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ARTICLE

CHURCH TAXES AND THE ORIGINAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE

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Since the Supreme Court's decision in Everson v. Board of Education*, it has been widely assumed that the Establishment Clause forbids government from 'aiding' or subsidizing religious activity, especially religious schools. This Article suggests that this reading of the Establishment Clause rests on a misunderstanding of Founding-era history, especially the history surrounding church taxes. Contrary to popular belief, the decisive argument against those taxes was not an unqualified assertion that subsidizing religion was prohibited. Rather, the crucial argument was that church taxes were a coerced religious observance: a government-mandated sacrifice to God, a tithe. Understanding that argument helps to explain a striking fact about the Founding era that the no-aid theory has largely ignored—the pervasive funding of religious schools by both the federal government and the recently disestablished states. But it also has important implications for modern law. Most significantly, it suggests that where a funding program serves a public good and does not treat the religious aspect of a beneficiary's conduct as a basis for funding, it is not an establishment of religion.*

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INTRODUCTION

No one likes paying for causes they find objectionable. The thought of subsidizing activities one does not like seems galling at best, an assault on freedom of conscience at worst. And given that fact, it is no wonder that the Supreme Court long ago read the Establishment Clause as containing a rule to that effect. In *Everson v. Board of Education*, Justice Hugo Black famously said that because the Clause forbids forcing citizens to pay for religion they oppose, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion."[1] In short, the Establishment Clause meant government could not "aid" religion, especially by subsidizing religious activity.[2]

In *Everson* itself, the Court stopped short of applying the no-aid theory as broadly as its rhetoric suggested and upheld a program paying for bus rides to both secular and religious schools.[3] But it eventually adopted the theory wholesale. In *Lemon v. Kurtzman*, the Court held that the Establishment Clause forbade any government aid that had the "primary effect" of supporting religion.[4] The main upshot was a ban on funding for K-12 religious schools, no matter the government's purpose in providing funds. But as the century progressed, problems piled up.

The first one involved the Free Exercise Clause. As interpreted in *Lemon*, the no-aid theory categorically forbade government from financing the religious activities of private citizens. Yet both before and after *Lemon*, the

1 330 U.S. 1, 16 (1947).
2 *Id.* at 15.
3 *Id.* at 16.
4 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

Court held that the Free Exercise Clause required providing things like unemployment benefits to citizens whose religious practice had made them ineligible.[5] The no-aid theory thus seemed to imply that the Establishment Clause forbade exactly what the Free Exercise Clause required.[6]

There were also difficulties in application. The no-aid theory prohibited any aid that subsidized religious activity regardless of the government's purpose.[7] As a result, it required asking about the *use* of aid, and specifically whether the aid could be "diverted" to religious activities.[8] But because almost any form of aid can be applied toward something religious, the outcomes in the cases depended almost entirely on what different coalitions of Justices were willing to imagine in terms of use. Over time, that situation produced some strikingly unpersuasive distinctions. Paying for textbooks was permissible, but paying for maps was not.[9] Subsidizing rides *to* religious schools was acceptable, but rides *from* those schools to museums was not.[10] Paying for special education teachers in religious schools to diagnose learning difficulties was allowed, but paying for them to treat those difficulties was not.[11] In the aggregate, the results made the no-aid theory look like a guessing game, not a sound legal rule.

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5 *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (holding that disqualifying a citizen from benefits solely because of religion imposes a burden on the free exercise of religion); Thomas v. Rev. Bd., 450 U.S. 707, 720 (1981) (concluding that an employee who terminated his employment because of religious objections to building weapons could not be denied benefits).

6 A few Justices noted the issue, but there was no working majority to resolve it. *See Sherbert*, 374 U.S. at 414-16 (Stewart, J., concurring in the judgment) (agreeing with the Court's holding forbidding the denial of unemployment compensation based on religious practice, but noting that the Court's no aid-jurisprudence "must inevitably lead to a diametrically opposed result"); *Thomas*, 450 U.S. at 724-26 (Rehnquist, J., dissenting) (making a similar point).

7 *See Lemon*, 403 U.S. at 613 (invalidating a funding program under the Establishment Clause even though there was "no basis for a conclusion that the legislative intent was to advance religion").

8 *See* Mitchell v. Helms, 530 U.S. 793, 840-41 (2000) (O'Connor, J., concurring in the judgment) (noting that under the no-aid paradigm, the Court had "long been concerned that secular government aid not be diverted to the advancement of religion").

9 *Compare Allen*, 392 U.S. at 238 (holding that a program paying for secular textbooks for use in religious schools did not violate the Establishment Clause), *with* Wolman v. Walter 433 U.S. 229, 249-51 (1977) (holding a program providing maps for use in religious schools unconstitutional under the Establishment Clause), *overruled by Mitchell*, 530 U.S. 793 (2000).

10 *Compare Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947) (upholding a program providing subsidies to parents for transporting children to private religious schools), *with Wolman*, 433 U.S. at 252-55 (holding that a program providing state funds to transport children from religious schools to field trips violated the Establishment Clause); *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119-20 (1992) (noting these examples).

11 *Compare Wolman*, 433 U.S. at 241-42 (holding that providing funds for diagnostic testing of speech and hearing difficulties at religious schools was permissible), *with* Meek v. Pittenger, 421 U.S. 349, 367-73 (1975) (holding that reimbursing therapeutic services to address those concerns was not), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); *see also* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 94 (2014) (noting this example and others).

There was also a more fundamental problem. The no-aid theory rested on the idea that taxpayers should not be required to pay for religious activities they oppose. But in point of fact, all aid by its nature is fungible. Providing *any* form of aid to churches or even individual religious citizens predictably subsidizes religious activities because it leaves those groups with more money to spend on religion.[12] And as a result, the no-aid theory implied that even benefits like police and fire protection for churches were unconstitutional. To be sure, no Justice was willing to go that far. But it was difficult to explain why, at least if 'no aid' meant what it said.[13] And that fact, combined with the theory's harsh results, made it seem callous and even hostile toward religious citizens.

Given these difficulties, it is no surprise that the Court has turned to an alternative principle. In *Everson*, Justice Black had said that notwithstanding the no-aid theory, "the state [ought] to be . . . neutral in its relations with groups of religious believers and non-believers," and that government cannot exclude citizens "because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[14] Justice Black did not elaborate on the normative force behind that statement, but it follows easily enough. Money and other state benefits are valuable to everyone: they influence people's choices and act as powerful tools to encourage and discourage behavior. Where religious entities provide public goods, funding them on equal terms with other providers does not encourage religion; it simply compensates these groups for a public service. But refusing to fund them solely because of religion is a penalty on religious practice. It discourages religion and undermines the Constitution's promise that government will remain neutral with respect to citizens' religious choices.

During the past two decades, the Court's cases have gradually moved closer to that view. Under current doctrine, government may provide money directly to churches and religious schools that deliver secular goods so long as it restricts the aid to secular uses.[15] The Court has also held that states may

12 *See Lemon*, 403 U.S. at 641 (Douglas, J., concurring) (observing in the context of school funding that "[w]hat the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training").

13 In *Everson*, Justice Black insisted that services like police and fire protection were acceptable because they were "indisputably marked off from the religious function," and thus could be classified as "public welfare legislation" rather than aid to religion. *See Everson*, 330 U.S. at 16-18. But as many have noted since, that distinction is hardly satisfying. *See, e.g.*, Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 138 (2017) ("Every law providing for any form of neutrally distributed government [aid] can be understood as public welfare legislation. And any part of that [aid] that goes to a religious organization can be understood as support for religion.").

14 *Everson*, 330 U.S. at 16, 18 (emphasis omitted).

15 *See Mitchell*, 530 U.S. at 861-64 (O'Connor, J., concurring in the judgment) (describing procedural safeguards that help ensure government funds are used for secular purposes and deeming these safeguards constitutionally sufficient).

include religious schools in voucher programs so long the decision to fund them is the result of "true private choice" exercised by "individual recipients" like parents.[16] And most recently, in *Espinoza v. Montana Department of Revenue*, the Court held that state funding for private religious schools is not just permissible, but *required* in instances where the government chooses to fund comparable secular recipients.[17]

The Court's movement away from a broad no-aid theory and toward a principle of "neutrality" is now well-entrenched as a matter of precedent. Yet the Court has done little to explain how its current approach to funding under the Religion Clauses is consistent with Founding-era history. In *Everson*, both the majority and the dissent insisted that the history from Virginia—and especially famous statements by Thomas Jefferson and James Madison—demonstrated that the Establishment Clause stripped government of "all power . . . to support, or otherwise to assist any or all religions."[18] And critics of the Court's current jurisprudence continue to argue as much. According to Justice Sonia Sotomayor, for instance, the Court's modern funding jurisprudence has "no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause."[19]

Numerous scholars also agree. According to Professor Noah Feldman, the Court has "adopt[ed] a position almost squarely the opposite of the original intent of the Establishment Clause," since the Clause was meant to "guard against the possibility that a citizen's tax dollars would be used to support religious teachings with which he might possibly disagree."[20] Likewise,

16 Zelman v. Simmons-Harris, 536 U.S. 639, 649-53 (2002).

17 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

18 *Everson*, 330 U.S. at 11-13; *see also id.* at 33-47 (Rutledge, J., dissenting) (analyzing the historical evidence in a similar way). In *Everson*, the Court relied primarily on two passages. The first was Thomas Jefferson's claim that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd, Lyman H. Butterfield & Mina R. Bryan eds., 1950) [hereinafter A Bill for Establishing Religious Freedom]. The second was James Madison's insistence that "the same authority which can force a citizen to contribute three pence . . . for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." JAMES MADISON, TO THE HONORABLE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA: A MEMORIAL AND REMONSTRANCE, *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., 1985) [hereinafter MADISON, MEMORIAL].

19 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2030-31 (2017) (Sotomayor, J., dissenting). Although less totalizing in their criticisms, other Justices have made similar assertions. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2286 (Breyer, J., dissenting) (arguing that there is "no meaningful difference between the concerns that Madison and Jefferson raised and the concerns inevitably raised by taxpayer support for scholarships to religious schools").

20 NOAH FELDMAN, DIVIDED BY GOD 209 (2005). In this passage, Professor Feldman is speaking of the Supreme Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). But there is little doubt that the statement also captures Feldman's

Richard Fallon argues that the Court's doctrine has been too lax, since "the backdrop of history" proves that the Establishment Clause "protects each of us against being taxed . . . to support a religion to which we do not subscribe."[21] Caroline Corbin contends the Court's insistence on neutrality is flawed, since "no reasonable person of [the Founding] era would dispute that it violated freedom of conscience to be conscripted into financially supporting a religion not one's own."[22] And many others have expressed similar views.[23]

In *Espinoza*, the Court took an tentative step toward answering these criticisms, observing in a brief paragraph that Founding-era Americans had provided at least some funding for religious schools.[24] That development was notable—never before had a majority of the Supreme Court offered any historical justification for its movement away from the no-aid theory. But it was also incomplete. As Justice Stephen Breyer observed in dissent, *Espinoza*'s

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wider view of the Court's recent Establishment Clause jurisprudence. *See* FELDMAN, *supra*, at 218, 247 (suggesting that the ban on government funding for religion is "the cornerstone . . . of the American tradition of the separation of government institutions from the institutional church," and that "[a]ll attempts to use government resources to institutionalize religious practices" ought to be banned); *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 417 (2002) [hereinafter Feldman, *Intellectual Origins*] ("[T]he Framers broadly agreed that coercively *requiring* dissenters to contribute funds to religious purposes with which they disagreed constituted a violation of conscience.").

21 Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 90 (2017).

22 Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 653 (2019).

23 *See, e.g.*, HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 64 (2020) (arguing that "it is wrong to tax people to support the religion of others" and concluding the Court's case law would be unrecognizable to James Madison); William P. Marshall & Gene R. Nichols, *Not a* Winn*-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 234 (arguing that "the violation of an individual's conscience caused by supporting a religion to which she does not adhere" was "exactly the type of harm that was of concern to the Framers" and criticizing the Court's jurisprudence on this basis); Micah Schwartzman, *Conscience, Speech, and Money*, 97 U. VA. L. REV. 317, 318 (2011) (drawing on Founding-era history to suggest that the Establishment Clause forbids "requiring citizens to pay for religious expressions they find objectionable" and arguing this prohibition should be extended to other expenditures that violate taxpayer conscience); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1273-74 (2008) (criticizing the Court's jurisprudence and asserting that "the religious freedom of taxpayers who object to supporting institutions with which they differ" has "some pedigree in American constitutional history"); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 209-11 (1992) (arguing that, rightly understood, the Establishment Clause "require[s] excluding religious organizations from public programs" because the Clause "protects individuals from compulsory financial support of other people's religion through the tax system"). There are, of course, some notable dissents from this view. *See, e.g.*, Laycock, *supra* note 13, at 144-45 (suggesting tentatively that "the Founders were not concerned about money that went to churches in pursuit of secular goals"); Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 89-90 (2009) (questioning expansive interpretations of Founding-era evidence that would disqualify religious entities from neutral funding programs).

24 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020).

discussion of the historical evidence was too limited to demonstrate a clear pattern of practice, much less a principled one.[25] Nor have individual Justices filled the void. The only attempt—a solo concurrence written by Justice Clarence Thomas more than two decades ago—confined its discussion almost entirely to an exposition of James Madison's views, and did not purport to offer anything like a comprehensive analysis of the issue.[26]

The Court's failure to offer a historical explanation for its doctrine about funding for religious organizations is troubling, especially for a jurisprudence that claims to be focused on "historical practices and understandings."[27] But this Article suggests—contrary to critics and most scholars—that Founding-era history and the Court's funding jurisprudence are not actually at odds. More specifically, it suggests that the supposed divergence between Founding-era history and the Court's modern funding cases arises almost entirely from a misunderstanding of the historical record.

Since *Everson*, it has been widely assumed that the Founding generation believed that government was forbidden from forcing taxpayers to subsidize religious activity. On further inspection, however, that interpretation of the evidence is unconvincing. Although broad arguments against paying for religion sometimes appeared in debates over church taxes, the evidence suggests they did little to move public opinion. Rather, such arguments were frequently criticized as calling into question all taxation to support the public good, and were easily evaded by making church tax schemes more tolerant.[28] But even more importantly, the idea that taxpayers can never be required to pay for someone else's religious activity does not square with Founding-era practice. Both before and after the ratification of the First Amendment, the federal government and virtually every state that ended church taxes also funded religious activity—specifically, religious schools of all kinds—despite the fact that even in the Founding era, Americans took their religious disagreements seriously.[29] The practice was pervasive, and far more so than *Espinoza*'s brief sentences implied. Those facts provide good reason to think the Constitution does not—nor did it ever—contain an expansive categorical rule against subsidizing religion.

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25 *Id.* at 2286-87 (Breyer, J., dissenting) (contending that many of the majority's historical examples were without force and insisting that Founding-era supporters of religious liberty perceived an "obvious contradiction between the *reasons* for prohibiting compelled support [for clergy] and the effect of taxpayer funding for religious education").

26 *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 852-56 (1995) (Thomas, J., concurring).

27 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (observing that the Establishment Clause "must be interpreted 'by reference to historical practices and understandings'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (internal quotation marks omitted))).

28 *See infra* notes 51–59, 181–182 and accompanying text.

29 *See infra* Sections II.A–B (documenting such funding in the states); Section II.C (documenting such funding by the federal government and actors under its control).

How then should the evidence be understood? Simply stated, the answer is as follows. By the end of the eighteenth century, Americans largely agreed that government could not rightfully compel people to engage in specific forms of religious worship. And quite ingeniously, proponents of religious liberty realized that the same argument could be extended to church taxes. Far from being just another form of taxation, church taxes were a coerced religious observance. They were a compelled sacrifice to God, a tithe—an offering of money, taken by force, solely to finance the religious function of ministers and churches.[30] And because that was so, these writers reasoned, laws requiring them were no different from laws forcing citizens to engage in other specific modes of worship. To be sure, coercing tithes for other people's churches was even more objectionable, and many people did not hesitate to say so. But the controlling point was that church taxes were a coerced religious observance—they invaded each citizen's right to "render to the Creator such homage and such only as he believes to be acceptable to [H]im."[31] And understanding that argument in its original context yields several significant insights for both history and modern law.

First, recognizing that Founding-era objections to church taxes rested in significant part on an argument about coerced religious observance explains facts about the Founding era that the no-aid reading does not. In the years surrounding the ratification of the First Amendment, virtually every state that ended church taxes also provided tax money to religious schools—including schools directly affiliated with a church.[32] And the same was true of the federal government after the Establishment Clause was ratified.[33] Yet as far as we know, proponents of religious freedom did not object to that practice. Rather, they seem to have actively supported it.[34] Those facts are difficult to square with the idea that taxpayers can never be required to subsidize religious activity. But they are perfectly explainable if one begins from the premise that requiring citizens to contribute funds for the exclusive purpose of financing worship is a coerced tithe, but support for things like education is not, even if some of the money might also be used for religion. Admittedly, we cannot be sure why Founding-era supporters of religious liberty objected to funding for churches but not for religious schools. But a theory focused on coerced observance provides a plausible explanation, and one that makes their widespread practice both understandable and principled.

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30 *See infra* Part I.

31 MADISON, MEMORIAL, *supra* note 18, at 56.

32 *See infra* Section II.A–B.

33 *See infra* Section II.C.

34 *See infra* Section I.B.

Second, understanding the Founding-era view that church taxes were coerced tithes provides a new vantage point for evaluating the Court's contemporary jurisprudence. The modern notion that funding schemes must be "neutral" in their treatment of secular and religious beneficiaries is not a Founding-era concept. But rightly understood, the Founding-era evidence leads to a similar place.

Members of the Founding generation who opposed church taxes did not object to funding religious schools. On the contrary, foreshadowing cases like *Espinoza*, many of them argued that *refusing* to fund certain schools because of their religious activity was a form of discrimination, and their fellow citizens agreed.[35] On this view, government was not forbidden from providing funds to religious entities in pursuit of public goods. Rather, it was forbidden from taking religion into account—either by extracting funds solely to finance a recipient's religion, or by denying funds where the sole reason for doing so was disapproval of a recipient's religion. And under modern conditions, that principle leads to neutral treatment of religious and secular entities as a matter of course. Where the government's interest in funding rests on something other than financing religion for its own sake, it will necessarily treat religious and secular entities providing the relevant good evenhandedly.

At the same time, the historical evidence suggests some important correctives to current doctrine. Although the Court has moved away from the broadest versions of the no-aid theory, much of its jurisprudence remains focused on the *use* of money by beneficiaries. That focus has led even some of the Court's more recent cases to embrace nonsensical distinctions and unconvincing formalisms which have been quite rightly attacked.[36] The Founding-era evidence points the way out of the muddle. As an original matter, church taxes were analogous to coerced tithes because they provided money solely to support religious functions. In other words, they were created with the *aim* of financing religion and in fact did so, which is why the Founders viewed them as coerced tithes.[37] And that realization can provide significant guidance for modern doctrine. Where a program provides money for a nonreligious purpose like education or social services and is available without regard to religion, there is little reason to think it requires anything like a coerced tithe on the part of the citizenry. So long as a program does not treat the religious aspect of a beneficiary's conduct as an independent basis for funding, it is not an establishment of religion.

This Article is organized as follows. Part I begins the historical examination by considering the evidence from Virginia. It suggests that the

35 *See infra* notes 278–284, 315–330 and accompanying text.

36 *See infra* notes 425–431 and accompanying text (describing these problems).

37 *See infra* Part III.

argument equating church taxes with a coerced religious observance played an important role in the debate, and provides an explanation as to why proponents of religious liberty opposed church taxes but did not object to funding religious schools. This Part also explores the origins of the argument that church taxes were a coerced observance and explains how that argument limited the scope of objections to funding religion, even among the most radical supporters of religious liberty. Part II widens the historical frame to consider historical practice, especially evidence regarding funding for religious schools in disestablished states and by the federal government in the period surrounding the adoption of the Establishment Clause. Part III examines in more detail the nature of the claim that church taxes were a coerced religious observance, and especially the characteristics of those taxes that were of primary concern to advocates of religious freedom. Part IV summarizes the evidence and considers how it supports certain aspects of modern doctrine while calling others into question.

I. CHURCH TAXES AS COERCED TITHES

Since *Everson*, it has been widely assumed that Founding-era history supports the idea that the Establishment Clause forbids forcing citizens to fund someone else's religious activity, especially religious schools. And supporters of that theory have long viewed the history from Virginia as providing the strongest support for that conclusion. This Part questions that view. It first argues that the more important claim in Virginia was that church taxes were a coerced religious observance—a tithe—and that this insight helps explain why opponents of church taxes did not also oppose the state's repeated funding of religious schools. It continues by examining the origins of the argument that church taxes were a coerced religious offering and the ways this argument defined the scope of Founding-era complaints about paying for religion.

A. *The Debate in Virginia*

Prior to the American Revolution, many colonies imposed compulsory taxes to support a single established church. Virginia was among these, and mandated that eligible citizens within the commonwealth be taxed to support the Anglican Church in their parish.[38] In the Commonwealth's earliest laws, those taxes were

38 I use the term "Anglican" to refer to the Church of England in America before independence. I use the term "Protestant Episcopal Church" or "Episcopal Church" to refer to this denomination after independence.

known as "tithes," after the biblical mandate in which God commanded the Israelites to set aside one-tenth of their property for the temple priests.[39]

In establishing and maintaining its tithing system, Virginia's practices resembled those of England. But there were also some important differences. Most notably, unlike in England, where tithes ran with the land,[40] in Virginia they were computed by reference to tobacco and assigned on a per capita basis. The law set the salary for the local Anglican minister at 16,000 pounds of tobacco per year,[41] which was divided by the number of "tithables" within a parish—that is, all free males and slaves over the age of sixteen.[42] Typically, the required payment amounted to thirty to sixty pounds of tobacco per tithable each year—a modest sum—that was collected by the churchwardens.[43] Following American independence, however, things began to change.

In 1776, Virginia enacted a Declaration of Rights, which contained a provision declaring that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[44] That law officially ended things like discriminatory licensing requirements for preaching and compelled church attendance.[45] But it was notably silent on the question of church taxes. Defenders of establishment in Virginia quickly realized they could never garner public support for continuing taxes that funded only the Anglican church.[46] So instead, they coalesced around a compromise known as the general assessment. Like Virginia's earlier tithing regime, the assessment would have required all citizens to submit to a tax specifically designed to support religious worship by paying for clergy salaries and church buildings.

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39 *See* Act IX (1629), *reprinted in* 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS IN VIRGINIA 144 (1823) ("IT *is thought fitt* that all those that worke in the ground of what qualitie or condition soever, shall pay tithes to the ministers."); *see also Numbers* 18:21-24 (King James) ("And, behold, I have given the children of Levi all the tenth in Israel for an inheritance, for their service which they serve . . . . [T]he tithes of the children of Israel, which they offer *as* an heave offering unto the Lord, I have given to the Levites to inherit . . . .") For an account of the development of Virginia's tithing system, see JAMES BELL, THE IMPERIAL ORIGINS OF THE KING'S CHURCH IN EARLY AMERICA 1607–1783, at 75-76 (2008).

40 *See generally* ERIC J. EVANS, THE CONTENTIOUS TITHE 16-37 (1976) (describing the history and mechanics of England's tithing system).

41 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2152 (2003).

42 Arthur Pierce Middleton, *The Colonial Virginia Parish*, 40 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 431, 437-38 (1971).

43 *Id*. Failure to pay resulted in punishment by order of the county courts. *See* William H. Seiler, *The Anglican Parish Vestry in Colonial Virginia*, 22 J.S. HIST. 310, 311 (1956) (explaining this process).

44 *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 34-35 (1977); *see also* VA. CONST. of 1776, § 16, *reprinted in* 7 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3812, 3814 (1909).

45 Baptists and others were punished for preaching without a license prior to the Declaration of Rights. *See* McConnell, *supra* note 41, at 2164-65.

46 BUCKLEY, *supra* note 44, at 35.

But unlike the prior scheme, it would allow citizens to direct their money to the church of their choice.[47]

Jefferson was one of the first in Virginia to argue against calls for a general assessment. And in 1779, his supporters in the legislature introduced Jefferson's now-famous "Bill for Establishing Religious Freedom."[48] The preamble contained Jefferson's well-known argument about paying for religious activity one does not like:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern . . . .[49]

Numerous commentators have treated Jefferson's broad claim about paying for disagreeable religious opinions as articulating a widely held view that government was categorically forbidden from subsidizing religious activity.[50] But Jefferson's argument was hardly so influential. On the contrary, it suffered from at least two difficulties that seem to have rendered it largely powerless to sway public opinion.

The first difficulty was that Jefferson's argument was unresponsive to the actual controversy. Unlike Virginia's prior tithing regime, the whole point of a general assessment was that it maintained state support for religion *without* forcing anyone to "furnish contributions" for disagreeable views.[51] Instead, it allowed people choice over where their taxes would be directed.[52] That fact was not lost on Jefferson's contemporaries. According to one writer in the *Virginia Gazette*, Jefferson's argument about paying for disagreeable opinions was "attacking the old establishment of a particular church . . . and in that

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47 *Id.*

48 *Id.* at 47.

49 A Bill for Establishing Religious Freedom, *supra* note 18, at 545.

50 *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2286 (2020) (Breyer, J., dissenting) (arguing that Jefferson's statement reflected a well-considered Founding-era position that "the allocation of state aid" for religious schools and universities was prohibited); Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 868-71 (1995) (Souter, J., dissenting) (citing Jefferson's statement as proof that "[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money"); Marsh v. Chambers, 463 U.S. 783, 803 (1983) (Brennan, J., dissenting) (interpreting Jefferson's statement as demonstrating that the Establishment Clause is violated when "government requires individuals to support the practices of a faith with which they do not agree"); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 12-15 (1947) (citing Jefferson for a similar proposition).

51 *Accord* A Bill for Establishing Religious Freedom, *supra* note 18, at 545.

52 *See* Feldman, *Intellectual Origins*, *supra* note 20, at 383 (noting the general assessment "had been designed to avoid any charges of coercion of dissenters to pay taxes to support religious teachings with which they disagreed").

view is raising a ghost to frighten us with."[53] Moreover, although many in Virginia expressed concern about the possibility that Jews and Muslims would be forced to pay for Christian churches, that problem was easily solved by allowing those citizens to direct their money elsewhere.[54] And as a result, even George Washington admitted he did not see the problem with a general assessment, at least if the objection involved paying for disagreeable religion.[55] Jefferson's argument was stirring rhetoric. But it was simply not a convincing objection to the general assessment.

The second difficulty with Jefferson's claim arose from the substance of the argument itself. In making his assertion about paying for disagreeable religious opinions, Jefferson was focusing on a feature of traditional establishments that many found offensive. But taken to its natural conclusion, Jefferson's argument risked collapsing into absurdity. Proponents of the general assessment agreed that government could not dictate matters of conscience. But they insisted that construing that freedom as Jefferson had done—as a right to avoid paying for "opinions which [one] disbelieves and abhors"—called into question *any* form of taxation to support the public interest.[56] "[W]hy do you compel men to contribute to the salaries of your judges," asked Jefferson's critic in the *Gazette*, "and [then] submit, against their wills, to the decisions of the judges?"[57] He continued: "You must answer that these regulations are for the general good and therefore individuals must acquiesce: This answer is to me perfectly satisfactory, and . . . doth equally apply to religious regulations, judged by a majority to be for the general good."[58] For many in Jefferson's time—as for

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53 "A Social Christian," *To the Publick*, VA. GAZETTE, Sept. 18, 1779. During the assessment controversy others also agreed, asserting that the assessment imposed "not 'the smallest coercion'" since it allowed citizens choice in how their money was to be directed. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 145 (1986) (citation omitted).

54 For instance, the famous Virginia statesman Richard Henry Lee explained to Madison that he "fully agree[d] . . . that true freedom embraces the Mahomitan and the Gentoo as well as the Christian religion," and he hoped the assessment would reflect this more "liberal ground." *See* Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 18, at 65.

55 Washington wrote:

> Although, no man's sentiments are more opposed to *any kind* of restraint upon religious principles than mine are, yet I must confess, that I am not amongst the number of those, who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denomination of Christians, or declare themselves Jews, Mahometans, or otherwise, and thereby obtain proper relief.

Letter from George Washington to George Mason (Oct. 3, 1785), *reprinted in* 10 THE WRITINGS OF GEORGE WASHINGTON 1782-1785, at 506 (Worthington Chauncey Ford ed., 1891).

56 A Bill for Establishing Religious Freedom, *supra* note 18, at 545 (emphasis omitted).

57 "A Social Christian," *supra* note 53.

58 *Id.*

many today—the idea that people have a right to avoid subsidizing opinions they find objectionable was implausible.[59]

Jefferson's proposal to ban church taxes during the summer of 1779 was passed over without a vote.[60] And in subsequent years, calls for a general assessment gained significant popularity in Virginia, thanks in part to Patrick Henry, one of the state's most popular politicians. In 1784, Henry introduced a bill "Establishing a Provision for Teachers of the Christian Religion."[61] Unlike some prior proposals, Henry's bill did not aim to establish specific articles of faith or contain other more controversial measures.[62] Instead, it simply required that all citizens be taxed to support the Christian minister of their choice. Moreover, the act provided that those not wishing to contribute to any church simply declare their opposition to doing so and the money would be allocated to "seminaries of learning" within the Commonwealth.[63] It even provided a partial exemption for Quakers and Mennonites, since these groups did not employ professional clergy.[64]

Proponents of religious liberty like James Madison and Thomas Jefferson readily perceived the threat that Henry's bill posed. Indeed, Henry's popularity was so powerful that Jefferson wryly suggested, "What we have to do I think is devoutly to pray for his death."[65] But by the time Henry's bill was actually introduced, several developments leveled the playing field. First, Henry had been appointed governor, leaving defense of his bill to less able orators in the legislature.[66] But even more importantly, by the time Henry's bill came to a vote, defenders of religious liberty had begun to rely on a different set of arguments than Jefferson had been able to muster in 1779. And

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59 *See, e.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 180 (2018) (noting that "[r]equiring people to pay money that can be used for speech with which they disagree is utterly commonplace" and arguing that if Jefferson was right that demanding such payments is sinful, "it's sin and tyranny that are everywhere in modern government"); *see also* Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 252 (2019) ("Jefferson's ideas about religious freedom were not widely held at the Founding and are thus an unreliable guide to the First Amendment's original meaning.").

60 BUCKLEY, *supra* note 44, at 56.

61 A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in* BUCKLEY, *supra* note 44, at 188-89 [hereinafter A Bill Establishing a Provision for Teachers].

62 *See* CURRY, *supra* note 53, at 139-41 (contrasting Henry's bill with earlier general assessment proposals).

63 A Bill Establishing a Provision for Teachers, *supra* note 61, at 189. As Carl Esbeck has observed, "seminaries" meant "schools of general education." *See* Esbeck, *supra* note 23, at 79 n.121.

64 A Bill Establishing a Provision for Teachers, *supra* note 61, at 189. The exemption did not relieve Quakers and Mennonites from paying the tax, but provided that they were not required to use the funds to support a minister. Instead, they could use the money "in a manner which they shall think best calculated to promote their particular mode of worship." *See id.*

65 Letter from Thomas Jefferson to James Madison (Dec. 8, 1784), *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 18, at 65, 65 (emphasis and brackets omitted).

66 BUCKLEY, *supra* note 44, at 100.

foremost among them was the claim that the general assessment was impermissible because it forced citizens to engage in a state-mandated religious observance.

To understand the point, begin with the opening paragraphs of Madison's *Memorial and Remonstrance*. Madison began his *Remonstrance* by insisting that "Religion or the duty which we owe to our Creator and the manner of discharging it" must be "left to the conviction and conscience of every man."[67] But how did the assessment violate that principle, since it did not actually require anyone to support a church against his will? Madison insisted the answer was as follows:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him [i.e., to God]. . . . We maintain therefore that in matters of Religion, no man[']s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[68]

On a first read, the meaning of this passage seems obscure. But as a response to the arguments being made by the assessment's supporters, it makes more sense. Supporters of Henry's bill argued the general assessment was acceptable because unlike traditional establishments, it did not exalt a single church or "prescrib[e] a mode or form of worship to any."[69] Madison responded to this argument by rejecting its premise. Allowing people to direct payments to the church of their choice or to education did not require them to make a contribution to someone else's minister. But the problem ran deeper than that: church taxes were objectionable no matter how tolerant the scheme because they deprived citizens of the right to worship only as they wished—to "render to the Creator such homage and such only" as conscience directed. The assessment was an affront to freedom because it amounted to a coerced religious observance—a compelled act of "homage" to God, a tithe.

The idea that the assessment mandated a coerced tithe also illuminates other passages in the *Remonstrance*. Most importantly, it clarifies Madison's famous statement about three pence, the other piece of historical evidence often cited in support of a categorical no-aid theory. Claiming that the assessment was indistinguishable from other forms of establishment, Madison argued: "the same authority which can force a citizen to contribute three pence . . . for the support of any one establishment, may force him to

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67 MADISON, MEMORIAL, *supra* note 18, at 56 (internal quotation marks and citation omitted).

68 *Id*.

69 CURRY, *supra* note 53, at 138 (quoting a petition from inhabitants of Caroline County); *see also* Letter from Richard Henry Lee to James Madison, *supra* note 54, at 65 (contending the general assessment was permissible because the Declaration of Rights prohibited only "forcing modes of faith and forms of worship, [not] compelling contribution for the support of religion in general").

conform to any other establishment."[70] Many modern readers have interpreted Madison as arguing that citizens cannot be forced to pay even one penny that subsidizes someone else's religious practice.[71] But context makes that interpretation difficult to sustain: remember, the assessment did not actually require anyone to contribute to a repressive state church. Moreover, just a few years later, Madison advocated exempting Quakers from militia service without paying for a substitute—a policy that almost surely would have required taxpayers to pay more than 'three pence' to accommodate the Quaker religion.[72] Reading Madison's statement as an unqualified objection to subsidizing religion just does not fit the facts.

But consider another possibility. In the preceding paragraphs of his *Remonstrance*, Madison had argued that the assessment was unacceptable because it amounted to a coerced religious observance, a compelled act of "homage" to God. And in making his claim about three pence—that whoever can "force a citizen to contribute three pence . . . may force him to conform to any other establishment whatsoever"—Madison was simply extending that argument about coerced observance to its natural conclusion. By allowing the government to mandate a tithe, even one as trivial as requiring only three pence, the assessment implied that government could mandate *any* act of religious worship whatever. That claim makes much more sense given the actual features of Henry's bill. It also mirrors arguments by others in this period.

For instance, roughly ten years before Madison's *Remonstrance*, famed Baptist minister Isaac Backus argued that compulsory tithes exceeded the government's authority since "such communications are called *sacrifices to God* more than once in the New Testament," and coercing them implied that "civil rulers [may] appoint and enforce . . . any other sacrifice as well as this."[73] What is more, like Madison, Backus explicitly invoked the image of three pence to remind his readers of another "little tax" that stood for so much more:

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70 MADISON, MEMORIAL, *supra* note 18, at 57

71 *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (arguing that Madison's statement indicates that conscience is violated by "the expenditure of an identifiable three pence . . . for the support of a religious cause"); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 790-91 (1961) (Black, J., dissenting) (citing Madison's statement about three pence to conclude that "the First Amendment . . . deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against"); Everson v. Bd. of Educ., 330 U.S. 1, 40-41 (1947) (Rutledge, J., dissenting) (citing Madison's statement to support the view that the First Amendment "forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises").

72 *See* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 911-13 (2019) (describing Madison's position and the debate over the Uniform Militia Act in Congress).

73 Isaac Backus, Address to the Honorable Congress of the Massachusetts Province (Nov. 22, 1774), *reprinted in* ALVAH HOVEY, A MEMOIR OF THE LIFE AND TIMES OF THE REV. ISAAC BACKUS, A.M., at 215, 217 (1859).

> That which has made the greatest noise, is a tax of three pence a pound upon tea . . . . All America are alarmed at the [British] tea tax; though, if they please, they can avoid it by not buying the tea; but we have no such liberty. . . . [W]e are determined not to pay [the church tax] . . . because we dare not render that homage to any earthly power, which I and many of my brethren are fully convinced belongs only to God.[74]

The similarities between Backus's argument and Madison's are hard to ignore. Both invoked the language of "homage" to support an a fortiori argument against church taxes—if government could mandate this act of worship, so could it mandate any other. Moreover, both referenced three pence, not to argue that 'one penny aiding religion is too much,' but rather to argue that allowing government to require even a trivial religious observance was a precedent for tyranny, just like the tax that led to the Boston Tea Party had been.[75] And that same argument was made repeatedly by others throughout this period.[76] In all likelihood, Madison's claim about three pence was not a categorical objection to subsidizing someone else's religion. Rather, his claim was that the assessment mandated a coerced religious observance, which could be used to justify any other coerced observance the government might demand. The argument was about compelled worship, not compelled subsidy.

The same theory about coerced observance also animates Madison's argument about the assessment's impact on non-Christians—the one place if any where one would expect to find a categorical objection to paying for disagreeable religious activity. In its final form, Patrick Henry's bill would have allowed objectors to direct their money to schools within their county rather than a Christian church, though anyone choosing to do so would have their name "fixed up in the Court-house, there to remain for the inspection of all concerned."[77] Madison disapproved, but he did not focus his complaint on the idea that the law forced people to subsidize someone else's religious practice, even though many schools in Virginia were probably religious.[78] Instead, he asserted that the bill presumed an improper power on the part of

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74 *Id.* at 220-21.

75 The Tea Act imposed a tax of three pence per pound on tea imported to the American colonies. Colonists perceived the tax as an attempt to impose "parliamentary despotism" by symbolizing Britain's claimed power to tax American goods without allowing the colonists to be represented in Parliament. In protest, revolutionaries disguised as Native Americans dumped tea into the Boston Harbor on December 16, 1773. *See* BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS 79 (2010) (describing the politics that led to the Boston Tea Party).

76 *See, e.g.*, *infra* notes 221–223, 263–264, 349–351 and accompanying text.

77 A Bill Establishing a Provision for Teachers, *supra* note 61, at 189.

78 *See* Esbeck, *supra* note 23, at 79 (noting that, when the general assessment was being debated, many schools in Virginia were "affiliated with a church," though the bill did not specify whether its opt-out would lead to the creation of additional schools).

government to command a religious observance, and placed an additional burden on dissenters as a result. As Madison put it,

> [T]he Bill violates that equality which ought to be the basis of every law . . . . Whilst we assert for ourselves the freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny [others] an equal freedom . . . . If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered.[79]

Madison insisted that the assessment denied citizens the right "to embrace, to profess and to observe" religion only according to their own conscience—again, presumably because it demanded a coerced act of worship. He then asserted that, even if nonbelievers or others "abused" that freedom by refusing to tithe, the state simply had no business monitoring that choice or making it a matter of public record: "[t]o God . . . not to man, must an account of it be rendered." Admittedly, Madison's argument was not as clear as it might have been. But seemingly, his claim was the assessment violated "that equality which ought to be the basis of every law" because it required dissenters to publicly disclose their opposition to tithing in order to benefit from the opt-out for schools, with local persecution being the likely result.[80]

Madison was not alone in arguing that church tax schemes were objectionable because they amounted to a coerced religious observance. On the contrary, this claim was also a leading argument among his allies. For instance, one of the most popular petitions opposing the assessment employed language similar to Madison's, asserting that "[w]e never resigned to the control of government our right of . . . discharging our duty to our Creator."[81] Another petition, signed by four hundred Quakers, decried the assessment as "an Infringement of Religious and Civil Liberty Established by the Bill of Rights," clearly referring to the Commonwealth's new protection for the "free exercise of religion."[82] Likewise, another writer argued that

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79 MADISON, MEMORIAL, *supra* note 18, at 57.

80 For a similar interpretation of this part of Madison's *Remonstrance*, see Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim about the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991). Laycock contends that the bill's allowance to support schools would have required "[c]itizens desiring to support an unpopular religion . . . or no religion at all . . . to declare their unusual preference on the public record." *Id.* at 46.

81 Memorial of Convention at Bethel (Aug. 1785), *reprinted in* CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 236, 237 (1900); *see also* JOHN A. RAGOSTA, WELLSPRING OF LIBERTY 129-31 (2010) (noting the Bethel petition received "far more signatures" than Madison's *Remonstrance*); CURRY, *supra* note 53, at 145 (noting that the Bethel petition was "one of the most popular of the whole campaign").

82 *See* BUCKLEY, *supra* note 44, at 148 (quoting the petition); *see also* VA. CONST. of 1776, § 16, *reprinted in* 7 THORPE, *supra* note 44, at 3814. Madison also made this argument in the *Remonstrance*.

providing adequate support for one's minister was a "duty, established by an authority much higher than that of any Legislature on earth," and as such "entirely of a religious, or spiritual nature."[83]

Here it is important to be clear. In opposing the general assessment, Madison and his allies relied heavily on the idea that the assessment was a coerced religious observance. It was the lead argument in the *Remonstrance* and many other petitions.[84] But that is not to say this was their only argument.[85] Nor is it to say that supporters of religious freedom were unconcerned with taxes supporting someone else's religion. Beginning as early as 1776, Presbyterians in Virginia had argued it was unjust to compel people to "pay large taxes to support an Establishment, from which their consciences and principles oblige them to dissent," and others certainly agreed.[86] Complaints about paying for someone else's religion clearly had force. But the claim about coerced religious observance seems to have defined the scope of that objection in an important way. More specifically, it offers a plausible explanation as to why Madison and others who opposed church taxes did not oppose another practice that followed almost immediately after—the state's repeated funding of religious schools.

Following the debate over the general assessment, the legislature hastily reconsidered and passed Jefferson's "Bill for Establishing Religious Freedom" that it had originally rejected in 1779.[87] The bill included not only Jefferson's early statement about paying for disagreeable opinions, but also a crisp prohibition: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ."[88] Many modern readers have interpreted that law as categorically proscribing the use of

See MADISON, MEMORIAL, *supra* note 18, at 59 (arguing the assessment infringed on "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

83 "Virgilarius," *Messiurs Richards and Company*, VA. J. & ALEXANDRIA ADVERTISER, Mar. 31, 1785.

84 *See* JACK N. RAKOVE, BEYOND BELIEF, BEYOND CONSCIENCE 81 (2020) (observing that the opening paragraph of Madison's *Remonstrance* introducing this argument was "arguably its most important" section); *see also, e.g.*, *supra* notes 81–83 (noting the prevalence of this argument in other petitions).

85 *See, e.g.*, Esbeck, *supra* note 23, at 83-85 (providing a paragraph-by-paragraph description of several other important arguments in the *Remonstrance*).

86 Memorial of the Presbytery of Hanover, Virginia (Oct. 24, 1776), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE, at 269, 269 (Daniel L. Dreisbach & Mark David Hall eds., 2009). Likewise, during the assessment controversy itself, several petitions reiterated that objection notwithstanding the bill's tolerant design. *See* CURRY, *supra* note 53, at 145 (noting one petition's observation that "to compel Jews by law to support the Christian religion . . . is an arbitrary & impolitic usurpation which Christians ought to be ashamed of").

87 CURRY, *supra* note 53, at 146.

88 *See* An Act for Establishing Religious Freedom, *reprinted in* 12 HENING, *supra* note 39, at 84-86. Proposals were made to amend the preamble to Jefferson's bill by pro-establishment forces, leading advocates of religious freedom to cut off the debate. *See* BUCKLEY, *supra* note 44, 157-58.

government funds "for the direct support of religious activity."[89] But the evidence does not support that conclusion.

Throughout the revolutionary period and after, citizens who wished to acquire land in Virginia did so by obtaining a land patent based on surveys conducted by a designated local surveyor.[90] The process entailed mandatory fees, enforced by the sheriff, which were paid to the surveyor in exchange for his services.[91] Prior to the revolution, the Virginia legislature had declared that one-sixth of those fees were to be directed exclusively to the College of William and Mary, which was under Anglican control.[92] But after the assessment battle and the passage of Jefferson's bill, other religious schools in Virginia began to make requests to receive those funds. And very often, those requests were granted.

In 1787, for instance, the Virginia legislature ordered one-sixth of the surveyor fees collected in the district of Kentucky to be redirected to Transylvania Seminary, a Presbyterian school.[93] Like other schools chartered during this period, the seminary was created with the purpose of providing basic education to young people in the area.[94] But there is no doubt that "[p]rayers and singing of hymns and psalms" were "an essential part of [every] student's daily routine."[95] What is more, the legislature was almost surely aware of it.[96]

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89 *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 873 (1995) (Souter, J., dissenting); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033-34 (2017) (Sotomayor, J., dissenting) (reading Jefferson's bill as forbidding "the use of public funds to support core religious institutions").

90 *See* SARAH H. HUGHES, SURVEYORS AND STATESMEN: LAND MEASURING IN COLONIAL VIRGINIA 188 (1979) (providing a comprehensive account of Virginia's surveyor system).

91 *See* Act of Nov. 1738, ch. X, *reprinted in* 5 HENING, *supra* note 39, at 38, 50-54 (setting fees for county surveyors and providing that "the sheriff of any county . . . [may] make distress upon the slaves, goods and chattels . . . for surveiors, or other officers fees, refused or delayed to be paid").

92 *See* HERBERT BAXTER ADAMS, THE COLLEGE OF WILLIAM AND MARY 15 (1887).

93 *See* Act of Dec. 13, 1787, ch. XCVI, *reprinted in* 12 HENING, *supra* note 39, at 642.

94 *See* Act of May 1780, ch. XXI, *reprinted in* 10 HENING, *supra* note 39, at 287-88 (describing Transylvania Seminary as "a publick school," which accorded with the legislature's desire to "promote and encourage every design which may tend to the improvement of the mind and the diffusion of useful knowledge").

95 JOHN D. WRIGHT, JR., TRANSYLVANIA: TUTOR TO THE WEST 14 (1980).

96 In the months before Virginia allocated the fees to the seminary, a heated debate over the school's curriculum had erupted in the *Kentucky Gazette*. As one historian explains, critics of the school had been suggesting—and later wrote—that "religion be entirely removed from the curriculum" and that "the separation of church and state be applied to the seminary." WRIGHT, *supra* note 95, at 15. One of the school's trustees, a prominent lawyer and Presbyterian minister named Caleb Wallace, had actively assisted Jefferson and Madison in opposing Virginia's Anglican establishment. But in September 1787, he published a letter in the *Gazette* flatly rebuffing the school's critics. He insisted that while the school was ecumenical in its approach, it was also firmly committed to teaching basic Christian doctrine because its leaders believed that religion was essential to the moral formation of children. *Id.* at 14. Yet in spite of that clearly stated intention, the legislature

The practice of funding religious schools with a portion of local surveyor fees was not limited to Transylvania Seminary. Just a few weeks later, the legislature awarded an identical privilege to Randolph Academy, another Presbyterian school located in the far western frontier.[97] The same attitude also applied to religious colleges. Presbyterians in Hanover petitioned for a portion of local surveyor fees to support the College of Hampden-Sydney, but their request was passed over, perhaps because the college had already been awarded a land grant and a lottery privilege in prior years.[98] Likewise, although the College of William and Mary had eliminated its theology faculty shortly after the revolution,[99] it continued to receive its share of surveyor fees in most parts of the Commonwealth until 1819, all the while maintaining a connection to the newly-formed Protestant Episcopal Church.[100]

How could the practice of using surveyor fees to fund religious schools like these be consistent with Jefferson's bill and its ban on forcing citizens to support a religious ministry? One possibility—consistent with the broad no-aid theory—is that Virginians did not consider the fees to be genuinely coercive. After all, acquiring land was a voluntary choice. But that explanation is not very convincing. For one thing, traditional church taxes had also taxed voluntary conduct—the ownership of slaves in Virginia, and the ownership of real property in England.[101] Yet opponents of tithes and religious assessments did not view that fact as a reason to abandon their objections.[102] But even setting that point aside, there is also a more obvious problem. No matter its effect on those seeking land, the surveyor fee program contained an additional

chose to fund the seminary just a few months later. For more on Wallace's role in the struggle against religious establishment in Virginia, see Debra R. Neill, *The Disestablishment of Religion in Virginia: Dissenters, Individual Rights, and the Separation of Church and State*, 127 VA. MAG. HIST. & BIOGRAPHY 2, 8-10 (2019).

97 Act of Dec. 31, 1787, ch. XCV, *reprinted in* 12 HENING, *supra* note 39, at 638-41.

98 *See* RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 232 (1937); *see also* ALFRED J. MORRISON, THE COLLEGE OF HAMPDEN-SIDNEY: CALENDAR OF BOARD MINUTES 1776-1876, at 37 (1789) (1912) (documenting the college's request for surveyor fees). In 1794, the legislature awarded Hampden-Sydney an additional 1,200 acres of escheated land. *See* SADIE BELL, THE CHURCH, THE STATE, AND EDUCATION IN VIRGINIA 222 (1930).

99 *See* BUCKLEY, *supra* note 44, at 62-63.

100 ADAMS, *supra* note 92, at 15; *see also* G. MacLaren Brydon, *A List of Clergy of the Protestant Episcopal Church Ordained After the American Revolution*, 19 WM. & MARY COLL. Q. HIST. MAG. 397, 398 (1939) (noting that James Madison's second cousin, also named James Madison, was the first Episcopal bishop of Virginia and also the President of William and Mary during this period, and documenting "the large number of ministers [he] ordained").

101 *See supra* notes 40–43 and accompanying text.

102 This is not to say, however, that slavery was irrelevant to the politics of disestablishment. For an interesting exploration of this point, see Sarah Barringer Gordon, *The First Wall of Separation Between Church and State: Slavery and Disestablishment in Late-Eighteenth-Century Virginia*, 85 J.S. HIST. 61 (2019). For more on the relationship between coercion and church taxes, see *infra* notes 373–412 and accompanying text.

element of coercion: it required the surveyors themselves to surrender a portion of earnings allotted to them by law to pay for someone else's religious activity. It is hard to imagine that affront would have gone unnoticed, had Jefferson's bill actually imposed a general ban on subsidizing religion.

But consider the problem in light of Madison's *Remonstrance*. In fighting against the general assessment, Madison and others had argued the assessment amounted to a coerced religious observance. Yet Madison did not deny that the state had a rightful power to tax in service of the majority's preferences.[103] So what actually distinguished one kind of law from the other? Here, Madison's answer was that, unlike other kinds of legislative interests, "Religion [is] not within the cognizance of the Civil Government."[104] Legislation supporting things like education, public safety, and the like was permissible because it aimed to further goods that governments are created to protect: personal security, material prosperity, mutual convenience, and so on.[105] But laws like the general assessment—like other laws mandating specific acts of worship—were not actually keyed toward any of those goods. Instead, they provided funds specifically designed to finance religious worship, and in that way mandated a coerced tithe on the part of the citizenry.

Admittedly, Madison and others did not explain that point as clearly as they might have. But it closely tracks the explanations they did offer. Presbyterians from Hanover objected to "a general assessment for any religious purpose," but did not object to laws designed to secure the happiness, security, and property of citizens.[106] Baptists in Virginia said legislatures had no power "to proceed in matters of religion" and that "no human laws ought to be established for this purpose," but did not object to

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103 MADISON, MEMORIAL, *supra* note 18, at 56 (admitting that "no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority").

104 *Id.* at 58; *see also id.* at 56 ("We maintain therefore that in matters of Religion, no man[']s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.").

105 *See* Memorial of Convention at Bethel, *supra* note 81, at 237 (observing that "the end of civil government is security to the temporal liberty and property of mankind," but that "[r]eligion is altogether personal, and the right of exercising it unalienable; and it is not . . . resigned to the will of the society at large; and much less to the Legislature"). The theory that government is constituted to promote temporal rather than spiritual ends is traceable to John Locke. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 12-13 (Mark Goldie ed., 2010) (arguing that "[i]t is the Duty of the Civil Magistrate . . . to secure . . . the just Possession of . . . things belonging to this Life," but that "the whole Jurisdiction of the Magistrate reaches only to these civil Concernments," since "no man can so far abandon the care of his own Salvation"); *see also* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 255-56 (2017) (noting the influence of theories of alienable and unalienable rights at the Founding). For more on the use of Locke in arguments opposing church taxes, see *infra* notes 157–176 and accompanying text.

106 Memorial of the Presbytery of Hanover (June 3, 1777), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 86, at 272, 272-73; *see also* Memorial of Convention at Bethel, *supra* note 81, at 237 (arguing that the general assessment was "a departure from the proper line of legislation," and that making laws concerning religion was "an unwarrantable stretch of prerogative in the Legislature").

other laws involving taxing and spending, even when they benefited religious entities.[107] Madison and other defenders of religious liberty in Virginia clearly drew a distinction between ordinary taxation to support a public good and exceptional attempts to finance religion. The argument about coerced tithes explains that distinction.[108] And as such, it offers a reading of Jefferson's bill that fits much more comfortably with the facts.

In sending a portion of surveyor fees to schools like Transylvania Seminary, there is little doubt that people realized some of those funds would be used to pay for religious activity. But judged by the logic of Madison's argument, that kind of incidental effect is not what mattered. Rather, what mattered was that the obvious *aim* of the program—providing educational opportunity to a rural part of the state—was well within the state's authority. On this theory, no one argued the surveyor fee program violated Jefferson's bill because there was actually no conflict between them. Because the program was not a targeted effort to finance worship, it did not force anyone to "support" religion in a way the law actually prohibited.[109] And the other

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107 *See* ROBERT B. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 96 (1804) (documenting a resolution passed by the Baptist General Committee in Virginia); *see also infra* notes 114–120 and accompanying text (documenting Baptist support for various expenditures involving religious schools in Virginia). There is evidence of a similar attitude among Baptists located elsewhere in the country. *See infra* notes 202–212, 236–239, 245 and accompanying text.

108 This theory also explains why no one at the Founding viewed religious accommodations as analogous to church taxes, even when they involved incidental costs. Exemptions created to relieve burdens on religious practice served a public purpose–protecting free exercise–and thus were distinguishable from schemes created for the exclusive purpose of financing worship. For example, Presbyterians from Hanover reasoned:

> We never resigned to the control of government, our right of determining for ourselves . . . and acting agreeably to the convictions of reason and conscience, in discharging our duty to our Creator. And therefore, it would be an unwarrantable stretch of prerogative, in the Legislature, to make laws concerning it, except for protection.

See Memorial of the Presbytery of Hanover (Aug. 13, 1785), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 86, at 304, 305; *see also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808-25 (2005) (documenting debates over religious exemptions from militia service, including those that would have required the government to pay for a substitute, and noting the lack of arguments involving religious establishment). This is not to say, however, that the issue of establishment did not arise in relation to religious accommodations. For a discussion of the Founding-era evidence on that point, see Storslee, *supra* note 72, at 902-15.

109 This is not to say the virtues of religious education were universally accepted. As Justice Breyer pointed out in *Espinoza*, Jefferson founded the University of Virginia in part to counteract what he viewed as overweening clerical influence. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2286 (2020) (Breyer, J., dissenting). Yet even here, subsequent practice suggests that this view did not translate into a strict prohibition on subsidizing religion. In regulations approved by the Board of Visitors soon after the school's founding, Jefferson stated that students who chose to attend the University of Virginia while also attending any denominational school would be "entitled

evidence that we possess about the effect of Jefferson's bill also seems to support that conclusion.

With the defeat of the general assessment, religious dissenters in Virginia cast off the burden of church taxes. But there was still the question of how to deal with wealth the Anglican church had acquired over years of religious establishment. And here, by far the most important issue involved the glebes, or land set aside in each parish for the support of the Anglican minister.[110] These landholdings, which often contained the minister's residence and surrounding acreage, were typically farmed or rented out by the minister and were sometimes very valuable.[111] And although some glebes had been acquired through donations, many had been purchased or maintained with church taxes.[112]

Immediately following the passage of Jefferson's bill, Baptists in Virginia began lobbying the government to take control of the glebes, sell them, and apply the proceeds to "public use."[113] And eventually, the legislature obliged. In 1793, it authorized the sale of an Episcopal glebe in Botetourt parish.[114] The act provided that once the proceeds had been applied to parish debts, the remaining funds were to be paid to three schools. One of those schools was Liberty Hall, a Presbyterian institution providing general secondary education that later became Washington and Lee University.[115] As with Transylvania Seminary, there is no doubt that the curriculum at Liberty Hall included school-sponsored religious worship.[116] And there is also little doubt that the glebe at Botetourt had been purchased through taxes extracted under the old establishment.[117] Yet the legislature nonetheless provided funds to the

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to the same rights and privileges" as any other student—a policy that would have effectively supplemented the curriculum at neighboring religious schools using state funds. *See* Thomas Jefferson, Regulations of October 4, 1824, *reprinted in* THE COMPLETE JEFFERSON 1106, 1110 (Saul K. Padover ed., 1943).

110 *See* McConnell, *supra* note 41, at 2148 (explaining the glebe system).

111 *See* Thomas E. Buckley, *Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786–1801*, 45 WM. & MARY Q. 33, 34 (1988).

112 *Id.*

113 *Id.* at 38; *see also* SEMPLE, supra note 107, at 73 (documenting a resolution by the Baptist General Committee that the "public property which is . . . vested in the Protestant Episcopal Church be sold, and the money applied to public use").

114 Act of Oct. 1793, ch. 70, *reprinted in* 1 THE STATUTES AT LARGE OF VIRGINIA, 1792–1806, at 274-76 (Samuel Shepherd ed., 1835) [hereinafter STATUTES AT LARGE].

115 *Id.* at 275; *see also* GABEL, *supra* note 98, at 231 (noting Liberty Hall's Presbyterian affiliation and its later connection to Washington and Lee University). Liberty Hall was not chartered as a college until 1812. *See* HENRY HOWE, HISTORICAL COLLECTIONS OF VIRGINIA 449 (1845) (noting Liberty Hall's eventual incorporation as a college).

116 *See* BELL, *supra* note 98, at 229 (noting that the school's 1782 charter stated that each day should be "opened with prayer . . . after which every student was to apply himself silently to his task, and never to go out without permission until dismissed with prayer in the evening").

117 Act of Oct. 1793, ch. 70, *reprinted in* 1 STATUTES AT LARGE, *supra* note 114, at 274, 275 (noting that the land had been "purchased by the vestry of the . . . parish . . . and by law appropriated as a glebe").

school, "to the use of the same . . . in such proportions as [those facilitating the sale] shall think just."[118]

Likewise, when the legislature definitively resolved the glebe issue a few years later, it followed the same pattern. In 1802, it passed a law providing that local officials could appropriate money from glebe sales "either to the poor . . . or to any other objects."[119] But consistent with Madison's *Remonstrance* and the statements of other supporters of religious liberty, the law stated that officials could not "authorize an appropriation to any religious purpose."[120] Again, the most straightforward reading of that limitation seems to be that providing funds exclusively to support religious worship was prohibited, but providing money for education was not, even if the latter might also include something religious.

Since *Everson*, many have assumed that the history of disestablishment in Virginia supports the theory that the Constitution prohibits government from allowing the funds of unwilling taxpayers to be used for religion, especially religious schools. But on further inspection, the evidence points toward a different conclusion. Although proponents of disestablishment in Virginia clearly believed that taxing citizens with the sole aim of financing religion was prohibited, they did not object to providing taxpayer funds to religious schools. We do not know for certain why that was so. But a plausible explanation flows from one of their main objections to church taxes. Programs like the general assessment specifically allocated the property of citizens solely to support religious worship, and as such, could fairly be understood as mandating a tithe. But the same thing was not true when public funds were provided in pursuit of some other good, even if beneficiaries might use some of the funds for religion.

In considering the meaning of the Establishment Clause, the Supreme Court has long privileged the history from Virginia and the views of James Madison in particular.[121] And that history is surely important.[122] But it is also only part of the story. The claim that church taxes were a coerced religious observance was originally put forward by Quakers and modified by Baptists

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118 *Id.*

119 *See* Act of Dec. 1801, ch. 5, *reprinted in* 2 STATUTES AT LARGE, *supra* note 114, at 314, 314-16.

120 *Id.* at 315-16.

121 *See, e.g.*, Hosanna Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012) (giving special weight to Madison's views and noting his role as "the leading architect of the religion clauses of the First Amendment" (citations and internal quotation marks omitted)); Ariz. Christian Tuition Org. v. Winn, 563 U.S. 125, 140-42 (2011) (placing special emphasis on Madison's views and the history from Virginia generally).

122 *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 895 (1986) (noting that the debate in Virginia contained the most fully developed arguments, involved some of the era's most prominent statesmen, and appears to have been known and discussed by at least some others in the Founding period).

in New England before spreading throughout America. That story sheds additional light on why government funding of religious schools seems to have been of little concern at the Founding, even to those most concerned with religious freedom.

B. *The Origins of the Argument*

Arguments against church taxes in America originated with Quakers and Baptists. These groups were arguably the most vigorous advocates of religious liberty during the Founding period.[123] Yet as the evidence below indicates, they did not object to funding religious schools either.[124] Understanding the development of their argument that church taxes were a coerced religious observance provides an explanation for that position, and one that is consistent with their actual practice.

The story begins in Massachusetts. In 1692, the Commonwealth passed a law requiring the inhabitants of every town (with the exception of Boston) to provide for an "able, learned, [and] orthodox minister."[125] That scheme differed from church tax schemes that developed in other regions. Unlike places like Virginia that provided exclusive colony-wide support for the Anglican Church, Massachusetts's system stressed local autonomy: eligible citizens were required to pay church taxes, but majorities in each town decided which church was to receive them.[126] However, because Puritans were the dominant religious group in Massachusetts, the result in nearly all townships was an exclusive Puritan establishment.[127] But that began to change as pockets of dissent in the Commonwealth grew.

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123 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1439 (1990) ("The greatest support for disestablishment and free exercise . . . came from evangelical Protestant denominations, especially Baptists and Quakers . . . ."); *see also* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 344 (1996) (noting the particular prominence of Baptists and Quakers in Founding-era struggles for religious liberty).

124 *See infra* notes 193–212 and accompanying text.

125 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1833, at 124 (1971). Boston was exempt to maintain the tradition of voluntary support that had always existed there. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 17 (2d rev. ed. 1994).

126 1 MCLOUGHLIN, *supra* note 125, at 117. For a more extended discussion of the mechanics of Massachusetts's church tax system, see John Witte Jr. & Justin Latterell, *The Last American Establishment: Massachusetts, 1780–1833*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES 1776-1833, at 399, 407-08 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) [hereinafter CHURCH-STATE RELATIONS].

127 I use the term "Puritans" to describe the original Calvinist settlers of the Massachusetts Bay Colony, and the word "Congregationalists" to describe the same denomination after 1720.

In 1698, Quakers who formed majorities in the Massachusetts townships of Dartmouth and Tiverton refused to select a minister or pay the tax.[128] The Quaker resistance in these townships was by all accounts the earliest large-scale effort to resist church taxes in America.[129] To modern readers, however, the obstinacy of these dissenters can seem puzzling. After all, "government does all sorts of things with tax dollars that run contrary to the desires and beliefs of individual citizens."[130] But the wellspring of Quaker resistance was hardly so abstract.

Quakerism began in England in the 1650s as part of the most radical wing of the Protestant Reformation. Like other Protestants, Quakers sought a return to the pure Christianity of the New Testament. Unlike others, however, they believed that the authority of the Bible was on an equal plane with the "inner light"—the presence of Christ in each individual.[131] And as a result of those more radical views, Quakers began to resist certain legal requirements—they refused to comply with the forms of worship required by the Church of England, and also refused to swear oaths of allegiance to the King.[132] Both practices resulted in significant persecution, and Quakers were frequently subject to whippings, beatings, or imprisonment during the mid-seventeenth century.[133] But perhaps the most disturbing aspect of the Quaker position to the English authorities was their refusal to pay tithes to the established church.

The most common argument among Quakers was that tithes were inconsistent with the freedom of the Gospel. More specifically, they argued that although God had originally commanded the Jews to make tithes as a sacrifice, Christ had abolished such sacrifices and the "ceremonial law" that commanded them. As George Fox, the founder of Quakerism, wrote in one early tract,

> Now all the tythes by the law of God and his commandment, the children of Israel were to pay to the Levites [i.e., the temple priests] . . . . But Christ

128 1 MCLOUGHLIN, *supra* note 125, at 170-81; *see also id.* at 181 (explaining that several Quakers were imprisoned over the matter and that others met the same fate in subsequent years).

129 There were, however, some earlier isolated protests. *See id.* at 117-118 (describing instances of small-scale opposition to church taxes in 1643 and 1646).

130 Feldman, *Intellectual Origins*, *supra* note 20, at 421.

131 *See* THOMAS G. SANDERS, PROTESTANT CONCEPTS OF CHURCH AND STATE 115-19 (1964).

132 *See* HUGH BARBOUR & J. WILLIAM FROST, THE QUAKERS 41-43 (1988) (noting these Quaker practices).

133 *See* CHARLES FREDERICK HOLDER, THE QUAKERS IN GREAT BRITAIN AND AMERICA 152-3 (1913) (estimating that by 1662 no fewer than four thousand Quakers had been jailed in England).

> Jesus . . . has ended all the offerings, by offering up his own body, to wit, the offering of tythes, and all other offerings . . . .[134]

On this view, tithes were a sacrifice under the old law that Christ had revoked. And partially for this reason, Quakers did not employ professional clergy. Instead, they insisted that anyone ministering to the community be supported by their own labor or by gifts of any amount from the congregation.[135]

The Quaker view on tithes had two important implications for their views on church and state. First, because Quakers believed Christ had abolished tithes, they insisted that they were obliged to *disobey* laws requiring them. As one pamphleteer put it: "[I]t is a sin to pay Tythes now . . . . [I]f a man conscientiously refuses to pay them . . . [he] will be found guiltless in the sight of the Lord."[136] But there was also a second, more important implication. Because tithes were sacrifices that had been discontinued by Christ, any attempt on the part of government to require them was an attempt to institute a mode of worship that God himself had annulled. For instance, one of the earliest Quaker tracts on the subject, Francis Howgill's *The Great Case of Tythes and Forced Maintenance*, reasoned: "If God disannulled his own command . . . for the payment of Tithes, who or what is man that he should make a Law, as well to contradict . . . his Command[?]"[137] Another Quaker put it even more forcefully:

> Now for Men to make a Law to compel the Payment of Tithes, when the *Levitical* Law, whereof Tithes were a Part, is abrogated by the Law of God, what is it but to act in direct repugnancy to his Law, and to set up the Will of Man in Opposition to the Will of God?[138]

For Quakers, government possessed no rightful authority to command tithes of anyone, because to do so was to command a way of worship directly contrary to God's direction.

The Quaker position on tithes attracted little support in England. Although some radicals like John Milton agreed with Quakers that tithes had

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134 GEORGE FOX, *The Beginning of Tythes in the Law and Ending of Tythes in the Gospel*, *in* 5 THE WORKS OF GEORGE FOX 259 (1831). For the earliest source claiming that tithes were a religious observance abrogated by Christ, see JOHN SELDEN, THE HISTORIE OF TITHES 460 (1618).

135 *See* J. WILLIAM FROST, THE QUAKER FAMILY IN COLONIAL AMERICA 3 (1973) ("Quakerism was a lay religion with no professional religious leaders or paid clergy.").

136 THOMAS ELLWOOD, THE FOUNDATION OF TYTHES SHAKEN 350 (2d ed. 1720) (emphasis omitted).

137 FRANCIS HOWGILL, THE GREAT CASE OF TYTHES AND FORCED MAINTENANCE ONCE MORE REVIEWED 49 (1665).

138 RICHARD CLARIDGE, *An Answer to a Letter About Tithes* (1710), *in* THE LIFE AND POSTHUMOUS WORKS OF RICHARD CLARIDGE 269, 274 (Joseph Besse ed., 1726).

been abrogated by the New Testament,[139] most Protestants—and especially Anglicans—did not. Rather, they concluded that although Christ had ended the ceremonies of the Jewish law, compulsory tithes in some form were appropriate under the "moral law" that continued even after Christ.[140] And generally speaking, that was also the view of the Puritans in New England. In 1703, influential Puritan minister Increase Mather insisted that ministers were due an "Honourable Maintenance," since they are "set apart for the especial Service of God."[141] And "[i]f . . . People are unwilling to do what Justice and Reason calls for, the Magistrate is to see them doe their duty in this matter."[142] Yet neither the Quaker position nor the Puritan response accurately described the other group in early America most concerned with church taxes, and the group whose views would prove the most influential.

Baptists predated the Quakers as America's original religious radicals. Beginning as a loose movement of individuals in the mid-1640s, they established their first church in Massachusetts in 1665 and continued to grow in numbers as the century progressed.[143] Their distinctive belief, of course, was a rejection of infant baptism—a point on which they vigorously disagreed with the Puritans and suffered whippings, fines, and other punishments as a result.[144] But from the beginning they also resisted church taxes.[145] And in developing their arguments, no one was more important than a young minister named Isaac Backus.

The son of a wealthy Connecticut farmer, Backus had undergone a dramatic conversion while mowing his fields.[146] The experience eventually led

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139 *See* JOHN MILTON, CONSIDERATIONS TOUCHING THE LIKELIEST MEANS TO REMOVE HIRELINGS OUT OF THE CHURCH 6 (Aberdeen 1839) (1659) (arguing that "tithes were ceremonial," and that whoever "by that law brings tithes into the gospel, of necessity brings in withal a sacrifice, and an altar . . . never thought on in the first christian times [and] by an ancient[] corruption, were brought back").

140 For example, Richard Hooker wrote:

> Albeit therefore we be now free from the Law of Moses and consequently not thereby bound to the payment of Tithes, yet because nature has taught men to honour God with their substance, and Scripture has left us an example of that particular proportion which for moral considerations has been thought fittest . . . it seems in these days a question altogether vain and superfluous whether Tithes be a matter of divine right . . . .

RICHARD HOOKER, 2 OF THE LAWS OF ECCLESIASTICAL POLITY, bk. V, at 306 (Arthur Stephen McGrade ed., 2013).

141 INCREASE MATHER, A DISCOURSE CONCERNING THE MAINTENANCE DUE TO THOSE THAT PREACH THE GOSPEL 9-10 (1706).

142 *Id.* at 59.

143 CURRY, *supra* note 53 at 25; 1 MCLOUGHLIN, *supra* note 125, at 9.

144 *See* 1 MCLOUGHLIN, *supra* note 125, at 16-21 (describing various instances of persecution).

145 During the 1690s, Baptists cooperated with Quakers in their protest at Dartmouth and Tiverton and also mounted an independent resistance in nearby townships. *See id.* at 128-62.

146 In describing his conversion, Backus reported that "I saw clearly that [my life] had been filled up with sin. [Yet] I was enabled by divine light to see the perfect righteousness of Christ and

him into the ministry in dissenting churches throughout Massachusetts.[147] In that role, he encountered the oppressiveness of the church taxes regime firsthand and became a leading opponent of the practice.[148] And in an important early tract responding to Congregationalist minister Joseph Fish—which Backus defiantly titled *A Fish Caught in His Own Net*—he offered a justification for that position which would become exceedingly popular in many other places.

Backus began his discussion by acknowledging some common arguments in favor of church taxes—that support for ministers was commanded by Scripture, that laws requiring them were consistent with natural justice, and that magistrates were obliged to act as "nursing fathers" to the church.[149] Backus conceded that there was some truth to those arguments. It was true that Christians were obliged by both the Old and New Testament to offer tithes: "The priests were supported of old out of the offerings of the people; even so hath the Lord ordained concerning his ministers now."[150] According to Backus, however, supporters of church taxes like Fish had overlooked an equally important point:

> [T]he constant language of the divine direction was that every person of all ranks should *bring his offering* which God had prescribed . . . . [Y]et . . . I never could see any proof from the Bible of any allowance of the use of *coercive* power to *compel* any to bring their offering . . . . The *manner* as well as *matter* of this duty is *ordained* by [God] and he will not be *mocked* . . . . The Lord says, *I love judgment; I hate robbery for burnt-offering*.[151]

Unlike the Quakers, Backus agreed with most Protestants that providing for one's ministers was commanded by Scripture. It was an "offering" to God, a rightful "performance of worship."[152] Yet because supporting one's minister was in fact an act of worship, the "manner as well as the matter of this duty"

. . . my soul was drawn forth to trust in Him for salvation." *See* HOVEY, *supra* note 73, at 39; *see also* William G. McLoughlin, *Introduction to* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789, at 1, 2-3 (William G. McLoughlin ed., 1968) [hereinafter BACKUS ON CHURCH] (describing Backus's conversion).

147 *See* HOVEY, *supra* note 73, at 82-93 (recounting Backus's eventual rejection of infant Baptism and his own rebaptism).

148 At Backus's first church, several of his congregants had their goods seized and auctioned after refusing to pay the tax; another was jailed for more than a year. Backus also reported that he himself was arrested for refusing to pay and would have gone to prison, but a sympathetic observer intervened and paid the tax on his behalf. *See* McLoughlin, *supra* note 146, at 6-12.

149 ISAAC BACKUS, A FISH CAUGHT IN HIS OWN NET (1768), *reprinted in* BACKUS ON CHURCH, *supra* note 146, at 171, 237-38 (emphasis omitted).

150 *Id.* at 240 (emphasis omitted).

151 *Id.* at 238-40; *see also Isaiah* 61:8 (King James) ("For I the Lord love judgment, I hate robbery for burnt offering; and I will direct their work in truth, and I will make an everlasting covenant with them.").

152 BACKUS, *supra* note 149, at 238 (emphasis omitted).

were important.[153] Such worship must be, as Backus put it later in the tract, offered by a "willing heart" rather than extracted by "man's authority."[154] The problem with church taxes was not that they required the populace to make a heretical offering as the Quakers had thought. Nor was it that such taxes forced citizens to pay for someone else's ministers, though that surely made things worse. The problem was that, by compelling an act of worship—even one endorsed by Scripture—church taxes presumed that the magistrate had power to command what God himself had said could only be offered freely.[155] And in the following years, Backus and other Baptists linked their theological arguments to themes and rhetoric that were gaining wider acceptance throughout America.

One such example occurred in another early tract Backus wrote entitled *A Letter to a Gentleman in the Massachusetts General Assembly, Concerning Taxes to Support Religious Worship*. Writing under the pseudonym "A Countryman," Backus began by reciting the now-standard Baptist argument against church taxes. Although "particular Offerings . . . were enjoined upon every Man . . . for the Support of Worship," nothing in Scripture endorsed "any Allowance, much more Commandment, for the use of any Force to collect it."[156] Having made this point, however, Backus turned from the Bible to another venerable source—John Locke's *Letter Concerning Toleration*. In response to the argument that voluntary offerings would destroy religion, Backus quoted Locke's well-known claim that "[t]he Care of Souls cannot belong to the civil Magistrate, because . . . true and saving Religion consists" not in "outward Force," but rather in "the inward Persuasion of the Mind."[157] Locke as well as the Bible demonstrated that church taxes were prohibited by confirming that

153 *Id.* at 239 (emphasis omitted).

154 *Id.* at 238-39 (citation and emphasis omitted). The phrase "willing heart" is drawn from the Bible. *See Exodus* 35:5 (King James) ("Take ye from among you an offering unto the Lord: whosoever *is* of a willing heart, let him bring it, an offering of the Lord; gold, and silver, and brass . . . .").

155 Backus was one of the first Baptists in America to argue that church taxes were objectionable because they attempted to coerce an otherwise proper religious observance. But notably, a version of the same idea had been offered roughly a century earlier by none other than Roger Williams, New England's original religious dissenter. Writing in 1652 in a tract entitled *The Hirelings Ministry None of Christs*, Williams argued: "Let the Townes, the Parishes, and divisions of people . . . be undisturbed by any civil Sword, from their consciences and worships . . . and let their maintenance [for clergy] be by Tenths and Fifths, or how they freely please. Only let it be their soul[']s choice and no inforcing Sword . . . ." *See* ROGER WILLIAMS, THE HIRELINGS MINISTRY NONE OF CHRISTS, OR, A DISCOURSE TOUCHING THE PROPAGATING THE GOSPEL OF CHRIST JESUS ¶ 7 (1652) (emphasis omitted).

156 ISAAC BACKUS, A LETTER TO A GENTLEMAN IN THE MASSACHUSETTS GENERAL ASSEMBLY, CONCERNING TAXES TO SUPPORT RELIGIOUS WORSHIP 4 (1771).

157 *Id.* at 6. For the original quote, see JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* LOCKE, *supra* note 105, at 13.

Christ's kingdom and the worship it demanded "do[] not receive [their] support from earthly Power, but from Truth."[158]

The same kind of argument also appears in Backus's now-famous tract *An Appeal to the Public for Religious Liberty*. Written in Backus's capacity as "Agent for the Baptists in New England," the tract has been called "the most complete and well-rounded exposition of the Baptist principles of church and state in the eighteenth century."[159] It began by reciting familiar ideas drawn from Locke: "[I]t appears to us that the true difference and exact limits between ecclesiastical and civil governments is this, That the church is armed with light and truth . . . while the state is armed with the sword . . . ."[160] The tract went on to claim that Massachusetts's church tax system improperly "blended together" those governments, producing horrific suffering among Baptists and others as a result.[161] It concluded by bringing both themes together in a crescendo of revolutionary proportions:

> Therefore the whole matter very much turns upon this point, viz., Whether our *civil* legislature are in truth our representatives in *religious* affairs or not? As God has always claimed it as his prerogative to appoint who shall be his ministers and how they shall be supported, so under the Gospel the people's communications to Christ's ministers and members are called *sacrifices* with which *God is well pleased* . . . . And what government on earth ever had, or ever can have, any power to make or execute any laws to appoint and enforce *sacrifices to God*![162]

It is worth noting the similarities between this argument and later attacks on church taxes like Madison's *Memorial and Remonstrance*. Like the New England Baptists, Madison began his *Remonstrance* by invoking the Lockean insight that religion "can be directed only by reason and conviction, not by force or violence."[163] And because that was so, he reasoned, attempts by the legislature to mandate church taxes "exceed[ed] . . . their authority," by coercing an act of worship that could only be offered freely: "It is the duty of every man to render to the Creator such homage *and such only* as he believes

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158 BACKUS, *supra* note 156, at 5 (emphasis omitted).

159 McLoughlin, *supra* note 146, at 41-42.

160 ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, AGAINST THE OPPRESSION OF THE PRESENT DAY (1773), *in* BACKUS ON CHURCH, *supra* note 146, at 308, 315 (emphasis omitted).

161 *Id.* at 316, 325-30.

162 *Id.* at 332. In making this point, Backus cited two biblical passages. *See Philippians* 4:18 (King James) ("But I have all, and abound: I am full, having received of Epaphroditus the things *which were sent* from you, an odour of a sweet smell, a sacrifice acceptable, wellpleasing to God."); *Hebrews* 13:16-18 (King James) ("But to do good and to communicate forget not: for with such sacrifices God is well pleased.").

163 MADISON, MEMORIAL, *supra* note 18, at 56 (quoting VA. CONST. of 1776, § 16, *reprinted in* 7 THORPE, *supra* note 44, at 3814).

to be acceptable to [H]im."[164] To be sure, Madison chose the genteel language of "homage" rather than the gritty biblical term "sacrifice" in keeping with his more rationalist sensibilities. But the underlying point was the same. Church taxes were unacceptable because they amounted to a coerced religious observance that no legislature could rightly command. And that idea arose directly from a marriage of Locke's arguments about the essence of religion and the power of the magistrate and Baptist convictions about the voluntary nature of tithes and offerings.

The use of Locke by Baptists and others also underscores another important point. In tracing the intellectual history of the Establishment Clause, several scholars—most notably Noah Feldman—have emphasized the importance of John Locke in the development of arguments against church taxes.[165] And as a general matter, that emphasis is well-taken. Locke's ideas were exceedingly popular during this period, and played a key role in supplementing Baptist arguments against church taxes and pushing those arguments into the mainstream.[166] But it is misleading to assert without qualifier, as Feldman does, that the Founding generation's reliance on Locke yielded a widespread belief that "conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."[167] For one thing, Baptists and other religious dissenters did not actually object to funding other people's religious schools, nor did they object to requiring people to fund theirs.[168] But even more basically, the fact is that claims about paying for disagreeable religion were not ultimately controlling in arguments against church taxes.

To understand the point, consider just one example from the writings of Baptist minister John Leland, an influential figure in both New England and Virginia whom Feldman describes as "follow[ing] straightforwardly Lockean lines."[169] In a tract entitled *The Rights of Conscience Inalienable*, Leland pointed out that Connecticut's church tax scheme, which was similar to Massachusetts's in every major respect, was offensive because it failed to

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164 *Id.* (emphasis added).

165 *See* Feldman, *Intellectual Origins*, *supra* note 20, at 348-51 (tracing the origins of the Establishment Clause and identifying Locke as one of the main sources of arguments against church taxes).

166 *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35-36 (1992) (identifying John Locke along with *Cato's Letters* as providing "the most authoritative statement of the nature of political liberty" during the Founding period).

167 Feldman, *Intellectual Origins*, *supra* note 20, at 351.

168 *See supra* notes 113–120 and accompanying text (documenting Baptist support for funding religious schools in Virginia); *see also infra* notes 202–212, 236–239, 245, 369–372 and accompanying text (documenting Baptist support for government funding of their own schools).

169 Feldman, *Intellectual Origins*, *supra* note 20, at 387.

provide exemptions for "heathens, deists, . . . Jews" and others.[170] "Is it the duty of a Jew to support the religion of Jesus Christ, when he really believes that he was an imposter?" asked Leland, adding that "[t]hese things want [of] better confirmation."[171] Yet, Leland continued, that was not actually the heart of the matter. Even "[i]f we suppose that it is the duty of all . . . to support the Protestant Christian religion," there was a more basic problem: "[H]ow comes it to pass, that human legislatures have a right to force [people] so to do?"[172] Leland elaborated:

> I now call for an instance, where Jesus Christ . . . ever gave orders to, or intimated, that the civil powers on earth ought to force people to observe the rules and doctrine of the gospel. . . . That it is the duty of men . . . to communicate to him that teaches, is beyond controversy; but that it is the province of the civil law to force them to do so, is denied.[173]

By acknowledging that "it is the duty of all men . . . to communicate to him that teaches," Leland was adopting the usual Baptist line that paying ministers with the aim of supporting the Gospel was an act of worship—a "sacrifice[] with which the Lord is well pleased."[174] He then asserted, drawing on Lockean themes, that commanding such an observance was not within the magistrate's authority: "[T]hat it is the province of civil law to force them to do so, is denied."[175] Of course, coercing Jews or other non-Christians to offer that kind of sacrifice was even more objectionable—a "piece of Oppression that would make even a moral Heathen blush" as Isaac Backus put it.[176] But the objection about paying for disagreeable religion was nested within the claim about coerced tithes. Government had no authority to command payments solely to finance religion, either one's own or someone else's. But that was not because citizens possessed a freestanding right to avoid subsidizing religious activity. Rather, it was because church taxes purported to authorize what Locke had proven magistrates lacked power to do—namely, to require a religious observance by force. And indeed, understanding that

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170 JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE, AND THEREFORE, RELIGIOUS OPINIONS NOT COGNIZABLE BY LAW (1791), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 177, 187 (1845).

171 *Id.*

172 *Id.*

173 *Id.*

174 *See* John Leland, *Which has Done the Most Mischief in the World, the Kings-Evil or Priest-Craft?*, *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 170, at 484, 494 ("To honor the Lord with our substance . . . and communicate all good things to those who teach the word, are sacrifices with which the Lord is well pleased.").

175 LELAND, *supra* note 170, at 187.

176 BACKUS, *supra* note 156, at 6 (emphasis omitted).

point is crucial for understanding two aspects of the history that have often been a source of confusion.

The first involves the relationship between church taxes and conscience. In arguing against church taxes, proponents of religious liberty frequently contended that commanding such taxes infringed on liberty of conscience.[177] But it is important to realize that for these people, that did not mean conscience was violated anytime government subsidized religion—the idea animating many invocations of the concept today.[178] Rather, church taxes infringed on conscience because they coerced a religious duty—an act of worship—instead of leaving the matter to each citizen's private judgment. According to Backus, "[T]he free communications of our *carnal things* to Christ's ministers . . . concerns the exercise of a good conscience . . . as prayer and praise do, for they are both called *sacrifices*."[179] And indeed, that is why Madison and others frequently claimed that church taxes were not just improper religious establishments, but also inconsistent with free exercise.[180] By requiring tithes on the part of the citizenry, church taxes commanded an act of worship contrary to conscience (violating the right of free exercise), while also implying that government had power to control conscience and coerce such acts (echoing the oppressiveness of prior religious establishments).

The second point—and perhaps the more important one—concerns the scope of Founding-era objections to paying for religion. In defending their religious establishments, critics in New England frequently accused Baptists and Quakers of advocating anarchy. According to one writer, complaints against church taxes applied "with equal force against paying any tax for the support of civil government," and many others agreed.[181] That same

177 *See* Feldman, *Intellectual Origins*, *supra* note 20, at 351 (noting that complaints about church taxes sounding in liberty of conscience "achieved broad acceptance").

178 *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 616 (2007) (Kennedy, J., concurring) (arguing 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"); Marsh v. Chambers, 463 U.S. 783, 803 (1983) (Brennan, J., dissenting) (finding that "[t]he right to conscience, in the religious sphere" is "implicated when the government requires individuals to support the practices of a faith with which they do not agree").

179 BACKUS, *supra* note 160, at 342. For an illuminating discussion of the ways that Backus and other Founding-era writers equated liberty of conscience with a "right of private judgment," see NICHOLAS P. MILLER, THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT 91-113 (2012).

180 *See* MADISON, MEMORIAL, *supra* note 18, at 59-60 (arguing that the assessment infringed on "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience"). For additional examples of this same argument, see *supra* notes 81–83 and accompanying text.

181 "Irenaeus," *Messrs. Draper and Folsom*, INDEP. LEDGER, & AM. ADVERTISER, Apr. 24, 1780; *see also* ELIHU HALL, THE PRESENT WAY OF THE COUNTRY IN MAINTAINING THE GOSPEL MINISTRY BY A PUBLICK RATE OR TAX IS LAWFUL, EQUITABLE & AGREEABLE TO THE GOSPEL 26 (1749) (arguing that church taxes were "as lawfully Transacted as any other civil temporal Covenant" and "like [a] Tax for building a School-House"); JOSEPH FISH, THE EXAMINER

sentiment was later repeated by famed Massachusetts jurist Theophilus Parsons. According to Parsons, the Baptist position "seems to mistake a man's conscience for his money," and as a result "den[ied] the state a right of levying and of appropriating the money of the citizens."[182]

Backus and others met these arguments by restating their position, but also by explaining the limited scope of their objection. "Many try to elude the force of [our arguments] by saying that the taxes . . . for the support of ministers, are of a civil nature," Backus observed.[183] "But it is certain that they [i.e., those receiving church taxes] call themselves ministers of Christ; and the taxes now referred to are to support them under that name . . . ."[184] And "such communications are called *sacrifices to God* more than once in the New Testament."[185] Unlike ordinary taxes, in other words, church taxes were not designed to further any of the goods governments had been entrusted to protect.[186] Rather, their singular task was to finance religious worship—to support ministers "under that name." And because that was so, such taxes were indistinguishable from a coerced tithe—they were an offering of money, taken by force, solely to support a religious function. According to Backus, the difference between church taxes and other taxes was "so great a difference . . . as there is between *sacrifices to God* and the *ordinances of man*."[187]

Backus was not alone in distinguishing church taxes from other kinds of taxes by pointing to the ways that only the former were specially designed to finance religion. The same argument was made repeatedly by others. According to John Leland, the difference between church taxes and other civil rates was that only the first "forc[ed] people to part with their money for religious purposes."[188] As Leland explained elsewhere,

> [T]he Lord ordained in the New Testament, that those who preach the gospel should live of it. God has ordained it, but has not ordained that rulers should enforce it. Whenever, therefore, money is given for religious purposes, it is

EXAMINED 56 (1771) (arguing that church taxes were "acts of the civil state—done for its own utility," and indistinguishable from other "civil contracts . . . the violations of which neither are nor can be corrected by any power but the magistrate" (emphasis omitted)).

182 Barnes v. First Par. in Falmouth, 6 Mass. 401, 408 (1810). Parsons continued: "[I]f any individual can lawfully withhold his contribution, because he dislikes the appropriation, the authority of the state to levy taxes would be annihilated." *Id.* at 409.

183 Backus, *supra* note 73, at 216-17.

184 *Id.* at 217.

185 *Id.*

186 *See* BACKUS, *supra* note 160, at 315 ("[T]he state is armed with the sword to guard the peace and civil rights of all persons and societies and to punish those who violate the same." (emphasis omitted)).

187 *Id.* at 339.

188 LELAND, *supra* note 170, at 188.

> given in obedience to the law of God, and not in obedience to the laws of men: I mean when it is *rightly* given.[189]

Likewise, notwithstanding their disagreements with Baptists on other matters, Quakers took the same position. "Tithes are not imposed in the manner of a civil Tax," wrote Quaker Joseph Phipps, because "[t]he Intent of imposing them is, to support religious Ministers in the pursuit of religious Duties. Being not required for a civil, but a religious Purpose, the Payment of them is to be treated as a Matter of a religious Concern."[190] These writers all acknowledged that generally speaking, paying taxes was fully appropriate and part of a duty "to render unto Caesar the things that are his."[191] But they contended that allowing government "to take [property] away with the sword, under a religious mask," was something totally different.[192] And the logic of that position helps explain why even Quakers and Baptists—the most radical proponents of religious freedom at the Founding besides people like James Madison—did not object to government funding for religious schools either.

Consider just a few incidents that illustrate their position. Quakers were long concerned that sending their children to other people's schools would have a corrupting influence. As a result, they eventually began their own schools and sought government support for them. In 1786, Quakers in Lynn, Massachusetts successfully lobbied the town to refund tax money they had paid toward the local school in order to fund their own school instead.[193] But they did not stop at seeking a tax refund. A decade later, the town provided freestanding financial support for a Quaker school, presumably with their approval.[194] The same was true of a Quaker school in Bolton, which was "reimbursed regularly by the town . . . for almost the entire money expended for education."[195] Apparently, Quakers in Massachusetts did not object to government funding for their schools, even if those funds might be collected from others.

Quakers elsewhere in New England displayed a similar attitude. In 1791, the local school committee in Providence, Rhode Island recommended that

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189 *See* JOHN LELAND, *A Blow at the Root: Being a Fashionable Fast-Day Sermon*, *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 170, at 234, 247.

190 JOSEPH PHIPPS, BRIEF REMARKS ON THE COMMON ARGUMENTS NOW USED IN SUPPORT OF DIVERS ECCLESIASTICAL IMPOSITIONS IN THIS NATION, ESPECIALLY AS THEY RELATE TO DISSENTERS 6 (1769). Phipps's tract was written in England, but later reprinted in Philadelphia by a prominent Quaker printer named Joseph Crukshank.

191 BACKUS, *supra* note 160, at 317.

192 ISAAC BACKUS, POLICY, AS WELL AS HONESTY, FORBIDS THE USE OF SECULAR FORCE IN RELIGIOUS AFFAIRS (1779), *reprinted in* BACKUS ON CHURCH, *supra* note 146, at 370, 375.

193 ZORA KLAIN, EDUCATIONAL ACTIVITIES OF QUAKERS 149 (1928).

194 *Id.* Klain notes that this support for the school was withdrawn "years afterward." *Id.*

195 *Id.* at 148.

schools be set up throughout the city and funded out of the town treasury.[196] Recognizing that Quakers had already created a local school, however, the committee declared that the Quaker school ought to receive a share of "the money raised for schooling" according to "the proportion . . . of scholars in their school" compared to the total number of children being educated.[197] Moreover, the report continued, although the Quaker school would be open to authorities for "inspection and advice," no official was to interfere with "the address or manners of the Society, in relation to their religious opinions."[198]

The committee's recommendations in Providence ultimately failed to produce action by the city council, despite having received a majority vote at the town meeting.[199] But Quaker support for the proposal was unequivocal. Indeed, it became their official position. In 1801, the Quarterly Meeting of Quakers in Rhode Island instructed members to remove their children from local schools, set up their own, and seek to "obtain their proportion of school Moneys in the Respective Towns, According to their Assessments."[200] And the behavior of Quakers in other places around the country indicates a similar attitude.[201] Although Quakers rigorously opposed church taxes, the evidence strongly suggests they had no qualms about seeking money for their schools even if others might be taxed to pay for them.

Evidence related to Baptists in this period points toward a similar conclusion. In 1764, Baptists founded Rhode Island College—later Brown University—the first Baptist institution of higher learning in America.[202]

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196 *See* Report of the School Committee in 1791, *reprinted in* THOMAS B. STOCKWELL, A HISTORY OF PUBLIC EDUCATION IN RHODE ISLAND 1636 TO 1876, at 146, 146 (1876).

197 *Id.* at 147. The report stated that government officials were "to give orders on the town treasury" to support the Quaker school "as in the case of other schools." *Id.*

198 *Id.*

199 According to Stockwell, the council's failure to carry out the proposal stemmed from a fear of sectarian education. *See id.* at 148. But as historian Charles Carroll points out, a similar proposal was adopted again just a few years later and yet was also met with inaction. The explanation, he suggests, stemmed from the failure of either proposal to actually recommend a specific tax or other source of revenue to fund the measures. *See* CHARLES CARROLL, PUBLIC EDUCATION IN RHODE ISLAND 56-57 (1918).

200 *See* GABEL, *supra* note 98, at 195. The context of the instruction clearly indicates that the phrase "their Assessments" refers to the respective assessments of the towns—as in Providence—not to the Quakers' individual assessments.

201 *See infra* notes 291–298 and accompanying text (documenting the funding of religious schools in Pennsylvania, seemingly without Quaker resistance); *infra* notes 285–290 (noting funding for religious education in New Jersey and Delaware, both founded as Quaker colonies); THOMAS WOODY, QUAKER EDUCATION IN THE COLONY AND STATE OF NEW JERSEY 366 (1923) (noting broad Quaker participation in school funding in New Jersey until 1866).

202 1 MCLOUGHLIN, *supra* note 125, at 491. In keeping with Baptist piety, the college required every student to attend prayer each morning and evening and forbade any student to publicly deny the validity of the Bible or engage in licentious behavior. *See* REUBEN A. GUILD, EARLY HISTORY OF BROWN UNIVERSITY 265 (1897). Yet unusual for its day, the leaders of the college also stated that no student could be "molested in the free enjoyment of their . . . Christian faith, by ridicule,

During the Revolutionary War, the college housed American militia men and was later converted into a hospital for French soldiers fighting alongside the Continental Army.[203] However, the building was badly damaged rendering it more or less unusable for continuing the college's religious mission.[204] In 1786, its president James Manning sought assistance from Congress for rents and repairs.[205] Manning was a prominent Baptist and had personally assisted Isaac Backus in petitioning the Continental Congress to condemn Massachusetts's church tax regime.[206] Yet having expressed those convictions just a few years earlier, neither Manning nor any other Baptist recorded misgivings about seeking money from the government for their religious institution. And in 1800, Congress granted their repeated requests, awarding $2,800 to the college to repair the edifice—the main university building where instruction as well as the school's official daily prayers took place.[207]

A similar situation occurred elsewhere. In the district of Maine, several colleges were supported with land grants and also with a tax on banks.[208] The year after the tax was passed, Baptists authored a petition to the legislature demanding similar benefits for a school of their own. They first requested "the same aid that has been afforded to Williamstown and Bowdoin colleges as relates to grants of land."[209] But even more strikingly, they also sought "their proportion of the tax upon the banks," in order "to have an institution at which their children may be educated."[210] Nor was this attitude limited to funding for colleges. As we have already seen, Baptists in Virginia approved of funding schemes for religious secondary schools.[211] And as the evidence below outlines, Baptists in Maryland and elsewhere also sought (and often obtained) tax support for their religious primary schools, too.[212]

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sneers, scoffing, infidel suggestions, or any other means." While decidedly Christian, the college was clearly organized with "the grand object in view" being that "Christians of every denomination shall . . . enjoy free liberty." *Id.* at 271.

203 GUILD, *supra* note 202, at 294.

204 *Id.* at 337-38.

205 *Id.* at 333-34.

206 Manning likely co-authored a memorial that Backus presented to the Continental Congress recounting Baptist persecution under Massachusetts' regime. *See id.* at 278-80.

207 2 MCLOUGHLIN, *supra* note 125, at 770. For the text of Congress's act appropriating the funds, see GUILD, *supra* note 202, at 334.

208 EDWARD W. HALL, HISTORY OF HIGHER EDUCATION IN MAINE 44-46 (1903). Land grants were provided to Bowdoin College beginning in 1796. *Id.* at 44-45. The bank tax began in 1814 and provided funding for Bowdoin, Harvard, and Williams College. *Id.* at 45.

209 *Id.* at 100.

210 *Id.*

211 *See supra* notes 113–120 and accompanying text.

212 *See, e.g.*, *infra* notes 235–239, 245 and accompanying text (noting Baptist support for funding religious primary schools in Maryland); *infra* notes 369–372 and accompanying text (noting Baptist acceptance of funding for their schools in Connecticut).

Neither Quakers nor Baptists in early America objected to government funding for religious schools, even where the money might be provided through coercive taxation. They did not explain why that support did not trigger the same objections that church taxes did. But a ready explanation flows from their argument that church taxes were a coerced religious observance. Church taxes demanded a religious sacrifice, because they commanded an offering for the sole purpose of financing worship. But the same was not true of government support for public goods like education, even if recipients also used the money for religion. And if even Quakers and Baptists—the most radical supporters of religious liberty at the Founding—did not see funding for religious schools as a problem, it stands to reason that others probably did not either. To explore that question in full, however, we must examine the practices of the Founding generation more generally.

II. CHURCH TAXES AND RELIGIOUS SCHOOLS

Between the Revolutionary War and the decade after the adoption of the Establishment Clause, eight states besides Virginia either outlawed church taxes or rejected proposals to require them. This Part examines the practice of those states and the practice of the federal government following the ratification of the Establishment Clause and draws a simple conclusion. In each state that rejected church taxes, funding for religious schools followed shortly thereafter—a practice that was also replicated by the federal government following the adoption of the Establishment Clause. We cannot know for certain why majorities across the country made those decisions. But the pervasive practice of funding religious schools—seemingly without controversy—provides an additional reason to believe that objections to paying for religion were limited to instances where funding was provided solely to support religious worship and thus resembled a coerced tithe.

A. *The Former Anglican Colonies*

Like Virginia, other states throughout the South had Anglican establishments prior to the revolution that included some form of compulsory church taxes.[213] After American independence, each of these states—North Carolina, South Carolina, Maryland, and Georgia—ended the practice. In each, however, funding for religious schools continued.

The most extensive debate took place in Maryland. In 1776, the state enacted a declaration of rights that forbade taxes to support "any *particular* ministry," but left open the possibility of "a general and equal tax for the support of the

213 *See* CURRY, *supra* note 53, at 148-58 (describing these state establishments).

[C]hristian religion."[214] Like Virginia's general assessment proposal, that scheme included elements of choice. It provided each taxpayer the ability to direct money to his chosen church, or to benefit the poor within his denomination, or to support "the poor in general" within his county.[215] Moreover, when the legislature introduced a law in 1785 enabling the tax, it also included a complete exemption for Jews, Muslims, and any other non-Christians.[216]

Early in the controversy, supporters of religious liberty sometimes appealed to broad claims about paying for disagreeable religion.[217] Yet like Jefferson's argument a decade earlier, that claim faced significant difficulties. The Maryland assessment wholly exempted non-Christians from the tax, leaving no doubt that the argument about paying for disagreeable religion did not apply to them. Moreover, although the bill did apply to Quakers and Mennonites—who objected to paying their own ministers on principle—it explicitly allowed them to direct their money to the poor.[218] As a result, one writer reasoned, "No real injury can possibly be occasioned by the law to any society . . . . The Ministers, or the Poor of every respective society, or the Poor at large, if any will have it so, are to enjoy what is contributed."[219]

Supporters of religious liberty in Maryland responded with a variety of arguments.[220] Yet here too, many invoked the idea that the assessment amounted to a coerced religious observance. For instance, one writer noted that the Roman Empire "compelled the Christians to worship their idols, and killed those who refused," then drew an analogy to the general assessment: "[t]o compel a person to worship an idol, contrary to the dictates of his conscience, or to compel a person to pay money, against which he scruples in his conscience, is much like one and the same thing."[221] Another writer calling himself "Simon Pure" offered a similar argument, suggesting that the assessment was

214 MD. CONST. of 1776, art. 33, reprinted in 3 THORPE, *supra* note 44, at 1686, 1689 (emphasis added).

215 *Id.*

216 *See An Act to Lay a General Tax for the Support of Ministers of the Gospel of All Societies of Christians Within this State*, MD. J. & BALT. ADVERTISER, Jan. 21, 1785. The bill also limited eligible churches to those that were legally registered, composed of at least thirty adult males, and had a minister contracted to serve for at least one year. *See also* John Corbin Rainbolt, *The Struggle to Define "Religious Liberty" in Maryland 1776–85*, 17 J. CHURCH & STATE 443, 448 (1975).

217 For instance, one early Baptist Remonstrance insisted that "[t]hose who receive of their spiritual things should minister to [their clergy's] wants and necessities, and those . . . who do not receive a benefit, should not be compelled to pay them." *See* Ministers and Messengers of the Churches of the Baptist Denomination on the Eastern Shore, *To the Honorable the General Assembly of the State of Maryland*, MD. J. & BALT. ADVERTISER, Jan. 28, 1785.

218 *See An Act to Lay a General Tax for the Support of Ministers of the Gospel of All Societies of Christians Within this State*, *supra* note 216.

219 "Agrestis," *For the Maryland Journal, &c.*, MD. J. & BALT. ADVERTISER, Feb. 18, 1785.

220 For instance, they argued that the assessment was a poll tax prohibited by the state's constitution, and that it would place an intolerable financial burden on the populace. *See* Rainbolt, *supra* note 216, at 455-57.

221 "An Inhabitant of Maryland," *Msrrs. Printers*, MD. J. & BALT. ADVERTISER, Feb. 18, 1785.

impermissible since "[t]he great Creator of all things saith, expressly, that he delighteth not in robbery for burnt offerings."[222] Still another argued—just as Madison would about three pence—that because the assessment gave government officials power to "institut[e] . . . public worship," it followed that they could "become sole judges . . . of the particular modes also, which shall be hereafter observed."[223]

The Maryland legislature voted down the assessment proposal in November of 1785.[224] And although it is difficult to tell which arguments were decisive, social unrest over taxes suggests that those concerns may have played the dominant role.[225] Nonetheless, the argument about coerced religious observance explains why religious dissenters in Maryland condemned the assessment even though it did not require anyone to pay for disagreeable religious activity. But even more, it also offers a possible explanation for why opponents of church taxes did not object to the state's continued funding of religious schools.

Three years before the assessment controversy, the Maryland legislature had chartered Washington College, a school on the eastern shore.[226] The college's charter provided that students and faculty would be drawn from "all religious denominations and persuasions," but it also clearly stated that the school was authorized to instruct students in subjects "useful . . . for the service of their country in church and state," including divinity.[227] And just a few months before the assessment battle, the legislature appropriated £1,250 "as a donation by the public" to the college, to be renewed annually.[228]

Given the vigorous debate over the assessment, one might expect that state support for Washington College would have ended soon after the bill was defeated. In fact, however, something more like the opposite was true. After the assessment bill was voted down in 1785, the legislature left the annual appropriation for Washington College untouched for more than a decade.[229] Moreover, when it finally did alter the arrangement, it reallocated £800 of the tax revenue to five academies offering general secondary education,[230] at least

222 "Simon Pure," *To the Marylander*, MD. J. & BALT. ADVERTISER, Mar. 1, 1785.

223 "Philo," *To the Sincere Friends of Liberty and Religion*, MD. J. & BALT. ADVERTISER, Jan. 28, 1785.

224 *See* Rainbolt, *supra* note 216, at 450.

225 *See id.* at 457-58 (noting that significant tax increases led to a taxpayers' revolt the same year the general assessment was defeated).

226 *See* Act of Apr. 1782, ch. VIII, 1782 Md. Laws.

227 *Id.* pmbl., § IV.

228 Act of Nov. 1784, ch. VII, § II, 1784 Md. Laws. The funds were to be used to pay the salaries of the faculty, and drawn from taxes on marriage licenses and liquor, and from local fines. *Id.* §§ III-V.

229 *See* GABEL, *supra* note 98, at 223 (noting that this funding scheme for Washington College remained unchanged until 1798).

230 Act of Jan. 20, 1799, ch. CVII, §§ 3-4, 1798 Md. Laws.

three of which included religious instruction and worship in the curriculum.[231] And this example is hardly unique. St. John's College, a non-denominational school in Annapolis, benefited from a similar annual grant of £1,750 drawn from taxes and fines in the western shore.[232] That funding continued long after the assessment controversy, despite the fact that St. John's encouraged its students to attend religious worship, at least where it was consistent with a student's upbringing or authorized by parental consent.[233]

The same was true of religious schools offering basic education in Maryland. In 1810, Maryland passed a law explicitly banning church taxes.[234] A few years later, the legislature enacted a tax on banks and designated the revenue to fund "a general system of free schools" throughout the state.[235] Again, religious schools benefited without objection. In 1819, the legislature explicitly provided that commissioners in Baltimore were to pay portions of the school fund to three religious entities.[236] The first two—the Male Sunday School Societies of Baltimore and the Female Union Society for the Promotion of Sabbath Schools—were affiliated with various Protestant churches that provided free education to poor children on Sundays, often within church buildings.[237] The third entity—the Orphaline Charity School—was a Roman Catholic organization dedicated to educating female

231 Washington Academy possessed a "spacious hall for prayers [and] sermons." BERNARD CHRISTIAN STEINER, HISTORY OF EDUCATION IN MARYLAND 40 (1894). Charlotte Hall provided for the "liberal and pious education of the youth . . . to better them for their duties either in regard to church or state." CHARLOTTE HALL SCHOOL 1939 SENTINEL YEARBOOK (1939). And Samuel Knox, a Presbyterian minister and principal of Frederick County School, declared that teachers ought to "begin and end the business of the day with a short and suitable prayer" and read devotional literature to students. *See* SAMUEL KNOX, AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION, ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES 106 (1799). One historian credits Knox as the catalyst for the 1798 law. *See* STEINER, *supra*, at 43.

232 Act of Nov. 1784, ch. 37, § XIX-XXII, 1784 Md. Laws. The legislature also declared that Washington College and St. John's would collectively become the University of Maryland but the plan was not carried out. *See* GABEL, *supra* note 98, at 223.

233 *See* Act of Nov. 1784, ch. 37, § 2, 1784 Md. Laws (declaring that students would not be strictly required to attend religious worship, but that such a requirement could be imposed when "they have been educated in, or have the consent and approbation of their parents or guardians to attend").

234 *See* Act of Jan. 7, 1810, ch. CLXVII, 1809 Md. Laws (outlawing church taxes in Maryland).

235 *See* Act of Jan. 27, 1814, ch. 122, § 10, 1813 Md. Laws 113, 116; *see also* STEINER, *supra* note 231, at 55 (describing the law).

236 *See* Res. 24, 1818 Gen. Assemb., Dec. Sess. (Md. 1819).

237 *See* TERRY D. BILHARTZ, URBAN RELIGION AND THE SECOND GREAT AWAKENING: CHURCH AND SOCIETY IN EARLY NATIONAL BALTIMORE 105-06 (1986) (outlining the church affiliations of these organizations).

orphans.[238] All three provided religious instruction and worship, but received funds as a matter of course.[239]

Nor was this the only instance of state support. In 1826, the legislature passed a similar measure concerning the school fund for Frederick County, declaring explicitly that a portion of the funds were to be dispersed to the pastor of St. John's Catholic Church for the use of the church's female free school.[240] Likewise, in 1816, the legislature authorized an additional direct tax in five counties to support the education of poor children, stating that those funds should be used to send children to "the nearest and most convenient school," apparently without regard to its religious persuasion.[241]

Why didn't those who opposed the general assessment in Maryland also object to funding religious schools, especially denominational ones? One possibility is that they disapproved of paying for education that included religious worship but accepted it as a matter of practical necessity. Churches were a main source of education in this period, so perhaps supporters of religious liberty acquiesced to funding them even while disagreeing in principle. But as far as I have been able to discover, the historical record is devoid of evidence supporting that theory—either in Maryland or anywhere else. Although the funding programs for religious colleges in Maryland did face criticism, those criticisms "derived from the resentment of the high fees and of the aristocratic tone of the schools, rather than their religious ingredients."[242] Moreover, as in Virginia, the religious schools receiving funding enjoyed the public support of prominent citizens who had fought to defeat the assessment.[243] For instance, John Carroll, America's first Catholic bishop and a leading voice for religious freedom in the state, sat on the board of both Washington College and St. John's and publicly praised their endeavors.[244] The same was true of funding for religious primary schools, which enjoyed support from Baptists and others who had previously resisted church taxes.[245]

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238 *See* SAMUEL WINDSOR BROWN, THE SECULARIZATION OF AMERICAN EDUCATION: AS SHOWN BY STATE LEGISLATION, STATE CONSTITUTIONAL PROVISIONS AND STATE SUPREME COURT DECISIONS 45 (1912).

239 *See* BILHARTZ, *supra* note 237, at 106-07 (noting that curriculum at the free schools included memorizing Bible verses, answering questions from the catechism of the respective church, and attending worship).

240 Act of Feb. 15, 1826, ch. 72, § 2, 1825 Md. Laws 55, 56.

241 *See* Act of Feb. 5, 1817, ch. 244, § 5, 1816 Md. Laws 196, 197.

242 THOMAS O'BRIEN HANLEY, THE AMERICAN REVOLUTION AND RELIGION: MARYLAND 1770–1800, at 218 (1971).

243 *See, e.g.*, *supra* note 96 (noting Caleb Wallace's opposition to Virginia's religious establishment and subsequent support for funding of Transylvania Seminary).

244 *See* HANLEY, *supra* note 242, at 218 (noting a letter Carroll wrote to the Visitors and Governors of Washington College commending the school's "diffusion of liberal and tolerating principles").

245 BILHARTZ, *supra* note 237, at 106 (noting Baptist support for Baltimore's religious free schools).

The argument about coerced religious observance offers a more likely explanation. In arguing against the general assessment, defenders of religious liberty in Maryland asserted that government "ought not to interfere with any man's faith, or practice," even if that interference involved nothing more than requiring citizens to tithe to their own churches.[246] The general assessment demanded money for the specific purpose of financing religious worship, and as such was indistinguishable from a coerced tithe—it was "robbery for burnt-offerings," as Simon Pure had put it.[247] But the same was not true of funding to support goods like education, even if those being funded might also engage in religion. And the evidence from the other southern states points toward a similar conclusion.

In North Carolina, church taxes ended unceremoniously in 1776 with the passage of a new state constitution.[248] The change was supported by Baptists and also by the state's large Quaker population.[249] According to one contemporary observer, the inhabitants of North Carolina had "all in general imbibed a Quaker like abhorrence of Hirelings" well before the revolution.[250] But again, no one seems to have thought the ban on church taxes forbade funding for religious education. In 1784, the legislature transferred ownership of a decaying Episcopal church that had been built by taxpayer funds to Science Hall, a Presbyterian academy.[251] Several years later, it granted a surplus of £250 in local tax revenue to Warrenton Academy, a non-denominational school,[252] in what was likely "the first instance in the history of the State of local taxation for schools."[253]

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246 "Simon Pure," *supra* note 222.

247 *Id.*

248 *See* N.C. CONST. of 1776, art. XXXIV, *reprinted in* 5 THORPE, *supra* note 44, at 2787, 2793 (declaring that no citizen would 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").

249 *See* STEPHEN BEAUREGARD WEEKS, CHURCH AND STATE IN NORTH CAROLINA 28-29 (1893) (noting Baptist success in the colony); *see also id.* at 50-51 (documenting Quaker resistance to church taxes in the state).

250 CURRY, *supra* note 53, at 61.

251 *See* GABEL, *supra* note 98, at 236 n.27 (noting the school's Presbyterian affiliation and that the church building had been paid for with taxpayer funds); *see also* 24 THE STATE RECORDS OF NORTH CAROLINA: LAWS 1777–1788, at 606 (Walter Clark, C.J., ed., 1905) (documenting the property transfer to the school, described in the act as "an academy in the neighborhood of Hillsborough").

252 *See* An Act Respecting the Warrenton Academy, ch. XL, 1805 N.C. Sess. Laws 27. The same year the funds were provided, Warrenton Academy declared: "It shall be earnestly recommended to the principal to cause the students to meet at the Academy at twelve o'clock on every Sunday, by the ringing of the bell, and to deliver to them a discourse upon some moral or religious subject." *See* CHARLES L. COON, NORTH CAROLINA SCHOOLS AND ACADEMIES: 1790–1840, at xxxvi (1915).

253 *See* 2 1896–1897 REPORT OF THE COMMISSIONER OF EDUCATION 1393 (Washington D.C., Government Printing Office 1898).

A similar pattern occurred in South Carolina. In 1778 the state enacted a new constitution that ended church taxes.[254] But in 1811, the state provided $300 per year to multiple free schools within each county—that is, schools providing cost-free education to poor white children.[255] Many of those schools were religious.[256] Likewise, during this period the legislature appropriated funds for several colleges, including Mount Zion Academy and the College of Charleston, both of which had denominational ties.[257]

The process of ending church taxes in Georgia was more gradual. After the Revolution, Georgia ended exclusive financial support for the Anglican church.[258] But other kinds of support continued. In 1784, the legislature passed a resolution for "promoting religion and piety" that provided aid to build and repair churches in the state.[259] The next year, it passed a general assessment much like the one that had been debated in Virginia, though it seems never to have been enforced.[260] It was not until 1798 that the state's third constitution finally outlawed "tiths, taxes, or any other rate" in support of religious worship.[261] But as in other states, the passage of the ban on church taxes did not end support for religious academies. According to one source, at least thirty-six academies—many if not all of them religious—received state funds until as late as 1838.[262]

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254 S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 6 THORPE, *supra* note 44, at 3248, 3257 (declaring that no person would "be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in"). The constitution retained a provision stating that Christianity was the state's official religion and outlining articles of faith, but in 1790 the state also did away with those endorsements. *See* CURRY, *supra* note 53, at 150 (describing South Carolina's "provisions for freedom of religion").

255 Act of Dec. 21, 1811, 1811 S.C. Acts 27, 27-28. The bill provided that the funding for the program was to be "paid out of the treasury" of the state. *Id*.

256 *See* COLYER MERIWETHER, HISTORY OF HIGHER EDUCATION IN SOUTH CAROLINA WITH A SKETCH OF THE FREE SCHOOLS 114 (1889) (describing support for religious instruction in the state's free schools). Religious societies throughout the South also provided education to Black slaves, although many states including South Carolina eventually outlawed it. But slaves continued to educate one another, and some religious groups continued to assist them in spite of the prohibition. *See id*. at 123 (describing religious resistance to the ban on educating slaves in South Carolina).

257 Act of Mar. 19, 1784, No. 1274, 4 STATUTES AT LARGE OF SOUTH CAROLINA 674-75 (Thomas Cooper ed., 1838) (establishing the colleges mentioned). *See* 1 GEORGE HOWE, HISTORY OF THE PRESBYTERIAN CHURCH IN SOUTH CAROLINA 449 (1870) (describing Mt. Zion Academy's Presbyterian affiliation). The College of Charleston was not officially Episcopal but had three Episcopal priests as presidents and conducted morning and evening prayers. AN EPISCOPAL DICTIONARY OF THE CHURCH 85 (Don S. Armentrout & Robert Boak Scolum eds., 2000).

258 CURRY, *supra* note 53, at 152-53 (discussing the deterioration of the Anglican establishment in Georgia).

259 ELBERT W.G. BOOGHER, SECONDARY EDUCATION IN GEORGIA 1732–1858, at102 (1933).

260 CURRY, *supra* note 53, at 153.

261 GA. CONST. of 1798, art. IV, § 10, *reprinted in* 2 THORPE, *supra* note 44, at 791, 801.

262 GABEL, *supra* note 98, at 242.

In Georgia as in other states, we cannot know for sure why opponents of church taxes did not also object to funding for religious schools. But here again, the information we do possess suggests that arguments about coerced observance may have played a role. In 1785, Georgia's Baptist coalition wrote a memorial opposing the general assessment. They argued—just as Backus had done in Massachusetts—that "civil and religious government ought not to be blended together," since "statesmen derive no authority from God or men . . . [to] establish systems of religious opinion or modes of religious worship."[263] Moreover, they continued by insisting—just as Madison would do in Virginia—that the significance of the worship demanded by the assessment made no difference: "[t]he Three Penny Act on tea was a trifle in itself, but a badge of slavery, and a precedent [for] more destructive measures."[264] It is possible if not likely that proponents of religious liberty in Georgia came to the same conclusion that their allies in Virginia, Maryland, and other states already reached. While funding solely to support religious worship was prohibited, the same was not true of funding for other goods, even if religion benefitted indirectly.

B. *The Middle States*

Unlike their counterparts in the south, the middle states—New York, New Jersey, Delaware, and Pennsylvania—were never under state-wide Anglican control.[265] Nonetheless, here too the practices and arguments relating to church taxes display a similar pattern. While funding offered exclusively to support religious worship was banned, the same could not be said of funding for other goods—especially education—despite the fact that recipients also used those funds for religion.

The evidence from New York is the most interesting. Prior to the revolution, New York had at least a partial Anglican establishment in four counties in metropolitan New York, but no official establishment anywhere else.[266] In 1777, however, New York's constitution ended church taxes in those counties.[267] And although churches continued to receive land grants in some

263 HISTORY OF THE BAPTIST DENOMINATION IN GEORGIA 262-63 (1881). For an in-depth description of the role of Baptists in Georgia, see Joel A. Nichols, *Religious Liberty in the Thirteenth Colony*, 80 N.Y.U. L. REV. 1693, 1745-47 (2005).

264 HISTORY OF THE BAPTIST DENOMINATION IN GEORGIA, *supra* note 263, at 262 (brackets in original).

265 CURRY, *supra* note 53, at 159-61 (describing the relationship between religion and government in these four states).

266 McConnell, *supra* note 41, at 2129-30 (noting that four counties were required to support an Anglican minister, but that there was "no official establishment" anywhere else in New York).

267 CURRY, *supra* note 53, at 161 (noting a provision that declared void any laws "construed to establish or maintain any particular denomination of Christians or their ministers").

new townships,[268] the constitutional amendment ended taxation designed exclusively to finance religious worship. But like other states, New York continued to provide tax support for religious organizations that performed public functions.

In 1795, the legislature set up a program providing £20,000 annually to support schools.[269] That fund was eventually supplemented by a direct property tax—the first in the state's history.[270] And two years later, the legislature passed an act for dispersing those funds in New York City. The list of beneficiaries is striking. The law provided that the mayor was to pay an equal share of tax dollars "for the education of poor children" to the following entities:

> [T]he vestry of the Episcopal church, the vestry of Christ[']s church, the trustees of the first Presbyterian church, the minister, elders, and deacons of the Reformed Dutch church, the trustees of the Methodist Episcopal church, the trustees of the Scotch Presbyterian church; . . . the trustees of the African School, . . . the trustees of the united German Lutheran, the trustees of the German Reformed churches . . . the trustees of the first Baptist church [and] . . . the trustees of the United Brethren or Moravian church . . . .[271]

In subsequent years the state also expanded the recipients of government funds to include other religious institutions. In 1806, the legislature repealed the state's test oath excluding Catholics from office,[272] and that same year extended a share of the school funds to the Free School of St. Peter's Church, a Catholic charity school.[273] Likewise, just a few years later, the legislature provided identical tax support to a school for poor children run by the Shearith Israel Congregation, the oldest Jewish synagogue in America.[274] The funds provided by the state even made up for the back payments these groups should have received but for their earlier exclusion.[275]

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268 *See* Act of May 5, 1786, ch. 67, 1786 N.Y. Laws 334, 337 (allocating land for "promoting the gospel and a public school or schools" in new townships); GABEL, *supra* note 98, at 208.

269 *See* Act of Apr. 9, 1795, ch. 75, 1795 N.Y. Laws 626, 626. Unlike some education funds in the South, New York explicitly stated the funds would be used to pay for education not only for indigent white children but also for children "descended from Africans or Indians." *Id.* at 628.

270 Act of Apr. 3, 1799, ch. 93, 1799 N.Y. Laws 446; *see also* GABEL, *supra* note 98, at 211 & n.20 (noting the tax to support schools was the first direct tax in the state's history).

271 Act of Apr. 8, 1801, ch. 189, 1801 N.Y. Laws 552, 552.

272 For an account of the movement to repeal the test oath, see JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH STATE THEME IN NEW YORK HISTORY 121-25 (1967).

273 Act of Mar. 21, 1806, ch. LXIII, 1806 N.Y. Laws 393; *see also* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK 61-62 (1824) (documenting funding for the school well into the nineteenth century).

274 Act of Apr. 9, 1811, ch. CCXLVI, § XLIII, 1811 N.Y. Laws 328, 333-34 (enacting the payment of a sum to Shearith Israel).

275 *See* Jacob I. Hartstein, *The Polonies Talmud Torah of New York*, 34 PUBL'NS AM. JEWISH SOC'Y 123, 133 (1937) (noting the additional funds).

Support for Catholic and Jewish schools in New York brings up an important point that has yet to be discussed. In the eighteenth and early nineteenth century, the population of the United States was composed almost entirely of Protestant Christians.[276] As a result, funding for schools was often directed only to those groups, because in many places, they were the only ones with schools to fund. But as the evidence from New York illustrates, when religious minorities created organizations large enough to provide public benefits, they were often included in funding programs.[277] There is little surviving evidence about how these groups thought about funding for religion. But the evidence we do possess indicates that religious minorities like Catholics and Jews were not opposed to funding schemes that paid for religious instruction or religious activity more generally. They were opposed to funding schemes that disqualified denominational education in favor of more generic education, which was invariably Protestant and as such exclusionary. And when they raised these concerns, they insisted—much like opponents of church taxes had done—that government was forbidden from legislating solely to finance a preferred mode of religious worship.

In 1812, the New York legislature considered a proposal that would have ended funding for all denominational schools in New York City and turned the funds over to the New York Free School Society.[278] The Society, which ran New York's Lancasterian schools,[279] aimed to "inculcate the sublime truths of religion and morality contained in the Holy Scriptures" but "without

276 *See* Gerald V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty*, 37 CASE W. RES. L. REV. 674, 686 (1987) (noting the small numbers of Jews and Catholics and even fewer atheists in Founding-era America).

277 In Maryland, for instance, Catholics made up a significant portion of the population, and their schools received funding alongside others. *See supra* notes 238–241 and accompanying text (documenting financial support for Catholic education in Maryland). The same was true in the city of Georgetown in the District of Columbia. *See infra* notes 315–323. By the mid-nineteenth century, funding for religious schools had become controversial, in large part because of anti-Catholic hostility. But religious minorities continued to receive state support for other public services. In 1860, New York passed laws providing funds to the Hebrew Orphan Asylum to build an orphanage. Ultimately, the government paid for two-thirds of the orphanage's building costs as well as the land. *See* JACQUELINE BERNARD, THE CHILDREN YOU GAVE US: A HISTORY OF 150 YEARS OF SERVICE TO CHILDREN 8-12 (1973) (describing the history of Jewish asylum for orphans). Similarly, in the mid- to late- nineteenth century, Catholic orphanages received public subsidies in no fewer than eight states. *See* Marian J. Morton, *The Transformation of Catholic Orphanages: Cleveland, 1851-1996*, 88 CATH. HIST. REV. 65, 67 (2002) (noting public subsidies in New York, Illinois, Pennsylvania, Maryland, California, Michigan, Wisconsin, and Iowa).

278 *See* PRATT, *supra* note 272, at 164-66 (describing how the Free School Society came to power).

279 Lancasterian schools were founded by an English Quaker named Joseph Lancaster, and were known for their "monitorial" system, in which more advanced students monitored less-advanced ones under the supervision of a principal. *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, at 41 (1983).

observing the peculiar forms of any religious Society . . . ."[280] The trustees of Shearith Israel authored a memorial opposing the plan, alongside the city's Roman Catholics and several others.[281] According to Shearith Israel, the proposal was objectionable because it aimed to "turn to a particular channel, a bounty intended for the benefit of [] poor children," presumably a euphemism for the law's effort to fund only generic Protestant instruction.[282] But even more strikingly, the Congregation contended that the proposal violated the "liberal spirit of our constitution, which recognizes no distinction in religious worship."[283] For the trustees of Shearith Israel, funding for education that included religion was perfectly permissible. What was impermissible—and indeed unconstitutional—was directing funds to some schools but not others based solely on a recipient's religious activity.

Shearith Israel's memorial highlights an important point. Proponents of religious liberty in the Founding period resisted church taxes, in all likelihood because such taxes were instituted solely to finance worship and thus seemed indistinguishable from a coerced tithe. But refusing to fund schools based on their religious activity was a different issue entirely. Unlike church taxes, school funds were provided for the purpose of educating poor children, so there was nothing problematic about conveying such funds to religious actors. On the contrary, it was *denying* funds for schools based solely on a recipient's religious activity that was forbidden—it violated the "liberal spirit of our constitution" by disadvantaging some citizens relative to others based on a "distinction in religious worship." And as of 1813, the legislature in New York agreed. A few months after receiving Shearith Israel's memorial, it passed a law directing city officials to collect a tax and distribute the funds to schools run by "incorporated religious societies" as well as by the Free School Society, "in proportion to the average number of children between the ages of four and fifteen years" attending each school.[284]

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280 A. EMERSON PALMER, THE NEW YORK PUBLIC SCHOOL: BEING A HISTORY OF FREE EDUCATION IN THE CITY OF NEW YORK 22 (1908) (quoting a publication from the Free School Society).

281 *See* The Memorial of the Trustees of the Congregation of Sheerith Israel Convened, Petition to Legislature from K. K. S. I. on Religion and the Free School (June 10, 1813), *reprinted in* Israel Joel, Abraham Isaacs, and Jonas N. Phillips, *Items Relating to Congregation Shearith Israel, New York*, 27 PUBLN'S AM. JEWISH HIST. SOC'Y 1, 92 (1920).

282 *Id*. at 95.

283 *Id*.

284 Act of Mar. 12, 1813, ch. LII, § IV, 1813 N.Y. Laws 53, 54–55. Officials ended funding for denominational schools in New York in 1825. *See* GABEL, *supra* note 98, at 352-53. As several commentators have explained, that change was the direct result of efforts on the part of the Free School Society to stamp out competition, especially from Baptist and Catholic churches in the city. *See* Timothy L. Smith, *Protestant Schooling and American Nationality: 1800-1850*, 53 J. AM. HIST. 679, 685-87 (1967) (explaining that the Free School Society lobbied the legislature to de-fund church schools after a Baptist church "asked and received from the legislature . . . the privilege of using any surplus state funds beyond those required for [teachers'] salaries to equip or erect buildings," a privilege that "had previously been

Funding for religious schools was also common practice in the other middle states. With the exception of New York, these colonies were all either founded by Quakers or closely connected to the Quaker movement. As a result, none of them ever collected church taxes, though Quaker influence later in the period varied between states. Yet here too, evidence from these states suggests that these citizens did not oppose funding for religious schools.

We can deal with Delaware and New Jersey fairly quickly. Neither ever collected church taxes, though both explicitly banned them in their post-revolutionary constitutions.[285] Yet as in other places, citizens in both states seemed perfectly comfortable funding religious schools. In 1796, New Jersey made a three-year grant to Princeton University—then known as the Presbyterian College of New Jersey—to repair damages suffered during the war.[286] Moreover, when the state finally began funding basic education through taxation in the 1840s, it explicitly included religious schools in the allotment, declaring they ought to be supported in "just and ratable proportion" to the number of children in their care.[287]

Delaware's first expenditure for education occurred in 1817. A few years later, the state supplemented that program with another that provided money to Sabbath day schools—that is, church schools offering basic education to poor children on Sundays.[288] The act provided that the Sabbath schools were to receive a per-student sum not to exceed twenty cents per child, which was to be "raised as other county rates and levies are by the laws of this State."[289] Again, apparently no one thought such a law violated the state's ban on forcing citizens to "contribute to the . . . support of any place of worship, or . . . ministry."[290]

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reserved for the Free School Society alone"); PRATT, *supra* note 272, at 166-67 (noting the Society's "economic motive" since appropriations were tied to student enrollment).

285 Delaware's 1701 charter prohibited forcing citizens to "frequent or maintain any religious Worship, Place or Ministry." CHARTER OF PRIVILEGES FOR THE PROVINCE OF PA. (1701), *reprinted in* 1 THORPE, *supra* note 44, at 557, 558. In 1792, Delaware enacted a constitutional provision prohibiting citizens from being "compelled to . . . contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent." DEL. CONST. of 1792, art. 1, § 1, *reprinted in* 1 THORPE, *supra* note 44, at 568, 568. Likewise, New Jersey's 1776 constitution protected citizens from being "obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry." N.J. CONST. of 1776, § 18, *reprinted in* 5 THORPE, *supra* note 44, at 2594, 2497.

286 *See* GABEL, *supra* note 98, at 215-16 (detailing the grant to Princeton).

287 Act of Apr. 17, 1846, § 12, 1846 N.J. Laws 164, 167-68; *see also* GABEL, *supra* note 98, at 373-74 (discussing education policy in New Jersey).

288 Act of Feb. 3, 1821, ch. LXV, 6 Del. Laws 85 (1821).

289 *Id.*

290 DEL. CONST. of 1792, art. 1, § 1, *reprinted in* 1 THORPE, *supra* note 44, at 568.

The same was true in Pennsylvania, the original Quaker colony. Like other Quaker colonies, the state had never collected church taxes.[291] Moreover, Quaker influence there remained notable after the revolution.[292] Yet here too, funding for religious schools flourished.

In 1802, Pennsylvania began what was probably the country's first school voucher program, which continued for roughly a decade. Prior to the program, education in the state was provided through two primary means: "church schools" run by specific denominations, and independent "subscription schools."[293] The 1802 law included both, stating that poor families could send their children to "any school in their neighborhood" and government would reimburse the school at taxpayer expense.[294]

The state also provided a seemingly unending list of one-off subsidies to religious schools of all kinds. In 1798, Newton Academy—a Presbyterian-run school—received $4,000 for a building in exchange for a promise to educate poor children.[295] The year before, another Presbyterian school called Washington Academy got $3,000 under the same arrangement.[296] The Academy of the Protestant Episcopal Church in Philadelphia—where famed dictionary author Noah Webster once taught as a schoolmaster—received 10,000 acres of land as an endowment for its free school, as did several other Lutheran schools in the area.[297] And the same was true of the state's religious universities, which received land or money grants ranging from $2,000 to $9,000 between the years 1786 and 1815.[298]

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291 *See* CURRY, *supra* note 53, at 72-73.

292 *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1810 & n.82 (2005) (noting that Quakers were a "substantial minority" in Pennsylvania in the years immediately surrounding the Revolution and likely represented roughly one quarter of the state's voters).

293 JAMES P. WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 178 (1886).

294 *See* Act of Mar. 1, 1802, ch. MMCCXLVII, § 1, 17 STATUTES AT LARGE OF PENNSYLVANIA 81, 81 (1915); *see also* WICKERSHAM, *supra* note 293, at 264-66 (describing these laws and variations thereof which existed from 1802 through 1809). The 1802 law said funding for the program would be "collect[ed] in the same way and manner . . . as poor taxes or road taxes are levied and collected . . . ." *Id.* at 264.

295 Act of Mar. 16, 1798, ch. MCMLXXXIV, § 1, 16 STATUTES AT LARGE OF PENNSYLVANIA 62, 63 (1911); *see also* WILLIAM W.H. DAVIS, HISTORY OF BUCKS COUNTY 216 & n.12 (noting the academy "with the Presbyterian pastor at its head, was the right arm of the church" in the county).

296 Act of Mar. 20, 1797, ch. MCMXXX, § 1, 15 STATUTES AT LARGE OF PENNSYLVANIA 501, 502 (1911); *see also* CHARLES LEWIS MAURER, EARLY LUTHERAN EDUCATION IN PENNSYLVANIA 63 (1932) (noting a $2,000 grant for a Lutheran school called Reading Academy to construct a "commodious and elegant building").

297 Act of Mar. 29, 1787, ch. MCCXCVIII, 12 STATUTES AT LARGE OF PENNSYLVANIA 333 (1906); *see also* WICKERSHAM, *supra* note 293, at 98 (noting the connection to Webster); Act of Sept. 23, 1789, ch. MCDXXXIX, 13 STATUTES AT LARGE OF PENNSYLVANIA 333 (1908); Act of Feb. 14, 1789, ch. MCCCXC, 13 STATUTES AT LARGE OF PENNSYLVANIA 182 (1908) (providing land endowments to Lutheran free schools).

298 *See* GABEL, *supra* note 98, at 218-19 (documenting these subsidies).

At this point, a brief summation of the evidence is in order. From 1776 to the decade after the ratification of the Establishment Clause, citizens of every state outside of New England either banned church taxes in their constitutions or rejected proposals to enact them. Yet in every single one of these states, citizens went on to provide funding for religious schools. One could try to come up with an explanation for that practice consistent with a broad rule against subsidizing religious activity. But the most obvious ones are in significant tension with the evidence. Funding for religious schools was not a mistake, or explainable by a lack of resolve—it was done even in states like Virginia and Pennsylvania where resistance to church taxes was especially strong. Nor is it explainable in terms of the type of aid offered. In Pennsylvania, New York, and most other states, the funds were provided by coercive taxation of one sort or another.

But another explanation is possible. Judged by their practice, citizens in these states believed that providing taxpayer funds with the sole aim of supporting an institution's religious function was prohibited. But the same was not true of programs providing funds for things like education, even if recipients might also use those funds for religion. On the contrary, at least some argued that as to those programs, it was *withholding* funds solely because of a recipient's religious practice that was prohibited. We cannot know how widely these conclusions were linked to the argument about coerced religious observance. But the practice is consistent with that view, and with the more truncated versions of the argument that appear in places like Maryland, Georgia, and New York. Although majorities in different states almost surely had different reasons for their decisions, the argument about coerced observance offers an explanation as to why even vocal opponents of church taxes throughout the country did not object to government funding for religious schools. And indeed, the same practice was continued by the federal government even after the ratification of the Establishment Clause.

C. *The Federal Government*

The Establishment Clause was ratified on December 15, 1791. By its terms, the Clause prohibited Congress from enacting laws "respecting an establishment of religion."[299] Yet for decades after its enactment, the federal government—like the recently disestablished states—provided government funds for religious schools. That practice suggests that, just as citizens in the states had behaved with reference to their own constitutions, no one thought the federal Constitution prohibited funding for religious schools either.

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299 U.S. CONST. amend. I.

The first piece of evidence on this score involves funding for education in the District of Columbia. In 1804, Congress ordained a municipal government for the city of Washington, D.C. and provided it with authority to engage in "the establishment and superintendence of schools."[300] The city promptly used that delegated power to pass an ordinance declaring that the schools would be funded by taxes on various property, and by licensing fees for things like carriages, taverns, and billiard tables.[301] Initially, officials directed those funds to two government-established academies for poor children: one on the eastern side of the city and one on the western side.[302] But eventually, the city used its federal authority to support a Lancasterian school. Those schools—which were the same ones the Free School Society ran in New York—typically included non-denominational Bible reading and other religious elements as part of the curriculum.[303] And though we have limited information about the Washington, D.C. school, there is good reason to believe it ran the same way. Just a few years after the founding of the school, the principal wrote a letter to local officials reporting that more than half of the school's ninety-one children had "learned to read in the Old and New Testaments," and roughly one quarter "are now learning to read Dr. Watts's Hymns."[304]

Beginning in 1812, the city of Washington provided funds to support the Lancasterian school out of its education tax.[305] That particular funding scheme, which paid for the principal's salary and the costs of educating poor children, continued for at least six years.[306] After that, other funds seem to have been provided.[307] And that was not all. During this same period,

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300 J. Ormond Wilson, *Eighty Years of the Public Schools of Washington: 1805 to 1885*, RECS. COLUMBIA HIST. SOC'Y, WASH., D.C., 1897, at 119, 121.

301 *Id.* at 122.

302 *See* SAMUEL YORKE ATLEE, HISTORY OF THE PUBLIC SCHOOLS OF WASHINGTON CITY, D.C. 4 (1876).

303 *See infra* notes 279–280 (describing the features of New York's Lancasterian schools). The routine at the New York schools included daily Bible reading, assembling children each Sunday to attend worship at their chosen denomination, and even inviting members of local congregations to provide voluntary religious education once a week. *See* JOHN FRANKLIN REIGART, THE LANCASTERIAN SYSTEM OF INSTRUCTION IN THE SCHOOLS OF NEW YORK CITY 65-66 (1916).

304 ATLEE, *supra* note 302, at 11-12.

305 *Id.* at 9 (documenting that city officials had acquired a building for the Lancasterian school and hired a principal for a two-year contract at $500 per year).

306 *See id.* at 16 (documenting the end of the tax program and the annual $1,500 appropriation for schools in 1818). Prior to this date, the District sometimes struggled to pay the school's principal, but by 1817 it had increased his salary to $800 per year. *Id.* at 10-15; *see also* John Clagett Proctor, *Joseph Lancaster and the Lancasterian Schools in the District of Columbia, with Incidental School Notes*, RECS. COLUMBIA HIST. SOC'Y, WASH., D.C., 1923, at 1, 10-11.

307 The Committee's journal ends with the repeal of the $1,500 appropriation. However, the Lancaster school appears to have been in continuous operation until 1844, when the city enacted a law reorganizing all schools within the city. *See* ATLEE, *supra* note 302, at 16; Proctor, *supra* note 306, at 13.

Congress and then-President James Madison gave permission to institute a lottery to raise funds for two other proposed Lancasterian schools.[308] In 1821 President James Monroe even authorized the original Lancasterian school to take up residence in a building owned by the federal government that had been used as a horse stable.[309] The event was celebrated with a great public parade and speeches by prominent officials.[310] Likewise, in 1840, the city briefly funded two "Female Charity Schools" run by the Presbyterian Church.[311] The program was later discontinued out of a concern it might lead to "contention and strife," most likely a euphemism for the fear that Catholic schools may also ask for money.[312] Yet during all of this, there appears to be no record of anyone raising an Establishment Clause objection.

A similar set of events took place in Georgetown. Although the town had been originally chartered by the Maryland legislature, it was also part of the District of Columbia and thus under federal authority.[313] Yet here too, funding for religious schools proceeded as a matter of course. Beginning in 1815, the city appropriated $1,000 annually for the support of its own Lancasterian school.[314] But even more interesting is what followed.

In 1818, Trinity Church—the community's oldest Catholic congregation—began a free school for indigent boys.[315] Within a month of opening, it was educating more than one hundred poor children.[316] But supporting the school financially was difficult, and eventually the church petitioned the city of Georgetown for assistance. Several council members argued that exclusive support for the Lancasterian school was more than sufficient to provide for the city's poor.[317] But others contended that the

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308 *See* 2 AMERICAN STATE PAPERS: MISCELLANEOUS 635 (Walter Lowrie & Walter S. Franklin eds., 1834); *see also id.* at 634 (noting Madison's approval of the two schools).

309 *See* Proctor, *supra* note 306, at 11-12.

310 *Id.* at 12.

311 ATLEE, *supra* note 302, at 22. One of the Presbyterian schools served eighty indigent children, and another served as many as fifty. *Id.*

312 *Id.* at 24. By this period, anti-Catholic nativism was in full swing in many parts of the country. *See* TYLER ANBINDER, NATIVISM AND SLAVERY 11-12 (1992) (describing a famous three-day riot in 1844 in which two Catholic churches in Philadelphia were destroyed after local Catholics requested that Catholic Bibles be read alongside Protestant ones in the city's locally-funded schools).

313 *See* ADVISORY COMM. ON FISCAL RELS. STUDY, 74TH CONG., REPORT ON FISCAL RELATIONS BETWEEN THE UNITED STATES AND THE DISTRICT OF COLUMBIA 22-23 (1937) (describing Congress's control over Georgetown as a part of the District of Columbia). In 1805, Congress explicitly exercised its authority over the city by amending its charter. *See* Act of Mar. 3, 1805, ch. 32, 2 Stat. 332-36.

314 WILLIAM W. WARNER, AT PEACE WITH ALL THEIR NEIGHBORS: CATHOLICS AND CATHOLICISM IN THE NATIONAL CAPITAL, 1787-1860, at 76 (1994).

315 *Id.* at 118.

316 *Id.*

317 *Id.* at 77.

request raised a more fundamental issue. According to one member, a Protestant named Henry Addison:

> If any portion of our citizens are excluded from a just participation of any investment of the public funds in consequence of a peculiarity of religious faith, a case presents itself which demands the exercise of a tolerating spirit. Such is now the case before us. The real question is, whether a religious sect which has been taxed more than seventeen years to support a free school of whose advantages they could not avail themselves, can now be allowed a small sum of money to assist in defraying the expenses of their one free school, established and supported by more than ten years by their own individual contributions.[318]

Addison's argument bears a strong similarity to the argument offered by Shearith Israel during the controversy over school funding in New York. Shearith Israel had contended that a proposal to deny funding to denominational schools violated "the liberal spirit of our constitution," because it proposed allocating funds to some schools but not others based on a "distinction in religious worship."[319] Addison reasoned similarly, contending that government ought not "exclude[] [citizens] from . . . any investment of the public funds in consequence of a peculiarity of religious faith."[320]

Again, this argument highlights the important difference that citizens in this period perceived between church taxes and funding for religious schools. Providing funds exclusively to support a religious function was objectionable, probably because such schemes were viewed as coerced tithes. But that objection did not apply to providing religious entities with funds to support goods like education. On the contrary, for people like Addison and others, refusing to provide school funds based solely on "a peculiarity of religious faith" was actually a penalty on religious exercise—it excluded citizens from "just participation" in "investment of the public funds" solely for practicing their religion.[321] And as that argument had succeeded in New York, so it also succeeded in Georgetown.

In 1832, the city awarded Trinity's free school $200 annually—a sum which probably corresponded to the proportion of children educated there compared to the Lancasterian school.[322] Again, there seems to be no evidence

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318 *Id.*

319 The Memorial of the Trustees of the Congregation of Shearith Israel Convened, *supra* note 281, at 95.

320 WARNER, *supra* note 314, at 77.

321 *Id.*

322 *Id.* As of 1815, the Lancasterian school in Georgetown was educating roughly five hundred students, while Trinity's free school had roughly one hundred. *See* ATLEE, *supra* note 302, at 13 (documenting the number of children enrolled in the Lancasterian school); WARNER, *supra* note 314, at 118 (documenting the number of children enrolled in the Trinity free school). For the text of

of any Establishment Clause objection. On the contrary, the year after receiving the allotment, the trustees of the Trinity school successfully petitioned Congress to incorporate it, quite possibly so that the school could more easily receive the outside funds.[323]

An additional piece of evidence involving the federal government provides further reason to believe that arguments like Addison's and Shearith Israel's may have been fairly well-accepted. Beginning in 1727, Catholic nuns in New Orleans operated a convent which included a large free school for destitute children.[324] When the Louisiana Purchase occurred, the nuns sent a letter to Jefferson in 1804 inquiring about the future of their property. Because the property had previously been controlled by the French government, it could very well have been considered to have passed to the United States.[325]

Jefferson sent a response to assuage their concerns. He first assured the nuns that "the principles of the constitution" ensured that the property would be "preserved to you sacred and inviolate," and that the convent "will be permitted to govern itself . . . without interference from the civil authority."[326] He then said that "whatever diversity of shade may appear in the religious opinions of our fellow citizens," the "charitable objects of your institution . . . cannot fail to ensure it the patronage of the government it is under."[327]

Like Addison and Shearith Israel, Jefferson acknowledged that denominational schools were presumptively entitled to public support for the "charitable objects" they undertook.[328] Moreover, responding to the nuns' worries that their particular religious activity might disqualify them, Jefferson explicitly invoked the federal Constitution to assert the opposite conclusion. The Catholic school was guaranteed "the patronage of the government" for its educational activities, "whatever diversity of shade may appear in the religious opinions of our fellow citizens."[329] Far from providing a reason for special exclusion, Jefferson insisted that denying the school support because of its religious activity was not just impolitic, but perhaps even prohibited by

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the resolution authorizing the funds, see FIRST REPORT OF THE BOARD OF TRUSTEES OF PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA, 1874–'75, at 53 (1876).

323 *See* Act of Mar. 2, 1833, ch. 88, 22 Stat. 538 (incorporating the Georgetown Free School and Orphan Asylum in the District of Columbia).

324 43 THE PAPERS OF THOMAS JEFFERSON 298-99 (James P. McClure, Elaine Weber Pascu, Tom Downey, Martha J. King, W. Bland Whitley, Andrew J.B. Fagal, & Merry Ellen Scofield eds., 2018).

325 Letter from the Ursuline Nuns of New Orleans to Thomas Jefferson (Apr. 23, 1804), *reprinted in* 43 THE PAPERS OF THOMAS JEFFERSON, *supra* note 324, at 297, 297.

326 Letter from Thomas Jefferson to the Ursuline Nuns of New Orleans (July 13, 1804), *reprinted in* 44 THE PAPERS OF THOMAS JEFFERSON 78, 78-79 (James P. McClure, Martha J. King, Tom Downey, W. Bland Whitley, Andrew J.B. Fagal, & Merry Ellen Scofield eds., 2019).

327 *Id.* at 79.

328 *Id.*

329 *Id.*

the "principles of the constitution."[330] Just as government could not provide support solely to finance a recipient's religion, neither could it *deny* support where the sole reason for doing so was a recipient's religion.

Support for religious education on the part of the federal government was not limited to these instances. An equally important class of evidence involves federal funding for religious education among the Native American tribes.

Less than a year after the Establishment Clause was ratified, the Washington administration authorized payment of $1,500 annually to support a Presbyterian school among the Iroquois and Stockbridge Indians.[331] A similar practice continued during Thomas Jefferson's presidency. In 1803, the federal government provided the Kaskaskia tribe with a payment of $100 to be repeated annually for seven years "towards the support of a priest," who was to "instruct as many of their children as possible in the rudiments of literature" while also carrying out "the duties of his office."[332] It also provided a one-time payment of $300 toward the erection of a church, perhaps to facilitate the instruction.[333] Had the Establishment Clause been understood as forbidding any subsidization of religious activity, it is difficult to see how any of this could have proceeded without objection, from Jefferson himself no less. Yet that appears to be what happened.

Programs providing federal money to run religious schools for Native Americans continued long past Jefferson's presidency. Beginning in 1793 and continuing thereafter, Congress designated as much as $20,000 to fund "temporary agents, to reside among the Indians, as he [the President] shall think proper," many of whom were Christian ministers.[334] By 1817, Congress was appropriating $10,000 per year to support the work of religious organizations in providing basic education.[335] Congress continued that practice more or less uninterrupted until as late as 1870, when it appropriated $100,000 for such purposes.[336] Recipients of those funds were private agencies

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330 *Id.* at 78.

331 *See* Joseph D. Ibbotson, *Samuel Kirkland, the Treaty of 1792, and the Indian Barrier State*, 19 N.Y. HIST. 374, 391 (1938).

332 *See* A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, Kaskaskia Tribe-U.S., art. III, Aug. 13, 1803, 7 Stat. 78, 78-79 (1803); *see also* Robert L. Cord, *Mr. Jefferson's "Nonabsolute" Wall of Separation Between Church and State*, *in* RELIGION AND POLITICAL CULTURE IN JEFFERSON'S VIRGINIA 167, 174-75 (Garrett Ward Sheldon & Daniel L. Dreisbach eds., 2000) (describing the treaty).

333 *See* A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, *supra* note 332, at 79.

334 *See, e.g.*, Act of Mar. 1, 1793, ch. 19, § 9, 1 Stat. 329, 331; *see also* Michael D. Breidenbach, *Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 166, 189 (Michael D. Briedenbach & Owen Anderson eds., 2020) (describing the funds).

335 *See* CHARLES L. GLENN, THE AMERICAN MODEL OF STATE AND SCHOOL 167 (2012).

336 *Id.*

supervised by Methodists, Baptists, Presbyterians, Episcopalians, Quakers, Catholics, and other denominations, all of whom ran religious schools.[337]

In sum, both the federal government and officials under its authority continued to provide money to religious institutions for education even after the ratification of the Establishment Clause, just as the states had done after prohibiting church taxes in their constitutions. Again, perhaps there is an explanation for this practice consistent with a broad no-aid theory. But the most plausible explanation seems to be that, like their counterparts in the states, federal actors did not think such expenditures were prohibited merely because the funds might be used for religion. In fact, on several occasions, they asserted that it was the withholding of funds because of a recipient's religion that was forbidden, at least when the funds were provided for a public purpose.

Still, there is one other issue that merits attention. Traditional church taxes had certain features in common that made them objectionable to many people at the Founding. But there were also some areas of ongoing disagreement. For instance, what if the tax wasn't explicitly earmarked for religious recipients, or the funding didn't involve coercion of any kind? Understanding how members of the Founding generation actually identified church tax schemes is essential for relating the Founding-era history to ours, and to understanding how the argument comparing church taxes to coerced tithes functioned in practice.

III. IDENTIFYING CHURCH TAXES

Almost all church tax schemes at the Founding had three elements in common: (1) they collected private resources through coercion, (2) earmarked those resources for religious actors, and (3) redistributed them for the purpose of financing religious functions. In Massachusetts, for instance, church taxes were assessed on all eligible citizens and designated at collection for the benefit of the local minister to support him in carrying out religious duties. Likewise, in Virginia and other Anglican colonies, church taxes had long been assessed on a per-capita basis for the explicit benefit of the Anglican minister in his parish role. Later iterations like general assessment proposals or exemptions for dissenters complicated things slightly. But these elements were still the defining features of most church tax schemes during the Founding period.

The argument that church taxes were a coerced religious observance—a tithe or sacrifice—fits most comfortably in relation to these schemes. To paraphrase

337 *See id*. This material is just a sketch. For a more comprehensive description of these missionary partnerships, see Nathan Chapman, *The Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. (forthcoming 2020).

Founding-era advocates of religious liberty, earmarked taxes to support a church's religious function both "force[d] people to part with their money for religious purposes" at collection,[338] and subsequently financed ministers "in the Pursuit of religious duties."[339] But proponents of religious liberty also extended these objections to other kinds of funding schemes that were specifically designed to finance religious worship. Some of these arguments appear to have garnered less support than objections to traditional church taxes. But understanding them provides important information about how at least some at the Founding viewed other attempts to finance religion—a point of possible importance for considering controversies over funding today.

A. *The Role of Earmarks*

The first important consideration concerns earmarks. As has already been mentioned, one common feature of Founding-era church tax schemes was that they involved taxes earmarked for religious entities at collection, rather than generic taxes paid into the general treasury. For example, Patrick Henry's general assessment proposal in Virginia explicitly announced that the tax was "for the support of Christian teachers" and could only be distributed to churches for uses furthering that purpose.[340] Earmarks undoubtedly strengthened the argument that church taxes were a coerced sacrifice, since they accentuated the "causal link between the extraction . . . and the monetary support of religion."[341] But the fact that taxes were sometimes earmarked for religious recipients was not in itself sufficient to trigger this objection. And there is at least some evidence suggesting that, where the eventual expenditure was aimed exclusively at financing religion, an earmark may not have been necessary either.

The first point—that earmarks alone were not dispositive—relates to the distinction between church taxes and funding for religious schools. In supporting religious schools, many states employed tax money that was designated as general revenue or assigned for education generally at the point of collection. But sometimes they also created schemes that specifically earmarked funds for religious schools. In Virginia, for instance, the legislature repeatedly reserved a portion of surveyor fees in certain regions for specific schools, including several religious ones.[342] Similarly, support for Washington College and for other religious schools in Maryland was explicitly tied to the

338 LELAND, *supra* note 170, at 188.

339 PHIPPS, *supra* note 190, at 6.

340 A Bill Establishing a Provision for Teachers, *supra* note 61, at 188-89.

341 Esbeck, *supra* note 23, at 90.

342 *See supra* notes 90–100 and accompanying text.

imposition of various taxes and fees in the eastern shore.[343] The same was true in Delaware and New Jersey, which both had laws explicitly stating that a portion of specific taxes would be distributed to religious entities—including churches—to subsidize their schools.[344] As we have already observed, none of these schemes provoked protest, even from the most extreme supporters of religious liberty. The fact that a tax was earmarked for a religious recipient was not sufficient to generate the objection that it was a coerced offering, at least where the obvious aim was promoting education. Designating a tax for the benefit of a religious entity—without more—did not make it a tithe.

The second point is more complicated. For the Founding generation, earmarking a tax to support a religious school was not sufficient to trigger objections, presumably because such funding still served a public purpose even if it benefited religion indirectly. But what about instances in which government attempted to use funds collected through general taxes for an exclusively religious end? Here the evidence is less clear, but there is indication that at least some at the Founding viewed such schemes as comparable to coerced tithes, even though they lacked the earmarks normally associated with church taxes.

The most well-known example is payments for chaplains. Several days before the language of the Establishment Clause was agreed on, Congress passed a bill authorizing salaries for various officials, including a chaplain for each house of Congress.[345] The funds used to pay these salaries were to be drawn from the federal treasury,[346] which at the time was funded primarily through taxes on imports.[347] Madison voted for the expenditure and later approved appropriations for chaplains as President, but several years later he objected, in part because the payments for chaplains were given for "religious worship . . . performed by Ministers of religion . . . [that were] paid out of the national taxes."[348] Baptist minister John Leland reasoned similarly, noting that although the salary of federal chaplains was "a trifle, far less than the three pence upon a pound of tea," it was nonetheless objectionable since "[t]his money they receive for religious services, by the force of the laws of

343 *See supra* notes 226–233 and accompanying text.

344 *See supra* notes 285–290 and accompanying text.

345 *See* Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71.

346 *See id*. § 6, 1 Stat. at 71 (noting that the payments were to be "paid out of the public treasury").

347 THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., U.S. FEDERAL GOVERNMENT REVENUES: 1790 TO PRESENT 3 (2006) (noting that until 1863, the federal government's "major source of revenue was customs duties").

348 James Madison, Detached Memoranda, *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 18, at 89, 91-92.

the national legislature."[349] According to Leland, such support was a "thing to be reprobated,"[350] and at least roughly comparable to "robbery for burnt offerings,"[351] despite the fact that it was supplied through general tax revenue.

The argument against paying chaplains with tax revenue was consistent with what Madison called "the pure principle of religious freedom" interpreted "[i]n "strictness."[352] Chaplains threatened religious freedom because they inevitably reflected the majority's religious preferences to the exclusion of the minority, and because they risked corrupting religion by making it a tool of the state.[353] But the idea that the government's sole aim in paying chaplains was to finance "religious services" was questionable in many instances. Chaplains in the army and the navy were an accommodation to the religious needs of soldiers—their purpose was to allow individuals in the government's care to practice their religion, a point which Madison himself more or less admitted.[354] Moreover, although payments for congressional chaplains were more troubling, even these writers recognized that their unique context made them a minor deviation—a "little horn" as Leland put it—not a major encroachment.[355] But

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349 John Leland, An Elective Judiciary, *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 170, at 283, 293.

350 *Id.*

351 *See* John Leland, Speech Delivered in the House of Representatives of Massachusetts, on the Subject of Religious Freedom (1811), *in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 170, at 353, 355 (observing that "God hates robbery for burnt offerings" and continuing in the next paragraph by observing that "*we* cannot pay legal taxes for religious services, descending even to the grade of a chaplain for the legislature").

352 Madison, *supra* note 348, at 91.

353 *See id.* at 92 (observing that the "tenets of the chaplains elected [by the majority] shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority," and that chaplaincy erects "a political authority in matters of religion" (bracketed material in original)). Similar criticisms continue to be leveled against legislative chaplains today. *See, e.g.*, Christopher Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 978 (2010) (arguing that legislative chaplaincies require government to "decide the proper type of religious message and the proper type of person to deliver it," necessarily meaning that "someone will have to be rejected").

354 *See* Madison, *supra* note 348, at 92-93 (observing that "the motive" for providing chaplains for the armed forces "is laudable" and that chaplains for "navies with insulated crews may be less within the scope" of his objection). This same debate over military chaplains continues. *Compare* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 165 (2007) (defending the constitutionality of military chaplains and the appropriate role they provide to "those service members whose religious experience depends on a vibrant . . . corps of chaplains"), *with* Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 169 (2007) (contending that military chaplains are not required under the Free Exercise Clause and are unconstitutional under the Establishment Clause).

355 *See* Leland, *supra* note 349, at 293; *see also* Madison, *supra* note 349, at 92 (observing in reference to funding for chaplains that "it will be better to apply to it the legal aphorism de minimis non curat lex: or to class it cum 'maculis quas aut incuria fudit, aut humana parum cavit natura'"); Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 18, at 82, 82 (suggesting the same). The translations of those

the same was not true of other programs that directed general tax revenue solely to support religious functions. And here, the most significant evidence comes from Connecticut.

In 1816, Connecticut passed a law entitled "An Act for the Support of Literature and Religion."[356] The act began by recognizing that the state was set to receive a large amount of money from the federal government, which was a refund from taxes collected to support national defense during the War of 1812.[357] It then declared that the refunded money was to be divided among various denominations: Congregationalist churches were to receive one-third, Episcopalians one-seventh, Baptists one-eighth, Methodists one-twelfth, with an additional one-seventh for Yale College.[358] Each denomination was to use the funds "for the support of the Gospel in their respective societies."[359]

As a last-ditch effort to support Connecticut's religious establishment, the 1816 appropriation was a brilliant ploy. Because the money had been originally extracted as a war tax rather than a tax earmarked for ministers, it was arguably different in kind from other church taxes. Or so it appeared to the law's supporters. According to the drafting committee, the law's appropriation could be rightly accepted "[e]ven [by] those Christians who do not acknowledge the right of the Civil Magistrate to enforce collections for these purposes."[360] But proponents of religious liberty did not see it that way. "Surely they must have supposed us less virtuous than Judas Iscariot," noted one writer, and others agreed.[361]

Baptists and Methodists throughout the state published numerous objections to the law, which they saw as an extension of Connecticut's existing church tax system.[362] The resistance culminated in a memorial written by the state's Baptists.[363] It began by proceeding through the usual arguments. Laws requiring people to pay money solely to finance someone else's ministers were offensive and unjust, since they required others to do what supporters of church

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phrases are, loosely: "the law does not bother with trifles," and "I shall not cavil at a few faults, proceeding either from negligence, or from the imperfection of our nature."

356 An Act for the Support of Literature and Religion, ch. XIII, 1816 Conn. Pub. Acts 279.

357 *Id.* § 1.

358 *Id.* §§ 3-7.

359 *See e.g.*, *id.* §§ 3; *see also id.* §§ 5-6. The residual funds were to remain in the treasury—a reserve that, according to the drafting committee, was to be distributed to any denomination that had been omitted "for want of correct information." *See* COMMITTEE REPORT, *reprinted in* CONN. COURANT (Hartford, Conn.), Nov. 5, 1816.

360 *Id.*

361 *See* 2 MCLOUGHLIN, *supra* note 125, at 1039 (quoting Editorial, COLUMBIAN REG. (New Haven, Conn.), Dec. 7, 1816)). Proponents of religious liberty widely accepted the idea that the law was in fact a bribe. *See id.* at 1037-38.

362 *See id.* at 1034-42 (describing the resistance to the law).

363 *See* ASA WILCOX, A PLEA FOR THE BAPTIST PETITION (1818). For a truncated version of the petition, see also "The Baptist Petition," AM. MERCURY (Hartford, Conn.), Aug. 18, 1818, at 2.

taxes would never want done to them.[364] Moreover, since support for a minister in his religious role was "required as a religious duty," it was an "offering[]"[365] that exceeded government's rightful authority to compel—"the individual himself is the only human judge of what his duty is towards his God."[366]

Most important, however, was the memorial's treatment of the 1816 law itself. According to the Baptists, the appropriation was objectionable even though it had been raised through a non-earmarked tax: it still took "[s]ome money, that was raised by the civil authority by taxation," and "because it came in that way; and was to be used exclusively 'for the support of the gospel,' it remain[ed] unaccepted."[367] The 1816 law did not involve a tax labeled at collection for the support of ministers. But for these Baptists, that made little difference—it was money garnered through coercion and appropriated for an exclusively religious purpose. "It is more blessed to give than to receive," they observed, "but there is no blessedness in compulsion, either to the sufferer or receiver."[368]

Baptists in Connecticut objected to the 1816 appropriation as a form of religious coercion even though it did not originate as an earmarked tax. That conclusion resonates with objections to paying chaplains out of general tax revenue. And it also has clear affinities with the idea that taxing citizens solely to finance religion is in fact equivalent to mandating a religious observance. But none of the sources equate these schemes with coerced tithes unequivocally, and it is unclear how widely that argument would have been shared if they had—after all, no one would have recognized the payment as a tithe at the point of collection. Yet if there is ambiguity in the precise nature of the objection, there is no ambiguity in how far it extended. Having asserted that the 1816 law was unacceptable because it involved tax money appropriated "exclusively 'for the support of the Gospel,'" the Baptists clarified their position as follows:

> Had the legislature left it freely to the donees, to appropriate it, as they thought best; and if a method of dividing it could be found, that would give general satisfaction, perhaps it would have been accepted. It presents a singular instance in national concerns [however] that power and property

364 WILCOX, *supra* note 363, at 5.

365 *Id.* at 11-12.

366 *Id.* at 8.

367 *Id.* at 16. Baptists and other dissenters also noted that the law entirely omitted smaller denominations like Quakers and Separates, and that it may also have been defective in the proportions it allotted to other denominations. *See* 2 MCLOUGHLIN, *supra* note 125, at 1036-37 (describing arguments against the bill).

368 "The Baptist Petition," *supra* note 363, at 2.

> should be bestowed on a people, for religious purposes, which they never desired . . . .[369]

According to the Connecticut Baptists, the 1816 appropriation was objectionable because it provided funds garnered through coercion exclusively to support a religious function. But that did not mean that all appropriations to churches or religious entities were forbidden. Had the legislature instead simply provided funds for a public purpose and left religious recipients "to appropriate it, as they thought best," and had the method for dividing it achieved "general satisfaction" by being truly even-handed among denominations, it would have been acceptable.[370] That position coheres with the view held by Baptists elsewhere regarding tax support for education, even education that included religion.[371] And indeed, when Connecticut finally forbade church taxes and ended its establishment a few years later, Baptists in that state followed their counterparts elsewhere. In 1820, they took the money that had been provided under the 1816 act, now free of the prior restriction, and applied the funds to support their schools.[372]

Earmarks were a common feature of traditional church taxes. But the evidence indicates that members of the Founding generation viewed that point with some complexity. The decision to designate taxes at the point of collection for use by a religious entity was not in itself enough to make the tax a coerced tithe, at least where the appropriation was provided for a public purpose like education. Likewise, although it is unclear whether taxes lacking earmarks at collection could also be viewed as coerced tithes, some at the Founding spoke about these schemes in similar terms where the funds were appropriated solely to finance religious worship.

B. *The Role of Individual Coercion*

In addition to earmarked taxes, virtually all church tax schemes at the Founding involved some form of individual coercion. In Massachusetts, for instance, church taxes were assessed on all eligible citizens, and failure to pay

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369 WILCOX, *supra* note 363, at 16.

370 *Id.* The proportions of funds provided to various denominations under the 1816 act were not drawn from any objective criteria, leading many to argue that the law improperly excluded smaller denominations, underpaid dissenters, and overpaid the established Congregational churches. *See* 2 MCLOUGHLIN, *supra* note 125, at 1036-37 (documenting these objections).

371 *See, e.g.*, *supra* notes 113–120 and accompanying text (documenting the Baptist position in Virginia); *supra* notes 234–239, 245 and accompanying text (noting Baptist support for government funding of their schools in Maryland); *supra* notes 202–212 and accompanying text (documenting Baptist requests for school funds elsewhere in New England).

372 *See* 2 MCLOUGHLIN, *supra* note 125, at 1042 & n.36 (noting Baptist reception of the funds in 1820 and their incorporation of the Connecticut Baptist Education Society to receive them).

resulted in fines or imprisonment.[373] The same was true in Anglican colonies like Virginia.[374] Here too, however, the evidence suggests that although coercion played an important role in identifying church taxes, it was decisive only when joined with other considerations.

The first important observation is a simple one: the mere fact that funds obtained through coercion were given to religious entities did not trigger an objection—either about coerced tithing or anything else. As we have already observed, virtually every state that had ended church taxes in the decade before or after the ratification of the Establishment Clause provided government funds to religious schools. Some of these—like Virginia and Maryland—supported those schools through mandatory fees on common activities or through the sale of property acquired through taxation.[375] Other states like New York, North Carolina, or Pennsylvania funded religious schools through direct property taxes or similar forms of taxation, which were undoubtedly coercive.[376] And some entities like the federal government used a combination of these measures.[377] Taken at face value, those facts point toward a straightforward conclusion. Where funds were given to religious entities in support of a good like education, the fact that the money was acquired through coercion was not enough to make it a church tax.

But what about instances where resources actually were given for the exclusive purpose of supporting religious worship, but the coercive element was loosened or done away with entirely? Here, the evidence is clear on one point and less clear on another.

The clearer point is that proponents of religious liberty maintained their objections to tax schemes aimed exclusively at financing religion even when those schemes contained opt-outs or exemptions. General assessment proposals like those in Virginia or Maryland attempted to lessen the coercive element in church taxes by allowing citizens to support education or the poor rather than churches if they opted to do so. As noted above, however, those adjustments were inadequate to blunt the objection that these schemes

373 *See supra* note 148 and accompanying text.

374 *See supra* notes 42–43 and accompanying text.

375 *See supra* notes 90–100, 110–120 and accompanying text (Virginia); *supra* notes 226–241 and accompanying text (Maryland).

376 *See supra* notes 248–253 and accompanying text (North Carolina); *supra* notes 269–275 and accompanying text (New York); *supra* notes 293–298 and accompanying text (Pennsylvania).

377 *See supra* notes 300–312 and accompanying text (describing funding of religious education in the District of Columbia using fees from licenses and later an education tax); *supra* notes 331–337, 347 and accompanying text (describing funding of religious schools in federal territories, presumably using revenues from taxes on imports).

mandate a coerced tithe.[378] That conclusion may have rested in part on the belief that the opt-outs were not always genuine alternatives.[379] But the more basic point seems to have been that—whether church taxes contained exemptions or not—they still assumed that government had the power to compel people to pay money solely to finance religious functions. And because payments given exclusively to support religion had always been viewed as an act of worship, government lacked the power to require them just as it lacked the power to compel other religious observances.

The more complicated problem was schemes that provided state resources solely to finance religion but did so without any coercion whatever. And by far, the most significant issue on that score was land grants to churches.

Land grants had long been a feature of traditional religious establishments. Glebe lands were mandated by Anglican canon law and similar lands had long been provided in New England townships.[380] The purpose of these grants was to provide not just space for a parsonage or church, but also a perpetual source of revenue to fund the minister's salary or the maintenance of worship spaces.[381] In at least some states, these land grants continued after church taxes had been outlawed.[382] But they were also a matter of some debate. Understanding that debate provides a final insight into the nature of the argument that church taxes were a coerced observance.

One early skirmish took place in the Continental Congress. In 1785, Congress considered a bill organizing lands in the Northwest Territory. The bill, which eventually became known as the Land Ordinance of 1785, included a provision requiring that one section of each township would be reserved for a local school, and another "for the support of religion."[383] It further stated that "[t]he profits arising therefrom in both instances [were] to be applied for ever according to the will of the majority of male residents of full age."[384] The school provision passed without incident.[385] But the religion provision was more controversial.

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378 *See supra* notes 48-83 and accompanying text (describing objections to the general assessment proposals in Virginia); *supra* notes 217-223 and accompanying text (describing Maryland).

379 *See, e.g.*, *supra* notes 77-80 and accompanying text (describing this argument in relation to Virginia's proposed general assessment).

380 *See* McConnell, *supra* note 41, at 2148 (noting that Anglican canon law required providing glebe lands for the minister of each parish and noting similar grants in New England).

381 *Id.* (observing that a glebe "was income-producing land, either farmed or rented by the minister," and that it "form[ed] a kind of permanent endowment").

382 *See, e.g.*, *supra* note 268 and accompanying text (noting land grants in New York).

383 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 293 (John C. Fitzpatrick ed., 1933).

384 *Id.*

385 *Id.* at 375-81 (recording the final version of the ordinance and the vote enacting it).

Beginning the discussion, Charles Pinkney of South Carolina made a motion to delete the phrase "for the support of religion," and replace it with "for religious and charitable uses."[386] William Ellery of Rhode Island followed up by making a more notable motion. Ellery moved to delete the phrase "religious and," which would have left the land grant only for "charitable uses."[387] The motion failed. But immediately after, Ellery made another motion to delete entirely the paragraph providing land reserved for religion.[388] There was no reason to expect a different result on the merits. But through clever phrasing, the question calling Ellery's second motion made deletion the default option: "[S]hall the former part stand?"[389] And because the provision failed to receive the support of the seven states required for passage, the language regarding religion was struck.[390]

The deletion of the religion provision from the Land Ordinance of 1785 was not the result of widespread disapproval. The actual vote count on retaining the grant was seventeen representatives in favor, six against.[391] But the matter seems to have been far from resolved. In 1787, the final version of the Northwest Ordinance again consciously rejected the idea that townships be required to reserve parcels exclusively for the support of religion.[392] Yet two individual contracts created roughly contemporaneously with the

386 *Id.* at 293.

387 *Id.* at 293-94.

388 *Id.* at 294.

389 *Id.*

390 *Id.* at 295. For an account of the vote and an explanation of the rules in the Continental Congress regarding voting by state, see Michael S. Ariens, *Church State in Ohio, 1785–1833*, *in* CHURCH-STATE RELATIONS, *supra* note 126, at 249-51. A month after the vote, James Madison wrote to James Monroe, one of Virginia's representatives in Congress, stating his approval: "How a regulation so unjust in itself, so foreign to the Authority of Cong, so hurtful to the sale of public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a [Committee] is truly matter of astonishment." Letter from James Madison to James Monroe (May 29, 1785), *in* 2 THE WRITINGS OF JAMES MADISON 143, 145 (Gaillard Hunt ed., 1901).

391 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 383, at 295; *see also* Ronald A. Smith, *Freedom of Religion and the Land Ordinance of 1785*, 24 J. CHURCH & STATE 589, 596-600 (1982) (discussing the votes of individual representatives and the role that religion played in their respective states).

392 *See* Ariens, *supra* note 390, at 253-54 (observing that unlike earlier drafts which could have been interpreted otherwise, the final version of the Northwest Ordinance "did not require the territorial governments to reserve sections of land for the financial support of religion"); *see also* Northwest Ordinance (July 13, 1787), 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 334, 340 (Roscoe R. Hill ed., 1936) (acknowledging the importance of "[r]eligion, [m]orality, and knowledge," and going on to declare that "[s]chools and the means of education shall forever be encouraged").

Ordinance required land be set aside for religion in townships covered by those purchases.[393] After 1794, however, no other federal contract did so.[394]

The fact that land grants for churches appear to have been a subject of some confusion is not surprising. Perhaps the most important argument against church taxes was that those taxes mandated a coerced religious offering—a sacrifice of one's property solely to finance religious worship. But land grants were not readily susceptible to that objection. Such grants did not force any citizen to part with personal resources to support worship. Instead, they simply provided a share of existing government resources for those purposes. But proponents of religious liberty were hardly content to leave the matter there. And again, probably the most important evidence of their views comes from Connecticut.

In 1793, less than a decade after the debate over the land ordinances in Congress, Connecticut enacted a law that raised similar issues. The law declared that all funds collected from the sale of the state's western lands be appropriated to "the several Ecclesiastical Societies, Churches, or Congregations of all denominations" to support "their respective Ministers or Preachers of the Gospel, and Schools of Education."[395] Eventually, the law was amended to allow local majorities within each township to determine whether the money was to be "applied to the Support of the Worship and Ministry," or only for "the Support of Schools."[396]

In arguing in favor of the western lands law, its supporters observed the important difference between traditional church taxes and proceeds from land sales. Unlike church taxes, money from land sales would be "a free donation from the state," and thus acceptable even to "those denominations of [C]hristians whose principles forbid their having recourse to the civil arm to compel individuals . . . to contribute to the support of religion."[397] Proponents of religious liberty—especially the state's Baptists and Methodists—rejected that argument. But they could not fully deny its force.

One author, writing under the pseudonym "Farmer," exemplified the dissenters' position.[398] He began by noting that funding for schools was

393 *See* Ariens, *supra* note 390, at 254-55 (describing how these contracts required reserving ministerial lands).

394 Smith, *supra* note 391, at 592 ("The provision for religion in the Symmes tract was the last one to be included in a land grant from the federal government."); *see also* Ariens, *supra* note 390, at 255 (noting that Washington signed the Symmes patent, the second of the two agreements, in 1794).

395 2 MCLOUGHLIN, *supra* note 125, at 968 (providing the text of the law prior to amendment).

396 *See* CONN. COURANT, Nov. 3, 1794 (quoting an earlier version of 1795 Conn. Pub. Acts 487); *see also* 2 MCLOUGHLIN, *supra* note 125, at 969 (describing the amendment and the public debate surrounding it).

397 2 MCLOUGHLIN, *supra* note 125, at 973 (quoting CONN. COURANT, Mar. 16, 1795).

398 *Id.* at 972 (identifying Farmer as exemplifying "[t]he stand of the Baptists and other dissenters on the Western Lands Act").

indeed a "desirable object," and one that he had no qualms about supporting.[399] The problem was "solely . . . [the law's] making provisions for the perpetual support of ministers and teachers of the gospel," which was objectionable because "[i]t is no part of the duty or business of civil rulers . . . to make provision out of the property of the state" for such purposes.[400] In so arguing, however, Farmer did not explicitly claim that the Western Lands Act required a coerced religious observance.[401] Rather, he appealed to other adjacent arguments. "[T]he Divine author . . . [never] left on record any injunction . . . that the gospel or its ministers were committed to the trust or recommended to the care of civil rulers."[402] The state was "neither qualified nor authorized" to make judgments concerning religious truth or those properly suited to preach it.[403] Such support would corrupt "the purity of the original institution as taught and exemplified in the gospel" by making support dependent on a magistrate's approval.[404] Noncoercive support provided by land sales probably could not be said to require a religious sacrifice on the part of individual citizens. But it was still objectionable because it provided public property solely to support religious functions: "[I]t is generally admitted that considered simply as being ministers of the gospel, it is not the proper duty of civil rulers . . . to provide them support from the property of the state."[405] And indeed, that same conviction seems to have been at the heart of a final important controversy over land grants a few years later, this one again in Congress.

In 1809, Baptists in the Mississippi Territory wrote a letter to Congress requesting that it secure for them a parcel of land.[406] The letter explained that they had built a church on land belonging to the United States, only to realize that the only means to secure this land was through a "public sale."[407] The church worried that being forced to purchase the land this way "might subject us to pay, not only the value of the land, but a considerable part of the value of the [church]," or at the very least force it to purchase a much bigger parcel than it needed.[408] Notably, the Baptists stopped short of asking for a

399 "Farmer," *Messi'rs Printers*, CONN. COURANT, May 11, 1795.

400 *Id.*

401 However, he did note that in general "a christian . . . is obliged to contribute to the support of that wherein he thinks christianity to consist," and that "civil rulers [cannot] absolve him from this duty by disposing of his property to support that which *they* judge orthodox." *Id.*

402 *Id.*

403 *Id.*

404 *Id.*

405 *Id.*

406 Application of a Committee of the Baptist Church at Salem, Mississippi, for the Land on Which the Church Stands (Jan. 7, 1809), *reprinted in* 2 AMERICAN STATE PAPERS: MISCELLANEOUS 11, 11 (Walter Lowrie & Walter S. Franklin eds., 1834).

407 *Id.*

408 *Id.*

donation. Instead, the church asked Congress to pass a law "to secure us [the] land, and on such terms as you in your wisdom may think proper."[409]

Congress responded by including the church in a bill which reserved the relevant five acres of land "for the use of the Baptist church."[410] James Madison, now serving as President, vetoed the bill, declaring that it "comprise[d] a principle and precedent for the appropriation of funds of the United States, for the use and support of religious societies, contrary to the article of the constitution which declares that Congress shall make no law respecting a religious establishment."[411]

Madison did not explain the reasons underlying his conclusion. But it seems likely that he viewed the matter just as Baptists and other religious dissenters in Connecticut did. Providing land solely to support a church's worship did not involve individual coercion, and thus may not have been comparable to a compulsory tithe. But it still risked setting a dangerous precedent that the United States had power to appropriate property for the exclusive purpose of financing religion. That objection apparently did not apply to religious schools, at least if Madison's behavior is any indication.[412] But it applied to land grants given exclusively to support a church as a church, even if those grants did not involve coercing anyone.

Individual coercion was a hallmark of most church tax schemes. Yet as with earmarks, the element of coercion appears to have been neither necessary nor sufficient to trigger objections. Many states and the federal government supported religious schools with various forms of coercive taxation, but those programs seem to have been accepted without objection. Likewise, although supporters of religious liberty conspicuously avoided claiming that programs like land grants for churches could be compared to coerced tithes, they nonetheless objected to these schemes where they aimed solely to finance religious functions. At a more general level, however, the fact that this issue was relatively unsettled provides further reason think that the argument equating church taxes with coerced observance was central to the debate.

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409 *Id.*

410 *Id.* at 154.

411 President Madison's Objections to the "Bill for the Relief of Richard Tervin, William Coleman, Edwin Lewis, Samuel Mims, Joseph Wilson, and the Baptist Church at Salem Meeting-House, in the Mississippi Territory" (Feb. 28, 1811), *reprinted in* 2 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 406, at 154, 154.

412 As Nathan Chapman has noted, during Madison's administration the government's partnerships with missionary schools among the Native American tribes actually increased. *See* Chapman, *supra* note 337, at 9.

IV. SUMMARY OF THE EVIDENCE AND IMPLICATIONS

The history described above lacks clarity at certain points. In many states, there is only limited evidence about how ordinary citizens thought about church taxes or distinguished them from other kinds of funding schemes. Moreover, although the views of Baptists and other proponents of religious liberty can be known with more clarity, it is unclear how widely their more radical objections—especially to things like chaplains or land grants—were shared among their contemporaries. Yet even acknowledging these limits, the evidence considered above suggests several conclusions that can be stated with some confidence. It is worth briefly discussing what the history allows us to say before discussing its implications.

The first issue the history clarifies is the basic terms of the debate. As the evidence from places like Virginia, Massachusetts, and Maryland suggests, both opponents and supporters of church taxes generally agreed that government could not require citizens to engage in particular forms of religious worship. They did not agree, however, about whether that truism also applied to church taxes.

Proponents of church taxes argued that so long as those schemes did not explicitly favor one church or leave dissenters with no choice about where their funds were directed, they were acceptable. Supporters of religious freedom like James Madison, Isaac Backus, and others responded by asserting that those defenses missed the point. By requiring payments from citizens specifically designed to finance religious worship, church taxes required each person to make a sacrifice to God. And as a result, they reasoned, those taxes exceeded government's rightful authority regardless of whether they supported one church or many, and regardless of whether they built in exemptions or other kinds of allowances for dissenters. In later years, supporters of religious liberty extended their objection to schemes involving general taxes and land grants for churches. But these were skirmishes that arose out of the main issue. For the Founding generation, the key question seems to have been whether church taxes were a coerced religious observance and thus an improper form of religious establishment.

The second thing the history makes clear involves the scope of the objection. In states that had never collected church taxes like Pennsylvania or those that had ended the practice like Virginia, legislatures ceased providing money solely to support religious functions. But the same was not true of funding given to religious institutions for other reasons.

In every single state that rejected church taxes between 1776 and the decade after the Establishment Clause was ratified, churches and other

religious institutions eventually received public money for education.[413] The same was true of the federal government and actors under its control who funded religious education in the District of Columbia and other missionary schools for almost a century after the adoption of the Establishment Clause. We cannot know for certain why supporters of religious liberty objected to church taxes but did not object to that practice. But very likely, they believed that providing taxpayer funds solely to finance worship was a coerced tithe, but the same was not true of programs providing funding for other reasons. That theory tracks the arguments made by supporters of religious freedom like Madison and Backus, and it links those arguments to widespread practice in this period. It also explains why even Baptists and Quakers actively sought such funds for their own schools while simultaneously opposing church taxes. Churches were not to receive public money solely to support their worship, because such funding essentially required each citizen to make a religious offering. But the same was not true of funding for things like education, even if beneficiaries used some of the funds for religion.

The third thing the history illuminates concerns the no-aid theory. As the foregoing indicates, funding for religious schools during the Founding period was virtually ubiquitous in states that ended church taxes, and the same was true at the federal level for decades after the Establishment Clause was ratified. And given those facts, one might wonder: if the no-aid theory is so hard to reconcile with the evidence, why have so many people endorsed it as a proper reading of history?

The answer has to do with a key ambiguity at the heart of the theory. In *Everson*, Justice Black said that the historical evidence demonstrated that because citizens cannot be forced to pay for religion they oppose, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions."[414] In one sense, that statement is absolutely accurate. In rejecting church taxes, citizens at the Founding agreed that government had no power to levy taxes "to support" religious activity, at least where "support" is construed to mean "provide targeted funding for the religious function of churches and ministers." The error was in assuming that limitation *also* applied to programs in which support for religion was incidental to some other good. For the Founding generation, funding for religious schools did not 'support' religion in a way that was prohibited, in all likelihood because such programs bore no resemblance to coerced offerings. The no-aid theory was close enough to the truth to be plausible. But once the history is

413 Rhode Island banned church taxes in 1716, so is not technically included this group. But the practice of Quakers there provides some reason to think a similar attitude may have been present in that state too. *See supra* notes 196–201 and accompanying text (noting Quaker efforts to obtain school funding).

414 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

understood, it becomes apparent that extending it beyond its original scope—that is, beyond programs providing special funding for religious worship—was a major mistake.

To be sure, one might contest that last point. Supporters of the no-aid theory misunderstood the history by assuming that Founding-era sources condemned support for religious schools. But it is true that, beginning in the 1850s and continuing into the early twentieth century, many states amended their own constitutions to bar financial support for "sectarian" schools.[415] And by 1875, people like James Blaine were advocating for a similar constitutional amendment at the federal level.[416] Thus, even if no one at the Founding thought the Establishment Clause or any equivalent state provision forbade government funding for religious schools, perhaps the adoption of the Fourteenth Amendment and subsequent practice made the broad no-aid rule part of the Constitution.

This is not the place to engage in a full-scale discussion about the nature of incorporation or the relationship between original meaning and subsequent practice. However, two things are worth noting. First, assuming one believes the framers of the Fourteenth Amendment extended the Constitution's ban on religious establishment to the states,[417] their practice suggests that they did not view the Establishment Clause as banning aid to religious schools either. During Reconstruction, the Freedmen's Bureau provided tens of thousands of dollars to religious schools, and that was in addition to direct money grants provided by Congress itself.[418] Moreover, the push for a federal constitutional amendment by James Blaine and others suggests that most citizens in this period probably did not understand the Establishment Clause itself as forbidding funding for religious schools, including denominational ones.

There is also a second point. Even acknowledging that many states eventually ended funding for religious schools, there are major questions about

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415 The literature describing this transformation is vast. *See* GLENN, *supra* note 335, at 154-73 (describing the conflict between Protestants and Catholics in the 1870s over public funding for religious schools, and the eventual legislative push to end public funding for religious schools); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL: 1825–1925, at 69-145 (1987) (describing how conflict between Catholics and Protestants, in the absence of a federal ban on funding sectarian schools, led to mobilization in the States to take funding away from denominational schools in order to defund Catholic schools).

416 *See* GLENN, *supra* note 335, at 168-73 (discussing the anti-Catholic history of the "Blaine Amendments" and explaining how action on the no-aid theory shifted from the federal to state level).

417 *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. STATE L.J. 1085, 1150 (1995) (arguing that in the period surrounding the adoption of the Fourteenth Amendment "the Establishment Clause was understood as the substantive equal of the Free Exercise Clause, and . . . the principle of nonestablishment applied at both the state and federal level").

418 *See* GABEL, *supra* note 98, at 512-21 (describing these expenditures).

how seriously that practice should be taken as informing the Constitution's meaning. As the *Espinoza* majority pointed out, the claim that government funding for religious schools was unconstitutional arose out of intense Protestant-Catholic conflict.[419] More specifically, it arose out of a desire on the part of Protestants to deny funding to Catholic schools while retaining state support for common schools which were unabashedly and self-consciously Protestant.[420] One could argue this discriminatory context should not color the history as a whole.[421] But doing so requires explaining why a practice with such a dubious pedigree ought to trump pervasive Founding-era evidence, arguably rooted in clear principle, that funding for religious education is permissible. And assuming that Founding-era history is controlling—as every member of the Supreme Court has to at least some degree—that history contains several important implications for modern doctrine.[422]

The most obvious implication relates to the basic orientation of the Court's jurisprudence. Recently, several Justices insisted that the Court's modern emphasis on neutrality in its funding jurisprudence has "no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause."[423] And numerous scholars have made similar assertions.[424] But the foregoing history suggests a different conclusion.

For proponents of religious liberty at the Founding, church taxes were objectionable because their exclusive aim was financing worship, which made them indistinguishable from a coerced tithe. But the same objection did not apply when funds were provided to religious entities for other reasons, most notably for education. On the contrary, where the government's interest in providing funding rested on something other than financing religion for its

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419 140 S. Ct. 2246, 2258-59 (2020).

420 *See* Laycock, *supra* note 13, at 145-46 (describing this history); *see also* John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300-05 (2001) (concluding that "religious rivalry and anti-Catholic prejudice" was a "prominent" factor in state bans on aid to religious schools). For a more expansive account, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193-335 (2002). The Court acknowledged this same fact in *Espinoza*. *See* 140 S. Ct. at 2259 (noting the "checkered tradition" of denying funding to religious schools, and that both the Blaine Amendment and "many of its state counterparts" arose out of "pervasive hostility to the Catholic Church and to Catholics in general" (citation and internal quotation marks omitted)).

421 *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 295-99 (2008) (admitting that historians have characterized the Blaine Amendment as discriminatory but arguing that there was an understood "prohibition on state funding of religious education" before the Amendment); *see also* STEVEN K. GREEN, THE BIBLE, THE SCHOOL AND THE CONSTITUTION 225-36 (2012) (advancing a similar argument).

422 *See generally Espinoza*, 140 S. Ct. at 2258-59 (2020) (discussing Founding-era history); *id*. at 2285-87 (Breyer, J., dissenting) (same); *id*. at 2296-97 (Sotomayor, J., dissenting) (same).

423 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2030-31 (2017) (Sotomayor, J., dissenting).

424 *See supra* notes 20–23 and accompanying text.

own sake, even the most extreme advocates of religious liberty viewed it as wholly unobjectionable. And under modern conditions, that view leads to "neutral" treatment between secular and religious recipients as a matter of course. Where government provides funds to pay for public goods rather than solely to finance religion, it will necessarily treat religious and secular entities receiving those funds similarly as a matter of course. Contrary to at least some modern rhetoric, Founding-era history does not contradict the Court's modern funding jurisprudence. On the contrary, it vindicates the doctrine in its major respects, though it does so indirectly.

Yet if the history largely justifies the general direction of the Court's jurisprudence, it does not always justify the specific choices the Court has made. One example involves rules about direct funding given to religious recipients. In *Mitchell v. Helms*, Justice O'Connor insisted that although religious entities can receive direct aid to further secular goods, the Establishment Clause demands those funds be strictly confined so they are not diverted to anything religious.[425] The Court in *Espinoza* left that principle undisturbed, at least for now.[426] But if the foregoing history is accurate, that limitation was erroneous. As the evidence suggests, for members of the Founding generation who opposed church taxes, it was not the *use* of the money in isolation that mattered. What mattered was whether money was offered to religious entities in support of some public aim rather than simply to finance religion.[427] Where such funding was given in support of a good like education, specific decisions about the use of those funds by beneficiaries appear to have been irrelevant. The focus on the use of government dollars apart from a program's larger purpose is a holdover from the no-aid theory, not a reflection of Founding-era history.

A version of the same corrective could be offered in other areas. School vouchers are a good example. In *Zelman v. Simmons-Harris*, the Court concluded that a voucher program providing money for parents to send their children to either religious or secular schools did not violate the

425 *See* Mitchell v. Helms, 530 U.S. 793, 838-44 (2000) (O'Connor, J., concurring in the judgment) (arguing that "actual diversion of government aid to religious indoctrination" is forbidden under the Establishment Clause, even where a program distributes funds to religious and secular recipients on a neutral basis).

426 *See Espinoza*, 140 S. Ct. at 2254 (noting that under the scholarship program at issue, money "makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools" by donating to private scholarships supporting those schools).

427 For a sampling of other historical sources making a similar point, see Stephanie H. Barclay, Brady Earley, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 550-51 (2019). As the authors observe, the sources do not identify "neutral forms of government financial support for religious organizations . . . as a characteristic of establishment." *Id.* at 551.

Establishment Clause.[428] In so holding, the Court stressed—consistent with the history above—that the program was constitutional in part because it was demonstrably neutral as to religion: it offered money without "deliberately skew[ing] incentives toward religious schools."[429] Yet the Court also said that because the program funded religious activity, it was important that the funds be channeled through "individual recipients" like parents.[430] That latter ruling was an unconvincing formalism and has been rightly criticized as constitutional money laundering.[431] But in truth, the problem was not *Zelman* itself, but rather the idea that government may never provide funds that might also be used by a recipient for something religious.

As originally understood, the Establishment Clause almost surely did not prohibit government from funding religious activity, at least where such funding was incidental to furthering some other good. And that fact puts *Zelman*'s talk about private choice in a new light. Creating a program in which private individuals exercise ultimate choice about how funds are directed can be a good way to display that the government is acting neutrally with respect to religion. But the history indicates it is certainly not required. The question is whether a funding program aims at something other than financing religion for its own sake, not whether government dollars might be used for something religious along the way.

To be sure, there are complications lurking here. The most obvious one involves programs that employ formally neutral criteria but use them as a gerrymander to channel money to the government's favored religious recipients. That danger is especially acute where a program employs vague or highly discretionary criteria, which might allow officials to favor or disfavor specific religious activities or viewpoints.[432] There were at least accusations that George W. Bush's Faith-Based Initiative which provided funds for the social service activities of religious groups had this problem,[433] and one could imagine other examples too.

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428 Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

429 *Id.* at 650.

430 *Id.* at 652.

431 *See, e.g.*, Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L. J. 167, 187-91 (2000) (insisting that the Court's reasoning in *Zelman* suggests that "money can simply be laundered through 'private choice' as a way to avoid Establishment Clause guarantees"). For a nuanced examination of the money-laundering objection in relation to *Zelman* specifically, see Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 935-47 (2003), in which the authors explain that the *Zelman* majority very likely retained this requirement to attract Justice O'Connor's vote).

432 *See* Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 36 J.L. & RELIGION (forthcoming 2020) (manuscript at 14), https://ssrn.com/abstract=3680167 ("The more discretionary the criteria, the greater the risk of discrimination in the award of funds . . . .").

433 *See* Laycock, *supra* note 13, at 156-57, 157 n.176 (collecting and describing these complaints).

The Founders did not deal with the problem of gerrymandered funding schemes specifically, though they did sometimes contend that schemes like general assessments were attempts to shore up one church's dominance.[434] Here again, however, a comparison to historic church tax regimes is a helpful starting place. As we have already observed, church taxes schemes and their analogues provided funds solely to finance a religious function. Even at the Founding, however, those schemes were the exception. Funding for religious schools existed in every state that had ended church taxes, and as far as I am aware, none of those programs were accused of being a covert attempt to finance worship. On the contrary, other than New York's controversial moves to end funding for denominational education, those programs did not formally recognize the religious practice of recipients at all.

The same will likely be true of most programs today. When religious entities are included in funding programs for homeless shelters, scholarship programs, or historic preservation grants, the law does not take account of their religious practice. It cares about the services they provide, and the programs are structured to get the government its money's worth. And where those programs rely on relatively objective criteria, any differences in funding will usually be traceable to factors like the availability of providers in a particular area or the quality of the services rendered. To be sure, there may be outliers, and courts should be on the lookout for them. But unless the decision to fund is explainable only in terms of religion—that is, unless the evidence of religious bias demonstrates that the program is effectively a church tax in disguise—comparing a funding scheme to a compulsory tithe or anything like it is not very credible.

The history also has also another implication, this one concerning the mechanics of litigation. For purposes of Article III standing, the Court has treated Establishment Clause claims as an exception to the rule against "taxpayer standing," based on the erroneous conclusion that Madison thought the Clause would be violated anytime beneficiaries used taxpayer funds "to aid religion."[435] But again, the history above offers some help.

If the proper rule is that government may not provide funds solely to finance religious functions, the Court would have two options. On the one hand, it could retain broad taxpayer standing and instruct lower courts to dispose of cases at the motion to dismiss stage in light of the correct substantive rule. That strategy would reflect the belief—arguably held by at

434 *See, e.g.*, CURRY, *supra* note 53, at 147 (observing that opponents of the general assessment in Virginia saw the scheme as "merely a covert way of aiding the Anglican Church"); *see also* "A Christian," *Messrs. Goddard and Langworthy*, MD. J. & BALT. ADVERTISER, May 17, 1785 (speculating that Maryland's general assessment was a plot to prop up the Anglican Church).

435 *See* Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (describing Madison's concerns and the current test for taxpayer standing).

least some at the Founding—that money given exclusively to support a religious function is comparable to a coerced tithe even when it originates from a general tax.[436] But just as sensibly, the Court could also limit standing solely to entities that have actually been denied funds under a program (rather than extending it to any aggrieved taxpayer). That approach would probably enforce the rule just as well, since it seems unlikely a program designed exclusively to finance religion could do so without excluding beneficiaries who would otherwise be entitled to support.[437] Either strategy would capture the spirit of Founding-era views about funding for religion, and either would help bring an end to the mischief of the Court's earlier jurisprudence.

There is one final point worth discussing. If the Constitution does not affirmatively forbid allowing beneficiaries to use money for religious activity, does it have anything to say about a government's choice to embrace that restriction of its own accord? Even if the government *may* enact neutral programs that convey funds to religious recipients without restricting their use, could a state choose to exclude beneficiaries engaged in religious activity as a policy choice?

Answering that question involves two different considerations. The first has to do with justifications for a refusal to fund. In *Locke v. Davey*, the Supreme Court held that a state could exclude a student from a scholarship program because he chose to major in devotional theology.[438] According to the Court, that exclusion was permissible in part because a theology degree is about training to be a minister, and the Founding generation "prohibited *any* tax dollars from supporting the clergy."[439] Yet as the foregoing suggests, that reading of the history was very likely incorrect.

Proponents of religious freedom at the founding objected to support for ministers "under that name"[440] or "in the Pursuit of religious Duties."[441] But they did not object to funding ministers or churches in pursuit of public goods. On the contrary, New York provided tax money directly to churches of all kinds to fund their free schools, and the same was true in Maryland,

436 *See supra* notes 345–368 and accompanying text (describing these objections). At a minimum, however, the historical evidence suggests that where a funding scheme lacks any kind of individual coercion it probably cannot be compared to a coerced tithe provided by taxpayers. The modern Supreme Court has reasoned similarly. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 142 (2011) (holding taxpayers have standing when a funding program involves the expenditure of taxes taken by coercion, but not when it involves tax credits).

437 For one thoughtful argument that the Court's approach to Article III standing under the Establishment Clause has been misguided, see Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655 (2009).

438 540 U.S. 712, 715 (2004).

439 *Id.* at 723.

440 Backus, *supra* note 73, at 216-17.

441 PHIPPS, *supra* note 190, at 6.

New Jersey, Delaware, and Pennsylvania.[442] Moreover, the Court's insistence that the problem in *Locke* involved funding for an "essentially religious endeavor" is true only if one focuses on the *use* of money by a single beneficiary while ignoring the scholarship program itself.[443] Were a state to enact a program whose sole ambition was to fund ministerial training or religious worship, there is no doubt it would be unconstitutional. But that limitation does not apply to programs that fund schools, soup kitchens, or university scholarships and are available to religious and nonreligious recipients like the program in *Locke*. A state may have many legitimate reasons for limiting funding. But history provides little support for the idea that restrictions on religious use can be justified as flowing from "antiestablishment interests" with a Founding-era pedigree.[444]

The second point concerns the obligation to fund itself. The history above contains limited evidence about whether the founding generation thought government has a responsibility to fund religious entities when it chooses to fund secular ones. But that should not be surprising. Apart from modest funding for schools, the government funded almost nothing in the private sector in this period, making selective funding claims rare by default.[445] Moreover, although Founding-era views are broadly consistent with the Court's modern framework, the Founding generation itself did not actually employ a conceptual framework calling for "neutrality" between religious and secular recipients. Nonetheless, the historical record offers at least some reason to think that cases like *Espinoza* are broadly consistent with the Founding-era understanding.

Most notably, where religious entities at the Founding were excluded from otherwise available funding solely because of their religious activity, they protested vigorously. In the debate over school funds in Georgetown, the city official speaking in favor of the city's Catholics expressed concern over "any portion of our citizens [being] excluded from a just participation of any investment of the public funds in consequence of a peculiarity of religious

442 *See supra* notes 269–275 and accompanying text (New York); *supra* notes 234-241 and accompanying text (Maryland); *supra* notes 285-290 and accompanying text (New Jersey and Delaware); *supra* notes 291-298 and accompanying text (Pennsylvania).

443 *Locke*, 540 U.S. at 721. The focus on a single beneficiary's use was also in significant tension with a prior case in which the Court evaluated the scholarship program "as a whole." *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986) (holding that the Establishment Clause did not bar a blind student from using state-scholarship funds to attend a bible college and train to be a minister).

444 *See Locke*, 540 U.S. at 722 (justifying a theology student's exclusion from an otherwise available scholarship program on the basis of "antiestablishment interests" grounded in history).

445 Laycock, *supra* note 13, at 142 (noting the paucity of government funding programs in the Founding era).

faith."[446] Likewise, in New York, the Congregation of Shearith Israel went so far as to say that such discrimination violated "the liberal spirit of our constitution, which recognizes no distinction in religious worship."[447] In both instances, religious minorities confronted with selective funding argued that such exclusions were unjust or even unconstitutional. And in both instances, their views prevailed.

To be sure, these historical examples might be distinguishable from the modern cases. After all, they involve selective funding for *other* religious schools, not the decision to fund only secular ones. But the logic of the Founding-era arguments seems to apply with equal force to the latter context too.

Funding for religious schools did not fall within the Founding-era objection to church taxes, likely because such funding was not provided for the exclusive purpose of financing religion. Instead, many Founding-era citizens thought it was *denying* funding for schools solely because of their religion activity that was prohibited. Part of the rationale for that conclusion was the belief that such denials functioned as a penalty on religious practice—they deprived citizens of "a just participation of . . . investment of the public funds in consequence of . . . religious faith" as the official in Georgetown put it.[448] But even more, the idea that government could not exclude citizens from benefits solely on the basis of religious activity was just the flip side of the objection to church taxes. Just as government could not extract funds exclusively for a religious function, neither could it withhold funds provided for other purposes solely because of religion. And that principle seems to apply just as readily to programs that categorically exclude *all* religious recipients rather than just recipients of a particular faith.

What is more, Jefferson's correspondence with the Catholic nuns in New Orleans provides reason to think the federal Constitution contained the same principle.[449] Recall that, following the Louisiana Purchase, the nuns wrote to Jefferson to inquire whether their school—which now arguably rested on property belonging to the United States—would be allowed to continue. Jefferson responded by assuring them that the "principles of the constitution" confirmed that their school was "ensure[ed] . . . the patronage of the government" for its public service, "whatever diversity of shade may appear in the religious opinions of our fellow citizens."[450] If the property of the New Orleans school had actually passed to the United States, allowing the nuns to use it was a form of government subsidy. Yet here too, Jefferson suggested

446 *See* WARNER, *supra* note 314, at 77.

447 *See* The Memorial of the Trustees of the Congregation of Sheerith Israel Convened, *supra* note 281, at 95.

448 *See* WARNER, *supra* note 314, at 77.

449 For a full recounting of the incident, see *supra* notes 324–330 and accompanying text.

450 Letter from Thomas Jefferson to the Ursuline Nuns of New Orleans, *supra* note 326, at 78-79.

that federal assistance for the Catholic school's "charitable objects" was perfectly permissible.[451] But even more than that, he also strongly implied that the "principles of the constitution" indicated that the federal government could not discontinue that subsidy solely because of a disagreement with the nuns' "religious opinions."[452] Again, the point seems the same as that offered by Shearith Israel in New York and Catholics in Georgetown, now applied to the federal constitution. According to Jefferson, at least, the First Amendment prohibited denying otherwise available benefits where the sole reason was religion, just as it prohibited extracting funds where the sole reason was religion.

CONCLUSION

No one likes paying for causes they find objectionable. But for the Founders, that was not the starting place for managing our differences, even our differences around religion. In 1790, George Washington wrote a letter to Shearith Israel and America's other Jewish congregations in which he observed: "The liberality of sentiment toward each other which marks every political and religious denomination of men in this Country, stands unparalleled in the history of Nations."[453] And indeed, it was liberality that defined the attitude of the Founding generation toward funding for things like schools. For them as for us today, religious disagreement was a source of division. But without more, disagreement itself was not a limitation on the government's ability to support the public good.

On the best reading of the evidence, the Founders forbade government from deploying tax money or other public resources where the sole ambition was to finance religious worship. That conviction flowed from the idea that government could not coerce anyone to tithe, even to support one's own faith. But where no such ambition was present, it was Washington's sentiment that prevailed. To be sure, these Americans were not perfect in carrying out their commitment to religious freedom. To their credit, however, they largely agreed that when it came to goods like education or provision for the poor, it was cooperation—not 'no aid'—that defined the country they founded. And if historical practices and understandings are to guide our interpretation of the Religion Clauses, that liberal sentiment is still the rule today.

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451 *Id.* at 79 ("The charitable objects of your institution . . . cannot fail to ensure it the patronage of the government it is under.").

452 *Id.* at 78-79.

453 *See* Letter from George Washington to the Hebrew Congregations in the Cities of Philadelphia, New York, Charleston and Richmond (Dec. 13, 1790), *reprinted in* 7 THE PAPERS OF GEORGE WASHINGTON 61, 61 (Dorothy Twohig ed., 1998).