

MISUNDERSTANDING *FREEDOM FROM RELIGION*: TWO CENTS ON MADISON’S THREE PENCE

Kyle Duncan*

ABSTRACT

Forty years ago in Flast v. Cohen, the Supreme Court created, for the Establishment Clause only, a dramatic exception to the bedrock principle barring general taxpayer standing. The Court’s new exception was based on one catchy phrase from a famous historical document—James Madison’s 1785 Memorial and Remonstrance Against Religious Assessments. The Court has been notoriously bad at Establishment Clause history, but Flast seemed to push the envelope. Yet neither the Court nor commentators have questioned Flast’s historical credentials over the last four decades. Recently, the Supreme Court took up the taxpayer standing question again in Hein v. Freedom From Religion Foundation, Inc. Unhappily, the Justices’ various opinions did not clarify the matter, and only obliquely addressed the credibility of Flast’s use of history. This Article goes where the Court should have gone, and scrutinizes the historical underpinnings of the Flast exception to generalized taxpayer standing in Establishment Clause cases. The Article concludes that Madison’s Memorial offers little support for that doctrine. Flast lifted a political argument from one context and applied it uncritically in a different context and to a different issue. It confused what Madison thought about the substance of religious liberty in general, with what he thought about how religious liberty should be posited and enforced in particular legal provisions. Most fundamentally, it failed to consider Madison’s larger argument and objectives in the Memorial. The Article concludes by placing this failure of analysis in the broader context of Establishment Clause jurisprudence. Hein may well presage the Court’s reconsideration of Flast’s taxpayer standing exception. That reconsideration would itself be part of a much needed refinement of the Court’s treatment of historical materials in Establishment Clause jurisprudence.

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* Assistant Professor of Law, University of Mississippi School of Law. I am grateful to the Lamar Order for financial assistance in preparing this article. I am also grateful to Carl Esbeck, Jack Nowlin, Christopher Green, and Richard Garnett for their helpful suggestions. All errors are mine.

INTRODUCTION

In *Hein v. Freedom From Religion Foundation, Inc.*, the United States Supreme Court recently reconsidered whether taxpayers have standing to sue the government for Establishment Clause violations.¹ The Court's strange doctrine in this area needed clarifying. Forty years ago, in *Flast v. Cohen*, the Court had created, for the Establishment Clause alone, an exception to the otherwise "impenetrable barrier" against taxpayer standing.² *Flast* grounded that exception on a single historical document—James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*.³ Indeed, the Court seemed to rely not so much on the document itself, as on Madison's memorable jeremiad against "three pence . . . for the support of any one establishment."⁴ *Hein* gave the Court an opportunity to explain *Flast*, or to overrule it, but the Court did neither. Instead, a three-Justice plurality merely refused to extend *Flast*, while showing evident distaste for the precedent.⁵

The precise legal question in *Hein*—whether to extend the *Flast* exception from congressional spending to executive action—was not terribly interesting in its own right. That question depends on whether *Flast* itself was correct. But the opinions in *Hein* offer precious little insight. After four decades, the question still seems to boil down to Madison's "three pence." This Article addresses that strange state of affairs. Can a unique and important exception to the taxpayer standing bar be justified by one line from a famous document? Does the Court even need to engage in such special pleading for the Establishment Clause? Maybe the Clause supports taxpayer standing for reasons other than Madison's catchy turn-of-phrase?

Prompted by the Court's failure to confront the issue squarely in *Hein*, this Article reconsiders *Flast*'s own explanation for its taxpayer standing doctrine. It proceeds as follows. First, it briefly examines the development of that doctrine from *Flast* to *Hein*. Second, it asks whether *Flast* can be justified by analogy to other standing precedents, as Justice Souter argues in his *Hein* dissent.⁶ Third, it asks whether *Flast* is supported, as the decision claimed, by Madison's *Memorial and Remonstrance* and his "three pence" argument. Finally, if *Flast* is not persuasively supported by the *Memorial*, the Article explores the implications for the Establishment Clause itself.

The Article concludes that Madison's *Memorial* offers little support for *Flast*'s doctrine of taxpayer standing in Establishment Clause cases. *Flast* lifted a political argument from one context (a 1785 legislative proposal in Virginia) and applied it uncritically in a different context and to a different issue (the enforceability of a federal constitutional guarantee). It confused what

¹ *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

² *Flast v. Cohen*, 392 U.S. 83, 85, 105-06 (1968).

³ *Id.* at 103-04 & n.24. See also JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 5 THE FOUNDERS' CONSTITUTION 82, 82-84 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter MEMORIAL].

⁴ MEMORIAL, *supra* note 3, at 82.

⁵ Two Justices would have overruled *Flast*, while four would have reaffirmed it and extended its doctrine. See *infra* Part I.

⁶ See, e.g., *Hein*, 127 S. Ct. at 2563 (analogizing *Flast* standing to cases recognizing other forms of intangible harms).

Madison thought about the substance of religious liberty in general, with what he thought about how religious liberty ought to be posited and enforced in particular legal provisions. Most fundamentally, it failed to consider the “three pence” language in the context of Madison’s larger argument and objectives in the *Memorial*. The Article concludes by placing this failure of analysis in the broader context of Establishment Clause jurisprudence. *Hein* may well presage the Court’s reconsideration of *Flast*’s taxpayer standing exception. That reconsideration would itself be part of a more general and much needed refinement of the Court’s treatment of historical materials in Establishment Clause jurisprudence.

I. TAXPAYER STANDING: FROM *FLAST* TO *HEIN*

Unlike certain European courts, federal courts in the United States cannot offer advice about the constitutionality of government action.⁷ The Constitution itself insures this by vesting judicial power only over “cases” or “controversies.”⁸ To enforce this limitation of judicial power, the Supreme Court has elaborated the doctrine of standing.⁹ Central to standing is the idea of injury. To show standing, and thus to present a genuine “case or controversy,” a plaintiff must prove some personal injury caused by the challenged government action.¹⁰ But not all claimed injuries will suffice. Injuries far removed from traditional property or bodily damage, such as claims of symbolic or stigmatic harm, usually fail to create standing. This is the bar against “generalized grievances,” which Professor Chemerinsky describes as arising in cases “where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures.”¹¹ Thus, a citizen’s interest *as a taxpayer* in seeing tax dollars legally spent cannot create standing. The citizen may be correct that tax money was spent improperly, but without a *personal* injury, his indignation must be redressed by the political process rather than by federal adjudication.

On its face, this principle would foreclose a significant kind of Establishment Clause challenge to state action. Suppose someone claims that government spending amounts to a “law respecting an Establishment of religion,” and seeks to adjudicate that claim based on his status as taxpayer. The rule against general taxpayer standing bars the claim for two, interrelated reasons. First, the claimed injury is not sufficiently personal: the challenged expenditure does not uniquely harm *this* plaintiff compared to three hundred million other taxpay-

⁷ See generally NORMAN DORSEN, MICHAEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM* 113-133 (2003) (discussing abstract vs. concrete models of judicial review); MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS* 88-121 (3d ed. 2007) (discussing different models of judicial review in France, Germany and Italy).

⁸ U.S. CONST. art. III, § 2, cl. 1.

⁹ See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* § 2.5 (3d ed. 2006); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-14 to -16 (3d ed. 2000).

¹⁰ See, e.g., TRIBE, *supra* note 9, § 3-16 (discussing “injury-in-fact” component of standing).

¹¹ CHEMERINSKY, *supra* note 9, § 2.5.5, at 91.

ers.¹² Second, the nature of the claimed injury eludes definition. The plaintiff is not claiming back taxes on the expenditures. Nor does the plaintiff allege a special kind of personal affront: he does not claim, for instance, to have been exposed to the government program and injured psychologically or stigmatically.¹³ Instead, the plaintiff seeks redress for a dramatically attenuated kind of symbolic injury. Again, one might intuit that this amounts to some kind of harm, but articulating the harm in traditional categories of injury is difficult. Perhaps the injury lies in the knowledge that funds are spent in an illicitly “religious” manner, perhaps in some prophetic dread of the consequences that might flow from the transgression. But, however described, those appear to be precisely the kinds of injuries the standing doctrines were designed to weed out.

In *Flast*, the Supreme Court abruptly changed that.¹⁴ The Court allowed plaintiffs to bring an Establishment Clause challenge to a federal educational spending program, based “solely on their status as federal taxpayers.”¹⁵ To relax the traditional bar against taxpayer standing, the Court would require plaintiffs to show a two-part “nexus” between their federal taxpayer status and the lawsuit. Taxpayer status must be linked to the “type of legislative enactment attacked,” as well as to “the precise nature of the constitutional infringement alleged.”¹⁶ The first part means that plaintiffs may attack an exercise of Congress’ Article I power to tax and spend, but not “an incidental expenditure of tax funds in the administration of an essentially regulatory statute.”¹⁷ The second part means that plaintiffs must allege the violation of a “specific constitutional limitation[] imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the power delegated to Congress by Art[icle] I, § 8.”¹⁸ The Court found both parts met in *Flast*. The plaintiffs were challenging a “substantial expenditure of federal tax funds” to state and local educational agencies.¹⁹ And, they claimed the expenditures violated the Establishment Clause, which the Court said was “designed as a specific bulwark against” improper government use of its taxing and spending powers.²⁰

The new doctrine seemed tailor-made for Establishment Clause challenges, because of the unique role the Court ascribed to that constitutional provision. The Clause, argued that majority, grew out of the “specific evils feared” by its drafters and supporters, namely that “the taxing and spending power would be used to favor one religion over another or to support religion in general.”²¹ Concurring, Justice Stewart reasoned that, “[b]ecause that [C]ause plainly prohibits taxing and spending in aid of religion, every taxpayer can

¹² See, e.g., *id.* § 2.5.2, at 64; TRIBE, *supra* note 9, § 3-16, at 400, § 3-17, at 421.

¹³ See, e.g., CHEMERINSKY, *supra* note 9, § 2.5.2, at 70; TRIBE, *supra* note 9, § 3-16, at 400.

¹⁴ On the *Flast* exception to taxpayer standing, see generally CHEMERINSKY, *supra* note 9, § 2.5.5, at 92-95; TRIBE, *supra* note 9, § 3-17, at 421-24.

¹⁵ *Flast v. Cohen*, 392 U.S. 83, 85 (1968).

¹⁶ *Id.* at 102.

¹⁷ *Id.*

¹⁸ *Id.* at 102-03.

¹⁹ *Id.* at 103.

²⁰ *Id.* at 104.

²¹ *Id.* at 103.

claim a personal constitutional right not to be taxed for the support of a religious institution.”²² Similarly, Justice Fortas was willing to subscribe to the “thesis that this Clause includes a *specific* prohibition upon the use of the power to tax to support an establishment of religion.”²³

But the Court saw far more in the Establishment Clause than a mere limit on Congress’ taxing and spending powers. In the Clause, the Court discerned a crucial defense against vast dangers—crucial enough to justify a pointed exception to the usual standing rules and, consequently, a massive expansion of potential Establishment Clause plaintiffs. Justifying the link between taxpayer status and the Clause’s protections, Justice Fortas opined that

[i]n terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.²⁴

Justice Douglas went even further. Deriding the idea that the taxpayer’s interest was “infinitesimal,” Justice Douglas intimated that even minuscule amounts of tax dollars could “signal a monstrous invasion by the Government into church affairs, and so on.”²⁵ The “mounting federal aid to sectarian schools” was in his view “notorious[,] and the subterfuges numerous.”²⁶ To support his argument, Justice Douglas footnoted some remarkable passages from a scholarly article:

Tuition grants to parents of students in church schools is [sic] considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.²⁷

Justice Douglas likened such “tricks” to “the host of devices used by the States to avoid opening to Negroes public facilities enjoyed by whites.”²⁸

Thus, the *Flast* Justices cast the Establishment Clause as a specific, and crucial, limitation on the federal taxing-and-spending power. This was the lynchpin for creating a unique exception to what the Court termed an otherwise “impenetrable barrier” against generalized taxpayer standing.²⁹ But what was the historical evidence on which the Court based this understanding of the Establishment Clause? Remarkably, the Court relied on a single historical document—Madison’s *Memorial and Remonstrance Against Religious Assessments*—a document that was, incidentally, not written in support of the Establishment Clause. Literally not one other piece of historical evidence was cited. But speaking here of “citing” or “relying” on a document does not, as discussed below, do justice to the Court’s approach. The Court and individual

²² *Id.* at 114 (Stewart, J., concurring).

²³ *Id.* at 115 (Fortas, J., concurring).

²⁴ *Id.*

²⁵ *Id.* at 108 (Douglas, J., concurring).

²⁶ *Id.* at 113.

²⁷ *Id.* at 113 n.9 (quoting Editorial, CHURCH & ST., June 1968, at 5).

²⁸ *Id.* at 112-13. On Justice Douglas’s views of Catholic education, and on his citation of anti-Catholic writings in his judicial opinions, see generally JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 184-85, 264 (2003).

²⁹ See *Flast*, 392 U.S. at 85, 105-06.

Justices relied on just *one phrase* in the *Memorial*—Madison’s “three pence” language—as the sole, rhetorical touchstone for their new doctrine.

Madison’s “three pence” argument figures in one of the most famous slippery slope arguments in American legal history.³⁰ Urging the 1785 Virginia Legislature to reject Patrick Henry’s proposed tax for support of Christian ministers, Madison masterfully reasoned that the very smallness of the tax was ominous. “The free men of America,” rang out Madison, “did not wait till usurped power had strengthened itself by exercise,” but instead “[t]ook alarm at the first experiment on our liberties.”³¹ Madison’s vigilant countrymen “saw all the consequences in the principle, and they avoided the consequences by denying the principle.”³² What consequences did Madison see, and wish to avoid, in the Virginia ministry tax?

[T]hat the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects[.] [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]³³

Madison’s pamphlet was addressed to the Virginia Legislature, and his position triumphed.³⁴ Henry’s tax was defeated, and instead Thomas Jefferson’s “Act for Establishing Religious Freedom” became law later that year.³⁵ Jefferson’s Act contained language that seemed to vindicate Madison’s “three pence” argument. The Act’s preamble declared that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”³⁶ It added that even “forcing him to support this or that teacher of his own religious persuasion” amounted to “depriving him of the comfortable liberty” of deciding which minister deserved his patronage.³⁷

Like an architect designing a home around a particularly beautiful view, the *Flast* Justices built their new exception to taxpayer standing around Madison’s “three pence” verbiage. The majority quoted the language verbatim, as its first step to explaining why the individual taxpayer could claim that “his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.”³⁸ Justice Douglas was even plainer. Observing that “Madison in denouncing state support of churches said the principle was violated when even ‘three pence’ was appropriated to

³⁰ On the historical background to *MEMORIAL*, see generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 142-46 (1986); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 *CORNELL L. REV.* 783, 783-86 (2002).

³¹ *MEMORIAL*, *supra* note 3, at 82.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See CURRY, *supra* note 30, at 146.

³⁶ See *ACT FOR ESTABLISHING RELIGIOUS FREEDOM* (1785), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION* 84, 84-85 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *ACT FOR ESTABLISHING RELIGIOUS FREEDOM*].

³⁷ *Id.* at 84.

³⁸ *Flast v. Cohen*, 392 U.S. 83, 106 (1968) .

that cause by the Government,” Justice Douglas concluded that “[i]t *therefore* does not do to talk about taxpayers’ interest as ‘infinitesimal.’”³⁹ For Justice Douglas, then, the case involved not the judicial oversight of political matters, but instead judicial vindication “where wrongs to individuals are done by violation of specific guarantees.”⁴⁰ Justices Stewart and Fortas joined the chorus, referring explicitly to Madison’s “three pence” language, and to nothing else.⁴¹ Indeed, no Justice offered any support beyond this specific passage in the *Memorial* for the proposition that the Establishment Clause created a specific exception to Congress’s taxing authority that would justify a unique exception to otherwise universal bar on taxpayer standing.

In dissent, Justice Harlan took particular exception to this aspect of the Court’s methodology. Making an observation that, today, sounds shocking, Justice Harlan asserted that “the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison’s [*Memorial*].”⁴² While denying neither the relevance of the document to Establishment Clause interpretation, nor the possibility that forbidden establishments could be constructed from federal funds, Justice Harlan nonetheless rejected the majority’s uncritical reliance on the *Memorial* as a means of distinguishing the Establishment Clause for standing purposes:

I say simply that, given the ultimate obscurity of the Establishment Clause’s historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause’s complex history.⁴³

Like Justice Douglas, Justice Harlan showed he too could drop cutting footnotes. Justice Harlan approvingly cited a *Supreme Court Review* article arguing that “to treat [the *Memorial*] as authoritatively incorporated in the First Amendment is to take grotesque liberties with the simple legislative process, and even more with the complex and diffuse process of ratification of an Amendment by three-fourths of the states.”⁴⁴

This, then, is the curious origin of *Flast*’s exception to taxpayer standing. In the thirty-nine years between *Flast* and *Hein*, the Court did not really alter or explain the doctrine. Consistent with *Flast*’s letter, the Court did refuse to extend the exception from congressional taxing-and-spending to a federal agency’s transfer of property under Article IV.⁴⁵ But the Court never questioned, nor further elaborated, *Flast*’s theoretical or historical underpinnings. Madison’s “three pence” continued to be the only investment the Court had ever made in the matter. Thus, the time seemed ripe when the Court granted certiorari in *Hein* to reconsider the scope of *Flast*. The *Hein* plaintiffs brought an Establishment Clause challenge to executive orders aimed at facilitating

³⁹ *Id.* at 107-08 (Douglas, J., concurring) (emphasis added).

⁴⁰ *Id.* at 111.

⁴¹ *Id.* at 114 (Stewart, J., concurring); *id.* at 115 & n.24 (Fortas, J., concurring).

⁴² *Id.* at 126 (Harlan, J., dissenting).

⁴³ *Id.* (Harlan, J., dissenting).

⁴⁴ *Id.* at 126 n.15 (quoting Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 8 (1963)).

⁴⁵ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479-80 (1982).

religious groups' equal access to federal assistance.⁴⁶ The orders were not issued pursuant to any congressional legislation, and were funded by general executive branch—not congressional—appropriations.⁴⁷ The sole basis for plaintiffs' standing was their status as federal taxpayers.⁴⁸ What emerges from the Court's *Hein* opinions, however, does not bring closure to the matter of taxpayer standing. The controlling opinion in *Hein* is neither a ringing endorsement nor a complete repudiation of *Flast*.⁴⁹

Justice Alito's three-Justice plurality opinion (joined by Chief Justice Roberts and Justice Kennedy) merely "decline[s] [plaintiffs'] invitation to extend [*Flast*'s] holding to encompass discretionary Executive Branch expenditures."⁵⁰ But the opinion holds *Flast* itself at arms' length. Justice Alito repeatedly emphasizes *Flast*'s "narrowness," and essentially confines it to its facts—i.e., to Establishment Clause challenges to "a specific congressional appropriation" disbursed "pursuant to [an express] congressional mandate."⁵¹ The plaintiffs protested that such a distinction between congressional and executive action was arbitrary: their "injury" arose from the expenditures themselves and were thus identical in either case.⁵² But in response, Justice Alito simply points to *Flast*'s emphasis on Congress' taxing-and-spending power, and reminds plaintiffs that *Flast* was a "narrow" precedent that has never been extended.⁵³ He does say that extending *Flast* would "raise serious separation-of-powers concerns," but quickly adds that *Flast* itself "gave too little weight to these concerns."⁵⁴ Justice Alito's response to Justice Scalia's sharp dissent is especially curious. Justice Scalia's point, discussed below, is that *Flast*'s implicit logic demands that *Flast* either be extended to executive branch spending or overruled.⁵⁵ Justice Alito responds that Justice Scalia's position "is wrong," but does not explain why.⁵⁶ Instead, Justice Alito simply repeats that *Flast* made such distinctions and has never been extended.⁵⁷ His final rejoinder to Justice Scalia is that "[w]e need go no further to decide this case," intimating that perhaps he would go along with Justice Scalia in a case squarely presenting *Flast*'s viability.⁵⁸

Despite the controlling opinion, then, six Justices agree that the distinction between congressional and executive appropriations makes little sense. But two of them (Justices Scalia and Thomas) would overrule *Flast* outright, while

⁴⁶ *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2560 (2007).

⁴⁷ *Id.* at 2559.

⁴⁸ *Id.* at 2561.

⁴⁹ For another recent discussion of *Hein*, see Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, But Not Overrule, Flast To Allow Time To Re-Think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509, 511-13 (2008).

⁵⁰ *Hein*, 127 S. Ct. at 2568.

⁵¹ See, e.g., *id.* at 2565. By contrast, Justice Kennedy's concurrence, while joining Justice Alito's opinion "in full," says explicitly that "*Flast* is correct and should not be called into question." *Id.* at 2572 (Kennedy, J., concurring).

⁵² *Id.* at 2568 (plurality opinion).

⁵³ *Id.*

⁵⁴ *Id.* at 2569.

⁵⁵ See *infra* notes 59-62 and accompanying text.

⁵⁶ *Hein*, 127 S. Ct. at 2572.

⁵⁷ *Id.*

⁵⁸ *Id.*

four (Justices Souter, Stevens, Ginsburg and Breyer) would reaffirm and extend *Flast*.⁵⁹ Justice Scalia's concurrence is the most explicit in attacking *Flast*'s credentials. First, Justice Scalia argues that *Flast*'s taxpayer standing exception for Establishment Clause cases conflicts with the Court's consistent denial of such standing in all other cases.⁶⁰ Fundamentally, the injury implicitly recognized as the basis for *Flast* standing—what Justice Scalia derisively calls “Psychic Injury” at seeing tax money illegally spent—is precisely the kind of injury the Court had denied as a basis for standing elsewhere.⁶¹ Second, Justice Scalia rejects as irrelevant to the standing question “whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power.”⁶² Confronting *Flast*'s reliance on Madison's *Memorial* head-on, Justice Scalia argues that the document “has nothing whatever to say” about whether taxpayer-based grievances confer federal standing under the Establishment Clause.⁶³ In his dissent, Justice Souter disagrees with Justice Scalia on both points. First, Justice Souter reads Madison's *Memorial* as evidence that “the importance of [taxpayer] injury has deep historical roots,” and that the injury is linked to rights of conscience far deeper than mere “disagreement with the policy supported.”⁶⁴ Second, Justice Souter argues that the injury recognized in *Flast* finds analogous support in precedents recognizing standing for injuries such as “esthetic harms,” “inability to compete,” and “living in a racially gerrymandered electoral district.”⁶⁵ Justice Souter also recruits Madison for this final point, observing that “[t]he judgment of sufficient injury takes account of the Madisonian relationship of tax money and conscience”⁶⁶

So runs *Hein*, a doubly disappointing performance by the Court. At the level of precedent, the Court has reaffirmed *Flast*, but by damning it with faint praise. Two Justices, Alito and Roberts, think *Flast* is worth saving for now, but imply that it is badly flawed. Oddly, Justice Kennedy joined their opinion, but wrote separately that *Flast* is correct and should not be overruled.⁶⁷ Two Justices, Scalia and Thomas, think *Flast* is badly wrong and should be overruled immediately. Four Justices—Souter, Stevens, Ginsburg and Breyer—think *Flast* is doctrinally sound and should be extended beyond its holding. Such is the precedential mess. Furthermore, at the level of doctrine, we have no majority explaining *Flast*'s underpinnings. The plurality glosses over them. Justice Scalia's concurrence repudiates them. The dissent merely recapitulates what little *Flast* said about them forty years ago.

This is not pretty jurisprudence, but perhaps no one should be surprised that the confluence of standing and the Establishment Clause has generated a perfect storm of incoherence. Six Justices do recognize, albeit from opposite

⁵⁹ Compare *id.* at 2573 (Scalia, J., concurring), with *id.* at 2584 (Souter, J., dissenting).

⁶⁰ *Id.* at 2574 (Scalia, J., concurring).

⁶¹ *Id.* at 2573-2584.

⁶² *Id.* at 2583.

⁶³ *Id.*

⁶⁴ *Id.* at 2585 (Souter, J., dissenting).

⁶⁵ *Id.* at 2587.

⁶⁶ *Id.* at 2587-89.

⁶⁷ *Id.* at 2572 (Kennedy, J., concurring).

perches, that the path to greater clarity lies, not in anything the controlling opinion said about *Flast*, but in *Flast*'s own credibility. The remainder of this Article attempts to assess that.

II. *FLAST* AND STANDING PRECEDENTS

Flast recognized that a distinct kind of injury in Establishment Clause claims would confer standing. This injury lies precisely in the improper "extraction" and "spending" of tax dollars.⁶⁸ The most straightforward way to validate *Flast* is to analogize this injury to other injuries the Court has accepted for standing purposes, while at the same time explaining why such an injury does not fall under the general ban on taxpayer standing. This would be a better course than *Flast* itself took, because it avoids the burden of special pleading for the Establishment Clause. The Court would not have to theorize about why the Establishment Clause is a "special" part of the Bill of Rights that demands the recognition of a basis for standing denied in every other area of constitutional law.

Perhaps this validation is impossible, which is why the Court felt impelled toward such special pleading in *Flast*. But the possibility is worth exploring because the major weakness in *Flast* appears to be its thin reasoning about why the Establishment Clause deserves a special standing doctrine. Justice Souter senses this problem, for in his dissent he includes a separate section explaining why *Flast* standing is not as unusual as it appears. "[I]t would be a mistake," Justice Souter argues, "to think [*Flast*] is unique in recognizing standing in a plaintiff without injury to flesh or purse."⁶⁹ He analogizes the *Flast* injury to cases where plaintiffs were allowed to complain about "esthetic harms," or about the harm of being forced to compete on a racially-biased playing field.⁷⁰ Is this the way to justify *Flast*? Is it as simple as saying, as Justice Souter does, that "seeing one's tax dollars spent on religion" is just as "concrete" as injury as in these other cases?⁷¹

Justice Souter's focus on "esthetic" or "stigmatizing" harms appears to be the most promising avenue. By definition, the standing-conferring injury in a *Flast* case cannot lie in the economic effect of the tax on the plaintiff's pocket-book, because the injury would then be indistinguishable from any other complaint about improper taxation. Nor is plaintiff alleging that he was personally affected in a distinctive way by the spending of the tax funds (otherwise, no reason would exist for claiming standing on the basis of being a taxpayer). Thus, the precise injury must lie in the realm of the plaintiff's perception of the constitutional imbalance created by the improper taxing-and-spending. Perhaps here is where one might search for the link between the injury and the taxpayer's "conscience." That is, if the locus of the injury is perceptive, then involvement of the taxpayer's conscience is at least *prima facie* plausible. Of

⁶⁸ See *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (stating a taxpayer has standing based on the allegation that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power").

⁶⁹ *Hein*, 127 S. Ct. at 2587 (Souter, J., dissenting).

⁷⁰ *Id.*

⁷¹ *Id.*

course, one would still need to explain why the injury to “conscience” is cognizable *only* in this area and not elsewhere (such as conscientious scruples about tax money being spent on what one perceives to be an unjust war, or what one perceives to be the killing of unborn human beings). But Justice Souter clearly sees a constitutionally-distinct impact on conscience in this area, because he connects the “Madisonian relationship of tax money and conscience” to the modern-day endorsement test. In Justice Souter’s view, the spending of tax money for religious purposes gives rise to the perceptive or stigmatizing harm by “send[ing] the . . . message to . . . nonadherents ‘that they are outsiders, not full members of the political community.’”⁷²

Is this kind of perceptive or stigmatizing harm sufficient to confer standing under existing precedent? Note that we are not yet asking whether the Establishment Clause supports, as a doctrinal or historical matter, the recognition of such a special harm; we are merely asking whether this sort of perceptive harm is analogous to injuries in other cases. Justice Souter cites *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, in which the Court found standing where “a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.”⁷³ The “aesthetic” or “perceptive” harms consisted in plaintiffs’ avoidance of the affected areas either because of their fear of physical harm or because they perceived the area actually “looked and smelled polluted.”⁷⁴ Another case cited by Justice Souter, *United States v. Hays*, presents a different kind of “perceptive” harm caused by racial classification.⁷⁵ If a person is subject to classification on the basis of race, then the stigmatic harm caused by the classification itself is sufficient to confer standing. More specifically, if a person resides in a racially gerrymandered electoral district (the issue in *Hays*), then she suffers a concrete “representational harm” tied to the fact that “the plaintiff has been denied equal treatment.”⁷⁶ This harm would not, however, extend to a person not included in the gerrymandered district.⁷⁷

The harms recognized in cases such as *Friends of Earth* and *Hays* are perceptive or aesthetic in the sense that the injuries manifest themselves to the plaintiffs primarily through their own perceptions, instead of through economic

⁷² *Id.* at 2588 (quoting *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005)).

⁷³ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 184 (2000).

⁷⁴ *Id.* at 181.

⁷⁵ *United States v. Hays*, 515 U.S. 737, 744 (1995).

⁷⁶ *Id.* at 745. As the Court explained in *Hays*, “[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” *Id.* at 744 (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

⁷⁷ *See id.* at 745:

On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

or physical impact. Those decisions thus extend our thinking about cognizable injuries. As Professor Tribe explains, the interests vindicated in such cases “need only be expressible in terms of the individual’s concrete satisfactions or experiences”⁷⁸ But these are not “generalized grievance” situations, because the plaintiffs are differently situated from other persons: only because of personal circumstances (living near a polluted river, or residing in a gerrymandered district) are they actually subject to such perceptive or stigmatic harms. Professor Tribe clarifies that such cases recognize standing for aesthetic or recreational harms “only if such injury represents an individuated interest of the litigant as distinguished from the polity as a whole.”⁷⁹ Thus the harms do not lie *purely* in the plaintiffs’ perceptions. Rather, through their perceptions, the plaintiffs become aware of concrete harms (the polluted river, the gerrymandered district) outside themselves.

One might construct an analogy, as Justice Souter does, between such harms and those at issue in *Flast* and *Hein*, but the analogy cannot go far enough. True, *Flast* and *Hein* present plaintiffs who have been made aware of allegedly illegal activity (the expenditure of money for religious purposes) and are thereby wounded. They claim harm to conscience through their perceptions. One could analogize that to the perception of a polluted river, or to the perceived unfairness of a racial gerrymander. But *Flast* and *Hein* contain an additional, crucial component. The perceptive harms in those cases are mediated to plaintiffs solely through the tax system. The plaintiffs are *not* complaining about their own personal exposure to an illegally-funded government religious program. Rather, they are complaining about their exposure to a tax system that collects and spends money in an allegedly unconstitutional endorsement of religion. This factor decisively distinguishes the “perceptive/stigmatic/esthetic” harms claimed in *Flast* and *Hein* from those already validated by the Court elsewhere.

The Court’s decision in *Allen v. Wright* makes this difference plain.⁸⁰ There, the plaintiffs claimed standing based on the stigma caused them by an IRS policy of providing tax exemptions to private schools that discriminated by race.⁸¹ But the Court disagreed. “[Stigmatic injury],” explained the Court,

accords a basis for standing only to ‘those persons who are personally denied equal treatment’ . . .

. . . .

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school⁸²

This point was implicit in the other stigmatic harm cases. The plaintiffs in *Friends of the Earth*, for instance, would not have had standing based *purely* on their perception of environmental harm, had they not also lived near the polluted waters or desired to use them. The plaintiffs in *Hays* would have

⁷⁸ TRIBE, *supra* note 9, § 3-16, at 404.

⁷⁹ *Id.*

⁸⁰ *Allen v. Wright*, 468 U.S. 737 (1984).

⁸¹ *Id.* at 739-40.

⁸² *Id.* at 755-56. See also CHEMERINSKY, *supra* note 9, § 2.5.2, at 74 (discussing *Allen*).

lacked standing if they had not been included physically within the gerrymandered district.

Justice Souter's *Hein* dissent obliquely concedes this point. At the close of his attempted analogy between the perceptible harm cases and *Flast*, Justice Souter drops a revealing footnote. Observing that not "any sort of [] injury will satisfy Article III" and that the requisite "intangible harms must be evaluated on a case by case basis," Justice Souter admits that there is an *entire class* of injuries, which typically never confer standing :

Outside the Establishment Clause context, as the plurality points out, we have not found the injury to a taxpayer when funds are improperly expended to suffice for standing."⁸³

But that is precisely why Justice Souter's analogy does not work. Only in Establishment Clause cases have the required perceptible or esthetic harms been premised on the general operation of the tax system. The plaintiffs asserting such a unique basis for standing are not saying they have been personally exposed to a religious program that was improperly funded by the government. That would at least be analogous to the polluted river and the racially gerrymandered district. Instead, they claim harm from perceiving that the *tax system* is being used to fund activities they believe improperly endorse religion. But no perceptible harm case recognizes *that* perception as sufficient to confer standing.

Justice Souter's analogical argument fails, in sum, because it completely discounts the function of the tax system in the claimed injury. The Supreme Court has been willing to recognize perceptible harm for standing, even if the harm perceived emerges from a lengthy and attenuated chain of circumstances. For instance, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Court allowed a student environmental group standing to complain of aesthetic harms stemming from environmental degradation.⁸⁴ The degradation, the plaintiffs alleged, was the end result of a chain of causation starting with a hike in railroad freight rates that would supposedly discourage the use of recycled goods. While admitting this was an "attenuated line of causation," the Court found standing because the plaintiffs credibly alleged that "that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area."⁸⁵ The important point about *SCRAP* is that, notwithstanding the somewhat fanciful chain-of-circumstances argument, the Court took pains "to stress the importance of demonstrating that the party seeking review be himself among the injured"⁸⁶ But in the Establishment Clause taxpayer case, the only way the "party seeking review" can claim to be "among the injured" is to recruit the tax system as the instrument of his injury. This, however, is exactly the posture that the standing cases reject by requiring "personal injury." As Professor Chemerinsky explains, cases like *SCRAP* "establish that an ideologi-

⁸³ *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2587 n.4 (2007) (Souter, J., dissenting) (emphasis added).

⁸⁴ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-87 (1973).

⁸⁵ *Id.* at 687-88.

⁸⁶ *Id.* at 687.

cal interest in a matter is not enough for standing.”⁸⁷ But the intrusion of the tax system into the argument obliterates the distinction between cases, like *SCRAP*, where there is a real, albeit highly attenuated injury, and cases where plaintiffs merely have an ideological interest.

The exercise done in this Section has been to abstract the kind of injury allegedly suffered in taxpayer Establishment Clause cases, and compare it to other injuries the Court has accepted for standing purposes. But doing that reveals that *Flast* is not justifiable by analogy to those cases. The perceptive or aesthetic harms felt, via the tax system, from Establishment Clause violations may be genuine, but other areas of standing doctrine require a more directly-mediated form of personal injury to justify standing. This exercise has been an elaborate, but instructive, way of showing that there is nothing about such Establishment Clause claims, in the abstract, that escapes the general bar against taxpayer standing. Consequently, if taxpayer standing is to be justified, there must be something peculiar to the Establishment Clause itself that demands a departure from the general rule against taxpayer standing.

III. *FLAST* AND MADISON’S THREE PENCE

Flast’s unique doctrine was based entirely on Madison’s argument in the *Memorial and Remonstrance* that “the same authority that can force a citizen to contribute three pence only of his property for the support of one establishment, may force him to conform to any other establishment in all cases whatsoever[.]”⁸⁸ Of the *Flast* Justices, only Justice Harlan disputed this line of reasoning. While granting that the *Memorial* could shed light on the nature of the Establishment Clause, Justice Harlan denied that Madison’s 1785 arguments in Virginia simply mapped onto the later federal constitutional provision.⁸⁹ Nor did he believe that, based on such evidence, the Court could distinguish among different constitutional provisions based on whether they limited Congress’ taxing-and-spending powers.⁹⁰ Nothing, Harlan reasoned, marked out the Establishment Clause as a limitation more “specific” to taxing-and-spending than any other provision.⁹¹ Virtually every constitutional limitation on Congress operated to limit its taxing and spending authority, given that “Congress’ powers to spend are coterminous with the purposes for which, and methods by which, it may act”⁹² This debate among the *Flast* Justices is the last time the Court has squarely confronted the matter.

Thus, four decades later, the question still begs for an answer: Does Madison’s *Memorial and Remonstrance* demonstrate, of its own force, that the Establishment Clause deserves a unique standing doctrine, sufficient to overcome the bar against taxpayer standing in every other area? Testing *Flast*’s reliance on the *Memorial* is a delicate matter, however, because it risks wander-

⁸⁷ CHEMERINSKY, *supra* note 9, § 2.5.2, at 65.

⁸⁸ *Memorial*, *supra* note 3, at 82. See *supra* notes 28-41 and accompanying text.

⁸⁹ See *supra* notes 16-27 and accompanying text.

⁹⁰ See *supra* notes 16-27 and accompanying text.

⁹¹ See *supra* notes 16-27 and accompanying text.

⁹² *Flast v. Cohen*, 392 U.S. 83, 127 (1968) (Harlan, J., dissenting). See also *supra* notes 16-27 and accompanying text.

ing into the murky question of Madison's precise relevance to the meaning of the Establishment Clause.⁹³ The Supreme Court has generally treated Madison as a touchstone for what the Clause means, perhaps no more so than in this area.⁹⁴ Even where the Court has not followed Madison's hypothetical lead on a particular issue, dissenting Justices often recruit Madison to refute their colleagues.⁹⁵ A vigorous scholarly debate persists about the nature of Madison's influence on the religion clauses.⁹⁶ And Madison's views were protean, depending on whether he was occupying the role of Virginia legislator, constitutional advocate, First Amendment draftsman, President, or former President.⁹⁷ One can easily pit statements of these various Madisons against each other, effectively obscuring what Madison "really thought" about the clauses.⁹⁸ Madison, of course, did have historically verifiable views about what the religion clauses meant. But the variety of historical evidence cautions one about recruiting particular quotes or arguments from Madison as expressing his thoughts about the clauses.

This Article need not resolve those difficult questions, because they would simply overwhelm the distinct argument about standing. Quite frankly, if the question of taxpayer standing and the Establishment Clause hinges on correctly appraising Madison's relevance to the meaning of the religion clauses, then the question will never be answered. Establishment Clause standing doctrine would fluctuate according to differing opinions about Madison's significance to religion clause meaning. But surely one cannot be satisfied with that answer. One should be able to accept that certain of Madison's opinions are relevant to what the Establishment Clause *substantively* means, but perhaps not relevant (or relevant in a different way) to the question of *which parties* and *what interests* support adjudication of an Establishment Clause matter. Standing questions can overlap to some extent with merits questions, but the two are

⁹³ See, e.g., Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 592-600 (2006) (discussing varying interpretations of Madison's relevance to Establishment Clause interpretation).

⁹⁴ See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-16 (1947). Richard Albert observes that, in *Everson*, "[t]he Court's review of Jeffersonian and Madisonian thought . . . com[es] astonishingly close to declaring that the Court should rule in a particular way only because Jefferson and Madison would have done so." Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, 28 SEATTLE U. L. REV. 329, 338 (2004).

⁹⁵ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 724-29 (2005) (Stevens, J., dissenting).

⁹⁶ Compare GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 86-87 (1987) (arguing that "Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause"), and 2 JAMES HITCHCOCK, *THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES"* 22-30 (2004) (characterizing Madison's and Jefferson's views on church-state relations as novel for their time and hence not "command[ing] a consensus in their own day"), with CURRY, *supra* note 30, at 193-222 (treating Madison's views and influence as deeply influential on the content of the Establishment Clause), and Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 390-93 (2002) (same).

⁹⁷ See, e.g., GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 151-72 (2006) (discussing problem of Madison's different personae).

⁹⁸ See, e.g., STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 10-26 (2001) (discussing the tension between egalitarian and pluralist views in Madison's writings).

nonetheless distinct.⁹⁹ The doctrine of standing delimits the kinds of interests plaintiffs can pursue in federal court, while at the same time furthering other values such as separation of powers, judicial efficiency and effectiveness, and fairness.¹⁰⁰ Standing is not simply a stand-in for the merits question. Otherwise, the “case or controversy” requirement of Article III is superfluous.

Thus, the question is not whether Madison’s opinions can help one understand the object and content of the Establishment Clause. Instead, the precise question is whether Madison’s “three pence” argument in his *Memorial* supports the recognition of a unique form of taxpayer standing in Establishment Clause cases. That question will intrude somewhat on *how* Madison’s opinions bear on Establishment Clause meaning, but they are nonetheless two distinct questions. Madison had definite and well-known ideas about the large subject of religious liberty, but he may well have entertained very different views about whether those ideas were embodied in judicially enforceable legislation or constitutional provisions. More specifically, Madison may have thought a strategy appropriate for Virginia legislative contests would have been highly inappropriate, and politically inopportune, during the framing and ratification of a federal constitution. These different threads must be teased out if one is to arrive even at a tentative conclusion about the relevance of Madison’s “three pence” argument to standing. The *Flast* court, incidentally, did none of this work. It simply compacted all such questions into this syllogism:

1. Madison is the father of the Establishment Clause;
2. Madison said taxpayers should not be taxed even three pence for an establishment;
3. Therefore, every taxpayer has standing to sue for Establishment Clause violations.¹⁰¹

Let us try to do better than that. We will start by making a few brief points to set the general context of Madison’s *Memorial* and his arguments against the General Assessment. Doing so reveals the obvious point that Madison’s “three pence” rhetoric arose during a legislative and not a judicial dispute. It was a political, not a constitutional, argument that called for, and won, a legislative and not an adjudicatory remedy. Thus, on its face, Madison’s argument—of which the “three pence” point was a part¹⁰²—did not call for any particular kind of adjudicatory stance toward religious establishments. Our argument then moves on to the deeper points about the substance of Madison’s claims in the *Memorial*, in contrast to his views about religious liberty in general and about the Federal Constitution in particular. These show that Madison was probably not invoking the “three pence” argument to empower taxpayers in general, but rather to vindicate particular taxpayers

⁹⁹ See, e.g., TRIBE, *supra* note 9, § 3-17, at 418 (observing that “the availability of citizen standing must be analyzed with reference to the substantive right asserted”).

¹⁰⁰ See CHEMERINSKY, *supra* note 9, § 2.5, at 61-62. At the same time, Professor Chemerinsky notes that scholars have increasingly called for an abandonment of the doctrine. *Id.* at 62 n.16 (citing William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988)).

¹⁰¹ *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

¹⁰² And, notwithstanding the phrase’s popularity as a separationist epigram—a tiny part, the *Memorial* runs to fifteen meaty paragraphs. The three pence line is one part of one sentence of paragraph three. See MEMORIAL, *supra* note 3, at 82.

whose religious exercise was uniquely compromised by the Virginia scheme. Furthermore, understanding the “three pence” argument as a literal call for widespread adjudication by taxpayers would be out of character for Madison. Madison was more inclined to rely on indirect structural mechanisms for protecting religious liberties than on judicially enforceable guarantees found in bills of rights. Finally, even if Madison’s “three pence” argument in Virginia was championing religious liberty through taxpayer adjudication, his later arguments in Philadelphia over the federal religion clauses portray a markedly different character and strategy. Unlike the Madison of 1785 Virginia, the Madison of 1790 Philadelphia sought modest, politically achievable guarantees of religious liberty that would not have exacerbated national disagreements on church-state matters. The 1790 Madison would have shunned a federal constitutional remedy that risked entangling the federal courts in the delicate matter of religious taxpayer disputes.

The first and most obvious point is that Madison’s *Memorial* was not an argument about judicial review at all. Madison was addressing the Virginia legislature about a matter up for popular determination. The *Memorial* pleads in the name of “[w]e the subscribers, citizens of the said Commonwealth.”¹⁰³ The thrust of the argument is “that the General Assembly of this Commonwealth” has “no authority to enact into law the Bill under consideration.”¹⁰⁴ This is a political argument about popular legislation, not a legal argument about adjudication. As Professor Vincent Blasi explains, in the *Memorial*, “Madison was not making a constitutional argument before a court of law; he was appealing to the general public to bring pressure against a proposed piece of legislation.”¹⁰⁵ The question of judicial enforcement of statutes or constitutions was not on the table, much less the finer points of adjudicating a federal constitutional provision still six years in the future.

Thus, the fact that Madison included taxpayers’ interests in his catalogue of objections to the General Assessment does not, of its own force, mean he was claiming such interests should be vindicated by adjudication. The idea of taxpayers’ objections was an important device exploited by Madison, as we will see below, but his audience was a legislative assembly and, logically, he sought arguments couched to spur legislative action. We should thus not reflexively read Madison’s “three pence” argument as addressing whether taxpayers (or anyone else) should be allowed to bring a lawsuit against the Assessment.¹⁰⁶ This obvious point is typically overlooked when arguing about the significance of Madison’s *Memorial* to the federal religion clauses. Institutions and structures were every bit as, if not more, important to the framing genera-

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 84.

¹⁰⁵ Blasi, *supra* note 30, at 807.

¹⁰⁶ This distinction would hold even if, when Madison was participating in drafting the federal religion clauses six years later, he was thinking: “That three pence argument I made back in Virginia should apply to these new, federal religion clauses.” Of course, Madison said nothing of the kind during the debates on the Federal Constitution, as will be discussed below. But the point here is that, *even if* Madison had been silently rehearsing the three pence argument in 1790 Philadelphia, that alone fails to show Madison was *also* thinking about the requirements for judicial review of establishmentarian tax schemes.

tion as the judicial enforcement of rights.¹⁰⁷ One should not anachronistically project onto Madison's comments about taxpayers' concerns our modern preoccupations with constitutional judicial review.

Another basic point concerns the responses to Madison's *Memorial*. When the General Assessment was defeated, the Virginia legislature ended up passing Jefferson's Act "for Establishing Religious Freedom."¹⁰⁸ The Act stated explicitly that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . ." ¹⁰⁹ It enacted that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."¹¹⁰ If one wanted to argue that Madison's "three pence" language sought, as a remedy, something akin to general taxpayer standing to contest assessment-style taxes, then the language of Jefferson's Act furnishes a plausible textual hook by providing that "*no man shall be compelled . . .*"¹¹¹ Other state constitutions of the period contained similar language.¹¹² Such provisions might plausibly support general taxpayer standing by explicitly empowering anyone subject to the levies (or at least anyone whose religious freedom was impacted by the levies) to contest them. But

¹⁰⁷ Madison himself argued in *The Federalist* that, given the "compound republic of America," in which power was divided between state and federal governments, and then further divided at the federal level, "a double security arises to the rights of the people." THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁸ See, e.g., CURRY, *supra* note 30, at 146.

¹⁰⁹ ACT FOR ESTABLISHING RELIGIOUS FREEDOM, *supra* note 36, at 84.

¹¹⁰ *Id.* at 85.

¹¹¹ *Id.* (emphasis added). This leaves aside the point, discussed below, whether the "compulsion" to "furnish contributions of money" would impact every taxpayer, or rather only those taxpayers who could claim their "free exercise" rights were peculiarly affronted by the tax. See *infra* notes 118-130 and accompanying text. The narrower point here is whether the response to Madison's three pence argument showed at least some textual intent to allow *someone* to claim injury on the basis of the levy itself.

¹¹² For instance, the Vermont Constitution of 1777 provided that "no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience . . ." VT. CONST. OF 1777, ch. 1, § 3, reprinted in 5 THE FOUNDERS' CONSTITUTION 75, 75 (Philip B. Kurland & Ralph Lerner eds., 1987). See also, DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES § 2 (1776), reprinted in 5 THE FOUNDERS' CONSTITUTION 70, 70 (Philip B. Kurland & Ralph Lerner eds., 1987) (language similar to Vermont Constitution of 1777); N.J. CONST. OF 1776, art. XVIII, reprinted in 5 THE FOUNDERS' CONSTITUTION 71, 71 (Philip B. Kurland & Ralph Lerner eds., 1987) (providing "nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."). By the same token, state constitutions also knew how to provide for the opposite—i.e., that contributions might be required by law to support ministers. The Massachusetts Constitution of 1780 provided that:

[T]he legislature shall, from time to time, authorize and require, the several towns, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.

MASS. CONST. OF 1780, pt. 1, art. 3, reprinted in 5 THE FOUNDERS' CONSTITUTION 77, 77-78 (Philip B. Kurland & Ralph Lerner eds., 1987).

no such language, of course, appears in the federal religion clauses. Nor was any such formulation proposed by any state.¹¹³ Even Madison's own Virginia failed to put forward such language. Virginia's proposal did lift passages verbatim from the *Memorial*, but not those addressing forced exactions of money.¹¹⁴ Nor was such language ever proposed during the recorded debates on the drafting of the religion clauses, by Madison or anyone else.¹¹⁵ Thus, if one were looking for a plausible textual justification for general taxpayer standing (or, indeed, standing for *any* taxpayers), one might claim to find it in Jefferson's 1785 Act, but not in the federal religion clauses, whether in their proposed or final formulations. This does not mean that the idea of "compelling" someone to "frequent or support" religious worship is irrelevant to the substantive meaning of the federal religion clauses. The point is only to draw attention to the absence of the textual clues supporting the idea that taxpayers are empowered to litigate those clauses *as taxpayers*.

Beyond these contextual points, consider what Madison was substantively arguing in the *Memorial*, an argument in which the "three pence" idea figured as only one part. Simply put, with regard to taxpayers, Madison appears to have been making what we would today call a "free exercise" claim, as opposed to an "establishment" claim. Madison was asserting that the General Assessment violated the Virginia Declaration of Rights.¹¹⁶ As to religious liberty, that 1776 Declaration provided that, since "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 . . . therefore, all men are equally entitled to the free exercise of religion, according to the dictates of

¹¹³ See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 63-64 (2000) (discussing religious liberty provisions proposed by state ratifying conventions).

¹¹⁴ With respect to religious liberty, the Virginia Ratifying Convention proposed a provision exempting from military service "any person religiously scrupulous of bearing arms . . . upon payment of an equivalent[.]" as well as the following passage lifted in large part from Madison's *Memorial*, *supra* note 3, at 89, which in turn had quoted the 1776 Virginia Declaration of Rights:

That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.

VIRGINIA RATIFYING CONVENTION, PROPOSED AMENDMENTS (1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 89, 89 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter VIRGINIA RATIFYING CONVENTION].

¹¹⁵ See WITTE, *supra* note 113, at 64-72 (explicating various formulations of the religion clauses during the House committee debates).

¹¹⁶ As Professor Blasi explains, "[e]ight years earlier [in 1776] [Madison] had helped to draft and steer to enactment the religious liberty clause of the new Virginia Constitution. Madison viewed the General Assessment as a patent violation of that constitutional commitment and a profound threat to Virginia's experiment in republican government." Blasi, *supra* note 30, at 784. See also CURRY, *supra* note 30, at 143 ("[The *Memorial*] declared that the proposed bill violated the free exercise of religion guaranteed by the Declaration of Rights . . .").

conscience”¹¹⁷ Madison’s *Memorial* arguments converge around that idea, and, in fact, Madison quoted that identical language at the very beginning of the *Memorial*.¹¹⁸ Those attacking the 1785 Assessment, as Professor Thomas Curry explains, considered the tax to violate the “free exercise” rights enshrined in the 1776 Declaration—rights which the Assessment controversy had enabled them to deepen and refine.¹¹⁹ Far less important, however, was whether the Assessment constituted a religious “establishment.” While both proponents and opponents of the measure may have considered it to be some novel form of an “establishment,” that was not the issue: the principal ground of dispute was over what we would identify today as “free exercise” values. “Whether the assessment bill violated the Declaration of Rights,” Professor Curry asserts, “not what kind of establishment it represented or even whether it represented an establishment at all, proved to be the crux of the dispute.”¹²⁰ Disputes over ministerial taxes in other states underscore the point. Religious dissenters, such as northeastern Baptists, commonly attacked ministerial taxes as interfering with the free exercise of their religion.¹²¹ The interference sprang from the fact that the assessments were earmarked for support of ministers.¹²² Dissenters argued that this hampered religious exercise by tainting what they believed was a sacred, voluntary relationship between pastor and

¹¹⁷ VIRGINIA DECLARATION OF RIGHTS § 16 (1776), reprinted in 5 THE FOUNDERS’ CONSTITUTION 70, 70 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹¹⁸ MEMORIAL, *supra* note 3, at 82.

¹¹⁹ CURRY, *supra* note 30, at 146 (explaining that, “in the decade following the Declaration of Independence, Virginians debated and clarified for themselves the meaning of the *free exercise of religion*,” and that in the later Assessment controversy, “a majority of the people construed the *free exercise clause* of the Declaration of Rights to mean that religion had to be supported by voluntary means, and that state support of churches was incompatible with religious liberty”) (emphasis added). See also Blasi, *supra* note 30, at 793 (explaining that “[Madison’s] concern was that the clumsy effort to use religion to teach public virtue interjected the civil mechanism of compulsory taxation into the relationship of voluntary support that some denominations considered of the essence”). But see Bradley, *supra* note 96, at 39 (arguing that Madison’s “interpretation of section 16 [of the Declaration of Rights] was certainly not the accepted one in Virginia”).

¹²⁰ CURRY, *supra* note 30, at 148. See also *id.* at 191-192 (“Concerned primarily to show that it did not violate the free exercise of religion, proponents of a general assessment showed no consciousness of a need to develop such a distinction [i.e., between a ‘preferential’ and a ‘non-preferential’ establishment].”). Along these lines, in a draft of his Bill Exempting Dissenters from Contributing to the Support of the Church, Thomas Jefferson wrote that dissenters “consider the Assessments and Contributions which they have been hitherto obliged to make towards the support and Maintenance of the [Church of England] and its Ministry as grievous and oppressive, and an Infringement of their religious Freedom.” THOMAS JEFFERSON, DRAFT OF BILL EXEMPTING DISSENTERS FROM CONTRIBUTING TO THE SUPPORT OF THE CHURCH (1776), reprinted in 5 THE FOUNDERS’ CONSTITUTION 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹²¹ See CURRY, *supra* note 30, at 172 (noting that “Massachusetts’s voluminous discourse on Church-State matters during the revolutionary period focused almost entirely on the meaning of freedom of religion” and that dissenters “generally did not raise the issue of an establishment of religion”); see generally *id.* at 168-77 (detailing opposition by Massachusetts Baptists against ministerial taxes).

¹²² CURRY, *supra* note 30, at 137-39.

congregation.¹²³ As Professor Curry explains, “like their counterparts in other states, [Massachusetts dissenters] opposed the system primarily as a violation of religious freedom, rather than as an establishment of religion.”¹²⁴

How does this historical context help determine whether the *Memorial* supports, on its own terms, general taxpayer standing to adjudicate Establishment Clause violations? The Court’s crucial analytical move in *Flast* was to paint Madison’s “three pence” argument as a broad-based mandate for “taxpayers in general.” But this rips Madison’s argument out of its context. Madison is better understood as championing *those particular taxpayers* who had a precise personal and theological complaint against the interference in their religious practice caused by the ministerial tax. This reading harmonizes Madison’s arguments with the general tenor of arguments in Virginia and elsewhere against ministerial taxation schemes. Madison’s “three pence” argument thus vindicates a peculiar type of religious injury—specifically, an injury to freedom of association between ministers and congregation that is inflicted by the operation of the assessment tax system. What Madison does not do is lodge a generalized complaint about the “religious” use of tax revenues.

Put in its proper historical context, then, Madison’s “three pence” argument looks more like a modern “free exercise” claim than a modern “establishment” claim. Modern Establishment Clause doctrine, as is well known, agonizes over which kinds of taxation schemes amount to a forbidden establishment.¹²⁵ But Free Exercise Clause doctrine has been comparatively clearer. The imposition of a tax, by itself, rarely amounts to a free exercise violation.¹²⁶ Even in the days of *Sherbert* balancing, the Supreme Court found, for instance, that paying sales taxes on religious publications or paying social security taxes did not even amount to the “significant burden” on religious exercise that would trigger balancing.¹²⁷

But what does this perspective mean for standing? For standing purposes, a free exercise argument based on taxation would demand the plaintiff be the

¹²³ See, e.g., *id.* at 168 (explaining that Massachusetts Baptists “fundamentally disagreed with Congregationalists on the narrow ground of organization and support of churches” and that, among other things, “both church and minister should be supported voluntarily”); *id.* at 175 (explaining that “[t]o Baptists, who ‘owned that religion must at all times be by a matter between God and individuals,’ the very idea of state support—even impartial state support—was by nature wrong and an imposition of the Congregational way of religion”); Bradley, *supra* note 96, at 25 (explaining that, given the “Baptist disavowal of professional clergy” that “they chose ministers from their own congregation to serve without compensation . . . Baptists therefore did not need the system at all, and its burdens fell on them with no immediate tangible benefit”); Blasi, *supra* note 30, at 806 (“A crucial source of [Madison’s] concern was the claim by some denominations, especially the more evangelical Christian sects such as the Baptists, that *compulsory* support of their clergy impaired the fundamental relationship that must obtain between preachers and their congregations.”).

¹²⁴ CURRY, *supra* note 30, at 169.

¹²⁵ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (addressing whether allowing use of tax-derived voucher payments at religious schools violates the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388, 390 (1983) (addressing whether tax deductions for religious education violate the Establishment Clause).

¹²⁶ See *Jimmy Swaggart Ministries v. Bd. of Equalization of Ca.*, 493 U.S. 378, 392 (1990); *United States v. Lee*, 455 U.S. 252, 261 (1982).

¹²⁷ *Id.*

particular person whose religious exercise is burdened by the tax. This would rule out granting standing to any taxpayer *qua* taxpayer because of a generalized complaint about the allegedly unconstitutional operation of the tax system. Consequently, when we translate Madison's "three pence" argument into modern doctrinal categories, it fails to support an exception to the ban on generalized taxpayer standing. In other words, we should not read Madison's "three pence" rhetoric as literally calling on public authorities to track down every religious penny. Instead, the argument was Madison's effective way of dramatizing the harm to free exercise rights of those whose religious relationships the assessment threatened to corrupt.

Another facet of Madison's broader argument further contextualizes his "three pence" language. Professor Blasi points out that Madison's objection to the assessment hinges on the idea of the government taking "cognizance" of religion.¹²⁸ By this, Madison meant that the government wrongly assumed "responsibility" or "jurisdiction" for religious matters. For Madison the assessment did just this by seeking to "stimulate religious belief" through tax-supported funding of ministers.¹²⁹ It was not the *amount* of taxes, large or small, that Madison was drawing attention to. Rather, it was the violation of his underlying view of church-state separation, a violation underwritten by those tax funds. As Professor Blasi explains, this is why

Madison, a realist in politics, could have insisted that the state cannot require a citizen to "contribute three pence only of his property" to support a religious establishment. Surely he realized that some portion of a dissenter's taxes pays for public services, such as law enforcement and roads, that benefit churches no less than other members of the community. What coerced taxes, no matter how small, could not support, in Madison's view, was a religious "establishment," by which he meant any instance of government taking "cognizance" of, that is responsibility for, religion. Madison's concept of separation could be severe, but it was a separation of functions and purposes, not some quixotic attempt to achieve a hermetically sealed spatial separation.¹³⁰

On this view, the modern reading of Madison's "three pence" argument—the one *Flast* depends on—confuses the "three pence" of taxes for the religious establishment itself. But to Madison, the central flaw in the assessment scheme was the cooperative relationship set up between government and certain Christian churches.¹³¹ The "government cognizance" angle thus illuminates Madison's "three pence" argument just as the free exercise angle did. Madison was not seeking to empower private attorneys general to demand every religiously-tinged penny back from government coffers. Instead, he was drawing attention to what he believed was a dangerous structural union between government and churches.¹³² A taxpayer standing argument based on the "three pence" language misses Madison's actual target.

¹²⁸ Blasi, *supra* note 30, at 789-91. See, e.g., MEMORIAL, *supra* note 3, at 82 ("We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.")

¹²⁹ Blasi, *supra* note 30, at 790.

¹³⁰ *Id.* at 791.

¹³¹ See, e.g., MEMORIAL, *supra* note 3, at 82-83, ¶ 4.

¹³² Professor Kmiec makes this point well in a recent essay on *Hein*. Kmiec writes that Madison's "famous *Remonstrance* challenged the coercive taking of even 'three pence' not

In sum, reconstructing Madison's argument along free exercise or structural lines clarifies the function of his "three pence" rhetoric. Specifically earmarked taxes were underwriting the scheme he wanted the legislature to oppose, and that useful fact allowed Madison to make his powerful point: extracting the tiniest trickle of tax funds today *to fund this establishment* would be precedent for forcing you to give up larger amounts tomorrow *to fund future establishments*.¹³³ Essentially, Madison's is the same argument that politicians make today (less artfully, of course) when they criticize a government program on the basis that "Your tax dollars are being used to fund [insert politically unpopular project]." That may or may not be an effective argument, but it is unmistakably political; no one thinks the politician is making a legal point about standing to sue. Madison wasn't, either.

Consequently, Madison's "three pence" argument, properly understood on its own terms, provides no foundation for a modern exception to the ban on taxpayer standing. This alone is a crippling blow to *Flast*. It means that, even if we *hypothesize* that Madison exported his "three pence" argument from 1785 Virginia to 1790 Philadelphia (a proposition for which, as discussed below, there is no evidence), he was not exporting the particular idea of widespread taxpayer adjudication on religion clause matters. But what if we reverse matters? Let us assume that Madison's "three pence" argument *was*, in fact, a plea for something like standing for taxpayers generally to contest taxes based on religious objections. That does not solve the *Flast* problem, however, because we would then have to show that Madison successfully embedded *that* idea about constitutional adjudication in the federal religion clauses. But whatever the evidence shows about Madison's personal influence on the substance of the federal clauses, it fails to show Madison making any equivalent of our hypothesized "three pence" argument during the ratification debates.

When Madison changed his role as Virginia legislator in 1785, for the role of federal constitutional advocate in 1788, his arguments did not sound like someone who was holding up adjudication as the key to protecting religious liberty—much less adjudication employing general taxpayer standing. Instead, Madison explicitly downplayed the role of bills of rights in protecting religious liberty. This appears most clearly in Madison's 1788 remarks to the Virginia Ratifying Convention. There, in support of the proposed Constitution, Madison mocked the notion that a bill of rights would act as a "security for religion":

for the otherwise disinterested taxpayer 'upset' by the inclusion of faith groups in a general program, but for the compelled support of an established church and coerced 'conformity' thereto. That is a substantial difference." Kmiec, *supra* note 49, at 513.

¹³³ This is, not to put too fine a point on it, precisely what Madison wrote in the *Memorial*: "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" *MEMORIAL*, *supra* note 3, at 82. The "three pence" here was not the "establishment" itself, but rather a seemingly innocuous and minimal burden that a taxpayer might not notice and therefore not object to. Madison was arguing, in effect, "You *should* object to the establishment underwritten by the Assessment, even though you might not notice the burden." He was *not* arguing, "The three pence, in and of themselves, are the establishment." Professor Blasi makes a similar point. See Blasi, *supra* note 30, at 791 & n.34.

Would the bill of rights, in this state, exempt the people from paying for the support of one particular sect, if such sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty.¹³⁴

Notice that the specific example Madison used: an assessment, or “paying for the support of one particular sect.” Madison instead argued that the “utmost freedom of religion . . . arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society.”¹³⁵ This mirrors Madison’s arguments in *The Federalist* that the best protection for individual rights lies in the checking function of a thriving variety of factions, including religious factions. This was Madison’s famous “republican remedy for the diseases most incident to republican government”: the “variety of [religious] sects dispersed over the entire face of [the confederacy], must secure the national councils against any danger from that source.”¹³⁶ Madison contrasted this method of controlling factious majorities—which he said was “exemplified” in the Constitution—with the method of “creating a will in the community independent of the majority,” which by implication Madison must have thought alien to the new constitutional system.¹³⁷

Thus, as advocate for the new Constitution, Madison downplayed judicial review of specific constitutional guarantees as a means of protecting religious liberty. But this is unsurprising given “Madison’s penchant for thinking about issues of liberty and legitimacy in structural terms.”¹³⁸ Professor Blasi elucidates this aspect of Madison’s approach to protecting religious freedom:

[Madison] had little faith in legalistic guarantees—‘parchment barriers’ he dismissively called them. Instead, he focused on such matters as institutional incentives, checks and balances, object lessons from the past, and scenarios of decay and abuse. . . . He sought to forestall and contain abuses of power by means of perspicacious institutional design. His approach to the subject of church and state was in this spirit.¹³⁹

None of this suggests that Madison was pressing broad-gauged adjudication and judicial review as the bulwark of religious liberty in the Federal Constitution.¹⁴⁰ It does not matter that *today* we prefer such means. But it does matter that the *Flast* Court uncritically drafted Madison as the spokesman for an exceptionally broad form of such a remedy, and pressed his “three pence” argument into service as its ur-text.

¹³⁴ VIRGINIA RATIFYING CONVENTION, *supra* note 114, at 88.

¹³⁵ *Id.*

¹³⁶ THE FEDERALIST NO. 10, at 48 (James Madison) (George W. Carey & James McClellan eds., 2001); *see also* THE FEDERALIST NO. 51 (James Madison) (setting out general theory of checking function of numerous factions in an extended republic).

¹³⁷ THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹³⁸ Blasi, *supra* note 30, at 788.

¹³⁹ *Id.* at 788-89.

¹⁴⁰ As Professor Steven Smith points out, the “pluralism” Madison evidenced in *Federalist* 10 and 51 and at the Virginia Ratifying Convention militates strongly against the Madison of the *Memorial*, assiduously protecting taxpayers’ consciences against “three pence” of improper taxation. STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 10-26 (2001).

When in 1790 Madison again changed hats, and proposed amendments to the Constitution in the First Congress, his overall strategy and recorded comments during the debates further undermine the notion that he was pressing an aggressive version of his “three pence” argument (as understood here only *arguendo*) at the national level. At that point, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broad support. Madison would likely have supported far-reaching alterations in church-state relationships at the federal and state level, but, as Professor Thomas Curry observes, “[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification”¹⁴¹ According to Professor Gerard Bradley, “[t]he truth is that Madison’s personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause.”¹⁴² In the House debate, Madison minimized the substance of, and even the necessity for, the religion clauses.¹⁴³

Even more revealing was Madison’s response to Representative Benjamin Huntington of Connecticut during the debate. Representative Huntington feared that a broad interpretation of the religion clauses would grant a federal court jurisdiction to interfere in New England states’ enforcement of compulsory support for ministers’ salaries. But Madison assured him it would not.¹⁴⁴ Representative Huntington, as Professor Bradley explains, “was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment.”¹⁴⁵ Madison “alleviated this fear, clearly indicating that there was no conflict.”¹⁴⁶ Admittedly, Madison’s somewhat cryptic response might be interpreted along federalism lines: the religion clauses would have had nothing to do with New England states’ arrangements, and federal courts would not have likely had jurisdiction to meddle in them. But Madison’s response shows he was talking about more than federalism—he was in fact addressing the substance of what he thought the Establishment Clause outlawed. Madison proposed that the word “national” be inserted before “religion,” since, as Madison explained,

He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.¹⁴⁷

¹⁴¹ CURRY, *supra* note 30, at 205.

¹⁴² BRADLEY, *supra* note 96, at 87.

¹⁴³ In the debate, Madison commented that “[w]hether the words [of the religion clauses] are necessary or not, he did not mean to say, but they had been required by some of the State Conventions,” who feared the implications of Congress’ Necessary and Proper powers. HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION (1789), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 92, 93 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁴⁴ WITTE, *supra* note 113, at 66-67. Professor Bradley adds that, in *Everson*, Justice Rutledge’s dissent got this exchange exactly backwards, understanding Madison to be saying that the compulsory clergy tax was in fact an “establishment of religion.” See BRADLEY, *supra* note 96, at 91.

¹⁴⁵ BRADLEY, *supra* note 96, at 91.

¹⁴⁶ *Id.*

¹⁴⁷ WITTE, *supra* note 113, at 67.

In other words, Madison reassured Representative Huntington not merely because of the federalism aspects of the religion clauses, but also because the New England arrangement would not come within the purview of the substantive anti-establishment prohibition in the religion clauses.

The implications for the “three pence” question are evident. Had Madison intended to import his three pence idea into the Establishment Clause, his response to Representative Huntington would have been completely different. After all, the scheme Representative Huntington was concerned to protect was “much more coercive” than the 1785 Assessment Madison had defeated in Virginia.¹⁴⁸ But in response to Representative Huntington, Madison seemed to shrug—the federal clauses, he said in effect, have nothing to do with such matters, whether precisely because of their *federal* character, or because the anti-establishment prohibition would not be triggered by the New England taxation scheme. If matters stood otherwise, merely proposing the religion clauses would have immensely complicated the cause of the new Constitution. At the time, opinions diverged sharply in the states about whether religion should be supported by taxation. People even disagreed over whether mandatory assessments really amounted to full-blown “establishments” at all.¹⁴⁹ It would have been a particularly inauspicious time, then, for Madison to import his three pence idea (understood in its more aggressive sense) into the federal religion clauses.¹⁵⁰ A politician of Madison’s skill would have been urging a federal constitutional right empowering every single taxpayer in the country to contest federal taxation schemes based on whether they amounted to an “establishment of religion.” True, Madison knew how to introduce novel measures into the Constitution. He had unsuccessfully proposed an amendment binding the states themselves to respect freedom of conscience.¹⁵¹ So one cannot rule out the possibility that he might have sought to include an aggressive anti-taxation right as part of the Federal Constitution. But the important point is that Madison’s recorded comments during the drafting of the religion clauses betrayed the opposite intention. He was seeking to build consensus for the new Constitution, and to placate the fears of those who were attached to church-state relationships that Madison himself deplored. Madison the Virginia legislator was willing to fight for political goals at the state level that Madison the constitutional advocate sought to avoid at the federal level. Even *if* the Virginia legislator had been advocating for the modern equivalent of general taxpayer standing for anti-establishment claims (which is doubtful, as seen), the notion that the constitutional advocate was pushing such goals beggars belief.

CONCLUDING REFLECTIONS: THE HISTORY OF A BAD INVESTMENT

All that remains to be said for the merits of *Flast*’s taxpayer standing doctrine is: the thing is bankrupt. In forty years, no interest has accrued on the Court’s original “three pence” investment, even though picked from James Madison’s pocket. But this should come as no surprise. No scholar has made a

¹⁴⁸ BRADLEY, *supra* note 96, at 91.

¹⁴⁹ See, e.g., CURRY, *supra* note 30, at 219-20.

¹⁵⁰ See, e.g., *id.* at 205; BRADLEY, *supra* note 96, at 88-89.

¹⁵¹ See, e.g., WITTE, *supra* note 113, at 65-66.

sustained attempt to spruce up the Court's historical justification,¹⁵² although scholars commonly assert that some form of taxpayer standing is necessary to vindicate the Establishment Clause.¹⁵³ Perhaps the standing inquiry is in fact inextricable from the underlying merits, and any attempt to separate the two ends in incoherence.¹⁵⁴ Perhaps the Court was wrong in the first place to make an Article III "case or controversy" depend on the existence of a personal

¹⁵² For instance, although criticizing *Flast's* standing analysis, Professor Steven Winter seems to accept the Court's historical assertions about the Establishment Clause at face value. He notes that "Ms. Flast was arguing that the establishment clause protected her from a society in which tax monies would be used for impermissible, religious purposes," and that "[i]n support of this point, the majority invoked the *legislative history of the establishment clause . . .*" Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1467 & n.543 (1988) (emphasis added). Immediately thereafter, he correctly notes that the Court's actual support for its holding was Madison's three pence language, which, as this article and many other commentators have explained, forms no part of the "legislative history" of the Establishment Clause. *Id.* at 1467 & n.544. In the same vein, Professor William Fletcher agrees with *Flast* (and would in fact extend it) on the basis that "the protection provided by the establishment clause cannot be fully realized unless there is easy and unrestricted access to the courts to challenge federal expenditures or grants that might violate the clause." Fletcher, *supra* note 100, at 269. He does not attempt to support that conclusion, however, with any evidence beyond the Court's own "historical argument that the clause was enacted to prevent the forced exaction of moneys for the support of state-sponsored religion." *See id.* Professor Carl Esbeck argues that the existence of *Flast* standing shows that the Establishment Clause is properly understood as a structural restraint on government power, rather than as a guarantee of individual rights. *See, e.g.,* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 33-40 (1998). It is more than plausible to see the Clause as principally structural. But that is not a reason in and of itself to *require* general taxpayer standing to enforce the Clause (nor does Professor Esbeck seem to be making that point).

¹⁵³ *See, e.g.,* CHEMERINSKY, *supra* note 9, § 2.5.5, at 94-95 (criticizing the Court's failure in *Valley Forge* to extend *Flast* to Congress's disposition of property under Article IV); TRIBE, *supra* note 9, § 3-17, at 423-24 (same); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 91-92 (1991) (arguing that "a taxpayer may suffer more through the unconstitutional disposition of property . . . than through a budgetary expenditure . . ."). For instance, in criticizing the same decision, Professor David Dow argues that the majority opinion "simply paid no heed to the nature of the establishment clause," because "[h]ad the right at issue been analyzed, it would have been clear that whenever the clause is violated, the resulting injury is necessarily widely shared." David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1208 (1987). But in support of those propositions about the "nature of the establishment clause" and the "right" at issue in the case, Professor Dow cites only Justice Brennan's *Valley Forge* dissent. *Id.* at 1208 n.40. Justice Brennan's dissent, while lengthy, merely reiterates *Flast's* historical rationale for allowing generalized taxpayer standing in Establishment Clause cases. *See* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 499-510 (1982) (Brennan, J., dissenting).

¹⁵⁴ *See, e.g.,* CHEMERINSKY, *supra* note 9, § 2.5.1, at 62 (arguing that "[u]ltimately, the law of standing turns on basic normative questions about which there is no consensus"). Professor Chemerinsky here quotes Professor Fletcher for the proposition that the standing inquiry "should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked." *Id.* at 62 n.16 (quoting Fletcher, *supra* note 100, at 229). *See also* TRIBE, *supra* note 9, § 3-15, at 399 (noting that "the question of what it means to be 'injured' itself entails a complex and value-laden judgment").

injury.¹⁵⁵ Such profound questions are beyond the scope of this Article. Instead, the point here has been to explore the question raised but left unanswered in *Hein*: whether the taxpayer standing exception created by *Flast* stands on its own historical merits. The answer is no. This concluding Section briefly places that failure in the larger context of Establishment Clause jurisprudence.

Dramatic fallacies of historiography are nothing new in this area. The modern Establishment Clause project itself is based, say many scholars, on a misunderstanding of the function the Clause was meant to perform in our constitutional structure.¹⁵⁶ On that view, the Clause originally served to quarantine church-state issues at the state level, preventing such irresolvable questions from exploding onto the national scene. Such a jurisdictional provision did not, and could not, embody any grandiose “theory” of substantive church-state relationships useful for adjudicating particular controversies. To the extent that view is correct, what the Supreme Court did in 1947 by applying the Clause to the States was, as Professor Steven Smith argues, effectively to repeal it.¹⁵⁷ To the extent this jurisdictional thesis is wrong, many still admit that the Supreme Court’s understanding of the Clause’s history was grievously flawed.¹⁵⁸ Here,

¹⁵⁵ See, e.g., Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (concluding “the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded”). See also TRIBE, *supra* note 9, § 3-15, at 393 (observing that “[h]istorically, whether members of the public who had not suffered concrete or particularized injury could sue turned on whether substantive law . . . conferred a cause of action on them, not on any inquiry into ‘injury in fact’”); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1479 & n.229 (1988) (noting originalist doubts about personal injury requirement for Article III “case or controversy”).

¹⁵⁶ See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-58 (1991); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1557-63 (1995) (discussing the historical debates as evidence of the original intent of the Framers); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206-11 (1990) (discussing incorporation and the Establishment Clause); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 22-23 & nn.15-16 (2006) (noting that “a number of commentators have similarly argued that the Establishment Clause should never have been applied to the states, or that courts should apply a relaxed version of the religion clauses to government beneath the federal level”) (citing STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995) [hereinafter SMITH, *FOREORDAINED FAILURE*]); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 n.25 (1992). For my take on this issue, see Kyle Duncan, *Subsidiarity and Religious Establishments in the U.S. Constitution*, 52 VILL. L. REV. 67 (2007).

¹⁵⁷ See generally SMITH, *FOREORDAINED FAILURE*, *supra* note 156, at 17-34 (summarizing the case for a jurisdictional understanding of the Establishment Clause).

¹⁵⁸ See, e.g., *id.* at 4-5 (noting scholars who have disputed the Court’s reading of Establishment Clause history) (citing Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); BRADLEY, *supra* note 96; ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965)).

for instance, are the instructive comments in a recent essay by Professor Carl Esbeck, a prominent religion clause scholar:

The *Everson* Court did indulged [sic] the wildly improbable assertion that the Virginia experience of 1784-86 was bootlegged by James Madison and Thomas Jefferson into the Establishment Clause of the First Amendment as it was being drafted by the First Congress meeting in New York City during the period June to September 1789. The drafting and ratification of the Bill of Rights entailed a mostly different cast of participants and an entirely new array of concerns. We have a sketchy but still informative record of the debate in both the House and Senate of the First Congress over the drafting and redrafting of the text that eventually became the Establishment Clause. There is no indication that the Virginia experience of a few years before was even mentioned during these debates or was otherwise a factor. While Madison was in the middle of things, Jefferson was in Paris serving as our ambassador to France.¹⁵⁹

Given that state of affairs, *Flast's* own historical flaws—flaws that concern the same historical materials—are par for the course.

But *Flast's* failings raise the stakes of bad history. Standing is supposed to be, at least in some sense, distinct from the merits, and to serve distinct values such as separation of powers, judicial efficiency, and judicial competency.¹⁶⁰ It would seem anomalous, then, to make standing turn on highly contested questions about the merits of the provision sought to be enforced.¹⁶¹ But *Flast* did just that: its standing exception subsumes a host of murky questions about Establishment Clause doctrine and history. Consequently, *Flast* undercut whatever salutary restraining role that standing doctrine could play in constitutional adjudication of the Establishment Clause, with predictable effects on the coherence of the resulting jurisprudence.

Establishment Clause jurisprudence has generated many controversial, persistent, and seemingly intractable questions.¹⁶² The area of public funding

¹⁵⁹ Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 27 n.40 (2007) (citations omitted). For further criticism of the Supreme Court's use of historical materials in Establishment Clause cases, see Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006) (featuring articles by Steven K. Green, Marci A. Hamilton & Rachel Steamer, Douglas Laycock, and Steven D. Smith).

¹⁶⁰ See, e.g., CHEMERINSKY, *supra* note 9, § 2.5.1, at 61-62 (discussing values served by standing, such as separation of powers, judicial efficiency, judicial reputation, judicial competency, and fairness); TRIBE, *supra* note 9, § 3-14, at 388-91 (discussing Court's more recent emphasis on the separation-of-powers function of standing doctrines) (citing, *inter alia*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983)).

¹⁶¹ See, e.g., TRIBE, *supra* note 9, § 3-14, at 390 (observing that “[c]ritics have charged the Supreme Court with habitually manipulating settled standing rules to pursue extraneous, often unacknowledged ends—such as advancing the majority's view of the merits, resolving problems associated with broad equitable relief, and serving federalism values”).

¹⁶² See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (asserting that “in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified,” and describing the disarray at length); see also Michael A. Paulsen, *Religion, Equality & the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315 (1986) (asserting that “[f]or nearly four decades the Supreme Court has meandered through the province of church-state relations, leaving behind a serpentine trail of constitutionality”) (footnote omitted).

alone has its own zip code. What is the relationship between the Establishment Clause and government taxing-and-spending? May the government spend tax money for “religious” purposes? May public funds end up in the pockets of churches, synagogues, pastors, rabbis, or other religious associations and persons? Does it matter what path the funds take? May an evenhanded public welfare program fund religious organizations directly? May it do so indirectly, through private choices? May it provide in-kind aid to such organizations directly? Indirectly?¹⁶³

But a prior question, rarely asked, is whether such dilemmas are even susceptible to judicial resolution. Perhaps some of them are sensibly left to the political process because the Constitution furnishes no reliable standards for adjudicating them. Standing doctrine could help sort out such matters by limiting judicial resolution to cases in which plaintiffs alleged a concrete and personal injury. Thus, the courts would adjudicate only those Establishment Clause taxing-and-spending issues that impacted individual rights according to that traditional measure. Courts, then, could enforce the Establishment Clause just as far as any other constitutional protection—that is, to the extent that standing, and other justiciability doctrines, indicate that judicial enforcement is appropriate and effective.

But, whatever the proper restraints on Establishment Clause adjudication might be, *Flast* swept those concerns under the rug through historical sleight-of-hand. Prior to any merits question, *Flast* deputized *every taxpayer* to litigate taxing-and-spending issues based on the sole, undefended premise that every taxpayer *must*, by definition, have a litigable Establishment Clause interest. This is the case no matter how small the amount of the tax, no matter how or why the tax was levied, and no matter how or why the money was spent. Without saying so, then, *Flast* purported to resolve without argument profound disputes about the scope of the Establishment Clause, about what sorts of “rights” or “interests” the Clause protects, and about the proper use of historical materials to answer such questions.¹⁶⁴

The Court deployed these *sub silentio* decisions to create a standing exception unheard of, and explicitly rejected, in every other area of law. And, as we have seen, the Court’s sole support was a single phrase from a historical document with no relevance to the question. In its recent *Hein* decision, the Court did little to remedy this anomaly, but at least the case raised the question again after a long interlude. Perhaps *Hein*’s real significance will become evident only in a future case, when a majority of the Court finally takes a fresh and honest look at the strange doctrine created in *Flast*.¹⁶⁵ The Court could then

¹⁶³ See generally DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 172-201 (2003) (explaining the Court’s public aid jurisprudence).

¹⁶⁴ Cf., e.g., Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2288 (1998) (arguing that, while “a coherent concept of standing grows out of a clear definition of the relevant injury,” in voting rights cases, “the Supreme Court has failed to articulate any theory of injury that coherently accounts for the standing rule it has produced”).

¹⁶⁵ See, e.g., Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 1-2 (2007) (noting that “*Hein* may be the harbinger of further restrictions on standing in other types of Establishment Clause cases, such as cases involving government endorsement of sectarian religious principles and symbols.”); Kmiec, *supra* note 49, at 514 (arguing that

rectify yet another instance of shoddy law office history in Establishment Clause cases. Those are my two cents' worth, anyway.

“[t]he primary benefit of the modest decision in *Hein* is that it gives the Roberts Court an opportunity to re-think the underlying religion-clause jurisprudence more carefully”).