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## ESSAY

# SCHOOL VOUCHERS AND RELIGIOUS LIBERTY: SEVEN QUESTIONS FROM MADISON'S *MEMORIAL AND REMONSTRANCE*

*Vincent Blasi†*

In the immediate aftermath of the Revolutionary War, many up-standing citizens of the fledgling state of Virginia were not pleased. They were, in fact, appalled by the decline they perceived in the state of public morals. Newspaper editorials, sermons, and speeches in public assemblies resounded with references to the recent upsurge in gambling, whoring, cockfighting, and public drunkenness. That such departures from the straight and narrow are not uncommon in post-war periods, following all the social dislocations of military mobilization, was no consolation to Virginians eager to show a doubting world that government by the people could work.<sup>1</sup>

The root of the problem, in the view of many, was that the churches of the new commonwealth no longer enjoyed the influence or support they had taken for granted during the colonial period. In particular, the Episcopalian Church, formerly the colony's established Church of England, was suffering. Many of its splendid edifices had been damaged in the fighting; fully half of its clergy were now exiled or discredited former tories. Those ministers who remained were having trouble eliciting sufficient voluntary contributions from congregations unaccustomed to that method of ecclesiastical support.<sup>2</sup>

Into this breach leaped that eloquent opportunist, Patrick Henry. He sponsored in the Virginia Assembly a daring proposal to reinvigorate the public morality.<sup>3</sup> His plan was to harness the fiscal powers of the state in the service of religious teaching, all to the end of civic

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<sup>1</sup> See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA: 1740–1790*, at 275–78 (1982).

<sup>2</sup> See THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787*, at 81–82 (1977).

<sup>3</sup> The proposal was entitled, "A Bill 'Establishing a Provision for Teachers of the Christian Religion,' 1784." *Id.* at 188. The text of this proposal is reproduced in Appendix B.

virtue.<sup>4</sup> A "General Assessment" would be instituted in the form of a property surtax. In contrast to the traditional use of the taxing power to support a single, preferred religion, Henry's proposal permitted each taxpayer to specify which Christian denomination should receive his payment. Those who did not wish to support a church could direct their assessment to a proposed common school fund.<sup>5</sup> The bill provided that a record be kept of each taxpayer's choice of recipient, to be posted in the county courthouse, "there to remain for the inspection of all concerned."<sup>6</sup> Revenues would then be distributed in accordance with these taxpayer directions. Churches could use their allotments to pay for the salaries of their clergy, to provide places of divine worship, and to "none other use whatsoever."<sup>7</sup>

One member of the Virginia Assembly took particular exception to Henry's proposal, the representative from Orange County, James Madison.<sup>8</sup> Despite his relative youth, by 1784 Madison had a well-formulated position and some hard-earned political savvy regarding the sensitive issue of church-state relations. Eight years earlier he had helped to draft and steer to enactment the religious liberty clause of the new Virginia Constitution.<sup>9</sup> Madison viewed the General Assessment as a patent violation of that constitutional commitment and a profound threat to Virginia's experiment in republican government. He devoted the ensuing year to the cause of defeating Henry's proposal: first by convincing the legislature to postpone action on the measure until after the next election, then by organizing an appeal to the voters to elect assembly candidates who would oppose the General Assessment, and finally by engineering its defeat at the subsequent legislative session.<sup>10</sup> In the course of this campaign, Madison wrote a succinct polemic, the *Memorial and Remonstrance Against Religious As-*

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<sup>4</sup> See WILLIAM LEE MILLER, *THE FIRST LIBERTY* 24-29 (1986).

<sup>5</sup> See *id.* at 26.

<sup>6</sup> BUCKLEY, *supra* note 2, at 189.

<sup>7</sup> *Id.* The bill contained one explicit exception to this restriction on how the funds could be used: "except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship." *Id.* The Quakers and Menonists had no clergy or church buildings so the General Assessment would have been of little or no benefit to them absent such an exception. With the exception, however, they were free to use tax-generated funds for proselytizing expenses, something the other sects were not free to do.

<sup>8</sup> See *id.* at 113.

<sup>9</sup> IRVING BRANT, *THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON* 34-35 (1970).

<sup>10</sup> For a detailed account of the political maneuvering, by Madison and others, that led to the defeat of the General Assessment, see BUCKLEY, *supra* note 2, at 109-53.

sessments,<sup>11</sup> which constitutes the most powerful and influential statement of his views on the subject of religious liberty.

Madison's sense of the stakes in this struggle can be discerned from his uncharacteristic hyperbole when informing Jefferson, then in France, of the defeat of the General Assessment and the enactment in its stead of a bill drafted years earlier by Jefferson outlawing such a tax and forbidding religious tests for office. "I flatter myself," Madison told his friend, that the legislative triumph of their shared principles had "in this country, extinguished forever the ambitious hope of making laws for the human mind."<sup>12</sup>

Madison's passion on this subject is manifest. Not so obvious, however, is why a proposal so relatively ecumenical and evenhanded, with its broad class of beneficiaries and provisions for taxpayer specification of recipients, should have aroused in Madison the spectre of religious persecution.<sup>13</sup> What, exactly, was he so bothered about?

The answer to that question might be of more than purely historical interest. Today, the most vigorously contested question of church-state relations concerns the propriety and constitutionality of using tax-generated public funds to subsidize private, including religious, schools. The most ambitious subsidization proposals—ambitious in terms of departure from past practices, asserted educational benefits, and amounts of money involved—employ in one or another form the mechanism of vouchers. The parents of a school-age child receive a voucher from the government; they give that voucher to the accredited school to which they choose to send their child; the government then redeems the voucher by paying the school a specified sum from the public treasury. With vouchers, parents, not government officials, decide which schools get public funding and in what amounts. If the parents decide to send their child to a religious school, tax-generated

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<sup>11</sup> JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 29 (Jack N. Rakove ed., 1999). The *Memorial and Remonstrance* is reproduced in Appendix A.

<sup>12</sup> Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 211, 214 (Philadelphia, J.B. Lippincott & Co. 1867).

<sup>13</sup> Madison's rhetoric in the *Memorial and Remonstrance* is uncharacteristically strident and alarmist. See, e.g., MADISON, *supra* note 11, para. 2, at 30–31 ("The Rulers who are guilty of such an encroachment . . . are Tyrants. The People who submit to it . . . are slaves."); *id.* para. 7, at 32–33 ("During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less, in all places, pride and indolence in the Clergy, igitance and servility in the laity, in both, superstition, bigotry and persecution."); *id.* para. 9, at 33 ("Instead of holding forth an Asylum to the persecuted, [the proposed General Assessment] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."); *id.* para. 15, at 35–36 ("Either we must say, that [the legislature] may . . . despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration.").

funds subsidize religious teaching. In the typical voucher proposal, no provision restricts the use of those funds to the purely secular aspects (if such there be) of the religious school's endeavor.<sup>14</sup>

Proponents of vouchers argue that the First Amendment permits this form of public funding of religious education because the beneficiaries are not limited to preferred religions, or all religions, or even all private schools; a scheme so inclusive raises no serious problems of coercion, preferment, or endorsement along religious lines. Moreover, because the funds are distributed according to decisions made by private actors—the parents—the relationship between church and state entailed in a voucher system is not constitutionally problematic. As a matter of principle, so the argument goes, vouchers present none of the concerns that inform the First Amendment's prohibition of the establishment of religion.<sup>15</sup>

Opponents of vouchers agree that the church-state issues raised by the voucher mechanism are distinctive, straightforward, and resolvable at the level of basic principle. There, however, the agreement ends. As opponents view the matter, what is distinctive about vouchers is that coercively generated tax revenues pay for unambiguously religious instruction. This is objectionable on its face without the need to assess the purposes or particular effects, the subtle preferences and endorsements, the competing conceptions of neutrality, the insidious entanglements, and the long-term institutional consequences that must be explored to resolve more difficult cases of possible establishment. For good measure, opponents observe that the scale of the subsidy means that tax revenues supplant rather than supplement the traditional, voluntary sources of funding for religious education, a feature that distinguishes vouchers from the much smaller, more specialized and restricted subsidies that occasionally have been upheld.<sup>16</sup>

I believe that both sides of this controversy are wrong in claiming to have a simple, dispositive argument. In terms of either first principles of political theory or the implications of the modern case law, the voucher issue is complicated and daunting. Messy inquiries into meanings and consequences, and much else besides, are unavoidable.

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<sup>14</sup> For a good general explanation and defense of the proposal for educational vouchers, see JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999). For an excellent collection of essays about various aspects of the voucher controversy, see STEPHEN D. SUGARMAN & FRANK R. KEMERER, *SCHOOL CHOICE AND SOCIAL CONTROVERSY* (1999).

<sup>15</sup> See *Jackson v. Benson*, 578 N.W.2d 602, 617–19 (Wis. 1998); Scott A. Fenton, Comment, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 *CAP. U. L. REV.* 645, 670 (1997).

<sup>16</sup> See Steven K. Green, *The Legal Argument Against Private School Choice*, 62 *U. CIN. L. REV.* 37, 68–73 (1993).

My project here is a limited one. I will not attempt to determine whether a voucher system that includes religious schools violates the Establishment Clause as elaborated by the Supreme Court, or is in tension with the collective original understanding of the various actors who drafted and ratified the First and Fourteenth Amendments. Instead, I will inquire just how much we might learn in addressing these and related questions, in legislative forums no less than judicial, from what James Madison said when explaining his opposition to the General Assessment. I look to Madison not in his role of Father of the Constitution or principal author of the First Amendment, but rather his role as an astute, engaged critic of one funding proposal. I do not claim to know what he would have thought of vouchers were he with us today. I consider that question as impossible to answer as it is beside the point to ask. My aim is to discover whether we can understand and resolve the voucher issue better by attending to the principles Madison invoked and the considerations he emphasized when he was confronted with a different kind of broadly based program of support for religion that distributed its subsidy according to the private choices of citizens. It is the heuristic Madison, not the authoritative Madison, that interests me.

A close reading of the *Memorial and Remonstrance* yields, in my judgment, seven questions pertinent to the voucher issue. They are:

First, is the formal inclusion of church-operated schools in a public funding scheme, including the transfer of public funds directly to such religious institutions, a violation of the principle that religion must be wholly exempt from the cognizance of the state? In colloquial terms, does the degree of institutional interaction and recognition entailed in a voucher scheme violate the principle of separation that Madison held dear?

Second, can a voucher system that neither prefers nor excludes any religion ever amount to the type of establishment that Madison opposed?

Third, is a voucher system an effort to, in Madison's words, "employ Religion as an engine of Civil policy," a strategy he termed an "unhallowed perversion of the means of salvation"?<sup>17</sup> What is wrong with civil authorities drawing upon the resources, material and otherwise, of religions in the pursuit of a civic good such as quality or diverse education?

Fourth, would a voucher system lead participating religions to become too dependent on the state over time, to the detriment of their religious purity and vitality?

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<sup>17</sup> MADISON, *supra* note 11, para. 5, at 32.

Fifth, would the fact that certain religions receive a substantial state subsidy and may come to depend on it lead them to be less willing to criticize public officials or mobilize resistance to public policies, thereby diminishing what has historically been one of the major checks on governmental injustice and neglect?

Sixth, would the ongoing implementation of a voucher system, with all the fiscal and regulatory decisions that would be entailed, generate contests and resentment along religious lines that might, in Madison's words, "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects"?<sup>18</sup> Or would the decision to include religious schools in the public financing of education actually reduce the "animosities" and "jealousies" that Madison considered an enduring threat to the republic?

Seventh, would a voucher system deny to any citizens "equal title to the free exercise of [r]eligion" by subjecting some to peculiar burdens and others to peculiar benefits so far as the capacity to practice their religions is concerned; or conversely, can the move to a voucher system be defended as equality *enhancing* in this regard?<sup>19</sup>

These are the pertinent Madisonian questions for the voucher controversy, and except for the first two, they are not easy to answer.

The first two questions have a conceptual emphasis. To answer them, one must appreciate what Madison meant by "coguzance" and "establishment." Taken together, the last five questions reflect Madison's penchant for thinking about issues of liberty and legitimacy in structural terms. He had little faith in legalistic guarantees—"parchment barriers" he dismissively called them.<sup>20</sup> Instead, he focused on such matters as institutional incentives, checks and balances, object lessons from the past, and scenarios of decay and abuse. His assumptions regarding how power would be exercised were pessimistic.<sup>21</sup> His deepest concern was with the tyranny of the majority.<sup>22</sup> He considered the abuse of power by majorities to be more likely to occur

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<sup>18</sup> *Id.* para. 11, at 34.

<sup>19</sup> *Id.* para. 4, at 31 (emphasis omitted).

<sup>20</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JAMES MADISON: WRITINGS, *supra* note 11, at 418, 420.

<sup>21</sup> In *Federalist No. 51*, Madison explains:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>22</sup> See Letter from James Madison to Thomas Jefferson, *supra* note 20, at 421.

the smaller the political community.<sup>23</sup> 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.

If we are to be guided by Madison in grappling with the voucher issue, we need to consider, under pessimistic assumptions, what would be the institutional consequences for religion and for governance of that proposed restructuring of educational financing. In contrast, the efforts of both voucher proponents and their adversaries to resolve the constitutional issue in peremptory fashion, without attending to difficult assessments of institutional dynamics, represent a distinctly un-Madisonian approach. With emphasis on institutional considerations, I will address each of the seven questions in turn.

First, does making religious schools an integral part of the public financing of education violate Madison's absolute principle that religion must be "wholly exempt" from the "cognizance" of the state?<sup>24</sup> If "cognizance" in this context means "knowledge," "awareness," "notice," or "acknowledgment,"<sup>25</sup> surely a voucher system takes such cognizance of religion. Just as surely, under that interpretation a no-cognizance principle is a practical impossibility in the modern welfare state, or for that matter even in the minimal state of Madison's day. This difficulty has led some to question the very principle of separation of church and state.<sup>26</sup>

Such an argument from impossibility vanquishes a straw man. "Cognizance," so the dictionary specifies, has an alternative meaning, and doubtless it is the one Madison employs: "responsibility," "jurisdiction."<sup>27</sup> In the first two paragraphs of the *Memorial and Remonstrance*, Madison develops the point, derived from Locke, that the civil magistrate has no responsibility whatsoever for the way each citizen understands and discharges his duty to the Creator.<sup>28</sup> This does not

<sup>23</sup> This claim, arguably Madison's most significant general observation about politics, is defended in detail in *Federalist No. 10*. See THE FEDERALIST NO. 10 (James Madison).

<sup>24</sup> MADISON, *supra* note 11, para. 1, at 30.

<sup>25</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 222 (10th ed. 2001).

<sup>26</sup> See, e.g., William D. (Bill) Graves, *Evolution, The Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U. L. REV. 513, 556-57 (2001).

<sup>27</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 25, at 222.

<sup>28</sup> As Madison wrote in *Memorial and Remonstrance*:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

MADISON, *supra* note 11, para. 1, at 30. Madison continued: "[I]f Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body." *Id.* para. 2, at 30. John Locke provided the classic defense of this proposition in his 1689 *Letter Concerning Toleration*. For a good edition of the *Letter*, with extensive commen-



mean that the state must take no account of the religious beliefs and practices of its citizens, only that it has no authority to attempt to influence, facilitate, or promote those beliefs and practices. That responsibility belongs exclusively to the individual believer and the voluntary associations he forms.<sup>29</sup>

The General Assessment violated this injunction, Madison concluded, because by its very logic it sought to encourage the people of Virginia to embrace certain religious tenets as taught by religious authorities. True, the ultimate objective of the bill, at least on the face of it, was public morality, not salvation.<sup>30</sup> Religious belief was seen as a means to that civic good. Moreover, no taxpayer was coerced to believe anything or to support any religious practice—recall the opt-out provision whereby one's tax could be directed to the general school fund.<sup>31</sup> Nevertheless, had the General Assessment passed, the state would have embraced a strategy that gave it a stake in the religious beliefs of its citizenry. The state's purpose—whether intermediate or ultimate does not matter—was to stimulate religious belief. That, in Madison's view, is a form of taking cognizance of religion in the sense of taking responsibility for it. The magistrate, under Madison's principle of separation, has no such jurisdiction.

Does a voucher system likewise place the state in the position of taking responsibility for the religious beliefs of its citizens? I think not. There are secular educational objectives served by a voucher system that are not bound up with the religious beliefs of its participants. Even when those secular educational benefits are delivered by religious authority figures, acting out of religious motives and functioning in a "pervasively sectarian" environment, the state has not adopted an educational strategy that gives it a stake in the religious beliefs of its citizens. Were religious devotion to wane as a general matter, or were different theologies to flourish among the populace, the secular educational project need not suffer, just as the civic purposes served by an art museum that displays religious paintings do not depend to any significant degree on the religious beliefs of the patrons who view the art. That could not be said about the General Assessment.

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tary, see JOHN LOCKE, *A LETTER CONCERNING TOLERATION IN FOCUS* (John Horton & Susan Mendus eds., 1991).

<sup>29</sup> See BUCKLEY, *supra* note 2, at 135.

<sup>30</sup> The preamble to the General Assessment began: "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society . . ." *Id.* at 188.

<sup>31</sup> The proposed General Assessment provided that when a taxpayer failed to specify a Christian denomination to receive his tax payment, "the Sheriff shall pay the amount thereof . . . into the Public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." *Id.* at 189.

In this respect, a voucher system differs not only from the General Assessment, but also from the dubious practices, justified in the name of so-called civil religion, whereby public institutions invoke assertedly ecumenical (though almost invariably theistic) religious rituals, symbols, and precepts to solemnize civic endeavors. Prayer in public schools is, of course, the most salient example.<sup>32</sup> Whatever the value of such efforts to set the civic tone, they are more efficacious the more citizens hold the beliefs that are invoked. That puts government in the position of taking cognizance of religion, and Madison would have none of it, as his opposition to legislative chaplains and thanksgiving proclamations attests.<sup>33</sup>

This distinction helps to explain how Madison, a realist in politics, could have insisted that the state cannot require a citizen to “contribute three pence only of his property”<sup>34</sup> 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 spacial separation. Viewed in this light, his unqualified injunction against the state taking cognizance of religion seems to me not to be violated by a voucher system.

The second question about vouchers that derives from the *Memorial and Remonstrance* concerns the role of exclusivity and favoritism in Madison’s conception of establishment. Can an arrangement that employs no religious criteria for eligibility, and in other respects exhibits no preference among religious beliefs, ever be an establishment of religion as Madison used the term? The General Assessment provided only for allotments authorized by individual taxpayers to *Christian* denominations. No provision allowed the Jews, Muslims, and atheists of the Commonwealth to direct their taxes to the teachers of their beliefs. The best they could do was to specify that their taxes go to a common school fund. In the *Memorial and Remonstrance*, Madison describes the General Assessment as an establishment of Christianity and warns that it could lead to a narrower establishment of particular

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<sup>32</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316–17 (2000); *Engel v. Vitale*, 370 U.S. 421, 436 (1962).

<sup>33</sup> See James Madison, *Detached Memoranda*, in JAMES MADISON ON RELIGIOUS LIBERTY 89, 91–93 (Robert S. Alley ed., 1985).

<sup>34</sup> MADISON, *supra* note 11, para. 3, at 31.

Christian sects.<sup>35</sup> Would a more inclusive scheme such as the prototypical voucher plan fall outside his conception of establishment?

The answer is: not necessarily. We ought not to assume that Madison considered the General Assessment's denial of access to public funding to non-Christian denominations to be the fatal defect. Most of the arguments he mounted against the proposal take the form of claims relating to undesirable incentives and consequences. Many of those arguments, which I will canvass shortly, would impeach a subsidy that supported all religions without limitation. At no juncture in his sustained campaign against the General Assessment did he so much as imply that the proper remedy might be a broadening of the class of beneficiaries.<sup>36</sup> Indeed, at one stage of the legislative process the bill actually included non-Christian religions in its coverage, and Madison worked tirelessly to defeat it at every stage. For Madison, the concept of establishment referred to structural relationships that, under pessimistic assumptions, threaten to corrupt the state, religious institutions, or both. There is no reason to think that he thought those risks were confined to non-inclusive arrangements.<sup>37</sup> A school voucher program may not amount to an establishment of religion in Madisonian terms, but the fact that such a program is not confined to religious schools and is administered without religious favoritism by no means proves the point.

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<sup>35</sup> See *id.*

<sup>36</sup> In a letter to Madison written during the initial debate in the Virginia Assembly, Richard Henry Lee expressed his support for the General Assessment but added, "I fully agree with the presbyterians, that true freedom embraces the Mahomitan and the Gentoo as well as the [Christian] religion and upon this liberal ground I hope our Assembly will conduct themselves." Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), in 2 THE LETTERS OF RICHARD HENRY LEE 304, 304-05 (James Curtis Ballagh ed., 1914). Madison never answered Lee on this point. Two weeks earlier Madison had written to James Monroe explaining that "[i]n its present form [the General Assessment] excludes all but [Christian] Sects. The Presbyterian Clergy have remonstrated [against] any narrow principles, but indirectly favor a more comprehensive establish[ment]." Letter from James Madison to James Monroe (Nov. 14, 1784), in 2 THE WRITINGS OF JAMES MADISON 89, 90 (Gaillard Hunt ed., 1901). Madison predicted to Monroe that "the bottom will be enlarged [and] that a trial will be made of the practicability of the project." *Id.* Notice that Madison characterized even the scheme that would include non-Christian religions as an establishment. See *id.* And despite his prediction that the proposal would be broadened to include other religions, Madison marshalled all his tactical skill to prevent the Bill's consideration in the 1784 session so as to buy time to organize opposition to the General Assessment. See MILLER, *supra* note 4, at 33-34.

<sup>37</sup> See BUCKLEY, *supra* note 2, at 108. Buckley explained, "During the course of debate, the decision had been reached to liberalize the bill by dropping the word 'christian' and opening up the measure to any group which might consider itself a religion." *Id.* This decision was then reversed. Madison accused the proponent of the reversal, Benjamin Harrison, of "pathetic zeal." *Id.* There is no evidence, however, that Madison had withdrawn his fierce opposition to the bill during the period when it included non-Christians, just as there is no suggestion in his correspondence with James Monroe and Richard Henry Lee that the inclusion of non-Christians would alter his view that the General Assessment was an objectionable "establishment" of religion. See MADISON, *supra* note 11, para. 3, at 31.

If the first two questions, the conceptual queries, can be answered with considerable confidence with respect to educational vouchers, the remaining five, the inquiries indicated by the *Memorial and Remonstrance* relating to structural incentives and practical consequences, cannot. To these I now turn.

The third question is whether a voucher system amounts to an effort to employ religion as an engine of civil policy. Madison objected to the General Assessment on this ground. He characterized the strategy as “an unhallowed perversion of the means of salvation.”<sup>38</sup> Would a voucher system that included parochial schools run the risk of perverting the means of salvation to serve civil objectives?

One cannot help but be struck by the concern for the purity and integrity of religion—notice the key term “unhallowed”—that resonates in Madison’s protest. He believed that the ambitions of civil rulers pose a constant threat to religion, even when those ambitions manifest themselves in schemes of co-optation rather than persecution.<sup>39</sup> In the context of the General Assessment, his 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. At the time, the smaller evangelical denominations whose political energy Madison enlisted—particularly the Baptists, but others as well—thought that a financially secure clergy led to uninspired preaching and insufficient zeal, if not outright corruption. These were traits they ascribed to the established Anglican preachers of the colonial period. Had the General Assessment passed, it would have been all the more difficult for the evangelical congregations to keep their ministers on a short leash, something they fervently desired to do.<sup>40</sup>

As a general matter, the “means of salvation”—to wit, religious teachings and obligations—cannot help but lose some of their sacred authority when they are employed for reasons other than the purely spiritual. Even in the unlikely event that points of doctrinal refinement and emphasis do not change when civil objectives enter the mix,

<sup>38</sup> MADISON, *supra* note 11, para. 5, at 32.

<sup>39</sup> Madison observes that “ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.” *Id.* para. 7, at 32. Locke makes the same point repeatedly:

[W]e must acknowledge that the church . . . is for the most part more apt to be influenced by the court, than the court by the church. How the church was under the vicissitude of orthodox and Arian emperors is very well known. Or if those things be too remote, our modern English history affords us fresher examples, in the reigns of Henry VIII, Edward VI, Mary, and Elizabeth, how easily and smoothly the clergy changed their decrees, their articles of faith, their form of worship, every thing, according to the inclination of those kings and queens.

LOCKE, *supra* note 28, at 31.

<sup>40</sup> See BUCKLEY, *supra* note 2, at 178.

the justifications and reasons for obedience do. Moreover, as Alexis de Tocqueville, an avid student of Madison, later observed, when religion becomes a tool of state policy, the rivalries, resentments, and suspicions of civic life tend to be turned back on the religions themselves, to the great detriment of religious authority.<sup>41</sup>

These are important considerations, however subtle and speculative they may be. At least Madison thought so. But how do they bear on the issue of vouchers?

The first point to notice is that the problem of unhallowed perversion does not disappear simply because the employment of religion as an engine of civil policy occurs pursuant to the intervening private choices of parents who opt to send their children to religious schools. Whatever the mechanism that gives shape to the arrangement, we still must ask whether religious teachings or authorities are being used to serve civil objectives in a manner that cheapens those teachings or diminishes those authorities.

Should we be concerned that the phenomenon of religious teachers being, in a manner of speaking, on the public payroll might impeach their spiritual authority? That the payroll in question is distributed according to parental choice rather than official discretion does not eliminate its public character, given its provenance in taxation. As with the General Assessment, one might worry that the financial incentives and perceptions introduced by public funding might alter the character of the religious calling, and thereby perhaps the spiritual authority of those who teach in the name of religion. To Madison, that would be no small matter.

As always, it is the *incremental* consequences that must be assessed. Religious authority no doubt is threatened by many of the conditions and arrangements of modern life, but the incremental contribution of a voucher system to the diminution of religious authority may not be significant. For years, religious schools, like their secular counterparts, have sought state accreditation in order to satisfy compulsory education laws and fulfill prerequisites for higher education and employment. In that respect, such schools function as agents of the state and their students see themselves as pursuing state-sanctioned credentials as well as religious truth. I fail to perceive how the introduction of public funding exacerbates the diminution of religious authority that already occurs in the regulatory state.

An opponent of vouchers might contend that Madison's notion of "unhallowed perversion of the means of salvation" is not fully cap-

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<sup>41</sup> ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 311-12 (Phillips Bradley ed., Vintage Books 1990) (1945). On Tocqueville's study of Madison, see Bernard E. Brown, *Tocqueville and Publius*, in *RECONSIDERING TOCQUEVILLE'S DEMOCRACY IN AMERICA* 43 (Abraham S. Eisenstadt ed., 1988).

tured by this inquiry into diminished authority. In this view, Madison's basic point is that it is wrong in principle—sacrilegious really—to employ religion for worldly purposes. The objection to “unhallowed perversion” is not dependent on a claim about specific consequences; it is more fundamental than that.

This line of argument accurately describes Madison's view of perversion but fails to explain how a school voucher program amounts to such a perversion. Unless the *means of salvation* are used to pursue the end of civil education, Madison's concern is not activated. This “wrong-in-principle” notion would prove too much if every form of involvement of religious institutions in the multifarious endeavors of the welfare state were characterized as employing, and thereby risking the perversion of, the means of salvation. In one sense, of course, that would be a plausible characterization: a religious institution inevitably draws on its spiritual resources to some degree to effectuate any project it undertakes. But if the means of salvation are not invoked explicitly or otherwise assume prominence in the specific enterprise narrowly defined, the enlistment of the religious institution in the civil project should not be regarded in itself as a perversion of those means. The very fact that students in religious schools have all sorts of non-religious reasons to obtain secular knowledge and training in addition to religious instruction indicates that the means of salvation need not be perversely exploited whenever a religious institution undertakes to serve the state's mundane educational objectives. Even the omnipresence of spiritual reference in some pervasively sectarian schools that might participate in a voucher program would fall short of the perversion represented by the General Assessment: clergy paid to employ scripture to teach the state's moral message.

If vouchers do not amount to an unhallowed perversion of the means of salvation, are they nevertheless problematic because they threaten to compromise the purity and efficacy of religion by placing religious institutions in a position of financial dependency on the state, or on the state-created market? This is the fourth question on my list of seven.

Madison's discussion of the General Assessment is explicit, in fact strident, about how the experience of financial establishment corrupts religious institutions. He enumerates what he terms “the fruits” over fifteen centuries of such an arrangement: “[m]ore or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.”<sup>42</sup> He contrasts the Golden Age of Christianity, “in which its Teachers depended on the voluntary rewards of their flocks.”<sup>43</sup> We might be tempted to confine

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<sup>42</sup> MADISON, *supra* note 11, para. 7, at 32.

<sup>43</sup> *Id.* para. 7, at 33.

Madison's dependency critique to the historical practice of establishing a single religion and supporting it without regard to the wishes of the populace. But remember that he offered these observations about corruption while challenging a funding proposal that permitted each taxpayer to specify which denomination would receive his coerced contribution and allowed him to direct his tax payment away from all religions to the common school fund. Madison's concern in this passage is not preference, but rather corrupting dependency.

It is not difficult to imagine scenarios whereby the availability of vouchers could corrupt religious education. Participation in a voucher scheme might be conditioned on the willingness of participating schools to admit students without regard to their religious beliefs, to eschew religious tests in faculty hiring, and to refrain from requiring students to attend religious ceremonies or profess religious beliefs.<sup>44</sup> Any of these restrictions could change the character of the religious education offered. Apart from regulations of this sort, which might violate the Free Exercise Clause, market pressures introduced by a voucher scheme could create incentives for a religious school to modify its curriculum and general character in a more ecumenical direction so as to appeal to a broader range of voucher-wielding consumers. These and other such effects are far from implausible.

We might think that an Enlightenment figure like Madison could only applaud such a softening of sectarian parochialism. Not so, in my opinion. Whatever his own beliefs—and they have remained something of a mystery to his many biographers<sup>45</sup>—Madison was impressed by the value of religious pluralism. He took from his epic battle to defeat the General Assessment the lesson that a free government depends, as he put it in *Federalist No. 51*, on the flourishing of a “multiplicity of sects” no less than a “multiplicity of interests.”<sup>46</sup> He

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<sup>44</sup> Under the Milwaukee voucher program upheld in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), participating private schools were required to select students “on a random basis . . . except that they may give preference to siblings already accepted in the school.” *Id.* at 617. Moreover, “the private schools cannot require the students participating in the program to participate in any religious activity provided at that school.” *Id.* The Cleveland voucher program invalidated in *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001), provided that participating schools “are required to follow the program’s priority rules regarding the placement of students and may not discriminate on the basis of race, religion, or ethnic background; advocate or foster unlawful behavior; or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” *Id.* at 948–49. Sectarian schools participating in the program were permitted, however, to require “mandated participation in religious services.” *Id.* at 949.

<sup>45</sup> Cf. Ralph L. Ketcham, *James Madison and Religion*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 33, at 175, 175 (“A serious effort to discover the reality of Madison’s relationship to religion quickly runs afoul of his effective efforts to obscure this aspect of his life.”).

<sup>46</sup> THE FEDERALIST NO. 51, *supra* note 21, at 324. The thesis that Madison’s successful struggle to defeat the General Assessment, made possible by the fears and consequent

was acutely aware that his legislative triumph owed much to the sectarian fears and resentments of the more evangelical denominations. A few years later, Madison won a hard-fought and close victory over his friend James Monroe for the seat from the Virginia Piedmont in the First Congress. That political outcome, without which we would not have the First Amendment as we know it, was made possible by the strong support Madison once again received from the evangelicals.<sup>47</sup> For personal as well as philosophical reasons, he looked kindly on religious enthusiasm, including—indeed, especially—politically mobilized religion with an edge.

Some might argue that even if the financial temptations of a voucher system could corrupt religious education, the religions themselves should be free to decide where in lies the road to perdition. Religions eager to enjoy the benefits of access to the public fisc, as many are today, have the greatest stake in safeguarding their own purity and integrity. If vouchers really do threaten to cause a religious dumbing down, so to speak, these denominations need not take the bait.

There is something to this anti-paternalism point, but it should not be considered conclusive. The General Assessment did not require any denomination to receive public funds, but that did not assuage Madison's dependency concerns. He did not, and we should not, assume that the religious leaders likely to be tempted and corrupted by public funding are the exclusive custodians of the religious traditions they represent. In Madison's day, disputes over church-state relations were heavily bound up with struggles for influence *within* the various religions.<sup>48</sup> As mentioned earlier, probably the fiercest opposition to the General Assessment came from devout congregants fearful of clerical financial independence.<sup>49</sup> Such anti-clericalism seems anachronistic in the disputes of today, but intradenominational struggles over priorities certainly have not passed from the scene. The selective availability of public money can influence those struggles. Consider the possible impact of a voucher scheme on a denomination that historically has devoted its resources to missions aimed at the poor and not to sectarian education. Imagine the dynamics if, under a voucher system, the leaders of the religion feel pressured to invest in sectarian education simply to keep up with rival denominations that are successfully recruiting and then proselytizing voucher students. Apart from that kind of scenario, we might fear that a voucher system would induce religions to entrust

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political mobilization of a multiplicity of sects, informed the positions he expounded in the Philadelphia Convention and *The Federalist*, is advanced in LANCE BANNING, *THE SACRED FIRE OF LIBERTY* 76–107 (1995).

<sup>47</sup> See BRANT, *supra* note 9, at 223–24.

<sup>48</sup> See BUCKLEY, *supra* note 2, at 119–127, 178.

<sup>49</sup> See *id.* at 178.



their educational programs not to the most devoted and skilled teachers of the faith, but to persons who possess the entrepreneurial talents necessary for success in the competition for students. That might be considered a form of corruption that is none the less so for having been freely chosen, under the circumstances, by the proper religious authorities.

The anti-paternalism objection is not dispositive, but other objections might be. Notions of corruption, distortion, enervation, even compromise are meaningless in the absence of a baseline. We can say with some confidence that a school voucher program will affect religious priorities and practices. Not so obvious, however, is whether those effects overall will be detrimental to the particular religions that participate. Dependency on public resources is a dangerous condition for religion, to be sure, but so is the condition of competing in the educational marketplace with the well-financed institutions—and some would say the religiously subversive orthodoxies—of the modern welfare state. Even in the absence of vouchers, sectarian schools that are supported wholly out of tuition payments and voluntary contributions have financial incentives to recast their offerings to recruit students, in some settings in the direction of a demanding and strongly parochial religious curriculum, in other settings the reverse. Such schools and the denominations from which they spring may also be tempted to place religious entrepreneurs at the helm.

There is much more to be said on this point, but for now I conclude with some misgiving that although the possible corrupting effects on religion of a voucher system are serious, they are not so clear or pronounced that Madison's warnings about the dangers of dependency should be considered telling against the arrangement. Nevertheless, an observer who would learn from Madison ought to place far more emphasis on these risks of dependency than has occurred to date in the voucher debate.

So far I have discussed only the costs of financial dependency to the religious mission. There is another cost flowing from the reliance of religious institutions on public funding that concerned Madison greatly. This is the possibility that religions entangled in a fiscal embrace with government will cease to function as uninhibited critics of the hand that feeds them. The fifth of my seven questions addresses this danger.

In the *Memorial and Remonstrance*, Madison has this to say about established religions: "in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people."<sup>50</sup> In contrast, con-

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<sup>50</sup> MADISON, *supra* note 11, para. 8, at 33.

sider the role that religions not dependent on government funding have played throughout American history, most recently in the civil rights, antiwar, and anti-abortion movements. The *Federalist Papers* and his other essays on government make clear that Madison saw religion as a crucial oppositional force in politics and a vital check on the tyranny of the majority, but only when its role is properly structured to prevent it from serving instead as an instrument of popular tyranny.<sup>51</sup>

So the question is: how likely is it that a religion that comes to depend on the tax-generated revenues available to it in a voucher system will, on that account, desist from challenging, or tone down its criticisms of, the government that redeems its vouchers. To answer this question, we must focus on the incremental chilling effect, if any, of a voucher program. For many years now, religious organizations have received substantial subsidies, including property tax exemptions and grants for a wide variety of endeavors such as medical research, higher education, hospital and nursing home care, and poor relief.<sup>52</sup> Moreover, many religious organizations contract with government to provide social services.<sup>53</sup> Public officials incensed by criticism from religious leaders seldom lack for levers of financial or regulatory retaliation.

On the other hand, the sheer magnitude of the funding involved in at least some proposed voucher programs might raise distinctive problems of financially motivated political reticence or sycophancy on the part of church leaders. And even if a voucher system could be structured to make it almost impossible for a religious institution to suffer targeted retaliation, contingent general policies relating to funding levels and conditions on participation could be so important to a religion that it might hesitate to make enemies in high political places.

In my judgment, the key factor that is likely to determine the effect of a voucher system on political criticism is whether a significant number and variety of private schools, including religious schools, prove to be viable under the arrangement. If so, general policies of voucher administration will have a broad impact on a variety of constituencies. As a result, the manipulation of those policies to punish critics of government ought to encounter significant resistance. Madison's strategy of relying on a multiplicity of interests and a multiplicity of sects could well have contemporary purchase in this context.

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<sup>51</sup> See, e.g., THE FEDERALIST NO. 51 (James Madison); Letter from James Madison to Thomas Jefferson, *supra* note 20, at 420–21.

<sup>52</sup> See Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 380 (1999).

<sup>53</sup> See *id.* at 375.

But how likely is it that a voucher system will generate a multiplicity of private schools? Surely that is the goal of many proponents. Much will depend on the local circumstances. In some places we can expect numerous educational experiments, at least in the short run. In other locales, very few if any private schools will operate. In terms of protecting political critics, there is much to be said for instituting a voucher system on a statewide basis, thereby increasing the number and variety of participants. Recall Madison's argument in *Federalist No. 10* that the size of the political community is crucially important to the preservation of liberty.<sup>54</sup>

On balance, I do not find convincing the objection that a well-designed voucher program is likely to cause religions to forfeit their political independence. One can even imagine that if the reform works as its proponents hope, more students will be educated out from under the civic orthodoxies taught in the public schools. Upon entering the political sphere, such students ought on that account to be less inclined to accept the policies that reflect those orthodoxies. Deweyites might shudder but Madisonians should rejoice.

This prospect of the waning of the common school, which may or may not occur under a voucher system, suggests the importance of the sixth question on my list, relating to political strife.

Madison objected to the General Assessment in significant part because he thought such public funding of religion would "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects."<sup>55</sup> The very appearance of the proposal, he asserted, "has transformed that Christian forbearance, love and charity, which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased."<sup>56</sup> Madison called the General Assessment "this enemy to the public quiet."<sup>57</sup> Would the publicly funded balkanization of primary and secondary education have this result?

I can think of three major sources of political discord that a voucher program might introduce. First, some taxpayers will resent seeing even a symbolic portion of their tax contribution go to the teaching of religious tenets they reject. Second, some religions, for example those that already heavily invest in education, inevitably will benefit more from a voucher system than others. The jealousies to which Madison alluded in the *Memorial and Remonstrance* were due largely to the fact that the smaller, proselytizing religions saw the General Assessment, which provided that public funds could be spent only

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<sup>54</sup> See THE FEDERALIST NO. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961).

<sup>55</sup> MADISON, *supra* note 11, para. 11, at 34.

<sup>56</sup> *Id.* (internal quotation marks omitted).

<sup>57</sup> *Id.*

on salaries for clergy and church buildings, as a bailout of the Episcopal Church, with its peculiar problems of clergy recruitment and building damage and its lack of emphasis on proselytizing.<sup>58</sup> One can imagine similar suspicions of favoritism attending decisions regarding the specific design and implementation of a voucher system. Third, a population increasingly educated in enclaves of religious homogeneity may, by virtue of reduced exposure to persons who think differently, exhibit more of the inbred animosities that so concerned Madison. Even if a high degree of civic common ground is now beyond our reach and perhaps undesirable in any event, some capacity in the populace to compromise and to accept political defeats is indispensable. Too much religious parochialism may reduce that capacity, at least when it is not leavened by sustained experiences of personal interaction beyond the confines of the faith.

Each of these threats to moderation and harmony strikes me as real even if difficult to estimate. Much would seem to turn on what kind of voucher plan is implemented. For example, it might be possible to permit a taxpayer to check a box on her return specifying that her tax allotment can only go to support the public schools. That all of us see our taxes put to uses to which we object does not justify ignoring the distinctive political strains that are introduced when religious sensitivities are added to the equation. In deciding upon the amount of the voucher payment and the regulatory strings that go with it, we must take great care to minimize the risk of differential denominational impact. This priority counsels against restrictions on religious criteria for student admissions and faculty hiring. Voucher schools should also be permitted, if they so choose, to require all students to participate in worship services.

Intelligent design can counteract some of the sources of discord that vouchers might introduce, but can do little, I am afraid, to mitigate the religious enclave problem. Educational enclaves are not good for the democratic process, but I fear that as a society we have already traveled rather far down that path. Nevertheless, a voucher system would almost certainly exacerbate the phenomenon of religious clustering.

In evaluating the probable impact of vouchers on political good will, we must not assume that all is rosy with the status quo. Parents who pay both school taxes and private tuition feel imposed upon. Bitter struggles over what is taught in the public schools often divide parents along religious lines.<sup>59</sup> The mushrooming phenomenon of homeschooling constitutes, for most parents who undertake it, a spe-

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<sup>58</sup> See BUCKLEY, *supra* note 2, at 175–76.

<sup>59</sup> See, e.g., STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993).

cies of civic alienation. Vouchers cannot eliminate these tensions and antipathies, but they might reduce some of the pressure.

My bottom line on this point is tentative and tortured. The stakes here, at least to a Madisonian, are high indeed. That may counsel risk aversion, but I think we run risks by leaving undisturbed the current pre-voucher pattern of escalating, self-righteous, and often ill-tempered sectarian involvement in the politics of public education, followed by bigoted and paranoid reaction to that phenomenon. On balance, the priority Madison attached to preserving a spirit of moderation and harmony in political life does not, I conclude, provide a sufficient reason to consider a voucher system an imprudent or unconstitutional mixing of religious and civil institutions.

The seventh and final Madisonian question concerns the principle of equality. There can be no dispute that considerations of equal treatment lay at the core of Madison's conception of religious liberty, both his aversion to any form of religious establishment and his emphasis on the notion of "free exercise." His debut in prominent political debate came in 1776 when as a twenty-five-year-old delegate to the Virginia Constitutional Convention he succeeded in altering the wording of the proposed guarantee of religious freedom. In preference to the traditional Lockean argot of "toleration" submitted by no less a figure than George Mason, Madison persuaded the convention to adopt his own more robust and egalitarian formulation: "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."<sup>60</sup> No fewer than five of the fifteen paragraphs of the *Memorial and Remonstrance* make explicit appeals to equality.<sup>61</sup> Several others invoke notions of natural right and the rule of law<sup>62</sup> that for Madison and his intellectual milieu were bound up with egalitarian premises: equally the creatures of God, entering civil society on equal terms, equality before the law, and the like. Madison objected to the General Assessment in no small part because he did not believe it treated the citizens of Virginia equally in the free exercise of their religion. Undoubtedly, moreover, these considerations of unequal treatment were a dominant factor in the resounding political defeat of the General Assessment that he engineered.<sup>63</sup>

Given the relative inclusiveness of the proposed scheme for funding churches and clergy, not to mention the opt-out provision permitting taxpayers to direct their payments to the general education fund, one wonders exactly why Madison objected to the General Assessment

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<sup>60</sup> RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 72-73 (1971).

<sup>61</sup> See MADISON, *supra* note 11, paras. 4, 8-9, 14-15, at 31-36.

<sup>62</sup> See *id.* paras. 1, 2, 13, at 30-31, 35.

<sup>63</sup> See MILLER, *supra* note 4, at 38-41.

so fiercely on grounds of equality. What demanding conception of “equal title” or “equal rank of Citizens” did he employ?<sup>64</sup>

The narrowest answer to this question is the one Justice Clarence Thomas advanced in *Rosenberger v. University of Virginia*.<sup>65</sup> Madison considered the General Assessment to deny the equal right to free exercise because it would have excluded non-Christian religions from the funding program.<sup>66</sup> Although the General Assessment would not have required the small number of professed Jews, Muslims (mostly Turks), Deists, agnostics, and atheists of the Commonwealth to support religions in which they did not believe—they could have directed their taxes to the school fund—they could not have advanced the teachings of their creeds with the aid of the tax collector’s coercive authority. In that regard, the proposal disadvantaged them in comparison to their Christian counterparts.

As explained above, this interpretation of Madison’s objection to the General Assessment fails to account for the fact that he never urged a broadening of the coverage scheme and maintained his opposition even when the bill before the Assembly for a time did provide for the inclusion of non-Christian religions.<sup>67</sup> Of course, Madison considered the General Assessment even in its most inclusive form to be objectionable for reasons other than inequality, for example the dangers of dependency and the improper assumption of civil responsibility for religious flourishing.<sup>68</sup> That being the case, his equality-driven objections might have been confined to the possible impact on non-Christians.<sup>69</sup> However, in light of the context of religious disputation in which Madison expressed his equality concerns, far the better interpretation is that he perceived the General Assessment to deny citizens the “equal title to the free exercise of Religion”<sup>70</sup> because of its unequal treatment of and impact upon various Christian denominations.

On its face, the bill provided for special treatment of the Quakers and Menonists by exempting them from the restriction applied to all other denominations that funds provided by the government be used only for buildings and salaries for the clergy.<sup>71</sup> This exemption was perfectly logical because as a matter of theology the Quakers and Me-

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<sup>64</sup> MADISON, *supra* note 11, paras. 4, 9, at 31–32, 33–34.

<sup>65</sup> 515 U.S. 819 (1995).

<sup>66</sup> *See id.* at 853–56 (Thomas, J., concurring).

<sup>67</sup> In private correspondence with Madison several prominent Virginians expressed support for the General Assessment on the condition that it be expanded to include non-Christian religions. It is noteworthy that Madison apparently was unimpressed with this proposed solution. *See supra* notes 36–37 and accompanying text.

<sup>68</sup> *See supra* notes 28–31 and 42–43 and accompanying text.

<sup>69</sup> MADISON, *supra* note 11, para. 9, at 33.

<sup>70</sup> *Id.* para. 4, at 31 (emphasis omitted).

<sup>71</sup> *See* BUCKLEY, *supra* note 2, at 189.

nonists did not erect edifices for worship and did not have clergy.<sup>72</sup> Nevertheless, the exemption did permit them to use public funds to finance proselytizing efforts, an activity other denominations such as the Baptists and Presbyterians had emphasized in late-eighteenth-century Virginia.<sup>73</sup> In the *Memorial and Remonstrance*, Madison alluded specifically to this favorable treatment of Quakers and Menonists: "Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?"<sup>74</sup>

He also asserted that the General Assessment would subject some sects to "peculiar burdens."<sup>75</sup> He did not specify what those peculiar burdens might be or which sects would suffer them, but a good surmise is that he was referring to the burdens that would be borne by Christians who believed that only voluntary contributions engendered inspired preaching and manifested the proper devotion. Of course, under the General Assessment, congregants who wished to deny their clergy a secure public subsidy could always direct their taxes to the general school fund. But that decision, posted for public inspection in the local courthouse,<sup>76</sup> might arouse suspicions of impiety and in any event would leave less money available for voluntary support of one's church.

Madison's opposition to the General Assessment derived in part, it seems, from a concern about its unequal impact on different religions, calibrated in terms of specific practical burdens and benefits. In addition, he discerned a different kind of inequality in the proposal. He described the General Assessment as "a signal of persecution."<sup>77</sup> He argued that "[i]t degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."<sup>78</sup> He predicted that this illiberal signal would cause some Virginians to emigrate and would warn away other persons seeking a haven for the free exercise of religion.<sup>79</sup> This characterization seems overwrought, given the General Assessment's relative breadth, formal evenhandedness, respect for taxpayer choice, and opt-out provision for those who preferred not to support religious activities. What could Madison have been thinking?

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<sup>72</sup> See *id.* at 108 (discussing the bill's exception for Quakers and Mennonites because "these communities had no formal clergy").

<sup>73</sup> See ISAAC, *supra* note 1, at 161-77.

<sup>74</sup> MADISON, *supra* note 11, para. 4, at 32.

<sup>75</sup> *Id.* para. 4, at 31.

<sup>76</sup> See BUCKLEY, *supra* note 2, at 189. Curiously, this privacy-invading procedure, jarring to modern sensibilities, elicited no specific protest from Madison.

<sup>77</sup> MADISON, *supra* note 11, para. 9, at 33.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* paras. 9, 10, at 33-34.

Perhaps he thought that the failure of the proposal to include non-Christian religions would degrade the Commonwealth's few Jews and Muslims from "the equal rank of Citizens." That interpretation does not explain his reference to immigration and emigration, however, for non-Christians in eighteenth-century Virginia were demographically insignificant and certainly not the haven-seekers of the popular imagination. Rather, Madison believed that the General Assessment would degrade from "the equal rank of Citizens" certain Christians, namely those whose teachings and practices did not fit them so well to serve the state's project of civic moral instruction, those Christians perhaps who viewed such a commission as an "unhallowed perversion of the means of salvation."<sup>80</sup>

Are any of these various equality concerns present in the case of educational vouchers? There can be little doubt that some religions would benefit far more than others from the availability of public money to cover the general operating expenses of private education. One religion especially, the Roman Catholic Church, has developed over the years an extensive infrastructure for providing religious education and a culture that encourages members of its faith to seek such schooling.<sup>81</sup> Other religions have an educational infrastructure up and running, if on a smaller scale. During the last two decades there has been an upsurge in the number and variety of religions operating schools,<sup>82</sup> but there remain many faiths in many locales that do not do so. One would hope and expect that some religions previously unable to provide sectarian education would be financially empowered by a voucher system to undertake that ambitious project. Even so, under no imaginable scenario would an educational voucher program benefit religions equally, or in proportion to their memberships, or according to any other principle of equitable distribution. How much should this bother a Madisonian?

To answer that question, one needs to distinguish the problem of unequal material benefits and burdens from that of unequal civic status. On the dimension of material impact, it is wildly unrealistic, at least in the modern welfare state, to require all laws to distribute burdens and benefits equitably among religious faiths. Laws exempting conscientious objectors from military service, subsidizing hospitals and nursing homes, prohibiting the use of hallucinogenic drugs, restricting the alteration or destruction of architectural landmarks, offering tax deductions for charitable contributions, and exempting buildings used for religious purposes from property taxes all benefit or burden some faiths and their adherents much more than others.

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<sup>80</sup> *Id.* para. 5, at 32.

<sup>81</sup> See VITERITTI, *supra* note 14, at 82–86.

<sup>82</sup> See Lupu, *supra* note 52, at 391.



Madison was nothing if not a realist. Perhaps he would have objected in principle to the modern welfare state, in which case he probably has little to teach us concerning how to preserve religious freedom in such a state and how to prevent religious disagreements from disabling such a state. Or perhaps we should read him to employ a conception of equality less draconian than the proposition that all laws must benefit or burden all religions to a roughly equal degree.

One way to narrow Madison's equality principle is to link it more closely with the concept of "free exercise." Today we tend to look upon "equal protection" and "free exercise" as wholly separate notions, both fundamental to our constitutional structure but not conceptually integrated. That is not how Madison viewed the matter. He objected to the General Assessment in large part because he considered the inequality built into the arrangement to be not simply unfair but a threat to the capacity of the disfavored sects to practice their religion "according to the dictates of Conscience."<sup>83</sup> A crucial source of his 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.<sup>84</sup> That the unequal denominational impact in this respect was not due to a differential inscribed on the face of the statute, and could not be proved to be intended by the legislature—although the more evangelical sects had their suspicions<sup>85</sup>—did not forestall Madison's objection. With regard to burdens and benefits that implicate defining elements of a religious practice, his equality standard was indeed demanding. With regard to differential denominational impact more generally, Madison's argument in the *Memorial and Remonstrance* is either inapplicable or inconclusive.

Should we consider the differential denominational impact of educational vouchers to be a threat to the capacity of adherents of the disfavored faiths to engage in the free exercise of their religion? As discussed above,<sup>86</sup> some religions might experience pressure to get into the education business, if only to retain adherents tempted by the high-quality schools run by rival sects. Such a reluctant move would alter the priorities of a religion, but should we consider it an impairment of free exercise comparable to the practical inability to keep clergy dependent on voluntary contributions? Even without vouchers,

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<sup>83</sup> MADISON, *supra* note 11, para. 4, at 31.

<sup>84</sup> See Rhys Isaac, "The Rage of Malice of the Old Serpent Devil": *The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 139, 150-53* (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

<sup>85</sup> See THOMAS J. CURRY, *THE FIRST FREEDOMS* 157 (1986).

<sup>86</sup> See *supra* text following note 49.

religions that operate good schools exert competitive pressure on rival faiths, particularly in areas where the public schools are mediocre.

To my mind, the consideration that looms the largest in grappling with this difficult question of differential impact on the free exercise of religion is the effect already exerted by the massive public investment in elementary and secondary education. Unlike the situation when Madison opposed the General Assessment, today there is no such thing as the exercise of religion free from the distorting impact of state policy, certainly not as concerns education. Thousands, perhaps millions, of parents who otherwise would send their children to religious schools do not do so because they cannot afford the tuition on top of the school millage assessments they pay, or because the alternative of a secular education is so much more economical. Moreover, the expense of operating religious schools is made greater by the intervention of the state, both by regulations that can impose significant costs and by competitive pressure to invest in expensive facilities and extracurricular activities. This pattern of educational choice has consequences for the free exercise of religion. In Madison's day, religions transmitted their traditions and teachings in major part through the process of providing general education. Madison himself was educated by clerical tutors and professors of theology.<sup>87</sup> If today financial incentives generated by civil policy induce large numbers of citizens to decouple education from religion, their free exercise of religion is impaired, more so than is the case with the other examples listed above<sup>88</sup> of laws and public expenditures that have a differential denominational impact.

This argument may prove too much. If absent a voucher program the operation of an ambitious tax-financed system of public education burdens the free exercise of religion, perhaps the *failure* to enact a voucher system violates Madison's conception of religious liberty. It would be unimaginable for a court to hold that all states or school districts are constitutionally required to adopt a voucher program or an equivalent mechanism for reducing the competitive and regulatory burdens experienced by religious schools. Of course, in the *Memorial and Remonstrance* 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.<sup>89</sup> Part of the reason we might properly scoff at the claim that the First Amendment requires educational vouchers is that such a comprehen-

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<sup>87</sup> See KETCHAM, *supra* note 60, at 17–21, 32, 38.

<sup>88</sup> See *supra* text following note 82.

<sup>89</sup> He did, however, invoke fundamental principles of political status and structure and he surely believed that the General Assessment violated the religious liberty article of the 1776 Virginia Constitution. See Letter from James Madison to Thomas Jefferson, *supra* note 20, at 419–21.

sive fiscal restructuring seems quite beyond the judicial commission. To argue in a legislative forum that due regard for the constitutional principle of free exercise of religion requires a major alteration of current practices of educational financing is not nearly so far-fetched.

At a minimum, the adverse impact on free exercise caused by the preexisting competitive, fiscal, and regulatory practices of the state, an impact that burdens some religions and their adherents far more than others, can be a consideration to be balanced against the differential denominational burdens and benefits of vouchers. No system of educational financing can avoid this problem of enhancing the free exercise of religion by some while diminishing the free exercise of others. Although no Madisonian should treat these differential effects as inconsequential, and although a legislature should make every effort in the design of a voucher program to reduce or cushion them, as a general matter there is no good reason to consider well-conceived and administered voucher systems more problematic in this respect than the systems they would replace.

One must be careful not to inflate the argument just sketched beyond its equality-driven bounds. Were it not for the pressures on the free exercise of religion created by the system of public education, any effort by the state to make religious education financially feasible would be deeply antithetical to Madison's conception of church-state relations. For as much as he respected the need of persons and groups to be free to practice their religion according to the dictates of conscience, he did not believe it is the role of civil authorities and institutions to encourage or facilitate that practice. The role of the state, in his conception, is to stay out of the way. The modern system of public education, by virtue of the incentives it provides and the costs it imposes, does not satisfy that injunction. A voucher system that facilitates religious education can be justified in Madisonian terms only to the degree that it neutralizes the distorting pressure previously created by the intervention of the state in education.

Madison was concerned about differential denominational impact in practical terms, but also, and perhaps more so, in terms of the principle of equal civic status. Would a voucher system "degrade[ ] from the equal rank of Citizens"<sup>90</sup> those persons whose religions do not participate in the expanded civil project of publicly financed education for (almost) all? Would the religions that play the largest role in serving the state's educational purposes achieve over time an informal civic preeminence? Madison's opposition to the General Assessment derived from his belief that any structural interdependence between church and state would over time generate corrosive dispari-

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<sup>90</sup> MADISON, *supra* note 11, para. 9, at 33.

ties of civic status. In the case of the effort in post-war Virginia to teach public morals, some theologies were no doubt better suited for the task than others, a point not likely to have been lost on state and local officials.

To examine this dimension of Madison's equality norm as it relates to vouchers, we must again be careful to focus on the incremental consequences. Already some religions serve the purposes and projects of the state far better than others. In the realm of education, many public school districts are utterly dependent on the willingness and capability of certain local religious institutions to teach large numbers of students; these districts would be overwhelmed, at least in the short run, were the religious schools to close. That under pre-voucher arrangements the state has not enlisted the religious institutions in quite the same way that voucher financing would entail does not mean that adherents to the assisting religions do not enjoy enhanced civic status. The same holds true outside the educational domain: some religions are more useful to the state than others in caring for the poor and the sick, providing disaster relief, and counseling children at risk. Despite the egalitarian rhetoric of our constitutional tradition, the fact is that some religions enjoy greater civic status than others. Probably that will always be true, unless of course civic status were deemed to be solely a function of formal treatment rather than informal respect and access, in which case a comprehensive voucher system would be unproblematic.

An educational voucher system would represent an unprecedented level of institutionalization of the financial interdependence of church and state. That in itself might be troubling. However, in terms of the risk of degrading the civic status of adherents to religions that do not well serve the purposes of the state, one might think that such institutionalization would be a positive development. Perhaps it is mostly in the unstructured, low-visibility, discretionary instances of cooperation that civic favoritism flourishes. That the distribution of government largesse among eligible recipients is controlled in a voucher system by the choices of parents rather than the decisions of government officials counts in favor of the arrangement so far as the impact on civic status is concerned. That a voucher system would increase the number and variety of sects receiving public funds is also salutary. These can be important considerations but they do not completely put to rest the problem of unequal civic status. A Madisonian sensitive to the historical role that religious affiliation has played in determining civic status should consider any large-scale institutionalization of the civic participation of religion to be dangerous, even if not dispositive against the arrangement.

I realize that I have not been able to answer these last five Madisonian questions relating to incentives and consequences in anything like a definitive fashion. Another person as steeped in Madison's ideas as I have been recently could well decide, contrary to my judgments, that a voucher system that included parochial schools would cheapen religious authority, create a corrupting dependency, silence potential critics of government, introduce new sources of civic discord, and violate fundamental equality norms relating to the free exercise of religion. Moreover, certain local conditions might so alter the balance of considerations canvassed above as to make educational vouchers in that setting inconsistent with Madison's conception of religious liberty under almost any plausible understanding of his thought. One such instance would be if a voucher system resulted in so many students in a school district choosing a particular religious school that it became the only local educational institution, public or private, able to provide a decent education. In that event, parents would be all but required to send their children to the religious school, however much they objected to the sectarian content of the curriculum. A closer but nonetheless problematic case would be if the pattern of choices resulted in a variety of religious schools but no viable secular schools, public or private.<sup>91</sup>

Perhaps the difficulty of these questions proves that we—and Madison—cannot have it both ways: a multiplicity of politically mobilized but nevertheless distinctive and uncorrupted religious sects that serve as a check on government, combined with a politics of civility, moderation, mutual respect, equal civic status, and significant common ground. At times I wonder. But most of the time I take solace and inspiration from Madison's example of confronting head-on, and despite the uncertainties answering as best he could, the most challenging questions of political institutional design, not least those that concern the eternally vexed relationship of church and state. Madison's philosophy of church-state relations cannot decide for us the constitutionality of school vouchers. But his *Memorial and Remonstrance* at least should convince us that we cannot resolve this momentous issue in peremptory fashion by giving controlling weight to the features of inclusiveness and parental choice (to uphold a voucher

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<sup>91</sup> Some proponents of vouchers might argue that this type of burden is simply the converse of the burden borne by parents who object to the secular content of the public school curriculum (or the curriculum of the secular private school offering the only decent education in town) in locales where the alternative of a religious education is not viable absent vouchers. The burdens would be symmetrical if, under the condition of no viable religious schools, the public or secular private schools were teaching atheism or agnosticism as dogma. The burdens are not symmetrical when children of faith are required to endure the absence of religion from the curriculum, even if that absence might reasonably be perceived by them or their parents to imply certain views in tension with their religious beliefs.

scheme) or the direct subsidization of purely sectarian teaching (to strike it down). If Madison's thought can take us beyond such reductionism, it will have served us well.

## APPENDIX A: MEMORIAL AND REMONSTRANCE††

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "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." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires

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†† Source: JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 29 (Jack N. Rakove ed., 1999).

not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.

3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that 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? 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?

4. Because the Bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to be-



lieve that they either covet pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the measure.

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended on the voluntary rewards of their flocks, many of them predict its downfall. On which Side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? What influence in fact have ecclesiastical establishments had

on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.

10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning

be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed "that Christian forbearance, love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

12. Because the policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens, and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights

which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration. We the Subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.

## APPENDIX B: GENERAL ASSESSMENT†††

WHEREAS the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, That for the support of Christian teachers,        per centum on the amount, or in the pound on the amount, or        in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the        day of        in every year, return to the Court upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; and the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting a five per centum for the collection, shall forthwith pay to such persons or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their

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††† *Source:* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 188 (1977).

executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale, for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

And be it further enacted, That the money to be raised by virtue of this act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the Public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.