Protestant Dissent and the Virginia Disestablishment, 1776-1786

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CARL H. ESBECK*

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INTRODUCTION

This article is about the disestablishment of the Anglican Church in Virginia during and after the War of American Independence, important because in modern times the United States Supreme Court has elevated the ideas behind the Virginia experience as a principal guide for understanding the Establishment Clause of the First Amendment. The most salient events of the disestablishment struggle in Virginia spanned a ten-year period, 1776–1786. The Establishment Clause, on the other hand, went through several drafts in the First Congress from May to September of 1789 before its current text was agreed upon, and was then ratified by the requisite three-quarters of the states by late December 1791. The Supreme Court conflated these two events in 1947 when it handed down its decision in *Everson v. Board of Education of the Township of Ewing.* The imputation of the disestablishment experience in Virginia to the Establishment Clause has been questioned at a number of levels. Not only were the two experiences about different law-making events separated by four years, the Virginia House of Delegates of 1785–1786 and the First Congress of 1789 were almost entirely composed of different legislative officials, elected by different constituencies, bearing different responsibilities, fielding different pressures, and harboring different ambitions. However, the one common denominator for the events in Virginia and the formation of the Establishment Clause was the active involvement of James Madison, Jr., a highly capable statesman with strongly held views on church-government relations. Controversial when first handed down over sixty years ago, the pressure on *Everson* has been renewed and is building. This, in turn, has heightened interest in Madison and his thoughts on church and state.

Disestablishment was the immediate action called for when nine of the original thirteen states, as well as Vermont and Maine, embraced what Ameri-

3. The Establishment Clause provides as follows: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.
5. 330 U.S. 1, 11–13 (1947) (drawing primarily on the Virginia disestablishment experience); id. at 28–29, 33–63 (looking to the Virginia disestablishment, and its central figure, James Madison, Jr.) (Rutledge, J., dissenting).
6. See infra note 26 (referencing the disestablishment struggles in eleven states between 1776 and 1833).
cans in the new nation called (and spelled) voluntaryism. Voluntaryism was not their terminology for an individual's religious observance out of free will as opposed state coercion. Rather, voluntaryism meant that if a religion is to be actively supported it must be done voluntarily by the private sector—which is to say, not by the government. The purpose of this article is to show that Virginia's disestablishment came about through the allied efforts of a few well-placed statesmen of Enlightenment sympathies and a large block of Protestant dissenters, and that the dissenters were largely motivated out of reasons they viewed as biblical. The twin aims of voluntaryism are to protect the churches from the state in certain respects crucial to religious freedom, as well as to make republican government possible by not causing the body politic to so divide along religious lines as to dissolve in disunity.

The Virginia experiment with separation of church and state built on a long past that started in the Fourth Century, and for reasons of context that past requires at least a brief retelling which appears in Part I of this article. Part II takes up the Everson opinion and its adoption of the Virginia disestablishment struggle as informing the modern Supreme Court's view of the Establishment Clause and church-state relations. Measured by fidelity to history, Everson does not come off well. But the Everson Court had in mind an objective other than fidelity to the historical record. In Part III, we see that in the Virginia story there is no better documented example of the common cause between Protestant dissenters and a few Enlightenment-statesmen with respect to how and why they sought disestablishment of the Anglican Church. They shared the same arguments and immediate goal, namely prohibiting a special tax in support of any cleric or House of Worship. But at bottom they had different long-term expectations for bringing off this remarkable feat. It was these arguments that the Everson Court sought to embrace as principles for structuring relations between organized religion and government (federal, state, and local). Part IV seeks to systematize the historical, theological, and prudential arguments by this successful alliance behind the Virginia disestablishment. At times statesmen such as Madison used theological arguments, whereas at times the religious dissenters used historical and prudential arguments. The role reversals make for a tale worth unraveling, and they cause one to ask whether the statesman and dissenters can be so neatly cast as secular and sectarian, respectively. Finally, the Conclusion of this article touches briefly on some of what this has meant for the Supreme Court's post-Everson application of the Establishment Clause. As seen through voluntaryism as the organizing principle, the Court's church-state rulings since Everson are not as wildly inconsistent in result (if not always in rationale) as its many critics would allow.

7. In late eighteenth-century America the typical terminology for religious belief without coercion was "freedom of conscience," "freedom of inquiry," or "private judgment." See, e.g., infra notes 177 and 192.
I. A Short Course in Western Civilization: From Constantine to Madison

For heuristic purposes the task of studying religious freedom is usefully broken down into two lines of inquiry: (1) What is the relationship between the nation-state and persons holding a religious faith? and (2) What is the relationship between the nation-state and organized religion? As to the latter relationship, Western civilization since the Fourth Century has been characterized by a pattern of dual authority shared by government and church. While the exact location of the boundary between government and church has been in near constant dispute and has shifted in complex ways down through the centuries, there is no dispute over there being a marked division between these two centers of influence. This pattern of dual authority meant the church was autonomous in certain respects, and that the state was thereby limited by the church. This, in turn, had a profound affect on the first relationship (state and religious individual) because the individual subject (or citizen) was held to a dual loyalty. Persons now owed allegiance to a civil magistrate and to God, with the latter allegiance superseding the former in matters of conscience. This elevation of human conscience further limited the state. As a consequence, in the West these developments (church autonomy and individual conscience) in these two relationships have worked to limit the state and thereby help avoid totalitarian government. Hence, the title of this legal conference, "The Things that are not Caesar's" rightly implies that there are matters of conscience and of the church which lie beyond Caesar's purview.

The Edict of Milan (A.D. 313) decriminalized Christianity, and under Constantine the Great a favoritism of the faith soon followed. By edict of Emperor Theodosius I, Christianity became the established religion of the Roman Empire in A.D. 380-81, to the exclusion of all others. Nevertheless, from the outset Church authorities insisted on a degree of independence from Caesar. For example, Hosius, Bishop of Cordova, wrote the Emperor Constantius around A.D. 350 about his conception of church and empire as follows:

8. By "organized religion" I mean not only churches, synagogues, mosques, and religious organizations generally, but also identifiable systems of religion or religious observance such as Christianity, Judaism, Islam, Hindu, Buddhism, and the like, as well as their subdivisions such as Presbyterian, Catholic, Reformed Jewish, and Sunni religious communities.


The political and the religious are two independent sources of authority; they have crossed one another's paths more than once, but they never have merged in spite of attempts to fit them together, sometimes to the advantage of one, sometimes to that of the other. Although there has been cooperation between the two, there has never been confusion about which is which.


11. Id. at 4, 60.
Do not interfere in matters ecclesiastical, nor give us orders on such questions, but learn about them from us. For into your hands God has put the kingdom; the affairs of his Church he has committed to us. If any man stole the Empire from you, he would be resisting the ordinance of God: in the same way you on your part should be afraid lest, in taking upon yourself the government of the Church, you incur the guilt of a grave offense. "Render unto Caesar the things that are Caesar's and unto God the things that are God's." We are not permitted to exercise an earthly rule; and you, Sire, are not authorized to burn incense.  

In 358, Emperor Constantius attempted to unite Christians in opposition to the Nicene Creed. His attempt soon drew this rebuff from Athanasius, the powerful bishop of Alexandria and a supporter of the creed: "When did a judgement of the church receive its validity from the Emperor?" This sparring over the boundary between empire and church did not end with the formal establishment of Christianity. Writing to the Byzantine Emperor Anastasis I in 494, Pope Gelasius I explicitly laid out the dual-authority relationship: "Two there are, august Emperor, by which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power." Gelasius proceeded, however, to argue for a vision of the dual order where the papal office was superior to that of the emperor. These incidents are early manifestations of the dual-authority pattern, and they also demonstrate the pattern's propensity to generate struggles over turf. The dual pattern is still with us today, albeit in greatly altered form, traveling under the popular phrase "the separation of church and state."

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12. DOCUMENTS OF THE CHRISTIAN CHURCH 19 (Henry Bettenson ed., 2d ed. 1963). The reference to burning incense is to Old Testament passages in 1 Samuel 13 and 2 Chronicles 26:16–20. In the first passage King Saul was impatient over the Prophet Samuel’s failure to arrive and convey a blessing on the king and his soldiers. So King Saul burned the incense. This was a task God had assigned only to the priesthood, earning Saul a severe chastisement upon Samuel’s arrival. In the second passage King Uzziah entered the temple to burn incense. He was confronted by the Hebrew priesthood bearing the admonition that only they were consecrated to do so. The jurisdictional standoff was resolved when the king was afflicted with leprosy and withdrew from the temple.

13. The Council of Nicaea (A.D. 325) was the first of a series of important ecumenical councils. Over three hundred bishops from throughout the empire gathered in the city of Nicaea. The Council produced the Nicene Creed thereby resolving certain doctrinal disputes. The Nicene Creed was approved by an overwhelming vote thought to be 318 to 7. However, aspects of doctrine to which the creed spoke remained disputed. The Council of Chalcedon (A.D. 451) added to the creed, and this is likely the version used by churches in the West to this day. EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES: A HISTORY OF THE CHRISTIAN CHURCH 126–29 (3d ed. 1996).

14. See A LION HANDBOOK: THE HISTORY OF CHRISTIANITY 144 (rev. ed. 1990) [hereinafter LION HANDBOOK]. Gelasius went on, albeit not entirely accurate as to his history, "[t]here have been many councils held until the present and many judgements passed by the church; but the church leaders never sought the consent of the Emperor for them nor did the Emperor busy himself with the affairs of the church." Id.


16. LION HANDBOOK, supra note 14, at 151, 200–01.
The Protestant Reformation (Luther posted his ninety-five thesis in 1517) shattered Western Christendom and its unity in one universal church at Rome.\(^{17}\) The ensuing wars were as much about the ambitions of kings to expand their power and acquire territory, or counter the threats of a political rival, as they were over competing religious doctrines.\(^{18}\)

Arranged in 1648, the Peace of Westphalia ended the Thirty Years' War. The resulting religious settlements altered the situation from "a universal church in a universal empire" to one of nation-states and state churches. Catholic establishments spanned the south of Europe, while various Protestant national churches held the north. The emerging Westphalian states were of defined borders and vested with the modern attributes of what we now call sovereignty. For the two centuries following the Westphalian settlement, religious freedom for individuals evolved first toward toleration of ever-broader inclusion. Later there developed a protection for individual conscience marked by the absence of coercion directed against religious nonconformists. The churches too sought to step out from under their near domination by the civil states (called Erastianism), insisting on an autonomy to determine their doctrine, set their own polity, and to choose their own leaders.\(^{19}\) This renewed the sphere of ecclesiastical authority outside the state and thereby limited the state. The churches once again had the potential for being a ready critic and an effective check on the policies and politics of the state.

With the exceptions of Rhode Island and Pennsylvania, the chartered colonies in middle and southern America (Virginia was initially formed as a commercial company, but later chartered by the Crown), adopted for themselves the various European models of state and church, and over time made Modifications so as to adjust to New World conditions. The congregationalism\(^{20}\) of the Puritan colonies in New England offered a new model of highly decentralized establishmentarianism. By conquest, eventually all the Atlantic seaboard colonies (Dutch, French, and Spanish) became English. Back in Great Britain, religion was greatly affected by England's break with the Roman Church (1529–1536); the English Reformation (1547–1552); the Acts of Supremacy and Uniformity (1559) and subsequent splits from the Church of England by Presbyterians, Puritans, and Separatists; the English Civil Wars (1642–1649) and the failed Cromwellian Republic (1649–1660); the Restoration of the Crown (1660); the Glorious Revolution (1688); and the Act of Toleration (1689). Much of English

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17. Earlier, the Great Schism of A.D. 1054 had divided the church into Western Catholicism and Eastern Orthodoxy. In the East, the relationship between state and church took a very different path.
19. LINDSAY, supra note 10, at 60.
20. Congregationalism is a polity where questions before a church are decided among the members by majority rule. Each local church governs itself. Puritans held to congregational rule, having chafed under the Episcopal polity of the Church of England where governance within each geographically defined diocese is by a bishop.
domestic politics during this period can be summed up by two struggles: Parliament’s ascension to supremacy over the Crown and the avoidance of a Catholic successor to the Crown. Parliament’s ascension made the government more representative, which was favored by Protestants. The English antipathy for Roman Catholicism ran deep because, in their view, it tended to authoritarian government.

Continued religious conflict, including disagreements with the Church of England, spurred emigration to America for religious and other reasons. These settlers were overwhelmingly Protestant and carried with them the English prejudice against the Roman Church. Although separated by the Atlantic Ocean, colonialists still felt the religious convulsions going on in Mother England. Through the royal governors, the Crown sought to shape religious policy in the colonies. Inevitably this was resented by some, especially colonists out of step with the Crown or the Church of England. The Seventeenth Century closed with each colony still looking back to England for guidance, as opposed to looking continentally along the Atlantic seacoast and to shared interests with sister colonies.

The religious climate in America was greatly influenced by the First Great Awakening (1720s–1750s). This revival, while producing schism within New England Congregational and Presbyterian churches, greatly enhanced religion’s influence and the number of Calvinistic churches. Baptists, Separatists, The Friends (Quakers), and other dissenting churches increased only marginally in their numbers, but they were greatly invigorated in their protest against establishmentarianism.

Unlike the French Revolution, the American Revolution (1774–1783) was neither anti-clerical nor a sharp protest against a privileged church closely aligned with the outgoing corrupt regime. In New England, the Congregational Church vigorously supported the Revolution. In the South, the Anglican Church was divided over the war. It was opposed by some patriots, not because it was an oppressive religious establishment (with certain exceptions, the establishment now tolerated dissenting Protestants) but because it was the Church of England and thus associated with the Tory cause. Many patriots in the South remained Anglican during and following the Revolution (e.g., George Washington, Patrick Henry, George Mason, James Madison, Jr., and James Monroe). These leaders were hardly anti-religious. Presbyterians and Baptists supported the war; Quakers did not. The War of Independence was not in any way a fight to secure religious disestablishment, nor did independence bring about disestablishment. For the most part the war kept the existing establishments in New England and the Southern colonies in a holding pattern.

Even before peace was fully memorialized in the Treaty of Paris (1783), Protestant dissenters and American statesmen of enlightenment-rationalistic sympathies began their common drive for disestablishment where Anglicanism still had a hold.\textsuperscript{22} In New England where Congregationalism was still secure in its establishment, dissenters during the war sought to merely prove their loyalty by being patriots willing to carry the fight to the English. These events overlapped in part with the Second Great Awakening (1780s–1830s),\textsuperscript{23} which greatly increased membership in the nonconforming churches.\textsuperscript{24} The statesmen, while few in number, were well-placed, politically effective, and not anti-religious, whereas the Protestant nonconformists brought to the table the power of a highly motivated voting block. Both parties to this tacit alliance were

\textsuperscript{22} Historian Sidney Mead takes note of the alliance between religious dissenters (he calls them "pietists") and politically powerful rationalists as follows:

The struggle for religious freedom during the last quarter of the eighteenth century provided the kind of practical issue upon which rationalists and sectarian-pietists could and did unite, in spite of underlying theological differences. The positive thrust for the separation of church and state and the making of all religious groups equal before the civil law came from the sectarian-pietists both within and without the right-wing churches, and from the rationalistic social and political leaders.


\textsuperscript{23} Historians Nathan Hatch and John Wigger report that:

The early American republic [was]... a period of great religious ferment and originality. The wave of popular religious movements that broke upon America in the generation after independence decisively changed the center of gravity of American religion, worked powerfully to Christianize popular culture, splintered American Christianity beyond recognition, divorced religious leadership from social position, and above all, proclaimed the moral responsibility of everyone to think and act for themselves. In this ferment, often referred to as the Second Great Awakening, Christendom witnessed a period of religious upheaval comparable to nothing since the Reformation—and an upsurge of private initiative that was totally unprecedented.

The mainspring of the Second Great Awakening was that religion in America became dominated by the interests and aspirations of ordinary people. In the generation after the Revolution, American Christianity became a mass enterprise—and not as a predictable outgrowth of religious conditions in the British colonies. The eighteen hundred Christian ministers serving in 1775 swelled to nearly forty thousand by 1845. While the American population expanded tenfold, the number of preachers per capita more than tripled; the colonial legacy of one minister per fifteen hundred people [became] one per five hundred. This dramatic mobilization indicates a profound religious upsurge—religious organizations taking on market form—and resulted in a vastly altered religious landscape.


essential to their eventual success. Collectively they overcame civic republicans and establishmentarians—not the same, but greatly overlapping groups. Civic republicans believed that to sustain a republic required a virtuous people, that religion was a primary source of that needed virtue, and thus that it was in the self-interest of the state to support organized religion. The dissenters disagreed only with respect to the state support of religion. The Baptists and Presbyterians believed that direct support of religion by the state did considerable harm to both genuine religion and attempts to unify the citizenry behind the fledging state.

The push for disestablishment first succeeded in the South with the Anglican Church, and only much later in New England with the Congregational Church. If one focuses on the legal authority to assess a religious tax as the most salient feature of an establishment, then between 1776 and 1833 nine of the original thirteen states went through a disestablishment struggle, along with Vermont and Maine.

The adoption of the Establishment Clause of the First Amendment (1789–1791) had no impact on these eleven disestablishments in the American states. That it did is a widely held but mistaken belief. The reason the Establishment Clause did not influence disestablishment is simple enough: it was broadly known and understood that the Bill of Rights did not apply to the states, and it was at the state-level where the Anglican and Congregational churches were established. In America, the drive for disestablishment was not a short-term event. It was entirely a state-by-state development, entailing eleven different disestablishments and spanning a fifty-seven year period from 1776 to 1833.

25. MEAD, supra note 22, at 34–35, 38, 42–45, 51–52 (calling the coalition as between the “pietists” and the “rationalists”); see also WILLIAM G. MCLoughlin, 1 NEW ENGLAND DISSERT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE xv (Harv. U. Press 1971) (calling the allied parties the “pietistic” and “rationalist” approaches). On the common cause between rationalists and dissenters to bring about disestablishment, Stokes writes:

The alliance of Church and State, the identification of religious with civil institutions, was found to be detrimental to the cause of religion . . . .

We have emphasized elsewhere the important contribution made by a few liberally minded individuals to the cause of religious freedom, but it must be remembered that they could have accomplished little without the support they received from religious groups opposed to any Church-State connection.

STOKES, supra note 21, at 243–44.

26. Using the criteria of repealing the legal authority to impose a religious tax, the disestablishments were as follows: North Carolina (1776), New York (1777), Virginia (1776–1786), Maryland (1785), South Carolina (1790), Georgia (1798), Vermont (1807), Connecticut (1818), New Hampshire (1819), Maine (1820), and Massachusetts (1832–1833). Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 BYU L. REV. 1385, 1457–1542 (2004).

27. The Supreme Court first held in Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights was binding only on the federal government. See Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. (3 How.) 588 (1845) (holding that the First Amendment does not protect against impairment of religious liberty by states or municipalities, only against impairment by the federal government).
II. THE EVERSON CASE AND THE VOLUNTARY WAY

In 1947, the United States Supreme Court decided *Everson v. Board of Education of the Township of Ewing*.

28 *Everson* is a veritable treasure trove of interesting developments, none of which the Supreme Court itself seemed keen on discussing. First, *Everson* was openly acknowledged to be a taxpayer case, but the implications for the doctrine of justiciability by allowing taxpayer standing go entirely unexplored by the Court. It would not be until *Flast v. Cohen* was decided in 1968 that taxpayer standing was expressly permitted, and then only with respect to claims challenging legislative appropriations as a violation of the Establishment Clause.

Second, it was in *Everson* that the Establishment Clause was “incorporated” through the Due Process Clause of the Fourteenth Amendment as a fundamental right and made binding on all state and local governments. For the first time at the state and local level the prickly matter of church-state relations was now subject to a uniform nationwide substantive standard. However, even at the level of federal legislation, the meaning of the Establishment Clause was not well known in 1947. This is because up until the ruling in *Everson* the

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29. *Id.* at 3 (“The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students.”).
30. 392 U.S. 83 (1968) (holding that federal taxpayer had standing to challenge congressional spending on K–12 education in support of religious schools as a violation of the Establishment Clause).
31. See *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (plurality opinion). In *Hein*, a three-justice plurality reaffirmed the rule in *Flast*, but declined to extend taxpayer standing to challenge the practice of holding conferences that promoted the President’s faith-based initiative where the money to pay for the conferences came from general White House operating funds spent at the discretion of executive branch officials. *Id.* at 2565–68, 2571–72.
32. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. at 15. The entirety of the Court’s brief justification for “incorporation” of the Establishment Clause is as follows:

> The broad meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual’s religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause.

*Id.* (footnote omitted). The “earlier cases” relied on by the Court (referenced in the quote above) were decided under either the Free Exercise or Free Speech Clauses, not the Establishment Clause.
33. Limited to restraining only the actions of the federal government until the 1947 decision in *Everson*, the Establishment Clause was not applied by the Supreme Court until well into the nation’s second century. See *Bradfield v. Roberts*, 175 U.S. 291 (1899). The *Bradfield* Court upheld the use of federal funds for construction at a Catholic-affiliated hospital corporation situated in the District of Columbia. Only two of the Supreme Court’s Twentieth Century cases up to the time of the decision in *Everson* relied on the no-establishment text. See The Selective Service Draft Law Cases, 245 U.S. 366, 389–90 (1918) (upholding exemptions from military draft for clergy, theology students, and pacifist denominations); *Quick Bear v. Leupp*, 210 U.S. 50, 81–82 (1908) (upholding disbursement of Indian trust funds, held by the federal government as trustee, to a Catholic mission operating religious schools for Indian children). In both *Selective Service* and *Quick Bear* the Court did a mere summary examination into the meaning of the Establishment Clause.
Establishment Clause had been infrequently applied in the course of litigation.\textsuperscript{34} It had never been found violated. Moreover, the \textit{Everson} Court seemed not to notice that the Establishment Clause was not so much about protecting individual religious rights \textit{qua} rights (the Free Exercise Clause serves that role), as it is about the proper structuring of the relationship between two centers of authority, government and organized religion. That is why the phrase "the separation of church and state" is so useful and popular in describing what the clause is all about. If the Establishment Clause is indeed about denying certain powers to keep the national government from intruding into the sphere of organized religion—as opposed to being a rights-based clause—then it is hard to understand how such a structural clause can be "incorporated" as an individual right. The Court's practice of "selective incorporation" was designed to make binding on the states only those rights deemed fundamental, not to carry forward against the states the structural constraints on the national government.\textsuperscript{35} At the very least \textit{Everson}'s "incorporation" is an ill fit, and the Court is entirely silent on the foregoing conceptual difficulties.

Third, and of most interest to this article, \textit{Everson} attributes to the Establishment Clause a substantive rule or standard to decide future questions about church-state relations. The rule is that support for religion should be voluntary and thus come from the private sector, a principle which early in the Nineteenth Century was called "voluntaryism." The concept of voluntaryism is easily misunderstood today. Voluntaryism does not refer to religious belief being consensual and thus that there is an absence of government compulsion or coercion. To be sure, coerced belief is a violation of conscience and is prohibited as a matter of the free exercise of religion. But that is not voluntaryism. Rather, in America's early national period the term voluntaryism meant (juridically and theologically) that organized religion, including specific belief or observance, was to be voluntarily supported by the people, the churches, and others in the private sector. Voluntaryism describes a government not actively involved in advancing religion, or, for that matter, a government that is not actively opposing any or all religion. This understanding of voluntaryism is reflected in the modern Supreme Court's cases that distinguish the Establishment Clause from the Free Exercise Clause on the basis that the no-establishment principle (unlike free exercise) does not require a showing of

\textsuperscript{34} Despite questions of church-state relations coming before the Supreme Court starting early in its history, the cases were not resolved by reference to the Establishment Clause but on other legal grounds. See Michael W. McConnell, \textit{The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic}, 37 TULSA L. REV. 7 (2001) (reviewing four church-state disputes that reached the High Court in the first half of the Nineteenth Century but were resolved without resort to the First Amendment).

\textsuperscript{35} The conceptual problem of incorporating as a rights-based clause what is functionally a structural clause is discussed in Carl H. Esbeck, \textit{The Establishment Clause as a Structural Restraint on Governmental Power}, 84 IOWA L. REV. 1, 25–32 (1998) [hereinafter Esbeck, \textit{Establishment Clause as Structural}].
coercion of religion-based conscience or other religious harm.  

As a result of *Everson* there was to be no support for religion by government (federal, state, or local), neither financial aid nor any active support such as public school prayer or other government expression that promotes religion *qua* religion. Referring to the Virginia disestablishment, *Everson* stated the new substantive rule this way: government is “stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”  

Another formulation of the same rule that has been frequently quoted by the Court itself first appeared in *Walz v. Tax Commission of the City of New York*:

> “It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

Noteworthy in the *Walz* formulation is voluntaryism’s reciprocal nature (government is stripped of power to support or interfere), which, like structural clauses generally, places the judiciary in the role of policing a boundary between two centers of authority. This is not unlike the Court’s role when enforcing the doctrine of separation of powers.

The early Congresses, however, as well as several of the early Presidents, did not act in accord with this substantive rule. For example, the paid offices of chaplain were created in the House and Senate, federal land was given to the Society of the United Brethren Church and the Catholic Church with the aim of using Christianity to civilize the Indians, and Americans were called on by various Presidents to set aside a day for thanksgiving and prayer.

From this early conduct, *Everson*’s critics go on to infer that these Congresses and Presidents must have thought about the matter and concluded that their actions were not restrained by the Establishment Clause. If they did think about the

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38. Sch. Dist. of Abington Township v. Schempp, 397 U.S. 664 (1970) (holding that the Establishment Clause was not violated where a municipality extended property tax exemptions to religious organizations, along with an array of other nonprofit and charitable organizations).

39. *Id.* at 668.

40. *Everson*, 330 U.S. at 15, reinforced the reciprocal nature of voluntarism by quoting the following from the intra-church dispute case of *Watson v. Jones*, 80 (13 Wall.) 679 (1872): “The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.” *Id.* at 730.


In addition to citing contrary behavior by Congress and Presidents, legal scholars have poured over the House and Senate debates that took place from May to September of 1789 in New York City, which culminated in the final version of the Establishment Clause. There is no indication that the Virginia disestablishment of a few years before was even so much as mentioned during these debates or was otherwise a factor. The Everson Court, however, neither considered the drafting history of the First Amendment nor sought to reconcile the early contrary behavior by its two co-ordinate branches. Instead, the Everson Court looked to the struggle for disestablishment in the states for its substantive rule, with principal reliance on the Virginia experience.

After a three-page survey of the struggles in Mother England over church and state, as well as incidents of oppression under the initial establishments in the American colonies, the Everson Court said the following concerning its elevation of the Virginia experience:

It was these feelings that found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785–86 when the Virginia legislative body was about to renew Virginia’s tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law... Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for

44. It is possible that these early Congresses and Presidents never thought about whether their actions violated the Establishment Clause. Even if they did, it is possible that they did not have the political will to conform their practices to the principle. In his dissenting opinion in Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 872 n.2 (1995), Justice Souter makes this latter argument, and he is joined by Justices Stevens, Ginsburg, and Breyer.

45. We have a sketchy, but still informative, record of the debate in both the House and Senate of the First Congress over the drafting of the text that eventually became the Establishment Clause. See WRITT, supra note 4, at 80–89 (collecting all that appears in the Annals of Congress on religious freedom and the First Amendment).
consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson...

This Court has previously recognized that the provision of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, has the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.46

The rationale for elevating the Virginia disestablishment experience (as opposed to merely describing the experience) is little explained in the above-quoted text from Everson. It strikes the fair-minded as wildly improbable that the Virginia experience of 1784–86 was bootlegged by James Madison and Thomas Jefferson into the Establishment Clause as the First Congress convened in New York City during May to September 1789. During these months Jefferson was in Paris serving as our minister to France.47 France was in revolution, which occupied much of his attention.48 Although Madison was certainly in the thick of things in New York City, his influence on others in the House and Senate was not without bounds. For example, we know of defeats Madison suffered on religious liberty initiatives that he cared about greatly, such as the rejection as part of the Bill of Rights of his religious-conscience amendment, which was to be binding on states.49

The Everson Court sketches a popular reaction against taxation for religious

46. Id. at 11–13 (footnotes omitted) (quotations from Jefferson's Bill for the Establishment of Religious Liberty omitted). The cases cited in the omitted footnote were decided under the Free Exercise Clause or the Free Speech Clause, not the Establishment Clause.
48. Others have claimed that what the Everson Court did was elevate Thomas Jefferson's phrase to erect "a wall of separation between church and State" as the new substantive rule giving meaning to the Establishment Clause. Everson did briefly quote the wall metaphor, 330 U.S. at 16, and referred back to a much earlier case where the Court had first cited the phrase. See Reynolds v. United States, 98 U.S. 145, 164–65 (1879) (upholding federal criminal law prohibiting polygamy in Utah territory). The metaphor comes from an 1802 letter President Jefferson wrote to the Danbury Baptist Association in New England. Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332 (Adrienne Koch & William Peden eds., 1972) (1944). It is a puzzle why this wall-of-separation metaphor is singled-out by critics of Everson and the Court. The Court relied little on the metaphor to reach its decision in Everson, and not at all in Reynolds. The same is true with post-Everson cases decided under the Establishment Clause. In contrast, the Virginia disestablishment experience and the role played by James Madison are looked to frequently in majority and dissenting opinions of the modern Court. See, e.g., McGowan v. Maryland, 366 U.S. 420, 437–42 (1961). The role of Jefferson's metaphor in shaping the early Nineteenth Century law of church-state relations at either the federal or state level is negligible to nonexistent. Thus, focusing on the wall metaphor does make an easy target for those wanting to be dismissive of Everson and the Court. But it is the Virginia experience and Madison that are doing the substantive work in the post-Everson Court.
49. One of Madison's proposed amendments to what later became the Bill of Rights was to protect religious conscience over against the states. Madison knew he could not get a no-establishment clause binding on the states, but he hoped for a conscience clause. As Madison introduced this amendment in the House, it read as follows: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Witte, supra note 4, at 65. The proposal was first
purposes at work in Virginia during 1784–1786. This reaction caused the state to break decisively with Old World ecclesiastical establishments, as if voluntarism was then a groundswell encompassing not just Virginia but all of the original thirteen states—a rising tide so powerful as to engulf the First Congress four years later as it debated the Establishment Clause during the summer of 1789 in New York City. But we know from the Annals of Congress and Journal of the First Session of the Senate that nothing remotely like that happened.\(^{50}\) Moreover, the Court does not acknowledge that the First Congress and the Virginia General Assembly were made up of two very different groups of elected members with very different concerns and constituents. That makes it all the more remarkable that the justices in Everson were unanimous in adopting the Virginia experience to give meaning to the Establishment Clause,\(^{51}\) albeit the Court divided 5 to 4 over the detail of whether the reimbursement to parents of the outlay for student bus fare was aid to religion or merely a municipal service available to everyone like paved roads and sewer line hookups.\(^{52}\)

Everson appears to feed on its own indignation at past religious oppression, and then overreaches to conflate the Virginia experience with the drafting of the Establishment Clause, as if proceeding along any other path never even occurred to the Court. If what the Court really had in mind, however, was celebrating the best documented account of the progressive thinking of Protestant dissenters and the redoubtable James Madison on church-state relations, then the Court could have made no better choice than the Virginia disestablishment experience. That, along with close votes in the Virginia House of Delegates, behind-the-scenes political maneuverings, and the chance removal from the legislature of the powerful sponsor of the religious tax, Patrick Henry, makes for high drama and great storytelling.

III. The Virginia Experience, 1776–1786

A. The Virginia Declaration of Rights, 1776

A Virginia revolutionary convention first met in Williamsburg on May 6, 1776. On May 12\(^{th}\) the Second Continental Congress in Philadelphia urged that each of the thirteen colonies adopt state constitutions. In response, on May 15\(^{th}\) amended in the House and then passed. It was dropped in the Senate, and Madison did not persist when the Senate reported its work back to the House. Id. at 65, 69, and 75.

\(^{50}\) Witte, supra note 4, at 80–89 (reproducing what appears in the Annals of Congress and Journal of the First Session of the Senate on religion and the First Amendment).

\(^{51}\) This is not just something that occurred sixty years ago and then was forgotten. Four justices on the current Court, led by Justice Souter, continue to quote Everson and conflate the Virginia disestablishment and the Establishment Clause. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 871 (1995) (Souter, J., dissenting); Zelman v. Simmons-Harris, 536 U.S. 639, 711–12 (2002) (Souter, J., dissenting).

\(^{52}\) Everson, 330 U.S. at 16–18 (concluding that reimbursement of school bus fare is a general public benefit like police and fire protection); id. at 19–20 (Jackson, J., dissenting) (reimbursement to parents of student bus fare is aid to religion); id. at 49–58 (Rutledge, J., dissenting) (same).
the Virginia convention appointed a drafting committee. As was the pattern of the day, Virginia planned to begin its constitution with a declaration of rights. The responsibility for drafting this important exposition fell to George Mason IV (1725–1792), a prominent planter, life-long member of the Church of England, and vestryman at Truro Parish in Fairfax. His wife, Sarah, was Roman Catholic, a rarity in Protestant Virginia where Catholics were subject to official discrimination and widespread social prejudice.53

The convention soon styled itself the Virginia General Assembly. Mason’s first draft of the declaration did not involve originality so much as it was a compilation of the principles and theories that were increasingly read and debated in revolutionary America.54 Certain articles correspond to the English Bill of Rights adopted in 1689. Mason’s draft of what was destined to become the famous Article 16 on religious liberty, provided:

That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, not by Force or Violence; and therefore that all Men shou’d enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals. And that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.55

After stylistic amendments, the article on religion passed out of committee on May 27th and read as follows:

That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love and charity, towards each other.56

The committee’s draft Declaration of Rights was widely circulated outside of Virginia and influenced constitution-making in other states. The draft was forwarded to the General Assembly sitting as a committee of the whole. It was during the ensuing floor debate that monumental changes took place.

James Madison, Jr., a freshman in the Assembly and as yet untested in

54. Id. at 10.
55. Id. at 12.
56. Id. at 12.
politics, was troubled by what he perceived to be unintended consequences of the committee’s language. Madison objected to the term “toleration” and to the qualifications on religious liberty, beginning with his belief that the “unless” clause had dangerous implications.\footnote{Id. at 12–13.} It was his view that toleration belonged to a system where there was an established church and thus liberty of worship for dissenters was permitted only as a matter of official grace and not as an inalienable right. Of course, Virginia had an established church,\footnote{Professor Witte describes an establishment in the late eighteenth century as follows: \[T\]he founders understood the establishment of religion to mean the actions of government to “settle,” “fix,” “define,” “ordain,” “enact,” or “set up” the religion of the community—its religious doctrines and liturgies, its religious texts and traditions, its clergy and property. The most notorious example of this, to their minds, was the establishment by law of Anglicanism. English ecclesiastical law formally required use of the Authorized (King James) Version of the Bible and of the liturgies, rites, prayers, and lectionaries of the Book of Common Prayer. It demanded subscription to the Thirty-Nine Articles of Faith and the swearing of loyalty oaths to the Church, Crown, and Commonwealth of England. When such ecclesiastical laws were rigorously applied—as they were in England in the early Stuart period of the 1610s to 1630s, and again in the Restoration of the 1660s to 1670s, and intermittently in the American colonies—they led to all manner of state controls of the internal affairs of the established Church, and all manner of state repression and coercion of religious dissenters.} and thus the committee’s draft made sense. For Madison, however, a civil state had no jurisdiction in matters of organized religion, and thus Virginia should have done away with its establishment. Additionally, Madison feared the overriding of religious liberty was invited by the “unless” clause, which was made more probable by a magistrate’s natural bias for public order.\footnote{See Dreisbach, supra note 54, at 16; Charles F. James, Documentary History of the Struggle for Religious Liberty in Virginia 63 (J. P. Bell Co. 1900) [hereinafter James].}

Notwithstanding his junior status, Madison prepared an ambitious proposal, and apparently persuaded Patrick Henry to offer it on the floor.\footnote{See Thomas E. Buckley, Church and State in Revolutionary Virginia, 1776–1787, at 18–19 (U. Press of Virginia, 1977) [hereinafter Buckley].} Henry was thought to be sympathetic to religious dissenters because he defended them in the famous Parsons’ Cause,\footnote{H. J. Eckenrode, Separation of Church and State in Virginia 20–30 (2d printing, Da Capo Press 1971) (1910) [hereinafter Eckenrode]; James, supra note 59, at 65.} and Henry had many dissenters in his district. The proposal is very revealing of Madison’s far-reaching thinking on church-state relations. Madison’s amendment read:
That Religion or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it accord'g to the dictates of Conscience; and therefore, that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges; nor subjected to any penalties or disabilities[,] unless[,] under &c.\(^6\)

The change from “toleration” to “free exercise” is apparently the first occasion in America that this now-famous First Amendment phrase was used. Moreover, the proposal took “magistrate” out of the role as decision maker when it came to overriding the right to free exercise. Madison’s proposed text “no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges,” drew strong opposition because it would essentially disestablish the Church of England. For example, if no “class of men” could be vested with emoluments on account of religion, then Anglican clergy could not be specially supported by tax assessments.

To the popular mind, Mason’s use of “toleration” was progressive, since it was seen through the lens of John Locke’s *Letter Concerning Toleration*.\(^6\) To suggest that “toleration” was actually repressive, and to attack the established church in the same paragraph, was more than the delegates to the Virginia Assembly were prepared to accept. The proposal was going nowhere.

In a demonstration of his now famous political skills, Madison accepted that the way forward was blocked and immediately set to work on a new approach. Madison convinced Edmund Pendleton to sponsor a second amendment that preserved the “free exercise” phrase, but he abandoned the more controversial disestablishment passage.\(^6\) Pendleton, an opponent of any attempt to disestablish the Church of England, may have been convinced to sponsor such an amendment simply to rid the General Assembly of Madison’s dangerous first proposal. Others believe Madison convinced Patrick Henry rather than Pendleton to sponsor his fall-back amendment.\(^6\) In any case, the amendment read:

That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and

\(^{62}\) Dreisbach, *supra* note 53, at 13–14. By “&c” Madison evidently meant for his amendment to continue on from this point with the text of the committee’s draft beginning with the words “unless, under.” Accordingly, the balance of Madison’s amendment would read “colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love and charity, towards each other.” *Id.* at 14 n.31.


\(^{64}\) Buckley, *supra* note 60, at 18; Miller, *supra* note 23, at 6.

\(^{65}\) Dreisbach, *supra* note 53, at 18 n.44.
unrestrained by the magistrate, Unless the preservation of equal liberty and the existence of the State are manifestly endangered; And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.\footnote{Id. at 15.}

Once on the floor the new, trimmed down proposal was attributed to Patrick Henry by Edmund Randolph. Randolph was likely mistaken about the amendment's sponsorship, but he later remembered that in floor debate Henry was asked "whether it was designed as a prelude to an attack on the established church, and he declaimed such an object."\footnote{JAMES, supra note 59, at 64 (quoting Edmund Randolph, History of Virginia, in 9 VIRGINIA HISTORICAL SOCIETY DOCUMENTS 347 (Arthur Schaffer, ed., U. Press of Virginia 1970)); see also ECKENRODE, supra note 61, at 43–44.} The question was asked because some delegates to the Assembly resisted even this new proposal insofar as the "equally ... free exercise" text could be read to imply equality not with respect to individuals, but among all religions. The latter would disestablish the Church of England.

Madison was later successful in limiting the role of the magistrate in overriding the right to free exercise only when "the existence of the State [is] manifestly endangered." This change accorded with the Lockeian principle of noninterference with religious liberty except to preserve civil peace.\footnote{Dreisbach, supra note 53, at 16.} The remaining right of religious conscience is not wholly absolute, but constrained as springing from a religion of reason and conviction, and thus the exercise of the right carries with it a mutual duty among citizens of forbearance and charity. Rights are thus understood as freely exercised in the context of a citizen's concomitant responsibility to the community; that is, rights are not divorced from one's civic duties.\footnote{Id. at 16–18.} Once again the text on the explicit role of the magistrate was eliminated.

The article, as amended, passed the General Assembly on June 12, 1776, as part of a complete Declaration of Rights. The final, and now familiar, language of Article 16 provides:

That Religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.\footnote{Id. at 16.} Article 16 remains largely unchanged in the Constitution of Virginia to this day.\footnote{See VA. CONST. art. I, § 16.}
In the foregoing debate, we see a telling—albeit, not a novel—bifurcation of the protection of individual religious conscience, on the one hand, and religious disestablishment on the other. A state can guarantee the exercise of religion in the sense of an absence of state coercion, and also maintain an established church. The same bifurcation appears in John Locke’s extension of toleration to dissenting Protestants, while retaining an established English Church. Patrick Henry, as a proponent of a tolerant establishment, was regarded as a progressive advocate of individual religious conscience. Non-Anglicans were free of state compulsion with respect to what they believe and observe about God, and yet there was a Church of England by law established. This was not seen as inconsistent.

For James Madison, Article 16 was a halfway measure. The article protected individual conscience in one’s religious observance but continued to permit civil government to assume jurisdiction over matters of church-state relations. Whereas Henry and many others liberally supported an individual’s liberty from coercion with respect to religiously informed conscience, in 1776 Madison stood virtually alone in Virginia’s Assembly in support of anything resembling a desire to disestablish the Church of England. But, as so often happens, change is accelerated by war.

B. Suspension of the Religious Tax During the War, 1776–1783

With the revolutionary fighting now in its second year and independence having been declared in July 1776, the Virginia General Assembly met under its new constitution in October 1776. In place of the House of Burgesses, there was a House of Delegates, and in place of the colonial Council, there was a Senate. There was a Governor, no longer appointed by the king but elected by the people to a one-year term.

Given the ongoing hostilities with Great Britain, a surprising amount of legislative time was spent debating church-state relations. The adoption of Article 16 unleashed a number of petitions signed by religious dissenters calling for the repeal of colonial statutes requiring the licensure of dissenting clergy, requiring the approval of meetinghouses for worship by nonconformists, restricting dissenting clergy from performing marriages, and restricting the incorporation of churches and other religious societies. Article 16 having granted an individual right to religious exercise, some of the petitions urged that the Assembly “go on to complete what is so nobly begun” by proceeding to “pull down all Church Establishments [and] abolish every Tax upon Conscience and private judgment” in religious matters.72

The defenders of establishment urged the necessity of government support

72. Dreisbach, supra note 53, at 19, n.46 (quoting The Petition of Sundry Inhabitants of Prince Edward County dated October 11, 1776, which was a Presbyterian stronghold). This petition and several others opposing the establishment are reproduced in James, supra note 59, at 68–75, and petitions supporting the establishment are reproduced id. at 75–77.
for religion which they argued was instrumental to building civic unity and inculcating public virtue. Dissenters sought to place all churches on an equal footing and to repeal any requirement that citizens contribute to the monetary support of their own or the established church. For example, a petition from the Presbytery of Hanover presented to the General Assembly in October 1776 stated its case as follows: that heretofore Presbyterians had submitted to the laws, albeit discriminatory; that they had paid religious assessments to the support of the established clergy, even in counties where Episcopalians were but a small part of the population; that the taxes were in violation of their natural rights, and in consequence a restraint on free inquiry and private judgment; that because of the need for unity of every denomination behind the war effort, every religious bondage should be lifted; that any government with the authority to establish Christianity thereby has the authority to establish the tenets of Mohammed; that no civil magistrate can sanction a religious preference without claiming to be infallible in biblical matters, a claim harking back to the Roman Church; that religious discrimination holds back population growth and thereby retards progress in the arts, sciences, and manufacturing; that the gospel is in no need of government aid, for Christ declared that his kingdom is not of this world and not dependent on state power; that in the days of the apostles the church flourished in greatest purity when it was promoted on its religious merit and not its utility in building civic unity; that religion is not the proper object of civil government; that there should be equality before the law with respect to all denominations; and, that religious taxes should be repealed leaving support of any church a voluntary matter, thereby leaving every religion to stand or fall according to its own merit.

A Committee for Religion was quickly formed in the House of Delegates to respond to the petitions, but the committee was divided. In early November 1776 the matter was removed from committee and taken up by the House sitting as a committee of the whole. After vigorous debate, a series of resolves were adopted. One resolution was to repeal those statutes that criminalized religious opinion, required attendance at worship services, and dictated approved modes of worship. Another resolution would do away with religious taxes on dissenters. The collective effect of the resolutions was to seek to place “all

73. This is a paraphrase of Jesus’ words when on trial before Pontius Pilate, the Roman governor in Palestine, as recorded in the gospel of John. See John 18:36.
74. JAMES, supra note 59, at 222–25 (reproducing the entire petition). The petition’s last point is a well-phrased plea for voluntarism:

[T]hat all, of every religious sect, may be ... exempted from all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice, or voluntary obligation. ... [A]nd every one be left to stand or fall according to his merit, which can never be the case so long as any one denomination is established in preference to others.

Id. at 224–25.
75. Dreisbach, supra note 53, at 20; BUCKLEY, supra note 60, at 21–32.
76. JAMES, supra note 59, at 79–80 (reproducing the multi-point resolution).
religious groups on a purely voluntary basis with respect to financial support, while vesting in the established church all the property and goods it possessed at the time."

A second committee was formed to draft a bill that would respond to these House resolutions. The composition of this new committee was such that the dissenters lost influence and the momentum for disestablishment subsided. In late November 1776, a compromise was reached and a modest bill reported out by the committee. By early December 1776, with only minor amendments, the scaled-down bill passed both the House and Senate. The bill did away with colonial-era statutes still on the books requiring church attendance and exempted dissenters from the tax in support of the Anglican Church, while leaving untouched other laws that maintained the imprimatur of an establishment. Finally, even the Anglican laity were also freed, at least for a temporary time, from paying the tax to support their church.

The status of the resulting establishment was ambiguous. For a time no citizen was to be taxed to support the Anglican Church, nor were dissenters forced to support their own church. Going forward then, in matters of monetary support “[r]eligion in Virginia had become voluntary, and a man could . . . contribute as much or as little as he thought fit to whatever church or minister pleased him.” In matters of religious observance, a person could believe as he wished and “also worship when and as he chose, within certain limits; for the Assembly maintained a measure of control over the external operations of the [dissenting] churches.” For example, the legislature did not repeal the state’s authority to approve meetinghouses and license dissenting preachers. But the ongoing war, as well as popular sentiment, precluded enforcement of these licensure laws and they effectively lapsed.

It was also during these debates in the fall of 1776 that the propriety of a general assessment or earmarked tax in support of all Christian clergy was first raised. A novel proposition in America, a general assessment would create a “multiple establishment” of Christian churches. Each citizen would pay a special tax and designate the church to receive it. With an eye to Article 16 of the Declaration of Rights, this was said by the idea’s proponents to effect a fulfillment of “the duty we owe to our Creator,” while not coercing behavior contrary to conscience because of the freedom to choose the church where one’s tax money goes in support. The scaled down bill of December 1776 expressly reserved for future consideration such a general assessment law. Finally, the

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77. Buckley, supra note 60, at 33.
78. Id. at 34.
79. Id. at 34–36.
80. Id. at 36.
81. Id.
82. Id. at 38.
83. Dreisbach, supra note 53, at 22; see also Miller, supra note 22, at 11 (setting forth the text of the Assembly’s resolution postponing the general assessment question).
Church of England retained its hold on the glebe lands, as well as all real estate with church buildings and chapels presently in its possession.

The bill of December 1776 suspended all religious assessments on Anglicans until the end of the next legislative session. The General Assembly extended this suspension in May 1777, again in May 1778, and again in October 1778.\(^4\) The resulting lack of new tax revenues put the finances of the Anglican vestries into a state of disarray, and the salaries of Anglican clergy frequently went unpaid. But the war itself demanded money, and the loyalty of dissenters was not to be alienated by the renewing of a religious tax earmarked for the support of the Anglican establishment—even a tax that they did not themselves pay.

All during this period from late 1776 through 1778, dissenters continued to petition the General Assembly against the establishment and other religious regulations such as restrictions on performing marriage.\(^5\) For example, a 1778 petition from the Presbytery of Hanover argued against the proposed general assessment as follows: that religious conscience is inalienable, beyond the jurisdiction of the state; that the proper objects of civil government are limited, and do not extend to organized religion; that the church is Christ’s and He will adequately support her to final consummation; that to take government support would be an injury to the Presbyterian Church; that a minister financially supported becomes a hireling, thus subject to the paymaster’s control with respect to who can preach, what he can preach, and where he can preach; that any government with authority to establish one sect has authority to establish any sect; and, that a general assessment would subvert religious liberty.\(^6\)

During the May-June session of the 1779 General Assembly, several bills concerning the matter of church-state relations came on for consideration. As part of a larger package of law reform first commissioned in the fall of 1776, Thomas Jefferson unveiled his *Bill for Establishing Religious Freedom*, which was later assigned number 82, Bill No. 82 was debated but put over until the fall 1779 session, and then not considered in the fall.\(^7\) The politics had turned against it.\(^8\)

The idea of a general assessment in aid of all Christian churches was actively revisited in the spring of 1779, but a divided legislature meant that the general assessment issue also was put over until the fall. The Assembly again met in October 1779 and revisited the matter of a general assessment, as well as the ability to incorporate a church or other religious society. By then the sentiment “in the press and [evident in] the religious petitions clearly showed that the weight of public opinion favored some form of governmental intervention in

\(^4\) ECKENRODE, *supra* note 61, at 55.
\(^5\) BUCKLEY, *supra* note 60, at 38–45; JAMES, *supra* note 59, at 225–27 (reproducing the petition of April 25, 1777, from the Hanover Presbytery).
\(^8\) JAMES, *supra* note 59, at 95–100.
religious matters."89

Any general assessment bill would need to define those Christian churches which would be eligible for tax monies—those outside the definition being excluded. Accordingly, it was proposed that a qualifying church must conform to certain articles of faith, including that “there is one Eternal god and a future State of Rewards and Punishments, . . . the Christian Religion is the true Religion, [and] . . . the Holy Scriptures of the old and new Testament are of divine inspiration, and are the only rule of Faith.”90 The legislature was not about to fund the heterodox, let alone any non-Christian religion.

The general assessment bill was vigorously debated but did not pass.91 George Mason then presented a more modest bill that would permanently repeal the authority of the Anglican Church to collect a religious tax from its members.92 This bill passed on December 13, 1779.93 Passage meant it was no longer necessary for the General Assembly to periodically adopt measures to continue the suspension of the religious tax for those still holding membership in the Anglican Church. The matter of glebes and church buildings in the possession of the Anglicans went unsettled.94

It is tempting to survey the foregoing events of 1776–1779 with respect to church-state relations and pronounce an end to the establishment of the Church of England.95 A more cautious view is that while the General Assembly remained divided on the big issue, it could agree on pragmatic, short-term goals. The repeal of the religious tax for dissenters and of the tax suspension for Anglicans were welcomed in newly independent Virginia. Moreover, this fledgling state was at war with the world’s most powerful empire. The Anglican clergy were often Tory in their sympathies, and money collected for their salaries could be used elsewhere to equip and pay the Continental Army. This is not to say that the Anglican clergy were left destitute. Retention of the glebe lands ensured that at least the well-endowed parishes could generate income for their ministers to persevere.96 So it was that as the fighting continued, Virginia repealed the statutes on religious assessments for the duration of the war while retaining the authority to revisit the matters of a general assessment and Anglican property holdings at a later date.

As the revolutionary fighting moved into Virginia during 1780–1781, the legislature put aside many issues and was occupied with the commonwealth’s survival. Nevertheless, the struggle between dissenters and establishmentarians

89. Buckley, supra note 60, at 56.
90. The General Assessment Bill of October 25, 1779, is reprinted id. at 185–86. These articles of faith were borrowed from the South Carolina Constitution.
91. Buckley, supra note 60, at 59–60.
92. Dreisbach, supra note 53, at 25.
93. Buckley, supra note 60, at 61: James, supra note 59, at 95.
94. Dreisbach, supra note 53, at 25–27; Buckley, supra note 60, at 62.
95. James, supra note 59, at 92, 113.
continued. Issues such as barring preaching by all “non-juror” Anglican ministers (i.e., preachers who failed to take an oath of allegiance to Virginia), is exemplary of where energies were expended when there was any time at all to devote to religious questions. 97 A Baptist petition of October 16, 1780, had two complaints. 98 First, the Baptists were excluded from serving on the local Anglican vestry. This was a problem because taxes to care for the poor were administered by the vestry. Second, Baptist ministers were not permitted to perform marriages. Thus a Baptist couple had to see the Anglican minister to lawfully marry. The second complaint was promptly corrected by legislation. 99

C. A Bill for the Support of Christian Teachers, 1784–1785

In September 1783 the Treaty of Paris removed the distraction of the war, albeit most fighting had stopped with the surrender of Cornwallis at Yorktown in October 1781. The vast majority of the Anglican clergy had retired, died, fled to Canada, or returned to England. 100 The churches and chapels belonging to the Church of England in Virginia were in poor repair, owing at least in part to vandalism and other mischief on the part of the Continental Army. As soldiers returned home from their duties and the nation’s war debts demanded that the economy begin generating much needed public funds, the Virginia legislature turned to a familiar vehicle of religion to unify and motivate the population.

In this immediate post-war period, Patrick Henry was the most popular politician in Virginia. Even detractors such as Jefferson acknowledged Henry’s essential leadership in the cause for independence when the advisability of the initial break with England was much in doubt. As Henry returned to the House of Delegates, he was also coming off a successful performance as a three-term wartime governor.

Although progressive in his desire to safeguard individual religious conscience, Patrick Henry renewed consideration of a General Assessment Bill in November 1783. The idea was to create a multiple establishment of Christianity by adopting an earmarked tax where the taxpayer could designate the amount paid to the church of his or her choice. Mistakes learned during consideration of the 1779 assessment bill were not to be repeated; specifically there was to be no codifying of articles of the Christian faith to limit the funds to only churches regarded as orthodox. Initial debate by the General Assembly in late 1783 settled little, no actual bill was drafted, and the matter was put over for consideration in the spring of 1784.

Relying on centuries of Western tradition, Henry and his supporters hoped to use the pulpit to encourage public order and stimulate economic productivity. Soldiers, conditioned over several years by the amoral environment of war and

97. JAMES, supra note 59, at 112–21, 187.
98. Id. at 219–21 (reproducing the petition).
99. Id. at 221 (footnote quoting the adopted legislation).
100. BUCKLEY, supra note 60, at 43 n.9, 66, 81–82.
the authoritarian structure of the army, needed to transition back to being peaceful and productive citizens. These civic republicans reasoned thusly: a republican state required public virtue, virtue was largely derived from religion, and thus the state was self-interested in aiding the churches in their task of religious training.

Obstructing Henry’s way were two equally determined groups. On the one hand, James Madison championed the cause of the enlightenment-rationalists. On the other stood Protestant dissenters who believed that the government’s involvement in religion was an encroachment on the authority of Christ over His church. These two parties, although ideologically distinct, formed a tacit alliance for the purpose of defeating the general assessment and toppling the remaining vestiges of the established church in Virginia. The rationalists provided the political savvy and legislative knowhow. The dissenters provided the petitions to the legislature, election-day votes, and other popular support necessary to keep the rationalists in office and advance the agenda. Neither camp acted out of the same motive; both shared the same immediate objective. Neither would likely have succeeded without the other.

1. Patrick Henry’s Assessment Bill

The general assessment idea had been debated in Virginia going back as far as the fall of 1776, and by the time the war ended the assessment had substantial support due in part to dire social conditions. A petition from Warwick County, dated May 15, 1784, requested an assessment to revive the withering establishment. A few days later petitions were prepared by the Hanover Presbyterians and the Virginia Baptists opposing an assessment. On May 27th, the House committee to which the petitions had been assigned found the Warwick County petition persuasive and prepared to take favorable action. In June 1784, petitions arrived from the newly named Protestant Episcopal Church (successor to the Church of England in America) and from residents of Powhatan County supporting a general assessment. With backing from a handful of counties and solid control of the Assembly, the advocates of an assessment were confident of success.

On June 3, 1784, a petition was drafted by the Protestant Episcopal Church requesting a bill incorporating the Protestant Episcopal Church in Virginia. This petition was significant in two respects. First, it requested that the responsibility for tax-supported poor relief be taken away from the vestries. Vestry oversight of this governmental activity allowed dissenting sects to vote in vestry elections. That enfranchisement resulted in non-Anglicans having a say in

101. Historian Sidney Mead describes the ultimately victorious alliance as between the rationalistic statesmen and the dissenters, which he terms the “pietists.” MEAD, supra note 22, at 42–43, 62. See also MILLER, supra note 22, at 37–41, 53.
102. BUCKLEY, supra note 60, at 80–81.
103. Id. at 81.
104. Id. at 85–88.
episcopal governance. The petition also requested that the episcopal hierarchy be granted the power to determine church doctrine and regulations, a seeming admission that the General Assembly presently held that authority. Ultimately, the request to incorporate, although somewhat controversial itself at the time, proved to be far less of a concern than the jurisdictional elements that the request implied. In a letter to James Madison, dated June 21, 1784, John Blair Smith stated the Presbyterian position on the Incorporation Act. "Smith outlined the point clearly; he protested against the act granting the Anglican clergy the privilege of making the canons and regulations of their church as an assertion of the Assembly’s right to legislate concerning religion."105 As events unfolded, the Incorporation Bill served as a companion to the Assessment Bill. This linkage would prove to be a tactical mistake for the pro-assessment forces.

Meanwhile, the opponents of the general assessment were preparing for what seemed its inevitable passage. On October 27, 1784, the Presbyterian clergy met at Hanover to formulate a petition.106 Their petition attempted to limit the damage of an assessment by proposing more acceptable terms. The petition adopted the line of thinking of an assessment bill, but took pains to characterize an assessment as the church supporting and preserving the social bonds needed to sustain a representative government. James Madison’s disgust with this position is apparent in his expostulation that the Presbyterians were “as ready to set up an establishment which is to take them in [as beneficiaries of the tax], as they were to put down that which shut them out.”107 Presbyterian laity also expressed alarm at this apparent reversal.108 Viewed in context, the petition of October 1784 offered a compromise in the face of what was thought to be the inevitable adoption of a general assessment, rather than a statement of Presbyterian principle. As Eckenrode explains, “[T]he [Hanover] Presbytery never advanced beyond the position of accepting what was almost looked upon as a fait accompli.”109

On November 11, 1784, the two champions, Henry and Madison, debated the proposed general assessment. Madison’s notes of that floor debate have been preserved.110 His first point was that religion was not within the “purview” of civil authority. His second point was to properly rephrase the issue as not whether religion was necessary to support a republic (he believed it was), but whether an establishment of religion is necessary for religion to flourish (and thereby be of support to government).111 Madison cited evidence of govern-

105. ECKENRODE, supra note 61, at 81.
106. BUCKLEY, supra note 62, at 95–96.
107. THOMAS CARY JOHNSON, VIRGINIA PRESBYTERIANISM AND RELIGIOUS LIBERTY IN COLONIAL AND REVOLUTIONARY TIMES 106 (Presbyterian Committee of Publication 1907). See also ECKENRODE, supra note 61, at 91; BUCKLEY, supra note 60, at 96; MILLER, supra note 22, at 30–31.
108. JAMES, supra note 59, at 131, 135–37, 189–90.
109. ECKENRODE, supra note 61, at 89; see also MILLER, supra note 22, at 40–41.
110. See ECKENRODE, supra note 61, at 85 n.355; BUCKLEY, supra note 60, at 99–100; MILLER, supra note 22, at 32–33.
111. BUCKLEY, supra note 60, at 99.
ment's historical tendency to corrupt any religion it supports. Point three argued that an establishment would make Virginia inhospitable to dissenters, causing reduced immigration into Virginia as well as people leaving due to religious oppression. Madison's fourth point sought to demonstrate that the social decay the assessment was intended to cure could in fact be remedied by social activity and personal example. His fifth point addressed the practical problems of a multiple establishment, most significantly the difficulty of adjudicating religious questions in a court of law. Such questions were inevitable if only orthodox Christian churches were to be eligible to receive tax payments. It is clear from Madison's outline that his aim was to protect and liberate religion, not to control or curtail it, as well as to avoid the inevitable civic division that follows when government involves itself in specifically religious doctrine and observance.

Despite Madison's efforts, the House sitting as a committee of the whole reported out a resolution on November 11, 1784, stating that the people "ought to pay a moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination, or communion of Christians, or of some form of Christian worship." After being amended on the House floor a committee was appointed, chaired by Henry, to reduce the resolution to a draft bill.

On November 17, 1784, with plans for the Assessment Bill moving steadily through the legislative process, Patrick Henry left his seat in the General Assembly to again assume the post as Governor of Virginia. The responsibilities of that office were then far fewer, and Henry was able to leave the capital at Richmond and return to his home and family. These events, perhaps more than any other, provided James Madison and other opponents of the assessment the opportunity to stop its momentum. Had Henry remained in the legislature, his reputation and influence would have likely assured passage of the bill.

2. Turning of the Tide

Popular opposition to the assessment was regularly arriving in the form of petitions. On November 18, 1784, John Blair Smith and John Todd, both Presbyterian lobbyists, presented a paper that sought to avoid any misunderstanding concerning the Presbyterian position as a result of the October 27, 1784, petition. That same November day a petition arrived from Rockingham County opposing an assessment. Petitions favoring an assessment continued to arrive as well. On November 20, supporting petitions arrived from Lunenburg, Mecklenburg, and Amelia Counties. On December 1st, supporting petitions from Dinwiddie and Surry Counties were delivered. Also on December 1, a

112. JAMES, supra note 59, at 126.
113. MILER, supra note 22, at 31; BUCKLEY, supra note 60, at 105, 107-08.
114. BUCKLEY, supra note 60, at 100-02; ECKENRODE, supra note 61, at 94.
115. ECKENRODE, supra note 61, at 95.
116. Id. at 98-99.
petition from Rockbridge County opposing assessment was delivered.\footnote{117} With success still probable, on December 3, 1784, Francis Corbin reported a bill to the entire Assembly. At last put into written form, the printed bill was entitled \textit{A Bill Establishing a Provision for Teachers of the Christian Religion}.\footnote{118} It was astute of the bill’s supporters to refrain from putting the assessment idea into written form for as long as possible in order to present less of a target. At this point, however, a written bill could be delayed no longer. The preamble of the bill began, “\textit{whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men},” and went on to state that the desired diffusion was not possible without teachers of the Gospel (i.e., clergy or ministers). The bill did away with distinctions among Christians with respect to eligibility, giving each taxpayer the ability to divert the tax to aid the minister or church of his or her choice.\footnote{119} Accordingly, Catholics as well as all Protestants could benefit, but not Jews or any other non-Christians who were still subject to the tax. There was a brief movement to make all religions eligible to participate by substituting the word “religious” for “Christian,” but that was soon reversed.\footnote{120} Unlike the draft bill back in 1779, this bill did not attempt to define Christian orthodoxy and then limit payments to churches who met the definition. Therefore, the civil resolution of certain religious questions was avoided. Because Quakers and Mennonites had no formal clergy to receive the tax funds and in some cases no church building, designations to these denominations were to be paid into their “general fund.”

To deflect another objection that arose during floor debate, supporters inserted a default clause for those taxpayers who made no designation as to where their payments should go. Any such amounts were deposited into the “Public Treasury” and held for the support of schools within the relevant county (“\textit{for the encouragement of seminaries of learning within the Countries whence such sums arise}”).\footnote{121} While taxpayers could not support a non-Christian house of worship or religious leader, this amendment did give taxpayers the option of supporting schools. There were no such public schools in Virginia at the time; there were, of course, private schools generally affiliated with a church. Accordingly, the character of these “seminaries of learning,” whether private or public, and whether secular or religious, necessarily awaited future refinement by the

\footnotesize{\begin{itemize}
  \item \footnote{117} Id. at 94–98.
  \item \footnote{118} James, supra note 59, at 129–30. Cf. Eckernrode, supra note 61, at 99 (giving the date as December 2, 1784).
  \item \footnote{119} The tax receipts could be used for Christian clergy or church buildings (“\textit{... shall be by the ... religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing [of] places of divine worship, and to none other use whatsoever}.”). Accordingly, the assessment monies were not limited to paying the salaries of clergy. James; supra note 59, at 129–30.
  \item \footnote{120} Dreisbach, supra note 53, at 33. The assessment bill being debated quite intentionally excluded all non-Christian faiths.
  \item \footnote{121} Eckernrode, supra note 61, at 99–100. At this time “seminaries” were schools of general education.
\end{itemize}}
General Assembly. The Assembly would have to decide where to appropriate, and in what amount, any of these undesignated monies collected in the "Public Treasury."

On November 14, 1784, Madison thought the bill would pass. The bill was given a second reading on December 3, and was then referred to the House sitting as a committee of the whole. With Henry now absent from the Assembly, Madison sensed an opportunity for delay. Eckenrode traces Madison's thoughts from November 14 forward:

"I think the bottom will be enlarged," he wrote, "and that a trial will be made of the practicability of the project." But on November 27, he wrote as follows: "You will have heard of the vote in favor of the General Assessment. The bill is not yet brought in & I question whether it will, or if so whether it will pass." A few days later, on December 4, his opinion was still stronger. "The bill for the Religious Assessment was reported yesterday and will be taken up in a Committee of the whole next week. Its friends are much disheartened at the loss of Mr. Henry. Its fate is I think very uncertain."

Meanwhile, the Incorporation Bill designed to grant a corporate charter to the Protestant Episcopal Church was debated by the entire House from December 18 to 21. The Incorporation Bill passed on December 22, by a vote of 47 to 38. Madison voted in favor of incorporation, a strategy which he explained as follows:

The necessity of some sort of incorporation for the purpose of holding & managing the property of the church could not well be denied, nor a more harmless modification of it now obtained. A negative of the bill, too, would have doubled the eagerness and the pretexts for a much greater evil, a general Assessment, which, there is good ground to believe, was parried by this partial gratification of its warmest votaries.

The Incorporation Act became law upon signature by the governor, but remained controversial with dissenters, especially the Baptists. In the short term, the passage of the Incorporation Act caused Presbyterians to fear a resurgent Episcopal Church. This too added urgency to the Presbyterian opposition to the assessment bill.

Immediately after passage of the Incorporation Bill, the Assessment Bill was brought before the Assembly. On December 23, 1784, the bill was debated and

122. Id.
123. Id. (internal quotations are from Madison's private letters).
124. Id. at 101.
125. Id. (quoting from a private letter of Madison).
126. MELLER, supra note 22, at 33, 39–41; JAMES, supra note 59, at 138–39.
amended that day and the next, and was then engrossed by a vote of 44 to 42. The bill was to be read the third and final time on Christmas Eve, but a motion was made to defer the final reading until the beginning of the next legislative session in November 1785. The motion passed by a vote of 45 to 38. The next vote of the Assembly ordered the printing and distribution of the engrossed Assessment Bill to provide the people with an opportunity to express their opinions on the subject.

3. The Memorial and Remonstrance, June 1785

On April 22, 1785, George Nicholas wrote a letter to James Madison urging him to draw up a petition opposing the assessment. George Mason reached out to encourage Madison as well. These appeals resulted in Madison’s composition, in June 1785, of his petition addressed To the Honorable the General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance. In July 1785, Nicholas circulated Madison’s Memorial and Remonstrance in the middle and western counties where the proportion of dissenters was high and sentiment was generally against the assessment. Mason remained active, distributing the Memorial in Virginia’s northern neck, and also sending it to influential citizens seeking their backing.

In a preamble, followed by fifteen numbered paragraphs, Madison built on the social contract framework supplied by John Locke in Two Treatises on Government and A Letter Concerning Toleration. Madison writes from the perspective of a Christian, but without any air of superiority or conversionary purpose. Madison’s argument is presented in the form of a memorial (i.e., list of reasons) and a remonstrance (i.e., protest). Following the preamble where signatories declare they “remonstrate against the said Bill,” Madison begins each paragraph of his list of reasons (fifteen paragraphs in total) with “Because.” Some of the numbered paragraphs have multiple points. Stripped of its
Madisonian rhetoric as well as repetition, summaries of his numbered paragraphs follow. The most fundamental, and the most in need of some additional context, are the summaries of Madison’s paragraphs 1, 2, 4, and 11:

**Summary of ¶ 1:** Religion is “the duty which we owe to our Creator and the manner of discharging it.” It “can be directed only by reason and conviction, not by force.” Each man has a right to determine his own religion. This is a right as against other men, but as to God it is a duty. That is why it is unalienable. A duty to God precedes in both time and degree man’s obligations undertaken when entering into the social contract. Because man’s determination of his religion was never contracted away, indeed is a duty to God and thus not capable of being contracted away, government has no cognizance over religion.

**Commentary:** While the *Memorial and Remonstrance* is highly praised and much analyzed by writers, modern assumptions might obscure the logic of Madison’s argument. A common mistake is the assumption that religious convictions are mere preferences in the nature of a “liberty” within the Lockeian categories of “life, liberty, and property.” From Locke’s *Letter Concerning Toleration* religious convictions are a duty owed to God, not a personal preference. If religiously informed conscience is unalienable (cannot be contracted away when making one’s social contract), then necessarily the government is limited. This puts “religion” outside the power of government. But it must be asked just how Madison in the *Memorial* parses the meaning of “religion” beyond it being a duty to God. Certainly “religion” includes specifically religious beliefs and observances, such as prayer, liturgy, Sabbath rest, a belief in the existence of heaven and hell—what he calls questions of “religious truth” in ¶ 5 of the *Memorial*. But if a government has no cognizance over “religion,” then “religion” in that meaning could not possibly include the many ill-behaviors of our common life together to which most religions bring to bear their moral teaching, such as on stealing, lying, neglect of one’s children, and murder. So one must attribute to Madison some further refinement of the meaning of “religion” that distinguishes between specifically religious matters (“religious truth”) as opposed to religious teaching that speaks to moral issues of proper (even compelling) interest to our common life together and hence to

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134. Madison’s definition of “religion” was taken from the Petition of the Hanover Presbytery of October 24, 1776, reproduced in *James*, supra note 59, at 224. Madison put in quotation marks the definition indicating he was borrowing from a prior source. This is a good reminder that much by way of argument in the *Memorial* had been made before by others.

135. The Petition of the Hanover Presbytery of October 24, 1776, is more forthcoming with respect to the jurisdictional divide between church and state. Just before the definition of “religion” that Madison borrowed the petition states:

> “The only proper objects of civil government are the happiness and protection of men in the present state of existence; the security of the life, liberty, and property of the citizens; and to restrain the vicious and encourage the virtuous by wholesome laws, equally extending to every individual.”

*James*, supra note 59, at 224. The quoted passage is, in part, a paraphrase of *Romans* 13:3–4 and *1 Peter* 2:13–16.
civil government. It is specific religious matters over which the government has no cognizance, that is, no authority. Rather, specifically religious matters reside within the authority of God and his earthly surrogate, the church. Today’s popular descriptor for the latter division between two spheres of cognizance is “the separation of church and state.”

Summary of ¶ 2: If religion (as defined in ¶ 1) is exempt from the cognizance of government (as argued in ¶ 1), still less can religion be subject to the legislature. The legislature is but a department of the government. If the government has no jurisdiction over religion, then the same is necessarily true of the legislature. Not only is separation of powers among government’s three departments essential to limit government, but the departments must not “overleap the great Barrier” that limits all government.

Commentary: The limit on government’s cognizance as noted in ¶ 1 is here called “the great Barrier.” Neither one department nor the entire government has the authority to leap this barrier. There is thus authority that exists outside the government, an authority over religious matters. As with ¶ 1, Madison leaves us wanting to know more about the proper location of this “great Barrier” between government and those aspects of religion outside the reach of government.

Summary of ¶ 3: Because it sets a precedent, it is proper to protest even small violations of our liberties. If government has the authority to establish Christianity, it has the authority to establish one denomination of Christianity to the exclusion of others. Or it can force one to contribute money to the support of an establishment, or conform to its practices.

Summary of ¶ 4: All men are by nature equally free, they enter into the social contract on equal terms, and they retain equal rights. This is particularly so with respect to religious freedom, which according to the dictates of conscience must be an equal right for all. The accommodation in the Assessment Bill for Quakers and Mennonites violates this principle of equality. One’s abuse of religious freedom is an offense against God, not an offense against the public order, so an account must be rendered to God alone.

Commentary: There are two interrelated points here. (1) In social contract theory all men enter civil society as equals, and thus in religious matters all men are equal before the law. The Assessment Bill has exemptions just for Quakers and Mennonites and thus violates the equality principle. (2) Failure to extend religious freedom to all equally is an offense to God alone. Therefore, the government should not punish such abuses. This makes sense if the abuse is about a specifically religious matter (e.g., do not worship idols), but not if the duty coincides with a legitimate concern of civil society (e.g., do not murder). As with ¶¶ 1 and 2, Madison leaves us wanting to know more about where to draw this line.

Summary of ¶ 5: A civil magistrate is not competent to judge religious truth. For government to employ religion “as an engine of civil policy” is an “unhallowed perversion” of the Christian gospel.

Commentary: There are two points here. (1) By establishing a religion, the
government is necessarily saying that that religion is true and other religions are false. But civil rulers through the ages have reached contradictory conclusions on correct doctrine, thereby refuting the claim that government can accurately determine religious truth. (2) To be used as a tool to accomplish the political goals of the civil state is, for Christians, to exploit and debase the faith. The negative view of the Roman Catholic Church begins to emerge in this paragraph, and later in \[6, 7, and 8.\]

**Summary of \[6: Christianity does not need the support of government. Indeed, the scriptures expressly teach against a dependence on worldly powers. Christianity flourished when government opposed it. Government support weakens the confidence of Christians in their own religion, and it raises suspicions by skeptics about Christians who apparently think so little of their religion that it needs propping up by the government.**

**Commentary:** This is a normative claim about what Christianity teaches. It is being made by one who is apparently a Christian. The Protestant dissenters argued that the church should not depend on government. However, that claim went against the teaching of other churches in that day, such as Catholic, Orthodox, and the Church of England.

**Summary of \[7: From the establishment of Christianity in the Fourth Century the church was corrupted: in the clergy, pride and indolence; in the laity, ignorance and servility; and in both, superstition, bigotry, and persecution. Worthy of admiration is the primitive church before its establishment. A return to voluntary support of the church is predicted by some clerics to cause its downfall. Discount the prediction given the self-interest of these clerics in continued establishment.**

**Summary of \[8: Government has no need of an establishment. What has been the consequence? Churches have dominated government and brought about spiritual tyranny. Governments have used establishments to reinforce political tyranny. A just government, however, will safeguard equal religious freedom, and will neither invade any sect nor permit one sect to invade another.**

**Summary of \[9: Because the Assessment Bill proposes an establishment and discriminates on the basis of religion, the bill will discourage non-Christians from moving to Virginia.**

**Summary of \[10: For the same reasons stated in \[9, the bill will cause non-Christians to move out of Virginia.**

**Summary of \[11: When government meddles with religion it destroys moderation and harmony among sects, generating animosities and jealousies. On the other hand, experience reveals that when government has withdrawn from involvement in religious disputes, the result is public health and prosperity.**

**Commentary:** As with \[1, 2, and 4, we would like to know more about how Madison distinguishes between specifically religious matters (e.g., is God triune?) from religious matters addressing public morality (e.g., should plural marriage be prohibited?).

**Summary of \[12: Christians want to impart their faith to others. Yet the bill’s
discriminatory provisions will discourage non-Christians from moving to Virginia where they otherwise would be exposed to Christianity.

Summary of § 13: The enforcement of a law in a republic requires broad public support for the law. The enforcement of laws that are religiously obnoxious to many citizens will "slacken the bands of Society" and undermine support for the government.

Summary of § 14: A bill of this "delicacy" should not be imposed without broad support. We hope the elected representatives will oppose this bill. However, if they disappoint us we are confident the people will reverse the decision of the legislature.

Summary of § 15: Article 16 of Virginia's Declaration of Rights safeguards the free exercise of religion. The will of the legislature is not the measure of its authority. The legislature exceeds its authority were it to adopt this bill. We pray that "the Supreme Lawgiver of the Universe" illuminate the deliberations of the legislature and turn it from "every act which would affront his holy prerogative."

There were at least thirteen copies of the Memorial filed with the General Assembly, and a total of 1,552 signatures appeared thereon. In all this flurry of activity, Madison successfully worked to keep his authorship anonymous. Indeed, it was not until 1826 that Madison publicly acknowledged that he had written the petition. The Memorial's distribution in the summer and fall of 1785 was only one of a flood of anti-assessment petitions. The most popular petition was from an evangelical point of view. It was submitted in twenty copies and had a total of 4,899 signatures. The petitions especially attracted the signatures of the dissenting faiths. Eckenrode writes: "More important probably than the efforts even of Madison and Nicholas and their friends was the decision of the evangelical churches to oppose the assessment."

4. Matters Are Brought to a Head

On August 13, 1785, the Baptists were drawing up a petition in Powhatan County while the Presbyterians were doing the same in Hanover. On September 7th, the Baptist General Association met at Orange and adopted a remonstrance. Pittsylvania County drafted an anti-assessment petition dated November 7th; Montgomery County's petition was dated November 15th. On November 29th, Botetourt County drew up a petition concerned that a general assessment would indiscriminately support the Christian heterodox along with the orthodox. Even the generally apolitical Quakers submitted a petition opposing an assessment. Eckenrode summarizes:

136. Dreisbach, supra note 53, at 34 n.98.
137. See MILLER, supra note 22, at 39; NOONAN, supra note 3, at 74.
138. ECKENRODE, supra note 61, at 106.
139. Id. at 107–10.
The most popular argument in all these papers was the assertion, repeated in different terms in [Madison’s] Remonstrance and in the Presbyterian and Baptist memorials, that Christianity [during its first three centuries] had grown and prospered in spite of the opposition of the State. A score of petitions declared that “certain it is that the Blessed author of the Christian Religion, not only maintained and supported his gospel in the world for several Hundred Years, without the aid of Civil Power but against all the Powers of the Earth, the Excellent Purity of its Precepts and the unblamable behavior of its Ministers made its way thro all opposition. Nor was it the Better for the church when Constantine the great, first Established Christianity by human Laws[;] true there was rest from Persecution, but how soon was the Church Over run with Error and Immorality.”140

The exact proportion of the population for and against an assessment for religion is difficult to calculate. Eckenrode reports that the number of signatures on the anti-assessment petitions was at least 10,000, and may have been more. He estimates that opponents outnumbered backers of the bill eight to one.141 Of course, supporters of the general assessment did not entirely disappear. But the pro-assessment forces were not equal to their opponents in energy and organization, and the impression was produced that an overwhelming majority of the people in Virginia were opposed.142

While the many petitions signed by Presbyterians, Baptists, and other dissenters had more signatures and provided the show of force necessary to defeat Henry’s Bill, Madison’s Memorial has proven the more timeless American document on the subject of religious freedom. The other petitions were more openly religious, indeed Protestant; this is why they had more immediate appeal to the people than did Madison’s Memorial. History may not have judged rightly, for a singular focus on the Memorial leaves a serious misimpression. Clearly it was the combination of Madison’s legislative acumen and the large-scale opposition by dissenters that set the assessment proposition on the defensive. Neither member of this alliance would have succeeded without the other; while they shared the same immediate goal, their long range hopes were different.

Although factors such as the economic burden any tax would place on a largely impoverished post-war population contributed to the defeat of the Assessment Bill, it was the volume of disestablishment petitions awaiting the Assembly that sealed its fate. When the delegates reconvened in October 1775, the bill died quietly.

William Rives in his biography of James Madison writes:

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140. Id. at 110 (quoting a common passage appearing in petitions). Madison’s Memorial makes the same argument in ¶ 7.
141. Id. at 111–12. See NOONAN, supra note 3, at 74 (reporting 10,929 anti-assessment signatures).
142. ECKENRODE, supra note 61, at 112.
When the Assembly met in October [1785], the table of the House of Delegates almost sank under the weight of the accumulated copies of the memorials sent forward from the different counties, each with its long and dense columns of subscribers. The fate of the assessment was sealed. The manifestation of the public judgment was too unequivocal and overwhelming to leave the faintest hope to the friends of the measure.\(^{143}\)

There is no mention of the bill in the official journal in the fall of 1785, and no final reading on the House floor was ever held. It simply disappeared, never to be taken up again.

**D. A Bill for Establishing Religious Freedom, January 1786**

The victors in the assessment battle wasted no time. The Revised Code, first proposed to the House of Delegates back in June 1779, still had among its many provisions awaiting consideration Thomas Jefferson’s *A Bill for Establishing Religious Freedom*, assigned number 82.\(^{144}\) In late 1785, Jefferson was serving as the United States Minister in Paris, France. Once again Madison was the essential man. His tireless advocacy shepherded the bill through the legislative process.

On December 14, 1785, Bill No. 82 was plucked at Madison’s initiative from the stack of bills awaiting attention in the winding down session.\(^{145}\) The next day, the committee reported Bill No. 82 to the House but with an amendment that undermined its force. The amendment was considered by the House on December 16th and rejected by a vote of 38 to 66.\(^{146}\) This decisive margin signaled the impotence of the establishmentarians in the aftermath of the defeat of the Assessment Bill. After a third reading and the defeat of a motion to postpone a vote until the following session, on December 17th Bill No. 82 passed the House by a vote of 74 to 20.\(^{147}\) A battle of amendments ensued between the House and the more conservative Senate, resulting in a conference between the two chambers. With adjournment impending Madison reluctantly agreed to some amendments. Final passage of *A Bill Establishing Religious Freedom*, as amended, came on January 16, 1786.\(^{148}\)

Following a long preamble, the substantive provisions of Bill No. 82 are

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145. See Miller, *supra* note 22, at 34–36, 42–43, 50–64, and 69–75 (discussing Jefferson’s Bill No. 82 and how it was amended before eventual passage by the General Assembly). The amendments were not without importance. For example, Jefferson’s attribution of religion to reason alone (as opposed to reason and revelation, as Christian orthodoxy would have it) was excised from the long preamble. *Id.* at 52.
147. *Id*.
148. *Id.* at 114–15.
quite short. The most quoted section of the preamble is openly theistic. Jefferson wrote, for example, that civil restraints on religion “are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.”

The operative substance of the bill provides as follows:

Be it enacted by the General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

By its terms, the statute protects freedom of belief and speech in religious matters, and provides that there are to be no civil disabilities or tests on account of religion. These freedoms were likely already safeguarded by Article 16 of the Declaration of Rights. New in Bill No. 82 was the affirmative declaration that financial support for religion is to be voluntary (“no man shall be compelled to ... support any religious worship, place, or ministry”), albeit that had been the actual state of affairs in Virginia since 1776. Nevertheless, the codification of voluntaryism gave statutory confirmation to the status quo and thus was a cause for celebration by both Protestant dissenters and enlightenment-rationalists.

Surprisingly, the bill did not expressly disestablish the Anglican Church (or its successor the Protestant Episcopal Church). The church could, under the letter of Bill No. 82, continue to enjoy the imprimatur of the state (just not its financial support), as well as the state’s preferential treatment. This could take the form of the government’s hand in clerical appointments or the regulation of the liturgy, much as the Church of England in this day has a privileged position in the English civil law but receives no government financial support.

Historian William Lee Miller writes about Jefferson’s bill in celebratory fashion, which seems about half right. The bill has borne much rhetorical force in the service of religious freedom. But its impact has been symbolic rather than juridical, more a promotion of Jefferson than actual progress on the ground in enlarging religious freedom. As a legal document it did not alter the legal status quo in Virginia. As we have seen, there had not been legislative authority to impose religious taxes in Virginia on dissenters since 1776 and on

149. MILLER, supra note 22, at 357.
150. Id. at 62, 358.
153. See MILLER, supra note 22, at 34–36, 42–43, 50–64, and 69–75 (discussing Jefferson’s Bill No. 82).
Episcopalians since 1779. That would begin to explain why Bill No. 82 is rarely talked about in the course of being invoked in Virginia judicial opinions enlarging religious freedom. Its lack of juridical impact on the expansion of religious freedom is also because Jefferson created a statute and not a constitutional right. That meant any later statute enacted in Virginia, said to be contrary to the terms of Bill No. 82, merely raised a conflict of laws question and did not necessarily lead to an overturning of the later statute.154

E. Use and Misuse of the Virginia Experience

In *Rosenberger v. Rector and Visitors of the University of Virginia*,155 Justices Souter and Thomas squared off with respect to the Virginia experience, and in particular the meaning of the defeat of Henry’s Assessment Bill. In a separate opinion concurring in the Court’s decision, Justice Thomas argued that the defeat of the bill leant support to the “nonpreferentialist” position with respect to the meaning of the Establishment Clause.156 The nonpreferentialist school of thought argues that although the Establishment Clause does not permit government to prefer some religions over other religions, the clause does permit government to support religion so long as all religions are treated the same. On the other hand, in a dissenting opinion Justice Souter argued that the defeat of the Assessment Bill leant support to his view that the Establishment Clause meant that government can never aid religion, not even when the program of aid is equally available to a large class of providers none of whom are excluded because of their religious character.157 If that were so, then money from the student activity fees in *Rosenberger* could not be used to defray the cost of printing plaintiff’s student religious newspaper. No aid is no aid, insisted Justice Souter, regardless of the resulting discrimination within the university-created forum based on the religious content of the plaintiff’s newspaper.158

The historical record will not bear either of these two interpretations of the defeat of Henry’s Assessment Bill. First, Henry’s bill, as amended and then engrossed on December 24, 1784, and then tabled until the next assembly which was to convene in October 1785, was a special “earmarked” tax. The assessment was for funding only the activities described in the bill (clergy salaries and

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154. The entire text of Jefferson’s bill, as enacted, exists today in the Virginia code in the form of a recitation. Va. Code Ann. § 57-1. However, the last two sentences of the current Virginia Declaration of Rights draw heavily on Jefferson’s amended bill. That language was added to the Declaration by the Constitutional Convention of 1830, and was moved to its current location in 1971. See John Dinan, *The Virginia State Constitution: A Reference Guide* 67 (Praeger Publishers 2006).

155. 515 U.S. 819 (1995) (holding that state university’s denial of student activity funds to pay for printing of student newspaper with specifically religious perspective as part of a limited public forum to enlarge student writing constituted viewpoint discrimination contrary to Free Speech Clause).

156. *Id.* at 855–56 (Thomas, J., concurring).

157. *Id.* at 868–69, 872 n.1 (Souter, J., dissenting). In *Zelman v. Simmons-Harris*, 536 U.S. 639, 711–12 (2002), Justice Souter in his dissent takes much the same position claiming that appropriations from general tax revenues is a violation of the religious conscience of objecting taxpayers.

158. 515 U.S. at 870–76 (Souter, J., dissenting).
church buildings), as opposed to extracting monies from a general tax to be paid into the treasury. This makes a difference in terms of coercion on religiously informed conscience of taxpayers. The modern Supreme Court has twice ruled that there is no burden on religious conscience with respect to a general tax the monies of which are paid into the treasury, and there are no conditions on how treasury funds are later appropriated.\footnote{159} Unlike a general tax that is paid into the treasury without strings on how the money is later used, a special earmarked tax has the required causal link between the extraction of the tax from the taxpayer and the monetary support of religion. The “tax” in \textit{Rosenberger} (i.e., student activity fees) is like a general tax payment into the treasury, not like Henry's tax earmarked for religion. Madison's \textit{Memorial} \§ 3 objected to government “authority which can force a citizen to contribute three pence only of his property for the support of any one establishment.” That is an objection to a special tax earmarked for religion, nothing more.

Second, Henry's bill was amended to deal with the contingency where a taxpayer paid his or her assessment but neglected (or refused) to designate the Christian minister or church to receive the money. These undesignated monies were to be held in an account and later applied to “seminaries of learning” (schools) operating within the county where the undesignated tax money was collected. For practical reasons the bill needed to instruct officials on what to do with these undesignated monies. One would presume that this amendment was added by pro-assessment forces to give the bill an even broader appeal. This is because the option gave taxpayers more choices, especially for those who did not associate with any Christian church. Perhaps the taxpayers were Jewish, perhaps they were Christian but not affiliated with a local church, or perhaps they were of no religion. Contrary to what Justice Souter assumes, however, the option to use undesignated tax monies for schools did not turn Henry's bill into the modern-day equivalent of a “neutral” program of aid to education available to a broad array of schools without regard to religion.\footnote{160} With respect to the relatively small amount of undesignated tax money, this fund could only be used for “seminaries of learning.” But in Henry's bill it was entirely unclear as to the nature of these schools. In 1784-1785 Virginia, there was no public school system; to the extent there were formal schools, they were mostly

\footnote{159. The Court has twice rejected taxpayer claims brought under the Free Exercise Clause because of the absence of religious coercion to the taxpayer. \textit{See} Tilton v. Richardson, 403 U.S. 672, 689 (1971) (holding taxpayers lacked the requisite burden on religion to pursue free-exercise claim); \textit{Central Bd. of Educ. v. Allen}, 392 U.S. 236, 248-49 (1968) (same).

160. A few years after \textit{Rosenberger}, the Supreme Court by a vote of 6-3 upheld such an educational program, with Justice Souter dissenting. \textit{See} Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion). \textit{Mitchell} upheld a general federal program providing educational materials to K-12 schools, public and private, secular and religious, allocated on a per-student basis. Because \textit{Mitchell} was a plurality opinion, Justice O'Connor's concurring opinion, \textit{id.} at 836 (joined by Breyer, J.), is controlling because it worked the lesser alteration to the prior law. \textit{See} \textit{Marks v. United States}, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling).}
church-affiliated (likely Protestant). Justice Thomas is correct that the special fund created by the undesignated assessments awaited future legislation by the Virginia General Assembly with respect to how the monies in the fund were to be appropriated. There is no reason to assume that these undesignated monies would go to a "neutral" mix of secular and religious schools. Because it cannot be said that Henry’s bill would have created a "neutral" program of aid to schools chosen without regard to religion, the bill’s defeat was not a rejection of modern "neutrality" theory.

Third, Henry’s Assessment Bill funded all Christian churches. An attempt to have the bill fund all religious groups was defeated. Thus the proposed assessment was not nonpreferentialist, and thereby the defeat of the bill was not a defeat of nonpreferentialism. On the other hand, to call the defeat of the bill some evidence supporting nonpreferentialism will not do because it is so highly speculative. It cannot be said that Henry’s bill would have passed if only the assessment had been available to Jews, Muslims, Hindus, Buddhists, and so on. Rather, the central reason the bill was defeated was that the opposition believed it was best for religion and best for the body politic if support for religion was voluntary.

Although both Justices Souter and Thomas overreached in Rosenberger, are there legitimate inferences to be drawn from the defeat of Henry’s bill? I think we can say that the Protestant dissenters and Madison would have opposed the bill regardless of whether undesignated tax monies went to a special school fund. That is consistent with the central argument of their many petitions. Moreover, the immediate follow-up to the defeat of Henry’s bill was the passage of Jefferson’s Bill for the Establishment of Religious Liberty. The operative paragraph of that bill codified what had de facto taken place over the last ten years, namely, the state defunding of the Anglican Church. The unifying idea behind both the defeat of Henry’s bill and the passage of Jefferson’s was that support for religion should be voluntary—which is to say, not by the government. And the rationale was two-fold: to protect religion from government corrupting the church by bending her ministry to objectives set by the state; and, that denying government’s cognizance over religious questions was best for unifying the body politic, which in turn bode well for sustaining the fledging republic.

161. Rosenberger, 515 U.S. at 853 n.1 (Thomas, J., concurring) (citing authorities).
162. Id. (noting that under the terms of the Assessment Bill undesignated tax monies could fund schools operated by a religious organization).
163. It was believed that for government to take sides in disputes over creeds, doctrine, and other forms of specific religious observance was to dangerously risk dividing the body politic just at the moment when unity was most needed. Hence, for example, the germ of an idea at the founding was that religious tests for public office were bad for civic peace, as were civil courts attempting to resolve disputes over religious doctrine. See, e.g., U.S. Const. art. VI cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); Watson v. Jones, 80 U.S. 679 (1871) (no civil court jurisdiction to resolve disputes over religious doctrine, polity, or church discipline).
That still leaves open the question: What did the opponents to Henry's bill regard as government-funded religion? The bill's opponents clearly regarded a special earmarked tax for clergy salaries and church buildings to be government support for religion. But would general treasury funds appropriated for science, math, and reading classes in K–12 schools, funded on a per student basis without regard to the religious or secular character of the organization operating the school, be regarded by the dissenters and Madison as support for religion? Based on the defeat of Henry's bill, we honestly cannot say. I hasten to add that one ought not to be overly troubled by the failure of the Virginia experience to answer this question (arising 210 years later) debated by Justices Souter and Thomas. It is sufficient that we know the general principle to come out of the Virginia disestablishment experience is voluntarism. The rest is just so much detail left for others to answer as questions arose in the future concerning the principle's particular application.

IV. THE RATIONALE OF PROTESTANT DISSERT

The Presbyterians and Baptists in Virginia, as well James Madison, Jr., made arguments in their petitions that can be usefully broken down into the categories of historical, theological/religious, and governmental/prudential. Clustering the arguments in this way sheds new light on the case for disestablishment in Virginia, as well as reveals the substantial overlap of Madison's Memorial with the dissenters' petitions.

A. Historical Arguments in the Petitions

1. In the first three centuries the church grew rapidly and Christianity spread widely. This occurred despite the disapproval of and at times persecution by Imperial Rome. It was during this time of the primitive church that Christianity flourished in its greatest purity. It was the establishment of Christianity in the Fourth Century that caused the church to be corrupted by too close a proximity to government and its power.

2. What have been the fruits of establishment? "More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution." So the church was not only harmed, but it did harm to others.

3. A return to the energetic and uncorrupted church of the first three centuries

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164. Hanover Presbytery Petition of October 24, 1776, in JAMS, supra note 590, at 234 ("[W]e are persuaded that, if mankind were left in the quiet possession of their inalienable religious privileges, Christianity, as in the days of the apostles, would continue to prevail and flourish in the greatest purity, by its own native excellencies, and under the all-disposing providence of God.").

165. Madison's Memorial ¶ 7. See also ECKENRODE, supra note 61, at 110 (paraphrasing a common argument in anti-assessments petitions).
would entail having support for the clergy "depend[] on the voluntary
rewards of their flocks."\textsuperscript{166}

4. "[I]n many instances" the established church, in order to hold onto its
privileges, helped to prop up a government with its "thrones of political
tyranny." Never has an established church "been seen [as] the guardians of
the liberties of the people."\textsuperscript{167} Rather, establishment has alienated from
Christianity those who yearn for greater liberty.\textsuperscript{168}

5. The medieval church was at times so powerful as to "erect a spiritual
tyranny" by way of co-opting civil government.\textsuperscript{169}

6. Civil magistrates are not competent to judge religious truth. Down through
the ages, civil rulers have repeatedly contradicted one another in their
resolution of central religious teachings. This proves false any claim that
civil authorities can reliably judge religious truth.\textsuperscript{170}

7. Religious inequality by the government differs only in degree from the
Inquisition.\textsuperscript{171}

\begin{footnotes}
\textsuperscript{166} Madison's \textit{Memorial} \textsuperscript{7}. \\
\textsuperscript{167} Madison's \textit{Memorial} \textsuperscript{8}. \\
\textsuperscript{168} In a comparison with his native France, Alexis de Tocqueville made the same link between
liberty and the separation of church and state as practiced in Nineteenth Century America:

\begin{quote}
The Americans combine the notions of Christianity and of liberty so intimately in their minds,
that it is impossible to make them conceive the one without the other . . . .
\end{quote}

Upon my arrival in the United States, the religious aspect of the country was the first thing
that struck my attention; and the longer I stayed there, the more did I perceive the great
political consequences resulting from this new state of things, to which I was unaccustomed.
In France I had almost always seen the spirit of religion and the spirit of freedom pursuing
courses diametrically opposed to each other; but in America I found they were intimately
united, and that they reigned in common over the same country. My desire to discover the
causes of this phenomenon increased from day to day. In order to satisfy it, I questioned the
members of all the different sects . . . . I found that [Catholic clergy] . . . mainly attributed the
peaceful dominion of religion in their country, to the separation of church and state. I do not
hesitate to affirm that during my stay in America, I did not meet a single individual, of the
clergy or of the laity, who was not of the same opinion upon this point.

\textsc{Alexis de Tocqueville, Democracy in America} \textsc{1:334–35, 337 (Henry Reeve trans., J. \& H. G. Langley
4th ed. 1841)}.

\textsuperscript{169} Madison's \textit{Memorial} \textsuperscript{8}. While speculative, perhaps Madison had in mind the period of the
papal revolution when Pope Gregory VII declared the legal supremacy of the clergy, under the pope,
over all secular authorities. \textit{See Harold J. Berman, Law and Revolution: The Formation of the
Western Legal Tradition} \textsc{94} (1983). In the larger scheme of things, however, the papal revolution was
a positive development freeing the church from secular control. \textit{Id.} at \textsc{87–115}.

\textsuperscript{170} Madison's \textit{Memorial} \textsuperscript{5}; Hanover Presbytery Petition of October 24, 1776, \textit{in James, supra
note} \textsc{59, at 223} ("[T]he least impossible for the magistrate to adjudge the right of preference among
the various sects that profess the Christian faith, without erecting a claim to infallibility, which
would lead us back to the church of Rome.").

\textsuperscript{171} Madison's \textit{Memorial} \textsuperscript{9}. While speculative, perhaps Madison was referring to the Spanish
Inquisition. The Spanish Inquisition began under King Ferdinand and Queen Isabella in \textsc{1478} with the
approval of Pope Sixtus IV. In contrast to previous inquisitions, it operated completely under royal
authority, although staffed by clergy and orders. It was aimed primarily at converts from Judaism and

8. Dialogue and negotiation to resolve disputes over religious doctrine can be slow and frustrating. To put an end to such squabbling so that there might be unity within the state, civil authorities in the past sought to impose creational agreement by civil law. On other occasions church authorities have invited civil authorities to intervene in religious disputes and impose a doctrinal settlement. This proved unwise. "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion." Experience has shown that it is not for government to attempt to resolve religious doctrinal disputes. "The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate [disharmony among churches], sufficiently destroys its malignant influence on the health and prosperity of the State." Since 1776, Virginia had also enjoyed the salutary effects of withdrawing state jurisdiction over such doctrinal disputes, but the old "animosities and jealousies" among the churches would be reintroduced should the Henry's Assessment Bill be enacted.

B. Theological/Religious Arguments in the Petitions.

1. Authority over religiously informed conscience is vested in each individual, and it is a duty to God. People thus have two loyalties: God and state. Conscience or one's duty to God supersedes any duty to the state. Government is thereby limited by individual conscience.

172. While speculative, perhaps Madison had in mind the Council of Nicaea (A.D. 325). Constantine the Great issued invitations to the bishops of the church with the goal of public unity by way of religious consensus. Prodded by Emperor Constantine, the Council produced the Nicene Creed and thereby rejected by a near unanimous vote a heresy known as Arianism. For additional discussion and reference to authority on the Nicene Creed, see, supra note 13.

173. While speculative, perhaps Madison had in mind the Donatist Schism (A.D. 313-316). Diocletian's Great Persecution in North Africa produced two groups of clergy, those who had recanted and those who had not. Thereafter a disagreement arose over restoration of those who had recanted. To break the impasse, one faction requested intervention by Emperor Constantine. He declined, but appointed a council of bishops to internally hear and resolve the matter. When the council's resolution was appealed to Constantine, he gave the dissidents a hearing. After affirming the resolution of the council, Constantine issued an edict punishing the dissidents for persisting in their grievance and thus causing disruption of unity within the empire. The emperor thus still thought religious unity was essential to civic unity, a holdover from when paganism was the official religion of the empire.

175. Id.
176. Id. The location of the "American Theatre" is not specified by Madison. However, Pennsylvania was often favorably referred to by disestablishmentarians as having a church-state system that led to harmony among the sects and economic prosperity.
177. Madison's Memorial ¶ 1, 2; Hanover Presbytery Petition of 1778, in Baird, supra note 86, at 237 ("... to judge for ourselves, and to engage in the exercise of religion agreeably to the dictates of our own consciences, is an inalienable right, which upon the principles on which the gospel was first propagated, and the reformation from Popery carried on, can never be transferred to another.")
2. "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's."\(^{178}\) From this passage and others,\(^{179}\) a dual-authority pattern developed between state and church (God's earthly surrogate). When the church is truly independent, it will criticize public officials, when warranted, and act as a check on injustice. Government is thereby limited by the church.

3. These two limits on government have worked in the West to help check the authoritarian pretensions of the state.

4. Christianity does not need the support of civil government.\(^{180}\) Christ said that his kingdom is not of this world, thus renouncing dependence on worldly powers.\(^{181}\)

5. Dependence on government weakens the faith of Christians for they see their church propped up by the state. And such dependence by the church incurs the contempt of non-Christians.\(^{182}\)

6. While civil society and our communal life together are important,\(^{183}\) ultimately the central purpose of Christianity is not to shape domestic policy or to preserve the unity of the state.\(^{184}\)

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180. *See* Madison's *Memorial* ¶ 6; *see also* Hanover Presbytery Petition of October 24, 1776, in *JAMES*, *supra* note 59, at 224 ("Neither can it be made to appear that the gospel needs any such civil aid. We rather conceive that, when our blessed Saviour declares his kingdom is not of this world, he renounces all dependence upon state power; and as his weapons are spiritual, and were only designed to have influence on the judgment and heart of man, we are persuaded that, if mankind were left in the quiet possession of their inalienable religious privileges, Christianity, as in the days of the apostles, would continue to prevail . . . ").

181. *See* Hanover Presbytery Petition of October 24, 1776, in *JAMES*, *supra* note 59, at 224. This is a reference to Jesus' reply to a question asked by Pontius Pilate, the Roman governor of Palestine, recorded in *John* 18:36.


> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.

183. It was Anabaptists that cut themselves off from the government and general public affairs (e.g., Mennonites and Amish). This was not the way of Presbyterians and Baptists.

184. The dissenting Presbyterians were certain in their minds that they should not confuse the proper role of the church with the proper role of government. *See* Hanover Presbytery Petition of October 24, 1776, in *JAMES*, *supra* note 59, at 224 ("We would also humbly represent, that the only proper objects of civil government are the happiness and protection of men in the present state of existence; the security of the life, liberty, and property of the citizens; and to restrain the vicious and encourage the virtuous by wholesome laws, equally extending to every individual. But that the duty which we owe to our Creator, and the manner of discharging it, can only be directed by reason and conviction, and is no where cognizable but at the tribunal of the universal Judge."). The passage on the role of government is a paraphrase from *Romans* 13:3–4 and *1 Peter* 2:13–16.
7. Authentic religion will command respect and can stand on its own merit.\footnote{185} It appeals to people who will in turn support the faith, not out of compulsion but willingly.\footnote{186}

8. For clergy to take the state's general assessment will harm their church.\footnote{187} The state's assessment may be used to control the church.\footnote{188}

9. Civil government inevitably will attempt to use the church as an "engine of Social Policy" to accomplish its political ends. Should the church become a tool of the state, for Christians, this would be an "unhallowed perversion of the means of salvation."\footnote{189}

10. An established church makes evangelism harder. Juridically compelled support generates resentment toward the established church and thereby Christianity.\footnote{190}


[T]he Court has unambiguously concluded that the . . . First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .

\textit{Id.} at 52–53 (footnotes omitted).

\footnote{186} See Madison's \textit{Memorial} \S 6; see also Hanover Presbytery Petition of October 24, 1776, in JAMES, supra note 59, at 224–25 ("...that all, of every religious sect, may be protected in the full exercise of their mutual modes of worship; exempted from all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice, or voluntary obligation. This being done, all partial and invidious distinctions will be abolished, to the great honour and interest of the state; and every one be left to stand or fall according to his merit, which can never be the case so long as any one denomination is established in preference to others.").

\footnote{187} See Hanover Presbytery Petition of 1778, in BAIRD, supra note 86, at 237 ("...most certain we are, that it would be of no advantage but an injury to the society to which we belong; and as every good Christian believes that Christ has ordained a complete system of laws for the government of his kingdom, so we are persuaded that by his providence he will support it to its final consummation. In the fixed belief of this principle, that the kingdom of Christ and the concerns of religion are beyond the limits of civil control, we should act a dishonest, inconsistent part, were we to receive any emoluments from human establishments for the support of the gospel.").

\footnote{188} \textit{Id.} at 237 ("As the maxims have long been approved, that every servant is to obey his master, and that the hireling is accountable for his conduct to him from whom he receives his wages; in like manner, if the legislature has any rightful authority over the ministers of the gospel in the exercise of their sacred office, and if it is their duty to levy a maintenance for them as such, then it will follow that they may revive an old establishment in its former extent, or ordain a new one for any sect that they may think proper; they are invested with a power not only to determine, but it is incumbent on them to declare who shall preach, what they shall preach, to whom, when, and in what places they shall preach; or to impose any regulations and restrictions upon religious societies that they may judge expedient.").

\footnote{189} See Madison's \textit{Memorial} \S 5. This is a remarkable statement, for Madison is close to calling, in the judgment of one who is a Christian, the general assessment as blasphemous.

\footnote{190} See Madison's \textit{Memorial} \S 12. Just under the surface of many of these theological arguments is the negative opinion of the role played by the Roman Catholic Church in Western civilization.
C. Governmental/Prudential Arguments in the Petitions.

1. To permit the state to establish a church necessarily yields to the government the authority to determine religious truth. To concede that the state has cognizance over such matters is to necessarily concede it has authority to establish a different Christian church or to even establish a non-Christian faith.¹⁹¹

2. In reason and fairness all religions should be equal before the law. Each man leaves the state of nature and enters into the social contract on the same level as all others. Yet an establishment privileges one religion over others.¹⁹² Moreover, the accommodation in the Assessment Bill for Quakers and Mennonites (their designated assessments are paid into their general church funds, because they have no formal clergy) is an illustration of unequal treatment.¹⁹³

3. Discrimination on account of religion will be resented, the resentment being directed at the state and at the established church. This divides the body politic. Seditious thoughts come in response to such religious oppression.¹⁹⁴

4. In a free society the enforcement of laws requires broad public support. Religious discrimination generates animosity against the government and thereby undermines support for the rule of law.¹⁹⁵

5. Discrimination on account of religion discourages immigration, and it causes current residents to leave the state. This loss of population is bad for the practical arts and thus harms the economy.¹⁹⁶

¹⁹¹. See Madison's Memorial ¶ 3; see also Hanover Presbytery Petition of October 24, 1776, in James, supra note 59, at 223 (“... there is no argument in favour of establishing the Christian religion, but may be pleaded, with equal propriety, for establishing the tenets of Mohammed by those who believe the Alcoran ...”).

¹⁹². See Hanover Presbytery Petition of October 24, 1776, in James, supra note 59, at 223 (“... besides the invidious and disadvantageous restrictions to which they have been subjected, [we] annually pay large taxes to support an establishment ... all which are confessedly so many violations of their natural rights, and in their consequences a restraint upon freedom of inquiry and private judgment.”). See also id. at 224 (“Therefore we ask no ecclesiastical establishments for ourselves; neither can we approve of them when granted to others. This, indeed, would be giving exclusive or separate emoluments or privileges to one sect of men, without any special public services, to the common reproach and injury of every other denomination. And, for the reasons recited, we are induced earnestly to entreat that all laws now in force in this commonwealth, which countenance religious domination, may be speedily repealed ...”).

¹⁹³. See Madison's Memorial ¶ 4.

¹⁹⁴. See Madison's Memorial ¶¶ 6, 7, and 13; Hanover Presbytery Petition of October 24, 1776, in James, supra note 60, at 223 (“... religious establishments are highly injurious to the temporal interests of any community. Without insisting upon the ambition and the arbitrary practices of those who are favoured by government, or the intriguing seditious spirit which is commonly excited by this, as well as by every other kind of oppression”).

¹⁹⁵. See Madison's Memorial ¶¶ 13–14.

¹⁹⁶. See Madison's Memorial ¶¶ 9–10; see also Hanover Presbytery Petition of October 24, 1776, in James, supra note 59, at 223–24 (“establishments greatly retard population, and consequently the
6. Because of the Revolutionary War and the need to unify Americans, all religious oppression should stop. 197

CONCLUSION

Scholars dispute among themselves many law and religion issues, but they universally agree that the modern constitutional law of church-state relations began with the 1947 opinion in Everson v. Board of Education of the Township of Ewing. Whether one has come to accept this sixty-year old decision or not, Everson is surely the case where the United States Supreme Court adopted a new substantive rule for the Establishment Clause. The Court did so drawing neither from the evolving drafts and debates within the First Congress from May to September of 1789 nor upon church-state practices by Congress and Presidents during the early years of the new nation, but from the state-by-state struggles to bring about disestablishment with special emphasis on the Virginia experience. The new substantive rule—also imposed by Everson via "selective incorporation" on state and local governments—is that the active support of religion must be voluntary and thus at the behest of the private sector, which is to say, not by the government.

The immediate consequence of disestablishment was that religion is funded only to the extent of each religion’s merit as perceived by the people. This created a free market, so to speak, in religion. One would expect that disestablishment would soon be followed by a nationwide growth spurt in popular religion. And that is exactly what happened, as historian Mark Noll writes:

Between 1790 and 1860, the United States population increased eight-fold; the number of Baptist churches increased fourteen-fold; the number of Methodist churches twenty-eight fold, and the number of Disciples or Restorationist churches cannot be figured as a percentage, since there were none of these churches in 1790 and more than two thousand in 1860 . . .

This expansion of voluntaristic, modestly sectarian, democratic, and republican forms of Christianity constituted the second founding of American religion. 198

progress of arts, sciences, and manufactories: witness the rapid growth and improvements of the Northern provinces compared with this. No one can deny that the more early settlement, and the many superior advantages of our country would have invited multitudes of artificers, mechanics and other useful members of society, to fix their habitation among us, who have either remained in their place of nativity, or preferred worse civil governments, and a barren soil, where they might enjoy the rights of conscience more fully than they had a prospect of doing it in this.

197. See Hanover Presbytery Petition of October 24, 1776, in JAMES, supra note 59, at 223 (“In this enlightened age, and in a land where all of every denomination are united in the most strenuous efforts to be free, we hope and expect that our representatives will cheerfully concur in removing every species of religious, as well as civil, bondage.”).

198. Mark Noll, America’s Two Foundings, in FIRST THINGS 29, 33 (December 2007). For additional accounts of the explosive growth in popular religion in the new nation, see Nathan Hatch and John Wigger, supra notes 24 and 25.
The development of religion in Virginia was no different, as James Madison himself reported thirty-seven years after the defeat of Henry’s Assessment Bill:

The examples of the Colonies, now States, which rejected religious establishments altogether, proved that all sects might be safely and advantageously put on a footing of equal and entire freedom. . . . [I]t is impossible to deny that [in Virginia] religion prevails with more zeal and a more exemplary priesthood than it ever did when established and patronised by public authority. We are teaching the world that great truth that governments do better without kings and nobles than with them. The merit will be doubled by the other lesson: that Religion flourishes in greater purity without than with the aid of Government.199

From 1947 to the present, voluntaryism (which is disestablishment plus more) has been the general trajectory of the Supreme Court in its Establishment Clause cases.200 However, a substantive rule like voluntaryism still leaves some details to be filled in and some careful line-drawing yet to be done. Everson itself demonstrated that. While all nine justices in the case agreed that the voluntary support of religion meant that government must not give financial aid to religious schools, the Court split 5 to 4 over whether reimbursement to

199. Letter from James Madison to Edward Livingston (July 10, 1822), 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 273, 275–76 (Philadelphia 1865). In correspondence sent in 1819, Madison made note of the weakness that had beset the Anglican Church:

[B]uilt under the establishment at the public expense, [they] have in many instances gone to ruin, or are in a very dilapidated state, owing chiefly to a transition of the flocks to other worships. . . . [Whereas concerning the evangelicals,] [o]n a general comparison of present and former times the balance is certainly vastly on the side of the present, as to the number of religious teachers, the zeal which actuates them, the purity of their lives, and the attendance of the people on their instructions.

200. Letter from James Madison to Robert Walsh (March 2, 1819), id. at 3:124–25. Two lines of cases are often mistaken as contrary to the principle of voluntaryism: (1) cases involving religious exemptions from regulatory and tax legislation; and (2) cases involving equal access for private religious speech to a public forum. This is a categorical mistake, for neither line of cases is about active government support for religion. Religious exemption cases are not about the support of religion; they are about the support of religious freedom, which is quite different. The government may actively support religious freedom. Just as the First Amendment is pro-freedom of speech and pro-freedom of the press, it is also pro-religious freedom. See Carl H. Esbeck, When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court’s Analysis, 110 W. Va. L. Rev. 359, 360, 372–75 (2007). Similarly, equal-access cases are not about active government support for religion, but about discrimination against private speech because the content or viewpoint of the speech is religious. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (upholding free-speech right of after-school access to a public school building by religious group seeking to reach children). The Court has gotten the equal-access line of cases correct in result, if not always in their rationale. See Carl H. Esbeck, “Play in the Joints Between The Religion Clauses” and Other Supreme Court Catachreses, 34 Hofstra L. Rev. 1331, 1334–35 (2006) (praising the result in the religious speech equal-access case of Widmar v. Vincent, 454 U.S. 263 (1981), but criticizing some of the Court’s rationale).
parents for city bus fare to attend a parochial school was aid to religion or just a municipal service generally available to the public like police and fire protection.201

As with any rule of law that is frequently applied, there are going to be a few decisions that are outliers.202 Further, as new justices joined the Court, it was inevitable that some would not acquiesce to the substantive rule in *Everson*. But the Supreme Court's outliers are indeed few, and they have proven hard to implement in the lower federal courts because the cases go against the general rule which is voluntaryism. Consider, for example, the ongoing struggle in Indiana over whether clergy invited to give the daily invocation in the legislature can pray in Jesus' name,203 or whether a nativity scene depicting the Holy Family situated in a local city park is sufficiently obscured by reindeers, Santa houses, and snowmen to not "endorse" the Christmas of Christianity.204

When it came to government speech the content of which is specifically religious, the post-*Everson* Court did not hesitate to follow a rule of voluntaryism with respect to public schools teaching religion as truth,205 as well as applying the rule in the school prayer decisions of the early 1960s.206 Starting with the 1971 case of *Lemon v. Kurtzman*,207 the Supreme Court was of the mind that voluntaryism disallowed direct monetary state aid and most in-kind

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201. See, supra note 52.
202. See Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding municipality's practice of having an annual scene depicting the nativity of Jesus Christ as part of larger winter holiday display); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state practice of having a chaplain deliver daily prayer at the beginning of each day when the legislature is in session).
204. See, e.g., ACLU v. City of Florissant, 186 F.3d 1095 (8th Cir. 1999) (holding that nativity of Holy family displayed in courtyard of civic center did not violate Establishment Clause because display included snowmen, candy canes, and other secular objects); ACLU of New Jersey *ex rel.* Lander v. Schundler, 168 F.3d 92 (3d Cir. 1999) (holding that nativity of Holy Family displayed on city property did not violate Establishment Clause because display included menorah, Christmas tree, Kwanzaa symbols, a sled, Frosty the Snowman, Santa Claus, and two signs referring to cultural diversity).
205. See McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (invalidating program allowing local churches to conduct religion classes in public school during school hours).
207. 403 U.S. 602 (1971) (striking down state aid to K-12 religious schools in the form of teacher salary supplements and reimbursement for the cost of certain instructional materials). The *Lemon* test asked whether the law being challenged had a secular purpose, whether its primary effect was to neither advance nor hinder religion, and whether there resulted a relationship of excessive entanglement between church and state. Id. at 612-13. The first two parts of the test first came from *Schempp*, 374 U.S. at 222. The third part of the test came from *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).
support to K–12 religious schools. However, that understanding of the rule shifted beginning with the 1997 decision in *Agostini v. Felton.* In Madisonian terminology, the relocation of the “great Barrier” beginning with *Agostini* enlarged those aspects of “religion” over which the state has “cognizance.”

The Court’s current application of voluntaryism is that direct government aid to those aspects of education, health care, and social services which are not religious “indoctrination” yet provided by a religious organization is permitted, so long as the same aid is available to many nonreligious providers (called “neutrality” theory) and so long as monitoring is in place to catch any diversion of the aid to specifically religious activities. For K–12 schools, the shift from the *Lemon* test to *Agostini*’s “neutrality” approach was just an adjustment in where the line is drawn between church and state. Stated differently, if the substantive rule is still voluntaryism then the *Agostini* Court was refining its inquiry by asking what is specifically religious (hence, aid disallowed) and what is merely the provision of education, health care, or welfare services by a religious organization (hence, aid allowed). Of course, this “adjustment” or “refining” did not take place without dissent by those who liked the 1971 result in *Lemon.* But the shift was not overly complex or confusing, albeit (for some) controversial.

At bottom, voluntaryism is indicative of the dual-authority pattern of church-state relations going back to the Fourth Century as sketched in Part I. The reciprocity inherent in that pattern means that government has no cognizance (i.e., not to “overleap the great Barrier” and become “Tyrants,” as Madison colorfully put it) to intrude into the religious sphere. Procedurally the government in these cases has exceeded its constitutional authority, which is to say that the assertion of putative jurisdiction by the courts will sometimes be dismissed for lack of subject matter jurisdiction. This is more easily seen in the

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208. 521 U.S. 203 (1997) (holding that Establishment Clause did not prevent public employees from delivering special education services at the student’s religious school campus).

209. Recall that as to Madison’s *Memorial* ¶ 1, 2, 4, and 11, we were left with a need for more information with respect to where Madison drew the line between those aspects of “religion” over which the government has cognizance and those specifically religious activities over which the government has no jurisdiction. See the “Commentary” following Madison’s *Memorial* ¶ 1, 2, 4, and 11, at text accompanying notes 134–36, *supra.*

210. See *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002) (holding state school voucher plan for urban area available to schools without regard to religion does not violate Establishment Clause); *Mitchell v. Helms,* 530 U.S. 793 (2000) (plurality opinion) (the law of the case is found in Justice O’Connor’s concurring opinion as discussed, *supra* note 160); *Agostini v. Felton,* 521 U.S. 203 (1997) (holding public school employees may deliver special education services on the parochial school campus of qualifying students). Going back as far as 1971, neutrality theory had been the rule, more or less, when it came to aid for religious colleges. See *Tilton v. Richardson,* 403 U.S. 672 (1971) (plurality opinion in part) (upholding construction grants for secular-use buildings at religious colleges). See also, text accompanying notes 160–62, *supra* (discussing “neutrality” theory pursuant to which government funds may be received by religious organizations consistent with the Establishment Clause).

211. See Madison’s *Memorial* ¶ 2.

Supreme Court's intrachurch dispute cases,\textsuperscript{213} as well as in the interpretation of labor laws\textsuperscript{214} and employment nondiscrimination legislation that got too close to regulating the clergy of the church.\textsuperscript{215} These are but three examples of several lines of cases implicating the church autonomy doctrine. As with voluntaryism generally, the issue is not about individual rights \textit{qua} rights, but the church-state separation question of whether the government lacks constitutional authority to intrude into the religious sphere.\textsuperscript{216} Madison put it nicely: these are instances where "Religion be not within the cognizance of Civil


\textsuperscript{214} See, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501–02 (1979) (dismissing NLRB request for enforcement of order certifying bargaining unit of lay teachers at Catholic K–12 school; the Court's rule of construction is that when applying legislation to a religious organization presents a significant risk that religious freedom would be infringed, courts should proceed with the claim only where there is a clear, affirmative expression of congressional intention that the legislation applies); Holy Trinity Church v. United States, 143 U.S. 457 (1882) (upholding ability of church to employ its minister, including nonresident alien, in face of federal immigration legislation to the contrary).

\textsuperscript{215} There is also a long line of federal circuit court rulings that affirn a First Amendment "ministerial exception." The ministerial exception makes employment discrimination claims non-actionable where ministers are suing their church or other religious employer for discrimination. The ability to select ministers is an important part of church governance and is often essential to the well-being of a church, "for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its messages, and interpret its doctrines both to its own membership and to the work at large." Rayburn v. Gen. Conf. of Seventh-Day Adventists, 722 F.2d 1164, 1168 (4th Cir. 1985) (dismissing claim by minister against her church for sex discrimination); see also Curay-Cramer v. The Ursuline Academy, 450 F.3d 130 (3d Cir. 2006) (referencing the ministerial exception, dismissing an EEOC claim when a teacher at Catholic school was fired because she signed pro-choice advertisement); Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (referencing the ministerial exception, dismissing an EEOC claim when a youth pastor fired for homosexual activity); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (referencing the ministerial exception, dismissing an EEOC claim when a nun denied tenure); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (dismissing claim against religious school because divorced teacher lost her job when she remarried contrary to church teaching); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (referencing the ministerial exception, dismissing an EEOC claim when chaplain dismissed from church-affiliated hospital).

\textsuperscript{216} The "ministerial exception," for example, operates in favor of church autonomy when the offending civil rights nondiscrimination legislation is religiously neutral but nevertheless has a disparate impact on the employment relationship between employee and church. See, e.g., Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 656 (10th Cir. 2002) (citing four similar federal circuit decisions). This is only logical. If the church is to have its own sphere of activity where it is sovereign, then that sphere must be free of all government intrusions—whether the intrusion is intentional or unintentional.
Unlike the *Lemon*/*Agostini* line of cases involving government financial aid to religion, the courts have little experience with a second type of controversy that attempts to keep government from interfering with organized religion, i.e., the church autonomy doctrine.\textsuperscript{218} This second type of case typically arises where legislation directly regulates or a tort claim is brought against a church. As more of these cases make their way to the High Court, it will be for the religious party in the lawsuit to draw the judiciary’s attention to the barrier to the government’s jurisdiction or authority that goes all the way back to the dual-authority pattern in church-state relations that has been part of the Western legal tradition for sixteen hundred years. Additionally, while the enlightenment-rationalists in Virginia sought disestablishment for the unity of the body politic, the Protestant dissenters joined to support them out of a common desire to protect the church from undue control by the government. This close connection between political freedom and church freedom was there from the beginning. Constitutional law should honor both purposes. Without church autonomy, civil society will lose organized religion as a check and limit on the pretensions of Caesar. And that would surely lead to a more authoritarian state. Whether one is personally religious or not, we all have a liberty stake in that not happening.

\textsuperscript{217} See Madison’s *Memorial* ¶ 8.

\textsuperscript{218} The reason there are fewer cases, in large measure, is because for years it was socially unacceptable for a legislature to regulate the church or for a tort claimant to sue the church. Additionally, the church had charitable immunity when sued in tort. However, in today’s litigious environment those inhibitions are nearly gone.