their likely applications), and it deprives the government of authority to fund inherently religious activities.[51] This bar on funding is similar in some ways to the notion of non-divertibility debated in *Mitchell v. Helms*.[52] This conception of no-agency thus may allow for the scrap tire program in *Trinity Lutheran* but not for the vouchers in *Zelman*. As for standing to challenge unconstitutional expenditures and applications, injury would not rest with taxpayers but with similarly situated secular (and possibly religious) entities that have received (or are eligible for) the financial benefit, but are not using the funds for inherently religious activity. They would have a particularized injury to challenge a religious entity's use of public funds for religious purposes under a no-agency theory. Part IV then concludes with several examples of how the no-agency rule works in practice.

I. THE HISTORICAL BASIS FOR THE CONSCIENCE-BASED RATIONALE

The story of the nation's religious disestablishment has been recounted in numerous studies.[53] While disagreement exists among scholarly and popular authors as to

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[49] *See generally* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (advancing an early formal understanding of a no-agency approach).

[50] *See* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 5 (2014).

[51] Admittedly, the category of "inherently religious activity" may be amorphous. As used herein, it is intended to mean activity of a devotional or spiritual nature or activity that advances the religious mission of the entity in gaining converts or increasing religious fealty. It does not include non-devotional activities of a religiously affiliated entity or even houses of worship that can be engaged in by a secular counterpart, e.g., a food bank or homeless shelter. It also does not include financial aid that has both a secular purpose and application, such as Title I services under the Elementary and Secondary Education Act of 1965. *See* Elementary and Secondary Education Act of 1965, 79 Stat. 27 (1965).

[52] See Justice Thomas's discussion of the divertibility issue in *Mitchell v. Helms*, 530 U.S. 793, 820–25, 832–34 (2000).

[53] *See generally* THOMAS J. CURRY, THE FIRST FREEDOM: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1–89 (1986); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44

whether members of the founding generation intended to create a secular or pluralistic republic (or even a Christian nation), and whether they intended the non-establishment principle to prohibit government preference for one religion only or support for all religions generally, there are some indisputable points of agreement. First, the disestablishment impulse arose quickly as soon as the colonists severed their official ties with Great Britain. Considering the long tradition of church establishments in Western culture, the rapidity of change in early America was truly remarkable. In 1776, nine of thirteen colonies maintained some form of a religious establishment, meaning financial support for one or more sanctioned Protestant denominations and that important civic rights and privileges turned on one's affiliation with a recognized church (in the Anglican colonies, it also meant government control over the operations of the established church).[54] Within a short span of ten years, that ratio had been reversed with ten or eleven of fourteen states (depending on how one views the new state of Vermont) effectively disestablishing.[55]

Second, and closely related, the primary catalyst for disestablishment in the states was to abolish the compelled financial support of religion. In the words of historian Thomas Curry, by the 1780s, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[56] And third, people tied the rationale for abolishing compelled support of religion to rights of conscience.[57]

The idea of an inalienable right of conscience had existed for a while. For members of the founding generation, the antecedents of a right of conscience arose out of two transformative events: the Protestant Reformation and the Scientific Revolution that informed the Enlightenment. With the former, leaders of the Reformation such as Martin Luther and John Calvin asserted a distinctly religious understanding of conscience rights, arguing that because certain doctrines and teachings of the Catholic Church were unscriptural, to enforce their compliance on people infringed upon their conscience which was answerable to God alone.[58] "[T]he consciences of believers," Calvin wrote, "should rise above and advance beyond the [Church's] law, forgetting

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WM. & MARY L. REV. 2105 (2003); Carl Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385; FORREST CHURCH, SO HELP ME GOD (2007); THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION (2010); STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA 15–77 (2010).

[54] *See* CURRY, *supra* note 53, at 105–33.

[55] *See* GREEN, *supra* note 53, at 31–51. The Vermont Constitution of 1786 deleted language from its 1777 constitution that required people to financially support religious worship, but the legislature failed to strike a 1783 assessment law which allowed those towns so inclined to continue to impose religious taxes. *Id.* at 36–37. That assessment law was finally repealed in 1807. *Id.* at 37.

[56] CURRY, *supra* note 53, at 217.

[57] *See* KIDD, *supra* note 53, at 46–47.

[58] *See* Feldman, *supra* note 41, at 357–62.

all law-righteousness."[59] Arising out of that tradition, Puritans and other dissenters to church establishments in the seventeenth and eighteenth centuries asserted a personal right of "private judgment" about religious matters.[60] One such dissenter—here, to organized Puritanism—was Roger Williams, who famously addressed conscience rights within church-state terms in his letter, *The Bloody Tenent, of Persecution for Cause of Conscience* (1644): "God requireth not an uniformity of religion to be enacted and enforced in any civil state; which enforced uniformity (sooner or later) is the greatest occasion of civil war, ravishing consciences, persecution of Christ Jesus in His servants, and of the hypocrisy and destruction of millions of souls."[61]

Roger Williams' writings about freedom of conscience, while important, were less influential during the colonial period.[62] Of greater significance and influence were those by William Penn who, before establishing the colony with his name, faced persecution in England for his conversion to Quakerism in 1667.[63] In 1670, Penn wrote a pamphlet, *The Great Case of Liberty of Conscience*, where he laid out the case for freedom of conscience. "By liberty of conscience, we understand not only a mere liberty of the mind, in believing or disbelieving this or that principle or doctrine; but 'the exercise of ourselves in a visible way of worship . . . .'"[64] Accordingly, he declared, "no man is so accountable to his fellow creatures, as to be imposed upon, restrained, or persecuted for any matter of conscience whatever."[65] In founding his colony in 1682, Penn prohibited any religious establishment or a religious tax, and he invited religious dissenters from Europe, not solely fellow Quakers, to settle, guaranteeing to every resident "the free possession of his or her faith and exercise of worship towards God, in a manner as every person shall in conscience believe is most acceptable to God."[66] Penn's lively experiment in promoting religious equality and freedom of conscience would become the model for other colonies and eventually the new states.[67]

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[59] *Id.* at 359.

[60] NICHOLAS P. MILLER, THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE 1–4 (2012).

[61] Roger Williams, *The Bloody Tenent, of Persecution for Cause of Conscience*, *in* 5 THE FOUNDERS' CONSTITUTION 48, 48 (Philip B. Kurland & Ralph Lerner eds., 1987).

[62] *See* Feldman, *supra* note 41, at 372 n.45, 375, 427.

[63] *See* J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 10, 13 (1990) (discussing Penn's contributions to the fight against persecution of Quakers); William Penn, *The Great Case of Liberty of Conscience*, *in* THE SACRED RIGHTS OF CONSCIENCE 42, 42 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[64] Penn, *supra* note 63, at 43.

[65] *Id.* at 44.

[66] ISAAC SHARPLESS, A QUAKER EXPERIMENT IN GOVERNMENT 122 (Philadelphia, Alfred J. Ferris 1898); *see also* William Penn, *Laws Agreed upon in England, &c., 1682*, *in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 63, at 118, 118.

[67] *See* CURRY, *supra* note 53, at 78–85 (discussing the breadth of freedoms afforded in Pennsylvania under William Penn compared to the other colonies).

Religious dissenters were not the only ones to promote a right of conscience. Writing a half-century after Penn, Connecticut lawyer and Congregationalist minister Elisha Williams defended "a Christian's *natural and unalienable right of private judgment* in matters of religion."[68] "Every man has an equal right to follow the dictates of his own conscience in the affairs of religion," Williams wrote, "[a]nd as every Christian is so bound, so he has an unalienable right to judge of the sense and meaning of it and to follow his judgment wherever it leads him."[69] By the Revolution, this religiously based understanding of a right of conscience was well established.[70]

A related impulse for a right of conscience arose during the Scientific Revolution and then the Enlightenment as secular oriented theorists, such as Francis Bacon and Isaac Newton, sought to base knowledge and the discovery of scientific laws of nature on reason and empiricism, freely arrived at, rather than being subject to conformity with Church doctrines.[71] A free conscience was a prerequisite to discover those laws and to allow human knowledge to flower, even if both led in secular directions. These impulses complemented each other, as reason and religion were generally not in conflict according to most Enlightenment writers.[72]

John Locke was one of the more influential political theorists on the founding generation and one who wrote extensively about a right of conscience. Locke understood the notion of a conscience right chiefly in religious terms, and he advocated for it on three grounds.[73] First, the ability to acquire knowledge, religious and otherwise, necessitated that people be able to follow "their own reason, and . . . the dictates of their own consciences,"[74] as "such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force."[75] Accordingly, "[e]very Man has Commission to admonish, exhort, convince another of Error; and, by reasoning, to draw him into Truth."[76] Second, Locke asserted that "because the

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[68] Elisha Williams, *The Essential Rights and Liberties of Protestants*, *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730–1805, at 51, 85 (Ellis Sandoz ed., 1991).

[69] *Id.* at 61.

[70] *See* CURRY, *supra* note 53, at 136–38.

[71] *See* JAMES M. BYRNE, RELIGION AND THE ENLIGHTENMENT: FROM DESCARTES TO KANT 10–11, 151–55 (1996).

[72] *See* Jeffrey Barnouw, *The Separation of Reason and Faith in Bacon and Hobbs, and Leibniz's Theodicy*, 42 J. HIST. IDEAS 607, 607–28 (1981); BYRNE, *supra* note 71, at 10–11, 150–60. *See generally* ETHAN H. SHAGAN, THE BIRTH OF MODERN BELIEF: FAITH AND JUDGMENT FROM THE MIDDLE AGES TO THE ENLIGHTENMENT 207–49 (2018).

[73] *Accord* Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 917–26 (2005) (identifying three traditional rationales for protecting conscience, which he terms the "separate spheres," "futility," and "higher duty" rationales).

[74] John Locke, *A Letter Concerning Toleration*, *in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 123, 128 (J.W. Gough ed., 1968).

[75] *Id.* at 127.

[76] JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 39 (Mark Goldie ed., 2010).

Church itself is a thing absolutely separate and distinct from the Commonwealth," the "Care of Souls is not committed to the Civil Magistrate."[77] Thus to compel any belief was unjust and outside the authority of civil authorities.[78] And third, compulsion of belief was ineffective: "true and saving Religion consists in the inward perswasion [sic] of the Mind; without which nothing can be acceptable to God," because "[m]en cannot be forced to be saved . . . they must be left to their own Consciences."[79]

Locke's writings about religious toleration and conscience, like his political works, greatly influenced the thinking of later generations of Americans, religious and political figures alike.[80] In the letter quoted above, Elisha Williams cited to Locke for ideas about both civil government and religious understanding. "A man may alienate some branches of his property and give up his right in them to others; but he cannot transfer the rights of conscience, unless he could destroy his rational and moral powers . . . ."[81] And Williams tied the threat to conscience rights directly to religious establishments:

> [T]o carry the notion of a religious establishment so far as to make it a rule binding to the subjects, or on any penalties whatsoever, seems to me to be oppressive of Christianity, to break in upon the sacred rights of conscience, and the common rights and privileges of all good subjects.[82]

Writing around the same time, Whig essayist Thomas Gordon, of *Cato* and the *Independent Whig*, wrote in the latter that:

> Religion is a voluntary Thing; it can no more be forced than Reason, or Memory, or any Faculty of the Soul. To be devout against our Will is an Absurdity . . . . We have no Power over the Appetites of others, no more than over their Consciences. Neither a Man's Mind nor his Palate, can be subject to the Jurisdiction of another.[83]

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[77] *Id.* at 39, 45.

[78] *Id.*

[79] *Id.* at 39, 49.

[80] *See generally* Sanford Kessler, *John Locke's Legacy of Religious Freedom*, 17 POLITY 484 (1985); J. Judd Owen, *Locke's Case for Religious Toleration: Its Neglected Foundation in the* Essay Concerning Human Understanding, 69 J. POL. 156 (2007).

[81] Williams, *supra* note 68, at 62.

[82] *Id.* at 73.

[83] CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN 119–20 (1968) (quoting Thomas Gordon & John Trenchard, *Number XXXIV*, *in* THE INDEPENDENT WHIG: OR, A DEFENCE OF PRIMITIVE CHRISTIANITY, AND OF OUR ECCLESIASTICAL ESTABLISHMENT, AGAINST THE EXORBITANT CLAIMS AND ENCROACHMENTS OF FANATICAL AND DISAFFECTED CLERGYMEN 211, 215 (London, J. Peele, 7th ed. 1736)).

Finally, a generation later, Baptist leader Isaac Backus blended Lockean notions about conscience and church-state relations with his dissenting evangelical perspective. The Massachusetts establishment, supported by its assessment system, was "very hurtful to civil society" because it presumed that civil officials had authority over religious affairs.[84] In addition, establishments violated "the law of Christ" that required every person "to judge for himself, concerning the circumstantials as well as the essentials, of religion, and to act according to the *full persuasion of his own mind*."[85] According to Thomas Curry, "When colonial commentators upheld freedom of religion as a natural right and wrote in favor of 'absolute liberty of conscience, and entire freedom in all religious matters,' they represented broad-based agreement."[86]

For Backus and other dissenters living under eighteenth-century religious establishments, matters of conscience were not an abstract idea but an ever-present concern. Even though the Massachusetts and Connecticut assemblies had granted Baptists exemptions from paying assessments to support the dominant Congregational churches in 1729,[87] exemption certificates were difficult to come by because they required demonstrating membership in a recognized or incorporated church that was served by a full-time minister (a problem for many Baptist churches served by an itinerate pastor on a part-time basis).[88] Local officials regularly denied certificates (or ignored validated certificates); other times, pious Baptists refused to apply for certificates on theological grounds, which resulted in tax collectors or tithingmen seizing tangible property and cattle, foreclosing on farms, and sending dissenters to jail.[89] By the early 1770s, with Massachusetts's assessment exemption expired and the colony embroiled in the growing political crisis with Great Britain, Backus penned his *Appeal to the Public for Religious Liberty* (1773) where he tied tax assessments directly to violations of conscience rights, with him now calling for full disestablishment rather than an equitable system of exemptions. Even a multiple establishment that fairly distributed the taxes to all denominations "emboldens people to judge the liberty of other men[']s consciences."[90] Five years later, in a pamphlet opposing

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[84] Isaac Backus, *An Appeal to the Public for Religious Liberty*, *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730–1805, *supra* note 68, at 227, 358. "God has appointed two kinds of government in the world, which are distinct in their nature, and ought never be confounded together; one of which is called civil, the other ecclesiastical government." *Id.* at 334–35.

[85] *Id.* at 358–59.

[86] CURRY, *supra* note 53, at 78 (quoting Stephen Hopkins, *An Account of the Planting and Growth of Providence*, *in* 19 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 184 (1832)).

[87] WILLIAM G. MCLOUGHLIN, SOUL LIBERTY: THE BAPTISTS' STRUGGLE IN NEW ENGLAND, 1630–1833, at 157–60 (1991).

[88] *See id.* at 159–60.

[89] *Id.* at 157–61.

[90] Backus, *supra* note 84, at 357 (emphasis omitted). In his *Appeal*, Backus provided several examples of Baptists having their farms confiscated and other property seized, as well as being sent to jail, for failure to pay their religious taxes. *Id.* at 348–55.

incorporating a religious assessment in the proposed Massachusetts Constitution, Backus asserted: "How can liberty of conscience be rightly enjoyed, till this iniquity is removed? The word of truth says, why is my liberty judged of another man's conscience? Let every man be fully persuaded in his own mind."[91]

Predictably, members of New England's Standing Order disputed that a forced assessment supporting "public worship" violated rights of conscience; as one apologist put it:

> If the greatest part of the people, coincide with the public authority of the State in giving the preference to any one religious system and creed, the dissenting few, though they cannot conscientiously conform to the prevailing religion, yet ought to acquiesce and rest satisfied that their religious Liberty is not *diminished*.[92]

Deaf to the dissenters' conscience claims, the drafters of the Massachusetts, New Hampshire, and (initially) Vermont constitutions included provisions for maintaining forced assessments for the support of religion (Connecticut continued with its assessment system under the auspices of its colonial charter).[93]

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[91] ISAAC BACKUS, GOVERNMENT AND LIBERTY DESCRIBED; AND ECCLESIASTICAL TYRANNY EXPOSED 11 (Boston, Powards & Willis 1778) (emphasis omitted).

[92] Worcestriensis, *Number IV*, *in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 449, 452–53 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

[93] *See* MASS. CONST. pt. 1, art. III ("As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily."); N.H. CONST. of 1784, pt. 1, art. VI ("As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this State, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality . . . ."); VT. CONST. of 1777, ch. 1, art. III ("That all men have a natural and unalienable Right to worship Almighty God, according to the Dictates of their own Consciences and Understanding, regulated by the word of God; and that no man ought, or of right can be compelled to attend any religious Worship, or erect, or support any place

Among the remaining states, however, a consensus arose that any system of forced assessments violated rights of conscience. Two states that had operated putative establishments—North Carolina and New York—quickly abolished their assessment systems in their new constitutions, joining the ranks of Delaware, New Jersey, Pennsylvania, and Rhode Island in affirming the voluntary support of religion.[94] An early example of this reactive impulse to religious assessments is found in the Pennsylvania Constitution of 1776, which declared that:

> [A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent . . . .[95]

Pennsylvania's "no compelled support" of religion clause, which the Commonwealth added as a guarantee even though it had never operated an assessment system, became the model for several other states.[96] What is notable is that conscience was

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of Worship, or maintain any minister, contrary to the Dictates of his Conscience; nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right, as a Citizen, on account of his religious sentiment, or peculiar mode of religious Worship, and that no Authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the Rights of Conscience, in the free exercise of religious worship: nevertheless, every Sect or Denomination of People ought to observe the Sabbath, or Lord's day, and keep up and support some sort of religious Worship, which to them shall seem most agreeable to the revealed Will of God.").

[94] *See* N.C. CONST. of 1776, art. XXXIV ("[N]either shall any person, on any presence 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 minister or ministry, contrary to what he believes right, of has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship . . . ."); N.Y. CONST. of 1777, art. XXXVIII ("[T]o guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . . .").

[95] PA. CONST. of 1776, art. II, *in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3082 (Francis Newton Thorpe ed., 1909).

[96] *See* Brief of Baptist Joint Committee for Religious Liberty; The Evangelical Lutheran Church in America; General Synod of the United Church of Christ; Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) as

the primary solvent for securing the twin rights of freedom to worship without molestation and to be free of compelled support for another person's religion.

No place outside of New England had more rigorously enforced religious assessments than Virginia. By the 1760s, Virginia's Anglican establishment—which had earlier struggled from a lack of clergy—was firmly entrenched and closely aligned with the colony's powerful elite.[97] Under its system, all residents were required to pay assessments to support their local parish church and attend services, required attendance being a convenient method of enforcing support.[98] Despite the 1689 English Act of Toleration, civil and religious authorities grudgingly tolerated dissenting churches and clergy, requiring clergy to obtain licenses from less-than-cooperative parish officials.[99] The evangelical revivals of the First Great Awakening (early 1740s) had facilitated an influx of New Side Presbyterian clergy into the Piedmont region which had been settled by Scotch-Irish, to be followed in the 1760s by Separate Baptists.[100] Clergy and communicants of both groups resented and resisted the various measures, including paying the assessments.[101] As both evangelical bodies gained converts in the 1760s and 1770s, public officials clamped down on dissenters and their clergy, particularly on Baptist ministers who refused to obtain licenses based on theological principles.[102] Dissenters were jailed, whipped, and had property seized.[103] It was in this climate in early 1774 that a young James Madison, recently returned to Virginia from college in Princeton, New Jersey, discovered that a handful of Baptist ministers had been arrested and were being held in a nearby jail.[104] In a letter to a college friend, Madison bemoaned the ongoing religious persecution that was taking place in Virginia, writing:

> There are at this [time?] in the adjacent County not less than 5 or 6 well meaning men in close Goal for publishing their religious Sentiments which in the main are very orthodox. . . . So I

Amici Curiae in Support of Respondents at 11, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195). Those states being Delaware, New Jersey, North Carolina, Vermont, Kentucky, Ohio, Indiana, and Michigan.

[97] CURRY, *supra* note 53, at 99–100.

[98] *Id.* at 135–38.

[99] RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790, at 149, 152–53 (1982).

[100] *Id.* at 148–51, 162, 164.

[101] THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 38–39, 75 (1977).

[102] *See id.* at 38–39, 75; CURRY, *supra* note 53, at 100.

[103] *See, e.g.*, BUCKLEY, *supra* note 101, at 14; ISAAC, *supra* note 99, at 148–51, 167–77; ROBERT B. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 15 (Richmond, Robert B. Semple 1810); JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY 28–29, 32 (2010).

[104] RAGOSTA, *supra* note 103, at 43–44.

> [leave you] to pity me and pray for Liberty of Conscience [to revive among us.][105]

The Revolutionary War disrupted Virginia's Anglican establishment along with its assessment system, and the legislature formally abolished the taxes in 1779.[106] During this period, Thomas Jefferson penned his Bill for Establishing Religious Freedom designed to outlaw the resumption of the assessment. Jefferson justified its permanent abolition on freedom of conscience grounds: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[107] After the Treaty of Paris officially ended the war in 1783, supporters of the newly reorganized Episcopal Church petitioned for a new law authorizing a religious assessment.[108] To make it more palatable, assessment leader Patrick Henry's bill for "Establishing a Provision for Teachers of the Christian Religion" included a provision to allow taxpayers to designate the Christian denomination to receive their tax or to allocate non-designated funds to "seminaries of learning."[109] With Jefferson now in France as the United States minister, opposition leadership fell on James Madison. After a preliminary version of Henry's bill passed the House by a vote of 47–32, Madison secured the bill's postponement so he and other assessment opponents could mount a petition drive.[110] Madison then penned his famous *Memorial and Remonstrance* to rally support for the petitions, which laid out fifteen arguments against all forms of religious establishments.[111] Some of the arguments in the *Memorial* were jurisdictional—that civil government had no authority over religious matters—while others were more pragmatic—that religious establishments had not benefitted religion but had had an opposite effect.[112] Running throughout many of his arguments, and providing a unifying theme, was

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[105] Letter from James Madison to William Bradford (Jan. 24, 1774), *in* 1 THE PAPERS OF JAMES MADISON, 16 MARCH 1751–16 DECEMBER 1779, at 106, 106 (William T. Hutchinson & William M.E. Rachal eds., 1962) (alterations in original).

[106] CURRY, *supra* note 53, at 135–36.

[107] Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 77.

[108] *See* CURRY, *supra* note 53, at 139–41.

[109] *See* PATRICK HENRY, A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION 1–2 (1784), https://www.colorado.edu/herbst/sites/default/files/attached-files/nov_16_-_religion.pdf [https://perma.cc/6L96-WN3A].

[110] *See* CURRY, *supra* note 53, at 134–43; BUCKLEY, *supra* note 101, at 113–17, 128–31; Marvin K. Singleton, *Colonial Virginia as a First Amendment Matrix: Henry, Madison, and Assessment Establishment*, 8 J. CHURCH & STATE 344, 354 (1966).

[111] *See* CURRY, *supra* note 53, at 143–44; BUCKLEY, *supra* note 101, at 131–36. *See generally* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), https://www.law.gmu.edu/assets/files/academics/founders/Madison%27sMemorial.pdf [https://perma.cc/LP6R-JSCP].

[112] *See* MADISON, *supra* note 111, at 1–2.

that forced support of religion violated rights of conscience. "The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[113] Paraphrasing Locke, Madison declared that all people entering society were "to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of Conscience.'"[114] And when it came to tax assessments for the support of religion, Madison wrote, "Who does not see . . . [t]hat 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?"[115]

Madison's *Memorial* was not the only memorial submitted against the assessment bill, but it helped turn public opinion against it, and the legislature permanently tabled Henry's bill.[116] Madison then took advantage of the bill's demise to introduce Jefferson's Act for Establishing Religious Freedom, which passed overwhelmingly.[117] While, as historian John Ragosta has noted, there were multiple explanations for the defeat of the assessment bill and the enactment of Jefferson's bill in its stead—not the least of which being evangelicals' distrust and resentment toward the Anglican clergy and the privileges the church had enjoyed—Jefferson's and Madison's arguments on behalf of conscience rights provided the disestablishment struggle with a moral authority.[118] As Madison later described matters: "This act is a true standard of Religious liberty: its principle the great barrier against usurpations on the rights of conscience."[119]

Accordingly, the revolutionary argument that religious assessments violated the rights of conscience of taxpayers had significant salience at that moment. The assessments, which were imposed directly on behalf of religion, forced taxpayers to support the official or recognized religious bodies.[120] Those who were conscientiously opposed to the theology, doctrines, and practices of those bodies were compelled to support institutions and beliefs that were contrary to their own "private judgements."[121] In addition, those who refused to pay the religious tax were subjected to punishments and persecution: fines, whippings, and imprisonment.[122] The

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[113] *Id.*

[114] *Id.* at 2–3.

[115] *Id.* at 2.

[116] Singleton, *supra* note 110, at 360.

[117] BUCKLEY, *supra* note 101, at 159–64.

[118] *See* JOHN RAGOSTA, RELIGIOUS FREEDOM: JEFFERSON'S LEGACY, AMERICA'S CREED 90–100 (2013).

[119] *Id.* at 100.

[120] Feldman, *supra* note 41, at 351.

[121] THOMAS HOBBES, LEVIATHAN 172 (J.M. Dent & Sons Ltd. 1914).

[122] *See* William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392, 1396 (1968); RAGOSTA, *supra* note 118, at 52–53.

members of the founding generation rightfully "worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."[123] Members of the Court in *Flast v. Cohen* and its progeny were thus correct to identify a historical nexus between taxation, compulsion, conscience, and government aid to religion. As the *Flast* Court identified, "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."[124] During the founding period, that nexus was real and undeniable.

II. THE MODERN ADOPTION OF THE CONSCIENCE-BASED RATIONALE

If a legal challenge to religious assessments had arisen in the early 1800s, it would have been understandable if the U.S. Supreme Court had developed a rule prohibiting public aid to religion based on the nexus between taxation, compulsion, conscience, and government support for religion. However, the Court was deprived of that opportunity due to the accepted understanding that the Bill of Rights applied only to actions of the federal government.[125] In the two federal aid-to-religion cases considered before incorporation in 1947, the Justices sidestepped the issue of a connection between aid and compulsion by deciding in *Bradfield v. Roberts* (1899) that the aid recipient—a Catholic hospital—operated as a secular entity,[126] and in the second case, *Quick Bear v. Leupp* (1908), that the funding to maintain a Catholic religious mission came out of Indian trust funds and was not truly public money.[127] Neither case therefore implicated the coercive aspect of taxes supporting religious activities. As a result, the 160-year hiatus from disestablishment to incorporation meant that an alternative constitutional rationale for the no-aid principle was not allowed to evolve at the federal level. With no intervening development in Establishment Clause jurisprudence regarding funding, it was as if in *Everson* that Justices Black and Rutledge opened a time capsule, extracting a rationale from the past that had little application to the financial realities of the mid-twentieth century.

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[123] Feldman, *supra* note 41, at 351.

[124] Flast v. Cohen, 392 U.S. 83, 103 (1968); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 141 (2011) ("*Flast* was thus informed by 'the specific evils' identified in the public arguments of 'those who drafted the Establishment Clause and fought for its adoption.'" (quoting *Flast*, 392 U.S. at 103–04)).

[125] *See, e.g.*, Barron v. Baltimore, 32 U.S. 243, 247 (1833).

[126] 175 U.S. 291, 297–98 (1899).

[127] 210 U.S. 50, 81 (1908). Had the Justices squarely addressed the issue, however, they possibly would have agreed with Thomas Cooley's assessment that "[c]ompulsory support, by taxation or otherwise, of religious instruction" was clearly unlawful "under any of the American constitutions." THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 663–64 (7th ed. 1903).

And that is more or less what they did. In his majority opinion Black described the historical antecedents to disestablishment where the majority of colonies had "erect[ed] religious establishments [under] which all, whether believers or non-believers, would be required to support and attend . . . all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches."[128] Although Black suggested other rationales for the no-aid rule—to protect religious institutions from "'invasions of the civil authority'"[129]—compelled support via taxation was the controlling rationale.[130] A compulsion of conscience rationale also runs throughout Justice Rutledge's dissenting opinion, with it beginning by quoting applicable passages from Jefferson's Statute.[131] None of the opinions challenged the revolutionary understanding that tax support for religion violated taxpayers' rights of conscience or questioned why that assumption should apply under modern taxing structures. Similarly, the scholarly criticism of the *Everson* opinions focused on the Court's historicism and adoption of separationism as the legal paradigm, not on its assumption that using taxpayer funds for religious purposes violated rights of conscience.[132]

This rationale for the no-aid principle persisted for forty-plus years and formed the basis of the Court's holding in *Flast v. Cohen*. Although Chief Justice Warren's opinion largely assumed that using tax funds to aid religion violated rights of conscience,[133] Justice Stewart's concurrence made that assumption explicit: "Today's

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[128] Everson v. Bd. of Educ., 330 U.S. 1, 9–10 (1947).

[129] *Id.* at 15.

[130] *Id.* at 16 (The state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

[131] *Id.* at 28, 40 (Rutledge, J., dissenting) ("Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference."). In his dissenting opinion, Justice Jackson placed greater emphasis on preventing what he viewed as a sect preference in the funding and then on ensuring the independence of civil and religious entities and preventing "bitter religious controversy" over funding. *Id.* at 21, 26–27 (Jackson, J., dissenting). Still, he accepted the assumption of taxpayer conscience: "One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Id.* at 22.

[132] *See* PARSONS, *supra* note 6, at 140–48, 177–78; O'NEILL, *supra* note 6, at 189–218. *See generally* Murray, *supra* note 6.

[133] Flast v. Cohen, 392 U.S. 83, 103 (1968) ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments 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.'").

decision no more than recognizes that the appellants have a clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . of (their) property for the support of any one establishment.'"[134] Justice Harlan challenged the assumption of a taxpayer burden, but he did not discuss the nexus between tax support and compulsion/conscience. Rather, he questioned the nexus between the taxpayers and a cognizable injury. The plaintiffs' complaint, Harlan wrote,

> contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations. Even in cases in which such an allegation is made, the suit cannot result in an adjudication either of the plaintiff's tax liabilities or of the propriety of any particular level of taxation. The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens.[135]

Justice Harlan's assessment of a taxpayer's injury thus focused on the concept of a generalized grievance rather than on the question of compulsion and conscience rights.

So that rationale remained largely intact. That assumption also survived the decision in *Valley Forge Christian College v. Americans United*[136] fourteen years later. In denying standing to a challenge to a transfer of government surplus property to a sectarian college, Justice Rehnquist distinguished the challenged financial benefit (i.e., grant) from a tax expenditure, thereby narrowing the scope of the *Flast* doctrine but otherwise not questioning its core assumption.[137] In his dissenting opinion, Justice Brennan criticized the majority's cramped view of standing that would deprive courts the ability of adjudicating otherwise cognizable Establishment Clause claims. But he also reaffirmed the conventional, historically based rationale that tax expenditures for religion violated rights of conscience.[138] After citing to the same historical statements related in the *Everson* opinions, Brennan declared that it was "clear, in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax moneys for religious purposes. *The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion.*"[139] Thus the holding in *Valley Forge* did little to undermine the taxpayer-compulsion rationale, and subsequent commentary generally reaffirmed the bona fides of that rationale.[140]

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[134] *Id.* at 114 (Stewart, J., concurring).

[135] *Id.* at 118 (Harlan, J., dissenting).

[136] 454 U.S. 464 (1982).

[137] *See id.* at 479–81.

[138] *See id.* at 504 (Brennan, J., dissenting).

[139] *Id.* Later in his opinion, Brennan reaffirmed that a taxpayer must be entitled to sue "in order to halt the continuing and intolerable burden on his pocketbook, his conscience, and his constitutional rights." *Id.* at 510.

[140] Bill Latham, Valley Forge Christian College v. Americans United for Separation of

As noted in the introduction, the taxpayer-compulsion rationale still commands a large following and is generally accepted on face value.[141] More recently, however, scholars have called into question certain aspects of that rationale. The first, and most obvious, criticism concerns the justification for recognizing a conscience objection based on religious grounds but not one based on other grounds. It points to the incongruity of recognizing the conscience claim of an atheist opposed to the funding of religious education (i.e., a religious activity), but not of a born-again Christian who objects to his tax dollars paying for the teaching of evolution in the public schools (i.e., not a religious activity).[142] Both people may be consciously opposed to being forced via taxation to support activity with which they disagree, but only the former action arguably violates the Establishment Clause and is recognized as raising a cognizable claim for preventing the government expenditure. According to Professor Micah Schwartzman,

> [I]t is unclear why taxpayers' freedom of conscience is violated only when government provides financial support for religion. Taxpayers are required to pay for all sorts of government programs they find morally objectionable. Except when it comes to funding religion, however, they have no constitutional recourse to oppose such programs.[143]

The common response to this privileging of conscience-based objections to government funding of religion relies on two claims: the historical connection between rights of conscience and religion; and the distinctiveness of religious-based

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Church and State*: Taxpayer Standing and the Establishment Clause*, 34 BAYLOR L. REV. 748, 761 (1982) ("[I]n light of the history of the establishment clause, it is clear that every man must be allowed to worship or not in accordance with his own conscience. No majority can ever compel a minority faith or a single individual to contribute even 'three pence of their property for the support of any one establishment.'" (quoting *Flast*, 392 U.S. at 114 (Stewart, J., concurring))); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 13–14 (1987) ("[M]eaningful danger to religious liberty is posed when compulsorily raised tax funds are expended for religious purposes. It violates my religious liberty to have my tax raised funds spent for even my own religion, and it compounds the violation if they are spent to support some religion with which I am not affiliated or with those precepts I disagree."); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1008 (1991) ("Taxation is coercion, and to require taxpayers to support religions they do not accept is understood to violate their religious conscience.").

[141] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2281–83 (2020) (Breyer, J., dissenting).

[142] *See* Steven Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365, 365–67 (2007) (describing such a scenario involving the fictional "Al Agnostic and Betty Basic"); *see also* Schwartzman, *supra* note 41, at 327–30.

[143] Schwartzman, *supra* note 41, at 322.

conscience—i.e., the unique harm associated with having to compromise one's religiously grounded beliefs as opposed to politically grounded beliefs, for example. Professor Noah Feldman has offered a strong defense of the former claim:

> To the eighteenth-century mind, liberty of conscience meant that the individual must not be coerced into performing religious actions or subscribing to religious beliefs that he believed were sinful in the eyes of God and that could therefore endanger his salvation. Indeed, it was, following Locke, literally "absurd, to speak of allowing Atheists Liberty of Conscience," because conscience necessarily related to one's salvation, in which atheists presumably disbelieved altogether.
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> . . . .
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> . . . [If we] broaden conscience to include secular matters of deep belief . . . the Lockean distinction between the sphere of the church and that of the state evaporates. Suddenly there is no clear rationale for allowing government to take any action of any kind where it violates conscience; or alternatively, all attempts to protect conscience look unjustifiable.[144]

The Constitution, Professor Feldman urges, "protects liberty of conscience, it would appear, only in the sphere of government action that relates *specifically to religion*."[145]

While Professor Feldman is correct that historical affirmations of conscience claims appeared most commonly with respect to religious opinions—for Locke, solely within that sphere—it is not clear that members of the founding generation subscribed to such a narrow view. In the crisis years preceding the American Revolution, pamphlet writers occasionally asserted that the coercive acts of Parliament violated rights of political conscience.[146] Jefferson, also, did not always describe conscience claims exclusively in religious terms. Although his 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" was made within the context of his Bill for Establishing Religious Freedom,[147] Jefferson's notion of conscience seems

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[144] Feldman, *supra* note 41, at 424–26.

[145] *Id.* at 424.

[146] *See, e.g.*, BRITANNUS AMERICANICUS, A SERIOUS ADDRESS TO INHABITANTS OF NEW-YORK 1 (1765); A BRITISH BOSTONIAN, AN ORATION ON THE BEAUTIES OF LIBERTY OR THE ESSENTIAL RIGHTS OF THE AMERICANS 24–26 (Hartford, Ebenezer Watson 1772); RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 7–11 (London, T. Cadell 1776).

[147] Jefferson, *supra* note 107, at 77; *accord* Smith, *supra* note 73, at 914 n.13 ("Notice that

broader. Indeed, in his Bill for the Diffusion of General Knowledge for establishing public schools, written during the same time, he urged "illuminat[ing], as far as practicable, the minds of the people at large, . . . giv[ing] them knowledge of those facts" to guard against efforts to keep them in ignorance.[148] This conformed with his earlier statement in his *Notes on the State of Virginia* that "[r]eason and free inquiry are the only effectual agents against error."[149] For Jefferson, the value of unconstrained opinions (i.e., conscience) transcended merely religious ones. As Jefferson famously declared in an 1800 letter to Benjamin Rush, he had "sworn upon the altar of God, eternal hostility against *every* form of tyranny over the mind of man," not solely clerical tyranny.[150] In later letters related to establishing the University of Virginia, Jefferson praised in general terms "the illimitable freedom of the human mind" and the freedom "to follow truth wherever it may lead."[151] Jefferson's understanding of conscience claims seems broadly based.

The additional response to the historical argument asks why a religious view of conscience rights should control today when many people adhere to secularly based convictions as strongly as other people hold religiously based ones. The strength of this response may turn on how one defines "conscience,"[152] but modern society has collectively recognized conscience claims regarding a variety of subjects that do not involve religious convictions, political and environmental ones to name two. In today's society, every taxpayer furnishes money for the "propagation of opinions which he disbelieves"[153]—military armaments and family planning services, for example—so that taxpayers regularly fund numerous government policies to which they have serious conscience-based objections. The Court has affirmed this in its holdings

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the evil to be avoided is forced support of 'opinions [one] disbelieves'—not only of *religious* opinions one disbelieves."); Schwartzman, *supra* note 41, at 322–23.

[148] Thomas Jefferson, *79. A Bill for the More General Diffusion of Knowledge*, *18 June 1779*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079 [https://perma.cc/FX2J-DYFF] (last visited May 6, 2021).

[149] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of North Carolina Press 1982). Although the passage was written within a discussion about religious constraints on freedom of conscience, the sentiment is not limited to religious freedom of conscience.

[150] Letter from Thomas Jefferson to Benjamin Rush (Sept. 23, 1800), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-32-02-0102 [https://perma.cc/EY9H-947C] (emphasis added) (last visited May 6, 2021).

[151] Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/98-01-02-1712 [https://perma.cc/X7KL-Q8VK] (last visited May 6, 2021).

[152] Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 328 (2005) ("[W]hen we describe an act as being done from 'conscience' we usually mean at least to say that the person in question acted on the basis of a sincere conviction about what is morally required or forbidden.").

[153] Jefferson, *supra* note 107, at 77.

concerning the forced payment of union dues, among others.[154] In today's world, "the idea that there is something distinctive about *religious* conscience, or that claims of conscience can only be religious in nature, has become normatively untenable."[155]

The second criticism of a taxpayer conscience claim flows immediately from the first. Scholars have long recognized the problem with recognizing *any* conscience objection to excuse a taxpayer from supporting legitimate government policies and programs to which that taxpayer objects.[156] The harm a taxpayer suffers from an appropriation from general tax revenues is abstract and tenuous. As the Court has affirmed on numerous occasions, "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for" a legally cognizable injury.[157] And as the Court observed a century ago, and has continued to reaffirm,

> interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.[158]

This is where the taxpayer-compulsion rationale has always been on its weakest historical footing. The practice that members of the revolutionary generation

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[154] *See* Janus v. Am. Fed. of State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.").

[155] Schwartzman, *supra* note 41, at 324; *accord* Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 659 (2009) ("[T]here are solid reasons for believing that respect for conscience should *not* be 'limited to religiously shaped or informed consciences' or confined to specifically religious questions and contexts."); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 35 n.137 (1998) ("As citizens, we are taxed to support all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders, which some believe are acts of murder by the state. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. None of these complaints give rise to judicially cognizable 'harms' to federal taxpayers. And there is no reason that a taxpayer's claim of 'religious coercion' is any different.").

[156] McConnell, *supra* note 140, at 1010 ("[T]he government necessarily makes many expenditures despite the conscientious objections of large numbers of taxpayers—expenditures on armaments, for example. For the most part, there is no constitutional remedy for this.").

[157] Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 433 (1952).

[158] Massachusetts v. Mellon, 262 U.S. 447, 487 (1923); *accord* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006).

complained about, and the one that Jefferson and Madison so eloquently wrote against, differs in crucial respects from a disbursement to religion out of general tax funds today. Under colonial establishments, officials imposed free-standing assessments on residents to pay directly for the support of a recognized minister and for "public religion."[159] They were not general taxing schemes that funded a variety of services.[160] To be sure, Patrick Henry's sanitized Bill Establishing a Provision for the Teachers of the Christian Religion allowed taxpayers to designate their assessment to their own religious society or, if not, to be placed in the general funds to support "seminaries of learning," but the indisputable and overarching purpose of the tax—as the bill's title indicated—was to support religion.[161] Similarly, the Massachusetts Constitution authorized towns to tax their residents "for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily."[162] Under these provisions, an assessment represented a specific tax extracted solely to support religion—in many instances, for beliefs to which a taxpayer was consciously opposed—accompanied with the compulsive threat of having one's property or person seized for failure to pay the tax.

In contrast, the revenue that paid for the transportation reimbursements in *Everson* came from general tax funds, not separately extracted for the specific purpose of subsidizing religious activity.[163] This has been the pattern in the majority of the public aid to religion cases considered by the Supreme Court—that governments used funds raised through general tax extractions (such as income taxes) that funded a variety of services.[164] For example, the monies for the educational equipment and materials at issue in *Mitchell v. Helms* were distributed under the Education Consolidation and Improvement Act, which channels congressional appropriations drawn from general tax revenues toward educational programs in public and private schools.[165] This common pattern of raising revenue through a system of general taxation and then distributing those funds to pay for myriad public programs and services, which are frequently determined through later legislative appropriations, differs significantly

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[159] Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1239–40 (1986).

[160] *See supra* notes 97–105 and accompanying text; LEVY, *supra* note 53, at 1–24.

[161] HENRY, *supra* note 109, at 2.

[162] MASS. CONST. pt. 1, art. III.

[163] Everson v. Bd. of Educ., 330 U.S. 1, 5 n.3, 6 (1947).

[164] The public monies in question in *Lemon v. Kurtzman* apparently represented the exception to the general practice. There, the legislature enacted the Pennsylvania Nonpublic Elementary and Secondary Education Act with the express goal of assisting financially troubled private schools. Lemon v. Kurtzman, 403 U.S. 602, 609 (1971). Revenue for the Act was derived from a separate tax on horse racing entrance fees, and the plaintiff, Alton Lemon, alleged that, in addition to being a taxpayer, he had purchased a ticket at a race track that was subject to the specific tax. *Id.* at 610–11.

[165] 530 U.S. 793, 801–03 (2000).

from the historical religious assessment system.[166] To be sure, at some level, all taxation involves a degree of compulsion and, as noted, taxpayers may have conscientious objections to various policies and programs funded by their (and others') taxes, but it raises the question of whether such actions burden a cognizable conscience interest.[167] In most if not all instances, the "offense" to one's conscience from disbursements of general tax revenue is only tenuous and abstract, not something experienced directly or even indirectly. Many times, taxpayers are unaware that some infinitesimal portion of their taxes is funding a policy or program they find offensive.[168] The taxpayer has at best suffered, in the words of Justice Scalia, a "psychic injury."[169] This is vastly different from the conscience claim of an eighteenth-century New England Baptist who had the stark choice of either financially supporting the local Congregational Church and effectively assisting in the dissemination of its "abhorrent" doctrines—in essence, taxing Peter to pay for Paul's religion—or living in constant fear of the late-night knock at the door by the sheriff or tithingman.[170]

Quoting Jefferson, Professor Steven Smith distinguishes "compelling a taxpayer to pay for *ends of which he disapprove*[*s*]" from "compelling him to support '*opinions which he disbelieves*.'"[171] Under this distinction—one that privileges the latter situation,

> claims of conscience have special force in matters of *expression* of opinion or belief. It is not necessarily tyrannical, or a violation of conscience, to make a taxpayer pay for programs (a war, for example) to which he is conscientiously opposed. But it *is* tyrannical to force the taxpayer to subsidize the promulgation of opinions he disbelieves.[172]

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[166] In *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), the plurality recognized this distinction between a disbursement made from general tax collections and the collection of a specific tax assessment, noting how, as in *Follett v. Town of McCormick*, 321 U.S. 573 (1944), "a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein*, 551 U.S. at 599 (2007) (plurality opinion).

[167] Smith, *supra* note 142, at 366 ("After all, many citizens and taxpayers will say, sincerely, that they are opposed in conscience to any number of things that (with the support of their tax dollars) government does. Some citizens are conscientiously opposed to particular (or all) military activities, others to particular government funded programs in the arts or in science, others to an array of 'liberal' or 'conservative' social programs.").

[168] *Id.* at 376 ("The taxpayer, by contrast, pays money into a general fund which is used to support a whole variety of activities and programs—most of which the taxpayer knows little or nothing about, and many of which are presumptively beneficial. So again, it is far from clear that the taxpayer has any responsibility for the fact that *some* of the money is used for purposes to which she is conscientiously opposed.").

[169] *Hein*, 551 U.S. at 632 (Scalia, J., concurring).

[170] *See generally* MCLOUGHLIN, *supra* note 87.

[171] Smith, *supra* note 142, at 376–77.

[172] *Id.* at 377.

Smith's distinction has some appeal. In applying tax monies to pay for religious education, the government is not asking any taxpayer to endorse the correctness of government financial support for religion (i.e., an opinion) but merely to help pay for a program that, in most if not all instances, promotes a secular policy goal (e.g., providing secular textbooks or educational materials). The taxpayer is not complicit in furthering some arguably offensive program. In contrast, in *West Virginia State Board of Education v. Barnette*, the State attempted to compel the Barnette children to publicly affirm an opinion about the patriotic values associated with the American flag—something that was anathema to their beliefs as Jehovah's Witnesses.[173] As this Article will address, "There are good reasons to be cautious about public support of religious activities and institutions," as Professor Richard Garnett has written.[174] "The best reason, however, is not because such support violates taxpayers' 'consciences'—it does not."[175]

III. THE ERROR OF TAXPAYER STANDING

Based on the foregoing discussion, the saliency of recognizing taxpayer standing for raising an Establishment Clause challenge to disbursements from general tax revenues has already been answered. The rule in *Flast v. Cohen* recognizing an exception from the general ban on taxpayer standing makes no sense if that exception is based on the taxpayer conscience rationale.[176]

The purpose of this Part is not to defend the Court's standing jurisprudence, particularly not its trend in recent decades of narrowing of the availability of bringing lawsuits.[177] Despite the Justices' assertion that standing rules are mandated by Article III's requirement of a case or controversy for federal courts to exercise jurisdiction, standing is essentially a rule of the Court's own creation, particularly with its definition of a cognizable injury.[178] One could argue that because many alleged Establishment Clause violations—such as the government's use of religious symbols or, again, disbursements from general tax revenues aiding religious activity—impose harms that are shared equally by all citizens,[179] the Court should abandon the requirement

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[173] 319 U.S. 624, 625–29 (1943).

[174] Garnett, *supra* note 155, at 672.

[175] *Id.*

[176] An exception to this statement would be a situation involving a special tax imposed on a taxpayer, the proceeds of which would directly fund inherently religious activities. *See supra* notes 128–32 and accompanying text.

[177] *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom From Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115 (discussing the potential for narrowing of the standing doctrine under the Establishment Clause after *Hein*).

[178] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992).

[179] William P. Marshall & Gene R. Nichol, *Not a* Winn-*Win: Misconstruing Standing and*

of standing completely and recognize a type of constitutional "citizen suit." The concurrences in *Flast* suggested as much—that the harm perpetrated by some Establishment Clause violations are collectively felt such that any citizen should be able to use the judiciary to correct that error.[180] In essence, every American is harmed when the government engages in activities that advance religion.[181] Such an approach would alleviate relying on the fiction of taxpayer compulsion under a disbursement from the general tax fund.[182] Persisting with the requirement that some citizens (i.e., taxpayers) are more injured than others, but then limiting that injury to actions arising under Congress's tax and spend authority, leads to absurd results as in *Hein v. Freedom From Religion Foundation, Inc.*, where alleged violations of the no-aid principle undertaken by the Executive were immunized.[183] But, of course, the trend of the current Supreme Court is in the direction of hardening standing requirements, not lessening them,[184] so the following discussion proceeds under the assumption that current standing rules control.

As suggested in the previous Part, a conscience-based rationale for an exception from the general prohibition on taxpayer standing makes no sense. The injury to one's conscience by the government disbursing of monies from general tax revenues

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the Establishment Clause, 2011 SUP. CT. REV. 215, 231–32 ("[P]articularized and concrete Establishment Clause harms are often the exception, not the rule. The reason is straightforward. The Establishment Clause is in large measure aimed at curbing injuries that are, by their very nature, intangible and widely shared. That is, many of the purposes underlying the anti-establishment mandate are directed specifically at preventing precisely the broad, nonconcrete 'psychic' harms that Justice Scalia derided in his opinion in *Hein* as nonjusticiable.").

[180] *See* Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) (embracing the concept of "private attorneys general" to correct constitutional wrongs); *id.* at 115 (Fortas, J., concurring) (speaking of the interests of "the taxpayer and all other citizens have in the church-state issue").

[181] *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 168 (2011) (Kagan, J., dissenting) ("*Flast* . . . arose because state sponsorship of religion sometimes harms individuals only (but this 'only' is no small matter) in their capacity as contributing members of our national community."); *see also* Note, *Taxpayer Suits*, 82 HARV. L. REV. 224, 227 (1968) ("A taxpayer seeking to enjoin governmental expenditures as unlawful clearly does not present a legally protected interest for judicial protection, since he does not question the government's right to take his money and is not claiming that the statute allegedly violated was intended to protect his economic interest *qua* taxpayer.").

[182] *See* Esbeck, *supra* note 155, at 40 ("[T]axpayer standing is a mere surrogate for vesting in a non-Hohfeldian litigant the requisite access to the courthouse in order that the federal courts may adjudicate a structural violation as set out in the Establishment Clause. Because the claim is non-Hohfeldian, there is no one with individualized injury caused by the violation.").

[183] *See generally* Steven K. Green, *The Slow, Tragic Demise of Standing in Establishment Clause Challenges*, 5 ADVANCE 117 (2011) (discussing the immunizing effect of *Hein* and other Establishment Clause cases on the political branches).

[184] *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Lupu & Tuttle, *supra* note 177.

is so tenuous, "remote, fluctuating and uncertain" as to be non-cognizable.[185] By the point of disbursement, the taxpayer has lost all connection to, and all claim on, the taxes she paid on some earlier date. Perhaps it is worth reconsidering a passage from Justice Harlan's dissent in *Flast*:

> Taxes are ordinarily levied by the United States without limitations of purpose; absent such a limitation, payments received by the Treasury in satisfaction of tax obligations lawfully created become part of the Government's general funds. . . . [At a minimum, the Tax and Spend Clauses of Article I] surely mean[ ] that the United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are thus subsumed in, and extinguished by, the common rights of all citizens. To characterize taxpayers' interests in such expenditures as proprietary or even personal either deprives those terms of all meaning or postulates for taxpayers a *scintilla juris* in funds that no longer are theirs.[186]

If taxes are lawfully extracted from a taxpayer, the monies become the property of the government. Not only have the taxpayer's rights to those monies been extinguished, the taxpayer retains no complicity in how her taxes, now comingled with those of millions of other taxpayers, are used. For example, a Quaker is legally obligated to submit her income taxes to pay for a variety of government programs. That a portion of her taxes were theoretically used to purchase a rifle and a bullet that in turn were used to kill an enemy combatant does not make the Quaker complicit in that death. Similarly, it is difficult to see the conscience violation to the Quaker (or a church-state separationist) when the ultimate application of the funds has occurred as a result of numerous intervening actions that have led to the disbursement. If "independent private choice" breaks the "circuit" as to the unconstitutionality of tuition vouchers,[187] then the government's control over and disbursement of tax funds for religious purposes is attributable to the government, not to the taxpayer who originally supplied some of the tax revenue.

Unfortunately, the post-*Flast* cases involving taxpayer Establishment Clause challenges are less than helpful on this matter. *Valley Forge* left in place the taxpayer conscience rationale, simply limiting its application to disbursements pursuant to Article I tax and spend powers.[188] Justice Rehnquist declined to respond to Justice

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[185] Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

[186] Flast v. Cohen, 392 U.S. 83, 118–19 (1968) (Harlan, J., dissenting).

[187] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

[188] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479–80 (1982).

Brennan's assertion that the transfer of government property to a sectarian college placed an "intolerable burden on his pocketbook, his conscience, and his constitutional rights."[189] In *Hein*, the plurality, speaking through Justice Alito, continued the *Valley Forge* distinction by reiterating that taxpayer standing is limited to "a specific congressional appropriation," not a disbursement occurring pursuant to some other authority (there, through an Executive Order).[190] In *Hein*, the logic of the taxpayer conscience rationale had been raised in the briefing,[191] but resolving that question was not necessary for the result, allowing Justice Kennedy to affirm that the "[Establishment] Clause expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion. In my view the result reached in *Flast* is correct and should not be called into question."[192] Similarly, in his dissent, Justice Souter reaffirmed the taxpayer conscience rationale, writing that "[t]he right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another."[193] Despite alleging the lack of "[c]oherence and candor" in the Court's taxpayer holdings and declaring that "*Flast* is damaged goods," Justice Scalia did not challenge Kennedy's and Souter's assumptions.[194]

Most recently in *Arizona Christian School Tuition Org. v. Winn*, the Court further narrowed the availability of taxpayer standing—now, not applicable to state tax credits—but again reaffirmed the basic premise of the taxpayer conscience rationale, with Justice Kennedy noting that James Madison opposed the Virginia assessment bill "on the ground that it would coerce a form of religious devotion in violation of conscience. In Madison's view, government should not 'force a citizen to contribute three pence only of his property for the support of any one establishment.'"[195] Like Justice Kennedy, Justice Kagan defended the taxpayer conscience rationale in her

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[189] *Id.* at 510 (Brennan, J., dissenting).

[190] Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 604 (2007) (plurality opinion).

[191] *See* Brief for the American Center for Law and Justice as Amicus Curiae Supporting Petitioners at 12–14, *Hein*, 551 U.S. 587 (No. 06-157), 2007 WL 43247, at *12–14.

[192] *Hein*, 551 U.S. at 616 (Kennedy, J., concurring).

[193] *Id.* at 638 (Souter, J., dissenting).

[194] *Id.* at 625, 634 (Scalia, J., concurring in the judgment).

[195] 563 U.S. 125, 141 (2011). Justice Kennedy made the hyper-technical argument that because the tax credits were not drawn from the general revenue, they could not violate other taxpayers' conscience rights:

> [W]hat matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience. Under that inquiry, respondents' argument fails. Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations.

Id. at 144.

passionate dissent, quoting from Madison's *Memorial and Remonstrance*. But Justice Kagan then made a curious argument that seemed to undermine the efficacy of taxpayer standing:

> No taxpayer can point to an expenditure (by cash grant or otherwise) and say that her own tax dollars are in the mix; in fact, they almost surely are not. "[I]t is," as we have noted, "a complete fiction to argue that an unconstitutional . . . expenditure causes an individual . . . taxpayer any measurable economic harm." That is as true in Establishment Clause cases as in any others. Taxpayers have standing in these cases *despite* their foreseeable failure to show that the alleged constitutional violation involves their own tax dollars, not *because* the State has used their particular funds.[196]

She was, of course, correct. But if a taxpayer cannot show that her taxes contributed to the government's support of religion, then they were not extracted in a manner that coerced her conscience, and the taxpayer conscience rationale for the no-aid rule crumbles.[197]

Does this call for the outright rejection of *Flast* and taxpayer standing? So long as taxpayer standing relies on a general taxpayer conscience rationale, it seems so. This does not mean that no taxpayer could ever raise a conscience-based challenge to a government disbursement in aid of religion. As discussed above, if that tax extraction is for the sole purpose of aiding religious activities (as occurred during the revolutionary era), then a legitimate conscience claim exists. I agree with Professor Schwartzman that

> when compelled subsidies are raised using special taxes or targeted assessments, taxpayers are more likely to perceive a closer association with the [activity] they find objectionable and, consequently, to "suffer a more acute limitation on their presumptive

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[196] *Id.* at 165 (Kagan, J., dissenting) (quoting *Hein,* 551 U.S. at 593 (plurality opinion)).

[197] The point Justice Kagan sought to make was that a distinction between a disbursement from tax revenues and a tax credit makes no economic sense as either can be used to fund religious activity: "Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow." *Id.* at 168. The Establishment Clause harm is equivalent under either scenario. This observation supports the thesis of this Article: The taxpayer conscience rationale for the no-aid rule is artificial. As she acknowledged, the *Flast* rule "arose because 'the taxing and spending power [may] be used to favor one religion over another or to support religion in general[]' . . . without causing particularized harm to discrete persons." *Id.* at 169.

> autonomy as speakers to decide what to say and what to pay for others to say."[198]

Such targeted assessments for religion, however, are rare.

Justice Scalia was correct that when the notion of compulsion related to a general tax expenditure is reduced to a psychic injury, "[a]ny taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause."[199] The understanding of compulsion to support another's religion becomes meaningless. It seems that the logical conclusion is that, in the words of Professor Richard Garnett, "*Flast* was wrongly decided, and the no-establishment rule does not protect the liberty of conscience primarily by authorizing taxpayer standing to challenge disbursements of public funds."[200]

IV. "NO AGENCY" OVER RELIGIOUS MATTERS

If the taxpayer conscience rationale provides an insufficient basis for the Establishment Clause's no-aid principle, then what remains of the no-aid rule and who would be able to enforce it? Do any other rationales exist to justify a bar to government funding of religious activity? Jurists and scholars have long proposed alternative theories to support the no-aid rule, some of which have gained traction but, unfortunately, all of which have been overshadowed by the taxpayer conscience rationale. This may be because some of the alternative rationales have appeared self-serving or less than sincere. A common argument is the "religious integrity" rationale: The reason for barring government assistance for religious activity is to protect the integrity of religious institutions. The argument is that government financial support of religion makes religious institutions dependent on government and in turn compromises them as they adjust their religious ministries to be more amenable to government policy.[201] This strain is present in Madison's writings. In his *Memorial and Remonstrance*, Madison maintained that aid to religion creates "a dependence on the powers of this world" and "weaken[s] in those who profess this Religion a pious confidence in its innate excellence."[202] In a later passage, Madison related how the government support of religious establishments, "instead of maintaining the purity and efficacy of Religion, have had a contrary operation . . . [encouraging] pride and indolence in the Clergy."[203] Similarly, Jefferson argued that public aid for religion "tends also to corrupt the principles of that very religion it is meant to encourage,

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[198] Schwartzman, *supra* note 41, at 370 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 575–76 (2005) (Souter, J., dissenting)).

[199] *Hein*, 551 U.S. at 632 (Scalia, J., concurring).

[200] Garnett, *supra* note 155, at 672.

[201] *See* Mitchell v. Helms, 530 U.S. 793, 871 (2000) (Souter, J., dissenting) ("[G]overnment aid corrupts religion."); Marshall & Nichol, *supra* note 179, at 243–46.

[202] MADISON, *supra* note 111, at 3–4.

[203] *Id.* at 4.

by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[204] Although there is ample historical evidence supporting this rationale, it also has a patronizing quality. Religious groups that have sought forms of government assistance for their operations—Catholics in particular—have long considered this argument dubious if not insincere when it is raised by groups otherwise opposed to religious based schooling and social services.[205] Not all neutral aid programs—particularly those with discrete policy objectives—require religious grant recipients to compromise their principles to receive the assistance, and, furthermore, it is the religious entity that should make that ultimate determination, not the government.

A second alternative argument to the no-aid rule is that it prevents the competition, dissention, and discord among religious organizations that can have a corrosive effect on the body politic. In his *Memorial*, Madison spoke about the "[t]orrents of blood" that had been spilt because of "Religious discord."[206] Based on this long history of interreligious conflict, the no-aid rule is designed to ensure social harmony among religions and between religion and the state.[207] Justice Breyer is a proponent of a divisiveness rationale for Establishment Clause issues,[208] and scholars have noted this strain as well.[209] According to Professor Ira Lupu, "[A] central function of the Establishment Clause [is] to discourage religious factions from competing with one another for political favor of any kind."[210]

Although religious conflict and discord are particularly pernicious, the strength of this argument is tempered by the reality of modern government benefits programs that purportedly advance beneficial secular goals, rather than religious ones. Even the Court's conservatives have acknowledged that a financial benefits program limited to religious recipients would be invalid—that the program goals must be neutral with respect to religious and secular applicants.[211] Thus, any dissension created by

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[204] Jefferson, *supra* note 107, at 77.

[205] *See* Murray, *supra* note 6, at 28–35.

[206] MADISON, *supra* note 111, at 5.

[207] Mitchell v. Helms, 530 U.S. 793, 872 (2000) (Souter, J., dissenting) ("[G]overnment establishment of religion is inextricably linked with conflict.").

[208] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting) ("[O]ur history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself."); Zelman v. Simmons-Harris, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting) ("The principle underlying these cases—avoiding religiously based social conflict—remains of great concern.").

[209] Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 361 (1996) ("Because state endorsement and discriminatory financial support are such potent advantages for any religious group seeking to expand its power and dominion, minimizing the incentives for such groups to compete against one another for state favor at all levels of government is of grave constitutional importance.").

[210] *Id.* at 364.

[211] *See* Bowen v. Kendrick, 487 U.S. 589, 602–04 (1988).

competition for a limited pool of grant monies will be shared by secular and religious entities. Any Request for Proposals that privileged religion or a particular religion over others would be per se invalid.[212] To be sure, larger and better organized religious bodies may have an advantage in obtaining government grants, but it is chiefly conjecture that the ongoing success of the Catholic Church in acquiring government benefits, for example, will engender dissention and discord among smaller and less structured Protestant bodies when the Catholic Church must also compete with secular entities.[213]

These two arguments for the no-aid rule should not be discounted, but there is a more compelling rationale for the rule, one that also allows for parties to bring challenges to potential abuses. We turn once more to Madison's *Memorial and Remonstrance* for guidance and find that one ground for preventing public funding of religious activity is that it is outside the authority of the government to do so. Employing the concept of "jurisdiction," Madison wrote that "Religion is wholly exempt from [the] cognizance" of "Civil Society."[214] "[I]f religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body."[215] In later writings, Madison employed related terms when discussing the idea: Government had no "religious agency" because it was "no[t] part of the trust delegated to political rulers."[216] "[T]he immunity of Religion from civil jurisdiction," he declared, had "always been a favorite principle with me."[217] Scholars have referred to this concept in several ways: "noncognizance,"[218] "religion blind,"[219] "no agency,"[220] or as a "structural restraint" on the government.[221] Professor Vincent Philip Muñoz argues that the notion of noncognizance is central not only to Madison's *Memorial*, but also to his overall philosophy of religious liberty. According to Professor Muñoz, the principle of noncognizance means that a "state noncognizant of religion lacks jurisdiction over religion. It may not take authoritative notice of or perceive religion or the religious affiliation of its citizens. A government noncognizant of religion, in other words, must be blind to religion."[222]

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[212] *See* Agostini v. Felton, 521 U.S. 203, 234 (1997) (In administering benefits programs, governments cannot "define its recipients by reference to religion.").

[213] *See Bowen*, 487 U.S. at 617 n.14.

[214] MADISON, *supra* note 111, at 1–2.

[215] *Id.* at 2.

[216] James Madison, *Detached Memoranda*, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 103, 105.

[217] Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 105, 105–06.

[218] *See generally* VINCENT PHILIP MUÑOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 11–48 (2009).

[219] *Id.* at 12.

[220] *See* Sikkenga, *supra* note 48, at 747.

[221] *See* Esbeck, *supra* note 155, at 4.

[222] MUÑOZ, *supra* note 218, at 26.

This idea that the government must be blind to the religious status of citizens when it comes to the distribution of benefits and burdens finds it roots in Justice Black's *Everson* opinion[223] and has fueled the Court's embrace of government neutrality toward religion.[224] More recently in *Trinity Lutheran*, the Court reaffirmed the constitutional concerns that exist when the government imposes "special disabilities on the basis of religious views or religious status."[225] A "religion blind" version of noncognizance, one that looks solely to the evenhanded application of a religion-neutral benefits program[226] and not to the likely applications of those government funds, remains controversial,[227] despite finding advocates among scholars and members of the Court.[228] Obviously aware of that controversy, in *Trinity Lutheran* Chief Justice Roberts highlighted not only the neutral nature of the grant program but also its clearly secular application.[229]

Rather than adopting a religion-blind interpretation of noncognizance, this Article advances a more nuanced understanding of Madison's jurisdictional claim, one that is consistent with the Founders' concerns about government funding of inherently religious activity. This jurisdictional claim is best represented by the phrase "no agency"—that the government lacks the authority to act on religious matters. As one scholar sums up this interpretation:

> [G]overnment has no power to be a causal agent of religious opinion or practice, whether by forming or acting on religious opinion itself (establishment), by attempting to cause citizens to

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[223] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (remarking that the government "cannot exclude . . . members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation").

[224] Mitchell v. Helms, 530 U.S. 793, 809 (2000) ("[W]e have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.").

[225] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017) (quoting Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877 (1990)).

[226] *Mitchell*, 530 U.S. at 810 ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.").

[227] *Id.* at 837 (O'Connor, J., concurring) (decrying the "unprecedented breadth" of the plurality's argument "that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.").

[228] *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (Thomas, J., concurring in part).

[229] *See id.* at 2023 (majority opinion). An additional problem with a "religion blind" approach is that it prevents the government from taking into account any special burdens that may befall religious recipients under a neutral program that prevents any cognizance of religion.

> form or act on religious opinions (establishment), by trying to force citizens to act against their religious conscience (free exercise), or by trying to prohibit them from acting on their conscience (free exercise) unless their religious practices are "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[230]

I would add that government has no authority to use its financial resources to advance inherently religious activity or to appropriate religious language and symbolism to advance governmental ends.[231] Although supporters of religious establishments, such as their defenders in New England, disputed the idea that the state had no interest in religion or jurisdiction over religious matters,[232] in the end they were on the losing side of that debate. The winners in that debate were Madison and Jefferson, with the latter famously writing in his *Notes on the State of Virginia* that "our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted . . . ."[233]

Another way of thinking about a no-agency understanding of the jurisdictional claim is that the Establishment Clause acts as a structural restraint on the powers of the government—that, in the case of funding religious activity, the Clause serves as an express limitation on the otherwise broad authority Congress possesses under its Article I, Section 8, spending power.[234] Professor Carl Esbeck's argument that the Establishment Clause serves primarily as a structural restraint on other powers contained in the Constitution is particularly helpful, though his schema is incomplete in that it excludes any additional rights-protecting quality to the Clause which exists to prevent specific government impositions on conscience.[235] The *Flast* majority acknowledged this structural restraint aspect to the Establishment Clause in stating

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[230] Sikkenga, *supra* note 48, at 746–47 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

[231] Professors Lupu and Tuttle describe this jurisdictional understanding thus: "Under the nonestablishment principle, the state may not invoke religion as a source of civil authority; must disclaim the comprehensive sweep of religion as a subject within the scope of civil authority; and may not invoke the concept of worship as the character of citizens' response to civil authority." LUPU & TUTTLE, *supra* note 50, at 5.

[232] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 722 (Boston, Hilliard, Gray & Co. 1833) ("Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state . . . .").

[233] JEFFERSON, *supra* note 149, at 159. The quotation continues: "[W]e could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others."

[234] LUPU & TUTTLE, *supra* note 50, at 75, 109–12 ("[W]e believe that questions of the permissibility of state funding of religious entities are far better understood through the lens of jurisdictional disability.").

[235] *See* Esbeck, *supra* note 155, at 1–14.

its second requirement for standing: that "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power."[236] That led the Court to declare: "The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."[237] In essence, *Flast* taxpayer standing existed for the purpose of vindicating an exercise of power that exceeded the government's authority, one that affected all citizens.[238]

Some may contest that the Establishment Clause, as historically understood and applied, and as currently conceived, constitutes an express limitation on Congress's plenary authority to tax and spend for the general welfare; however, the logical reading of the First Amendment and its sequencing in relation to the Anti-Federalists' vocal concerns about the potential for abuse afforded by the purportedly unlimited nature of that power supports an interpretation of the Clause as an express structural restraint.[239] When one combines that aspect with the near universal understanding that government appropriations of tax monies for inherently religious activity constituted the defining quality of a religious establishment,[240] then the no-agency interpretation of the Establishment Clause gains strength.

The above understanding of no agency over religious matters does not mean that the government is agnostic to religion, that it must ignore the potential applications and consequences of religion in its funding programs. While the complementary notion of noncognizance may imply that particular approach—that the government cannot take into account the religious character of its grant recipients or their intended uses of the aid—no-agency instructs that, because the government lacks jurisdiction over religious matters, it must be aware of whether it has exceeded its authority in its disbursements of government largesse. This does not mean that religious entities are categorically excluded from participating in neutral funding programs—on the contrary, to exclude an otherwise qualified applicant based solely on its religious identity would potentially violate free exercise principles.[241] It does mean, however, that the government is still responsible for determining whether its financial assistance is furthering inherently religious activity. The majority in *Trinity Lutheran* appeared to acknowledge as much in signing off on the distinction between "status" and "use."[242] As with

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[236] Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

[237] *Id.* at 104.

[238] In its analysis of *Flast*, the *Harvard Law Review* noted the collective wrong that was being vindicated by taxpayer plaintiffs acting as surrogates. *Taxpayer Suits*, *supra* note 181, at 229.

[239] *See Timoleon*, *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 69, 69–70 (Neil H. Cogan ed., 2015); *An Old Whig, No. 5*, *in supra*, at 70, 70–72.

[240] *See* CURRY, *supra* note 53, at 217; Esbeck, *supra* note 155, at 18–19.

[241] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017).

[242] *Id.* As a result, the exclusion of pervasively sectarian institutions as aid recipients is

all financial disbursements, the government's responsibility for how its funds are being applied does not end with the exchange but requires accountability to ensure that public funds are being appropriately spent in accordance with the government's authority.[243] When the government is aware that public funds are being spent in a way that is ultra vires to its authority—or that an unauthorized use is the natural and foreseeable consequence of the grant award—then the government has exceeded that authority.[244]

Once the government has exceeded its authority of acting on a matter outside of its jurisdiction by funding religious activity, then who may raise a challenge to that action if *Flast* taxpayer standing no longer exists? The short answer is that standing would vest in other applicants for and recipients of the grant at issue, particularly those in the former category who lost out in a competitive bidding process to a recipient who applies the government monies toward inherently religious activity. These unsuccessful applicants and other recipients (who have limited ability to acquire the funds for non-religious uses) have an actual and particularized injury that qualifies them to raise a claim that the government has exceeded its authority in funding inherently religious activity.[245] To be sure, the available class of potential plaintiffs would be substantially smaller than the potential class of taxpayers. This could mean that no qualified plaintiff would come forward and that some Establishment Clause violations would go unvindicated. But in today's litigious environment with public interest organizations eager to provide legal representation to potential plaintiffs, the number of unvindicated claims would likely be small.

So, what are the practical applications of this understanding of no agency over religious matters? Outside the funding context, the Supreme Court has already tacitly acknowledged at least one application, though more commonly through the modality of free exercise. The long strain of "church autonomy" decisions, severely restricting the authority of the government to regulate the internal operations of houses of worship,

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properly understood not as excluding any particular entity (status) but excluding those entities that choose to integrate religious devotional activity into their funded programs (use), such that the government is financially advancing religious activity.

[243] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 691–92 (2002) (Souter, J., dissenting) (discussing the government's responsibility for ensuring that public monies are not diverted for religious uses).

[244] In essence, the no-agency principle is violated when the government acts with an invalid purpose: to advance inherently religious activity. It is also violated when the government acts with an arguably valid secular purpose designed to produce a non-religious end, but it is both foreseeable and probable that the result will advance inherently religious activity. This awareness of the probable application thus indicates an invalid purpose of exceeding the government's jurisdiction.

[245] Continuing with the standing requirements of causation and redressability, this assumes a competitive process with a limited pool of available funds, such that the plaintiffs' injuries (i.e., denial of a grant or a self-limitation on the application of the funds) are traceable to the unconstitutional use by other recipients. A judicial ruling forbidding the religious uses would supply the remedy.

fits within this understanding. That would include ministerial exemption cases like *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[246] The caveat that this Article has attempted to maintain is that the no-agency rule limits the government's authority to advance (or inhibit) *inherently* religious activity which, as discussed, allows religiously affiliated entities to participate in neutral funding programs that enhance secular outcomes and do not run the risk of government monies supporting inherently religious activities. The converse exists for the category of church autonomy cases—that the claimed areas of exemption must involve inherently religious functions.[247] So the holding in *Hosanna-Tabor* is essentially correct as the government has no authority to direct the qualifications of a faith community's leadership. But the no-agency rule would not necessarily restrict the enforcement of non-discrimination laws to protect employees of religious entities that are not engaged in inherently religious activity.[248] Admittedly, that line is not clear, but the distinction is offered here for the purposes of example. I leave it to other commentators to deconstruct the intricacies of the Court's recent holding in *Our Lady of Guadalupe School v. Morrissey-Berru*.[249]

Within the funding context, the proposed no-agency rule would apply as follows. As stated, the government has no authority to distribute monies to advance inherently religious activity.[250] That means that government funding programs must be generally available to secular and religious recipients alike and must advance identifiably secular activity. Further, no agency means that the applications of government funds must be designed in such a way that they cannot be used for religious purposes (a "non-divertible" rule).[251] As a general matter, the government is always responsible not only for the goals of any program but also for how those funding goals are ultimately applied; government accountability requires nothing less. To restrict the no-agency jurisdiction principle to the design of a program but not to likely applications would allow the government to easily circumvent its limited jurisdiction and would make a mockery of the rule.

Therefore, as stated in the introduction, the Court's holding in *Trinity Lutheran* is consistent with the no-agency rule, notwithstanding Justice Sotomayor's moving

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[246] 565 U.S. 171, 172 (2012).

[247] *Id.* at 192 (noting that the teacher performed "important religious functions" for the church).

[248] *See* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 305–06 (1985).

[249] *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267 (U.S. July 8, 2020).

[250] Agostini v. Felton, 521 U.S. 203, 223 (1997) ("[G]overnment inculcation of religious beliefs has the impermissible effect of advancing religion."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (observing that the Court's decisions "provide no precedent for the use of public funds to finance religious activities").

[251] Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (criticizing the plurality's sole reliance on the neutrality of a program's design, noting that "we have long been concerned that secular government aid not be diverted to the advancement of religion").

dissent.[252] Like textbooks and teaching materials given to religious schools, the Missouri grant funded an identifiably secular item—the purchase of recycled tires for playground resurfacing—an item that could not be diverted for any inherently religious activity.[253] Despite the benefit being "cash" and flowing directly to a house of worship—two lines that had not been crossed in previous Court decisions, though suggested—the grant program did not rely on authority outside the state's jurisdiction that would otherwise be limited by the concept of no-agency. For the no-aid rule, *Trinity Lutheran* is an easy case.

Under the proposed no-agency rule, *Zelman* should also have been an easy case, though with a different outcome. Notwithstanding the claimed neutral design of the Cleveland voucher program and putative presence of "genuine and independent private choice" that determined the ultimate application of the funds, the program violated the no-agency rule because of the inevitable funding of inherently religious activity.[254] This is not to relitigate *Zelman*,[255] but Chief Justice Rehnquist's formalistic opinion obfuscated several important facts: that the Ohio legislators knew that no neighboring public schools would accept the vouchers, which undermined the neutrality of the program; and that the parents' "private choice" was neither genuine—in that ninety-six percent of the available uses of a voucher were at religious schools—nor independent—in that the parents never acquired an independent property interest in the voucher monies to direct their application, but rather they served as conduits for the transfer of public funds to religious schools.[256] Facing the reality that public monies would aid inherently religious activity by funding religious instruction and that this would be the natural and probable consequence of the voucher program, the Ohio legislature exceeded its jurisdiction in enacting the program.

Under the proposed no-agency rule, another decision that was wrongly decided was *Bowen v. Kendrick*.[257] *Bowen* considered the constitutionality of the 1981 Adolescent Family Life Act (AFLA), which provided federal funding to nonprofit counseling agencies to supply services to address adolescent sexuality and pregnancy.[258] The district court found that AFLA expressly required grant applicants to describe how they would involve religious organizations in the programs funded by the government and that AFLA allowed "religiously affiliated grantees to teach adolescents on issues that can be considered 'fundamental elements of religious doctrine.'"[259] AFLA did this

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[252] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., dissenting).

[253] *Id.* at 2017 (majority opinion).

[254] Zelman v. Simmons-Harris, 536 U.S. 639, 691–92 (2002).

[255] In full disclosure, I served as co-counsel for the respondents Simmons-Harris in *Zelman*.

[256] *See Zelman*, 536 U.S. at 694–707 (Souter, J., dissenting) (disputing both the neutrality of the program and the existence of private choice).

[257] *See generally* 487 U.S. 589 (1988).

[258] *Id.* at 593.

[259] *Id.* at 598, 604.

"without imposing any restriction whatsoever against the teaching of 'religion *qua* religion' or the inculcation of religious beliefs in federally funded programs."[260] The Court majority did not dispute these facts but, after limiting its review to that of a facial challenge, upheld AFLA.[261] The Court disputed that AFLA had the primary effect of advancing religious activity merely because some grant recipients were religious and the abstinence and non-abortion goals of the program coincided with the doctrinal beliefs of those recipients.[262] The majority held that because the funded projects were facially neutral, they were "not themselves 'specifically religious activities,' and they [were] not converted into such activities by the fact that they are carried out by organizations with religious affiliations."[263] In so holding, the Court ignored evidence supporting the strong likelihood that public monies would fund counseling and other services laced with religious doctrine, particularly in light of AFLA's failure to prohibit religious providers from integrating religious dogma into its services.[264] The no-agency rule, which limits the government's jurisdiction to advance inherently religious activity, does not allow the government to be blind to probable applications of its disbursements.

The harder question involves a neutral funding program where "genuine and independent private choice" truly exists and where there are no incentives to apply government funds for religious purposes. A program like the vocational rehabilitation scholarship in *Witters v. Washington Department of Services for the Blind*, where a recipient qualifies for the grant on neutral criteria and faces a wide variety of alternatives for using the grant, with only a small percentage being religious,[265] raises few questions whether the government has exceeded its jurisdiction in enacting the program based on potentially one or two religious uses.[266] One could argue if a particular recipient's use of a neutral grant for inherently religious activity is not the natural and probable consequences of the aid program, then the government has not exceeded its jurisdiction or acted in a manner in which it has no agency. Understandably, some may hesitate to have a constitutional rule turn on the foreseeability of applications. One response is that a legislature is under an obligation when drafting the requirements of an aid program to consider its possible or probable applications.

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[260] *Id.* at 599.

[261] *See id.* at 602–18.

[262] *See id.* at 611–15.

[263] *Id.* at 613.

[264] *Id.* at 638–42 (Blackmun, J., dissenting). In fact, the district court concluded that "[t]he record demonstrates that some grantees have included explicitly religious materials, or a curriculum that indicates an intent to teach theological and secular views on sexual conduct, in their HHS-approved grant proposals." *Id.* at 635 n.7.

[265] 474 U.S. 481, 488 (1986) ("Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.").

[266] The majority noted that Larry Witters's requested use of the scholarship represented a unique situation. *Id.* at 487–89.

At a minimum, the latter consideration (probability) should be part of any legislative drafting enterprise, particularly in areas of education and social services.[267] The statute involved in *Locke v. Davey*[268] possibly offers a "best practices" example. There, the state-funded "Promise Scholarship" program provided a grant to qualified recipients to assist with tuition to any in-state college, including private and religious colleges, but contained a prohibition on the scholarship being used to fund a degree program in devotional theology.[269] In drafting the authorizing statute, the state legislature was likely aware of such a possible application of the scholarship and acted to prevent it.[270] Relying on a no-funding provision in the state constitution, the legislature understood that it needed to exclude a probable religious application of the scholarship so as not to exceed its authority under the constitution.

So, would any private choice funding scheme that includes only possible (but not probable) religious applications satisfy the no-agency jurisdiction rule? At first, as stated, the neutral program would need to be one that offered truly "genuine and independent private choice,"[271] not one weighted toward religious uses but one that provided predominately secular applications. That government monies would end up paying for inherently religious activity would need to be an unlikely and unintended consequence. The recipient would also need to exercise significant control over the application of the funds. An example that comes to mind would be a program modeled on a modified version of the one considered in *Mueller v. Allen*.[272] Assume a state offered a tax credit to assist middle- and lower-income parents with expenses associated with educating their children.[273] The tax credit is capped at $500 per child and allows parents to bundle various expenses related to education—sports equipment, computers, musical instruments, instructional supplies, etc., including various types of fees for tuition, tutoring, lessons, and the like. Parents of children in both public and private schools can select from a wide menu of options, and even those parents with children attending religious schools may likely accumulate $500 in secular expenses without needing to rely on their child's tuition to her school. In any given year, parents with a child in a religious school may or may not apply religious school tuition toward their credit. Has the state in enacting this tax credit exceeded its authority based on the possibility that any parent may include religious school tuition, rather than hockey equipment, under the credit? Funding of inherently religious activity

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[267] *See Bowen*, 487 U.S. at 614. The Court observed that "although there is no express statutory limitation on religious use of funds, there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted." *Id.*

[268] *See generally* 540 U.S. 712 (2004).

[269] *Id.* at 716.

[270] *Id.* at 715–16.

[271] Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002).

[272] 463 U.S. 388, 390–91 (1983).

[273] As the father of a twelve-year-old daughter attending public middle school, I know firsthand the numerous educational expenses incurred by parents.

does not seem to be the natural and probable consequences of the law. The program would not exceed the jurisdiction of the state nor transgress the no-agency rule.

CONCLUSION

Protecting the right of religious conscience is a core function of the Religion Clauses. Coercing someone to attend, endorse, or support any religion—even of one's own choosing—violates the Free Exercise Clause and exceeds the government's authority under the Establishment Clause. This is axiomatic. And so, for example, a supervisor in a government agency could not require his subordinates to attend a brief morning prayer meeting. Freedom of conscience—religious and nonreligious—is also impacted when the government requires a person to financially support an ideological cause to which that person is conscientiously opposed.

Accordingly, recognizing a strain of a taxpayer conscience for Establishment Clause violations makes sense, but only in a limited context. That context would be one analogous to what existed with colonial and early state religious establishments where officials extracted a specific tax or assessment in support of religion qua religion. This scenario would be highly unlikely under today's modern taxing structure, but may still be possible. In contrast, a conscience claim evaporates when the government disburses monies from general tax revenues that may end up benefitting a religious institution; the injury to one's conscience from such disbursements is too tenuous and abstract. While the taxpayer conscience rationale for an Establishment Clause violation made sense in the late eighteenth century, it makes no sense today as the basis for the no-aid rule. And if the taxpayer conscience rationale makes no sense, then neither does *Flast* taxpayer standing.[274]

This Article has proposed an alternative theory for the no-aid rule: a no-agency rule that recognizes that the government lacks jurisdiction to support or advance inherently religious activity. It is, however, not a "religion blind" form of no-agency but one in which the government acts with awareness of the natural and probable consequences of its financial disbursements, even under a neutral funding program. This no-agency approach is consistent with the vision of Madison and Jefferson and represents a more honest foundation for enforcing the no-aid to religion principle that is embedded in the Establishment Clause. Granted, the sweep of the proposed no-agency rule may not be as great as traditional no-aid separationism; yet, it is consistent with the historical underpinnings of the no-establishment of religion principle and is more applicable to the modern welfare state than a rule based on an anachronistic taxpayer conscience rationale.

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[274] Flast v. Cohen, 392 U.S. 83, 102–04 (1968).