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Mis-under-standing Freedom From Religion: Two Cents on Madison's Three Pence

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cases only, a dramatic exception to a bedrock principle of standing doctrine, based on one catchy phrase from a famous historical document—James Madison’s 1785 Memorial and Remonstrance Against Religious Assessments.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

INTRODUCTION

I. TAXPAYER STANDING: FROM FLAST TO HEIN
II. FLAST AND STANDING PRECEDENTS
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CONCLUDING REFLECTIONS: A HISTORY OF A BAD INVESTMENT

Introduction
In Hein v. Freedom From Religion Foundation, Inc., the U.S. Supreme Court recently reconsidered whether taxpayers have standing to sue the government for

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Establishment Clause violations. The Court’s strange doctrine in this area needed clarifying. Forty years ago in Flast v. Cohen, the Court had created, for the Establishment Clause alone, an exception to the otherwise “impenetrable barrier” against taxpayer standing. Flast grounded that exception on a single historical document—James Madison’s 1785 Memorial and Remonstrance Against Religious Assessments.

Indeed, the Court seemed to rely not so much on the document itself, as on Madison’s memorable turn of phrase decrying the levy of “three pence … for the support of any one establishment.” Hein gave the Court an opportunity to explain Flast, or to overrule it, but the Court did neither. Instead, a three justice plurality merely refused to extend Flast, while showing evident distaste for the precedent.

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

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

The article concludes that Madison’s Memorial offers little support for Flast’s doctrine of taxpayer standing in Establishment Clause cases. Flast lifted a political argument from one context (a 1785 legislative proposal in Virginia) and applied it uncritically in a different context and to a different issue (the enforceability of a federal constitutional guarantee). It confused what Madison thought about the substance of religious liberty in general, with what he thought about how religious liberty ought to be

1 127 S. Ct. 2553 (2007).


3 Flast, 392 U.S. at 103-04 & n.24; see also 5 FOUNDERS’ CONSTITUTION 82-84 (Philip B. Kurland & Ralph Lerner, eds. 1987) (reprinting Madison’s Memorial and Remonstrance) (hereinafter “Memorial”).

4 Memorial at 83.

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

6 See, e.g., Hein, 127 S. Ct. at 2587 (analogizing Flast standing to cases recognizing other forms of intangible harms).
posited and enforced in particular legal provisions. Most fundamentally, it failed to consider the three pence language in the context of Madison’s larger argument and objectives in the *Memorial*. The article concludes by placing this failure of analysis in the broader context of Establishment Clause jurisprudence. *Hein* may well presage the Court’s reconsideration of *Flast*’s taxpayer standing exception. That reconsideration would itself be part of a more general and much needed refinement of the Court’s treatment of historical materials in Establishment Clause jurisprudence.

I. Taxpayer Standing: From *Flast* to *Hein*

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

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

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

\(^8\) U.S. CONST. art. III, § 2, cl. 1.


\(^10\) *See, e.g.*, Tribe § 3.16 (discussing “injury-in-fact” component of standing).

\(^11\) Chemerinsky § 2.5.5, at 91.
claiming back taxes on the expenditures. Nor does the plaintiff allege a special kind of personal affront: he does not claim, for instance, to have been exposed to the government program and injured psychologically or stigmatically. Instead, the plaintiff seeks redress for a dramatically attenuated kind of symbolic injury. Again, one might intuit that this amounts to some kind of harm, but it is nonetheless difficult to articulate in traditional categories of injury. Perhaps the injury lies in the knowledge that funds are spent in an illicitly “religious” manner, perhaps in the prophetic dread of the consequences that might flow from the transgression. But, however described, those appear to be precisely the kinds of injuries the standing doctrines were designed to weed out.

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

The new doctrine seemed tailor-made for Establishment Clause challenges, because of the unique role the Court ascribed to that constitutional provision. The clause, argued that majority, grew out of the “specific evils feared” by its drafters and supporters, namely that “the taxing and spending power would be used to favor one religion over another or to support religion in general.” Concurring, Justice Stewart reasoned that, “[b]ecause that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a

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12 On the Flast exception to taxpayer standing, see generally Chemerinsky § 2.5.5, at 92-95; Tribe § 3-17, at 421-24.
13 392 U.S. at 85.
14 Id. at 102.
15 Id.
16 Id. at 102-03.
17 Id. at 103-04.
18 Id. at 103.
religious institution.” Similarly, Justice Fortas was willing to subscribe to the “thesis that this Clause includes a specific prohibition upon the use of the power to tax to support an establishment of religion.”

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

[in terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.] 21

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

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

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

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19 Id. at 114 (Stewart, J., concurring).
20 Id. at 115 (Fortas, J., concurring).
21 Id. at 115 (Fortas, J., concurring).
22 Id. at 108 (Douglas, J., concurring).
23 Id. at 113 (Douglas, J., concurring).
24 Id. at 113 n.9 (Douglas J., concurring) (quoting 21 CHURCH & STATE 5 (1968)).
Thus the *Flast* justices cast the Establishment Clause as a specific, and crucial, limitation on the federal taxing-and-spending power. This was the lynchpin for creating a unique exception to what the Court termed an otherwise “impenetrable barrier” against generalized taxpayer standing. But what was the historical evidence on which the Court based its understanding of the Establishment Clause? Remarkably, the Court relied on a single historical document—Madison’s *Memorial and Remonstrance Against Religious Assessments*—a document that was, incidentally, not written in support of the Establishment Clause. Literally not one other piece of historical evidence was cited. But speaking here of “citing” or “relying” on a document does not, as discussed below, do justice to the Court’s approach. The Court and individual Justices relied on just one phrase in the *Memorial*—Madison’s “three pence” language—as the sole, rhetorical touchstone for their new doctrine.

Madison’s three pence argument figures in one of the most famous slippery slope arguments in American constitutional history.26 Urging the 1785 Virginia Legislature to reject Patrick Henry’s proposed tax for support of Christian ministers, Madison masterfully reasoned that the very smallness of the tax was itself ominous. “The free men of America,” rang out Madison, “did not wait till usurped power had strengthened itself by exercise,” but instead “t[ook] alarm at the first experiment on our liberties.”27 Madison’s vigilant countrymen “saw all the consequences in the principle, and they avoided the consequences by denying the principle.”28 What consequences did Madison see, and wish to avoid, in the Virginia ministry tax?

> [T]hat the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christian, in exclusion of all other Sects[..] [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[..]29

Madison’s pamphlet was addressed to the Virginia Legislature, and his position triumphed. Henry’s tax was defeated, and instead Thomas Jefferson’s “Act for Establishing Religious Freedom” became law later that year.30 Jefferson’s Act contained language that seemed to vindicate Madison’s three pence argument. The Act’s preamble declared that “to compel a man to furnish contributions of money for the propagation of

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27 *Memorial* at 82.

28 *Id.*

29 *Id.*

30 See Curry at 146.
opinions which he disbelieves, is sinful and tyrannical.”31 It added that even “forcing
him to support this or that teacher of his own religious persuasion” amounted to
“depriving him of the comfortable liberty” of deciding which minister deserved his
patronage.32

Like an architect designing a home around a particularly beautiful view, the Flast
justices built their new exception to taxpayer standing around Madison’s three pence
verbiage. The majority quoted the language verbatim, as its first step to explaining why
the individual taxpayer could claim that “his tax money is being extracted and spent in
violation of specific constitutional protections against such abuses of legislative
power.”33 Justice Douglas was even plainer. Observing that “Madison in denouncing
state support of churches said the principle was violated when even ‘three pence’ was
appropriated to that cause by the Government,” Douglas concluded that “[i]t
therefore
does not do to talk about taxpayers’ interest as ‘infinitesimal.’”34 For Douglas, then, the
case involved not the judicial oversight of political matters, but instead judicial
vindication “where wrongs to individuals are done by violation of specific guarantees.”35
Justices Stewart and Fortas joined the chorus, referring explicitly to Madison’s “three
pence” language, and to nothing else.36 Indeed, no justice offered any support beyond
this specific passage in the Memorial for the proposition that the Establishment Clause
created a specific exception to Congress’s taxing authority that would justify a unique
exception to otherwise universal bar on taxpayer standing. In dissent, Justice Harlan took
particular exception to this aspect of the Court’s methodology. Making an observation
that, today, sounds shocking, Harlan asserted that “the evidence seems clear that the First
Amendment was not intended simply to enact the terms of Madison’s [Memorial].”37

While denying neither the relevance of the document to Establishment Clause
interpretation, nor the possibility that forbidden establishments could be constructed from
federal funds, Harlan nonetheless rejected the majority’s uncritical reliance on the
Memorial as a means of distinguishing the Establishment Clause for standing purposes:

I say simply that, given the ultimate obscurity of the Establishment
Clause’s historical purposes, it is inappropriate for this Court to draw
fundamental distinctions among the several constitutional commands upon

31 See 5 FOUNDERS’ CONSTITUTION 84-85 (reprinting Virginia’s Act for Establishing Religious

32 Id. at 84.

33 Flast, 392 U.S. at 103-04.

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

35 Id. at 111 (Douglas, J., concurring).

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

37 Id. at 126 (Harlan, J., dissenting).
the supposed authority of isolated dicta extracted from the Clause’s complex history.  

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

In sum, this is the curious origin of, and justification for, Flast’s exception to taxpayer standing. In the thirty-nine years between Flast and Hein, the Court did not really alter or explain the doctrine. Consistent with Flast’s letter, the Court did refuse to extend the exception from congressional taxing-and-spending to a federal agency’s transfer of property under Article IV. But the Court never questioned, or further elaborated, Flast’s theoretical or historical underpinnings. Madison’s three pence continued to be the only investment the Court had ever made in the matter. Thus, the time seemed ripe when the Court granted certiorari in Hein to reconsider the scope of Flast. The Hein plaintiffs brought an Establishment Clause challenge to executive orders aimed at facilitating religious groups’ equal access to federal assistance. The orders were not issued pursuant to any congressional legislation, and were funded by general executive branch—not congressional—appropriations. The sole basis for plaintiffs’ standing was their status as federal taxpayers.

What emerges from the Court’s Hein opinions, however, does not bring closure to the matter of taxpayer standing. The controlling opinion in Hein is neither a ringing endorsement nor a complete repudiation of Flast. It is instead a peculiar study in conflict-avoidance.

Justice Alito’s three-justice plurality opinion (joined by Chief Justice Roberts and Justice Kennedy) merely “decline[s] [plaintiffs’] invitation to extend [Flast’s] holding to encompass discretionary Executive Branch expenditures.” But the opinion holds Flast itself at arms’ length. Alito repeatedly emphasizes Flast’s “narrowness,” and essentially confines it to its facts—i.e., to Establishment Clause challenges to “a specific congressional appropriation” disbursed “pursuant to an express congressional mandate.”

The plaintiffs protested that such a distinction between congressional and executive action was arbitrary: their “injury” arose from the expenditures themselves and

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38 Id. (Harlan, J., dissenting).

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


41 See Hein, 127 S. Ct. at 2559-61.

42 Id. at 2568.

43 See, e.g., id. at 2568-69. By contrast, Justice Kennedy’s concurrence, while joining Alito’s opinion “in full,” says explicitly that “Flast is correct and should not be called into question.” Id. at 2572 (Kennedy, J., concurring).
were thus identical in either case. But in response, Alito simply points to *Flast*’s emphasis on Congress’ taxing-and-spending power, and reminds plaintiffs that *Flast* was a “narrow” precedent that has never been extended.\(^{44}\) He does say that extending *Flast* would “raise serious separation-of-powers concerns,” but quickly adds that *Flast* itself “gave too little weight to these concerns.”\(^{45}\) Alito’s response to Justice Scalia’s sharp dissent is especially curious. Scalia’s point, discussed below, is that *Flast*’s implicit logic demands that it either be extended to executive branch spending or overruled. Alito responds that Scalia’s position “is wrong,” but does not explain why. Instead, Alito simply repeats that *Flast* made such distinctions and has never been extended. His final rejoinder to Scalia is that “[w]e need go no further in this case,” intimating that perhaps he would go along with Scalia in a case squarely presenting *Flast*’s viability.\(^{46}\)

Despite the controlling opinion, then, six justices agree that the distinction between congressional and executive appropriations makes little sense. But two of them (Scalia and Thomas) would overrule *Flast* outright, while four (Souter, Stevens, Ginsburg and Breyer) would reaffirm and extend *Flast*. Scalia’s concurrence is the most explicit in attacking *Flast*’s credentials. First, Scalia argues that *Flast*’s taxpayer standing exception for Establishment Clause cases conflicts with the Court’s consistent denial of such standing in all other cases. Fundamentally, the injury implicitly recognized as the basis for *Flast* standing—what Scalia derisively calls “Psychic Injury” at seeing tax money illegally spent—is precisely the kind of injury the Court had denied as a basis for standing elsewhere.\(^{47}\) Second, Scalia rejects as irrelevant to the standing question “whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power.”\(^{48}\) Confronting *Flast*’s reliance on Madison’s *Memorial* head-on, Scalia argues that the document “has nothing whatever to say” about whether taxpayer-based grievances confer federal standing under the Establishment Clause.\(^{49}\) In his dissent, Justice Souter disagrees with Scalia on both points. First, Souter reads Madison’s *Memorial* as evidence that “the importance of [taxpayer] injury has deep historical roots,” and that the injury is linked to rights of conscience far deeper than mere “disagreement with the policy supported.”\(^{50}\) Second, Souter argues that the injury recognized in *Flast* finds analogous support in precedents recognizing standing for injuries such as “esthetic harms,” “inability to compete,” and “living in a racially gerrymandered electoral district.”\(^{51}\) Souter also recruits Madison for this final point,

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\(^{44}\) Id. at 2568-69.

\(^{45}\) Id. at 2569.

\(^{46}\) Id. at 2572.

\(^{47}\) Id. at 2574-79 (Scalia, J., concurring).

\(^{48}\) Id. at 2583 (Scalia, J., concurring).

\(^{49}\) Id. (Scalia, J., concurring).

\(^{50}\) Id. at 2585 (Souter, J., dissenting).

\(^{51}\) Id. at 2587 (Souter, J., dissenting).
observing that “[t]he judgment of sufficient injury takes account of the Madisonian relationship of tax money and conscience.”

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

This is not pretty jurisprudence, but perhaps no one should be surprised that the confluence of standing and the Establishment Clause has generated a perfect storm of incoherence. Six Justices do recognize, albeit from opposite perches, that the path to greater clarity lies, not in anything the controlling opinion said about Flast, but in Flast’s own credibility. The remainder of this essay attempts to assess that.

II. Flast and Standing Precedents

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

Perhaps this is impossible, which is why the Court felt impelled toward such special pleading in Flast. But the possibility is worth exploring, because the major weakness in Flast appears to be its thin reasoning about why the Establishment Clause deserves a special standing doctrine. Justice Souter senses this problem, for in his dissent he includes a separate section explaining why Flast standing is not as unusual as it appears. “[I]t would be a mistake,” Souter argues, “to think [Flast] is unique in recognizing standing in a plaintiff without injury to flesh or purse.” He analogizes the Flast injury to cases where plaintiffs were allowed to complain about “aesthetic harms,”

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52 Id. at 2587-88 (Souter, J., dissenting).

53 See Flast, 392 U.S. at 106 (a taxpayer has standing based on the allegation that “his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power”).

54 Hein, 127 S. Ct. at 2587 (Souter, J., dissenting).
or about the harm of being forced to compete on a racially-biased playing field.\footnote{Id. (Souter, J., dissenting).} Is this the way to justify \textit{Flast}? Is it as simple as saying, as Souter does, that “seeing one’s tax dollars spent on religion” is just as “concrete” as injury as in these other cases?\footnote{Id. (Souter, J., dissenting).}

Souter’s focus on “aesthetic” or “stigmatizing” harms appears to be the most promising avenue. By definition, the standing-conferring injury in a \textit{Flast} case cannot lie in the economic effect of the tax on the plaintiff’s pocketbook, because this fails to distinguish the injury from any other complaint about improper taxation. Nor is plaintiff, as a taxpayer, alleging that he was personally affected in a distinctive way by the spending of the tax funds (otherwise, there would be no reason to claim standing on the basis of being a taxpayer). Thus, the precise injury must lie in the realm of the plaintiff’s perception of the constitutional imbalance created by the improper taxing-and-spending. Perhaps here is where one might search for the link between the injury and the taxpayer’s “conscience.” That is, if the locus of the injury is perceptive then it is at least \textit{prima facie} plausible that the taxpayer’s conscience is implicated. Of course, more work would be required to explain why the injury to “conscience” becomes cognizable \textit{only} in this area, and not in any other area (such as conscientious scruples about tax money being spent on what one perceives to be an unjust war, or what one perceives to be the killing of unborn human beings). But Souter clearly sees a constitutionally-distinct impact on conscience in this area, because he connects the “Madisonian relationship of tax money and conscience” to the modern-day endorsement test. In Souter’s view, the spending of tax money for religious purposes gives rise to the perceptive or stigmatizing harm by “send[ing] the … message to … nonadherents that they are outsiders, not full members of the political community.”\footnote{Id. at 2587-88 (Souter, J., dissenting).}

Is this kind of perceptive or stigmatizing harm sufficient to confer standing under existing precedent? Note that we are not yet asking whether the Establishment Clause supports, as a doctrinal or historical matter, the recognition of such a special harm; we are merely asking whether this sort of perceptive harm is analogous to injuries in other cases. Souter cites \textit{Friends of Earth Inc. v. Laidlaw Environmental Services}, in which the Court found standing where “a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.”\footnote{Id. at 2587 (Souter, J., dissenting) (citing Friends of Earth, Inc. v. Laidlaw En’vtal Servs. (TOC), Inc., 528 U.S. 167, 183 (2000)).} The “aesthetic” or “perceptive” harms consisted in plaintiffs’ avoidance of the affected areas either because of their fear of physical harm or because they perceived the area actually “looked and smelled polluted.” Another case cited by Souter, \textit{United States v. Hays}, presents a different kind of “perceptive” harm caused by racial classification.\footnote{United States v. Hays, 515 U.S. 737 (1995).} If a person is subject to classification on the basis of race, then the stigmatic harm caused by
the classification itself is sufficient to confer standing. More specifically, if a person resides in a racially gerrymandered electoral district (the issue in *Hays*), then she suffers a concrete “representational harm” tied to the fact that “the plaintiff has been denied equal treatment.” 60 This harm would not, however, extend to a person not included in the gerrymandered district.

The harms recognized in cases such as *Friends of Earth* and *Hays* are perceptive or aesthetic in the sense that the injuries manifest themselves to the plaintiffs primarily through their own perceptions, instead of through economic or physical impact. Those decisions thus extend our thinking about cognizable injuries. As Professor Tribe explains, the interests vindicated in such cases “need only be expressible in terms of the individual’s concrete satisfactions or experiences.” 61 But these are not “generalized grievance” situations. The plaintiffs are differently situated from other persons: only because of personal circumstances (living near a polluted river, or residing in a gerrymandered district) are they actually subject to such perceptive or stigmatic harms. Professor Tribe clarifies that such cases recognize standing for aesthetic or recreational harms “only if such injury represents an individuated interest of the litigant as distinguished from the polity as a whole.” 62 Thus the harms do not lie purely in the plaintiffs’ perceptions. Rather, it is through their perceptions that the plaintiffs become aware of concrete harms (the polluted river, the gerrymandered district) outside themselves.

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

The Court’s decision in *Allen v. Wright* makes this plain. 63 There, the plaintiffs claimed standing based on the stigma caused them by an IRS policy of providing tax

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60 As the Court explained in *Hays*, “[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” *Hays*, 515 U.S. at 744-45.

61 Tribe § 3-16, at 404.

62 *Id.*

63 *468 U.S. 737 (1984).*
exemptions to private schools that discriminated by race. But the Court disagreed. “[Stigmatic injury],” explained the Court, “accords a basis for standing only to those persons who are personally denied equal treatment …. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school.”64 This point was implicit in the other stigmatic harm cases. The plaintiffs in Friends of the Earth, for instance, would not have had standing based purely on their perception of environmental harm, had they not also lived near the polluted waters or desired to use them. The plaintiffs in Hays, as the Court explained, would have lacked standing if they had not been included physically within the gerrymandered district.

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

Outside the Establishment Clause context, as the plurality points out, we have not found the injury to a taxpayer when funds are improperly expended to suffice for standing.65

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

Souter’s analogical argument fails, in sum, because it completely discounts the function of the tax system in the analogy. The Supreme Court has been willing to recognize perceptive harm for standing, even if the harm perceived emerges from a lengthy and attenuated chain of circumstances. For instance, in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the Court allowed a student environmental group standing to complain of aesthetic harms stemming from environmental degradation.66 The degradation, the plaintiffs alleged, was the end result of a chain of causation starting with a hike in railroad freight rates that would supposedly discourage the use of recycled goods. While admitting this was an “attenuated line of causation,” the Court found standing because the plaintiffs credibly alleged that “that the specific and allegedly illegal action of the Commission would directly harm them in their

64 Id. at 755-56; see also Chemerinsky § 2.5.2, at 74 (discussing Allen).
65 Hein, 127 S. Ct. at 2587 n.4 (Souter, J., dissenting).
use of the natural resources of the Washington Metropolitan Area.”

For present purposes, the important point about SCRAP is that, notwithstanding the somewhat fanciful chain-of-circumstances argument, the Court took pains “to stress the importance of demonstrating that the party seeking review be himself among the injured.”

But in the Establishment Clause taxpayer case, the only way the “party seeking review” can claim to be “among the injured” is to recruit the tax system as the instrument of his injury. This, however, is exactly the posture that the standing cases reject by requiring “personal injury.” As Professor Chemerinsky explains, cases like SCRAP “establish that an ideological interest in a matter is not enough for standing.”

But the intrusion of the tax system into the argument obliterates the distinction between cases, like SCRAP, where there is a real, albeit highly attenuated injury, and cases where plaintiffs merely have an ideological interest.

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

III. Flast and Madison’s “Three Pence”

Flast’s unique doctrine was based entirely on Madison’s argument in the Memorial and Remonstrance that “the same authority that can force a citizen to contribute three pence only of his property for the support of one establishment, may force him to conform to any other establishment in all cases whatsoever.” Of the Flast justices, only Harlan disputed this line of reasoning. While granting that the Memorial could help understand the Establishment Clause, Harlan denied that Madison’s 1785 arguments in Virginia simply mapped onto the later federal constitutional provision. Instead, to Harlan “the evidence seem[ed] clear that the First Amendment was not intended simply to enact the terms of Madison’s” Memorial. Nor did he believe that, based on such evidence, the Court could distinguish among different constitutional provisions based on whether they limited Congress’ taxing-and-spending powers. Nothing, Harlan reasoned, marked out the Establishment Clause as a limitation more “specific” to taxing-and-spending than any other provision. Virtually every constitutional limitation on Congress operated to limit its taxing and spending authority, given that

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67 Id. at 688.
68 Id.
69 Chemerinsky § 2.5.2, at 65.
70 Memorial at 82-84; see supra notes __ and accompanying text.
“Congress’ powers to spend are coterminous with the purposes for which, and methods by which, it may act.” This debate among the Flast justices is the last time the Court has squarely confronted the matter.

Thus, four decades later, the question still begs for an answer: does Madison’s Memorial and Remonstrance demonstrate, of its own force, that the Establishment Clause deserves a unique standing doctrine, sufficient to overcome the bar against taxpayer standing in every other area? Testing Flast’s reliance on the Memorial is a delicate matter, however, because it risks wandering into the murky question of Madison’s precise relevance to the meaning of the Establishment Clause. The Supreme Court has generally treated Madison as a touchstone for what the Clause means, perhaps no more so than in this area. Even where the Court has not followed Madison’s hypothetical lead on a particular issue, dissenting justices often recruit Madison to refute their colleagues. A vigorous scholarly debate persists about the nature of Madison’s influence on the religion clauses. And there is the well-known problem of Madison’s protean views about the clauses, depending on whether he was currently occupying the role of Virginia legislator, constitutional advocate, First Amendment draftsman, President, or former President. One can easily pit statements of these various Madisons against each other, with the effect of making what Madison “really thought” about the clauses recede into obscurity. This does not mean, of course, that Madison did not have historically verifiable views about what the religion clauses meant. It simply means that one should

71 Flast, 392 U.S. at 126; see also supra notes __ and accompanying text.


be circumspect about recruiting any particular quote or argument from Madison as expressing the totality of his thoughts about the clauses.

This article avoids those difficult questions, because they would simply overwhelm the distinct argument about standing. Quite frankly, if the question of taxpayer standing and the Establishment Clause hinges on correctly appraising Madison’s relevance to the meaning of the religion clause clauses, then the question will never be answered. Establishment Clause standing doctrine would fluctuate according to differing opinions about Madison’s significance to religion clause meaning. But surely that cannot be the answer. One should be able to argue that Madison’s opinions are relevant to what the Establishment Clause substantively means, but perhaps not relevant (or relevant in a different way) to the question of which parties and what interests support adjudication of an Establishment Clause matter. Standing questions can overlap to some extent with merits questions, but the two are nonetheless distinct. The doctrine of standing delimits the kinds of interests plaintiffs can pursue in federal court, while at the same time furthering other values such as separation of powers, judicial efficiency and effectiveness, and fairness. It is not simply a stand-in for the merits question. Otherwise, the “case or controversy” requirement of Article III is superfluous.

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

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

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78 See, e.g., Tribe § 3-17, at 418 (observing that “the availability of citizen standing must be analyzed with reference to the substantive right asserted”).

79 See Chemerinsky § 2.5, at 61-62. At the same time, Professor Chemerinsky notes that scholars have increasingly called for an abandonment of the doctrine. Id. at 62 (citing William Fletcher, The Structure of Standing, 98 YALE L. J. 221 (1988)).
Let us try to do better than that. We will start by making a few brief points to set the general context of Madison’s *Memorial* and his arguments against the General Assessment. This reveals the obvious point that Madison’s three pence rhetoric arose during a legislative and not a judicial argument. It was a political, not a constitutional, argument that called for, and won, a legislative and not an adjudicatory remedy. Thus, on its face, the argument—of which the three pence point was a part—did not call for any particular kind of adjudicatory stance toward religious establishments. The argument then moves on to the deeper points about the substance of Madison’s arguments in the *Memorial*, in contrast to his arguments about religious liberty in general and about the federal constitution in particular. These show that Madison was probably not invoking the three pence argument to empower taxpayers in general, but rather to vindicate particular taxpayers whose religious exercise was uniquely compromised by the Virginia scheme. Furthermore, understanding the three pence argument as a literal call for widespread adjudication by taxpayers would be out of character for Madison. Madison was more inclined to rely on indirect structural mechanisms for protecting religious liberties than on judicially enforceable guarantees found in bills of rights. Finally, even if Madison’s three pence argument in Virginia was championing religious liberty through taxpayer adjudication, his later arguments in Philadelphia over the federal religion clauses betray a markedly different character and strategy. Unlike the Madison of 1785 Virginia, the Madison of 1790 Philadelphia sought modest, politically achievable guarantees of religious liberty that would not have exacerbated national disagreements on church-state matters. The 1790 Madison would have a shunned a federal constitutional remedy that risked entangling the federal courts in the delicate matter of religious taxpayer disputes.

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

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

81 *Memorial* at 82.

82 *Id.* at 84.

83 Blasi, at 807.
Thus, the fact that Madison included taxpayers’ interests in his catalogue of objections to the General Assessment does not, of its own force, mean he was claiming such interests should be vindicated by adjudication. The idea of taxpayers’ objections was an important device exploited by Madison, as we will see below, but his audience was a legislative assembly and, logically, he sought arguments couched to spur legislative action. It is thus perfectly consistent with Madison’s three pence argument to say that Madison was not even addressing the question of whether taxpayers (or anyone else, for that matter) should be allowed to bring a lawsuit against the Assessment. This obvious point is typically overlooked when arguing about the significance of Madison’s Memorial to the federal religion clauses. Institutions and structures were every bit as, if not more, important to the framing generation as the judicial enforcement of rights. One should not anachronistically project onto Madison’s comments about taxpayers’ concerns our modern preoccupations with constitutional judicial review.

Another basic point concerns the legislative response, and other responses, to Madison’s Memorial. When the General Assessment was defeated, the Virginia legislature ended up passing Jefferson’s Act for Establishing Religious Liberty. The Act stated explicitly that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” It enacted that “no man shall be compelled to frequent or support any religious Worship place or Ministry whatsoever.” If one wanted to argue that Madison’s three pence language sought, as a remedy, something akin to general taxpayer standing to contest assessment-style taxes, then the language of Jefferson’s Act at least furnishes a plausible textual hook by providing that “no man shall be compelled …” Other state constitutions of the period contained similar language. Such provisions might plausibly support general

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

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

86 See, e.g., Curry at 146.

87 Act for Establishing Religious Freedom at 84.

88 Id. at 85.

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

90 For instance, the Vermont Constitution of 1777 provided that “no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any
taxpayer standing by explicitly empowering anyone subject to the levies (or at least anyone whose religious freedom was impacted by the levies) to contest them. But no such language, of course, appears in the federal religion clauses. Nor was any such formulation proposed by any state.91 Even Madison’s own Virginia failed to put forward such language—in fact, its proposal lifted passages verbatim from the Memorial but not those addressing forced exactions of money.92 Nor was such language ever proposed during the recorded debates on the drafting of the religion clauses, by Madison or anyone else.93 Thus, if one were looking for a plausible textual justification for general taxpayer standing (or, indeed, standing for any taxpayers), one might claim to find it in Jefferson’s 1785 Act, but not in the federal religion clauses, whether in their proposed or final formulations. This does not mean that the idea of “compelling” someone to “frequent or support” religious worship is irrelevant to the substantive meaning of the federal religion clauses. The point is only to draw attention to the absence of the textual clues supporting the idea that taxpayers are empowered to litigate those clauses as taxpayers.

Minister, contrary to the dictates of his conscience.” 5 FOUNDERS’ CONSTITUTION 75 (reprinting VT. CONST of 1777, CH. 1, § 3); see also, e.g., DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES § 2 (1776) (reprinted in 5 FOUNDERS’ CONSTITUTION 70) (language similar to Vermont Constitution of 1777); NEW JERSEY CONSTITUTION OF 1776, ART. XVIII (providing “nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform”) (reprinted in 5 FOUNDERS’ CONSTITUTION 71). By the same token, state constitutions also knew how to provide for the opposite—i.e., that contributions might be required by law to support ministers. The Massachusetts Constitution of 1780 provided that “the legislature shall, from time to time, authorize and require, the several towns, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.” MASS. CONST. OF 1780, PT. 1, ART. 3 (reprinted in 5 FOUNDERS’ CONSTITUTION 77-78).


92 With respect to religious liberty, the Virginia Ratifying Convention proposed a provision exempting from military service “any person religiously scrupulous of bearing arms” (upon payment of “an equivalent”), as well as the following passage lifted in large part from Madison’s Memorial, which in turn had quoted the 1776 Virginia Declaration of Rights:

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

VIRGINIA RATIFYING CONVENTION, PROPOSED AMENDMENTS (27 June 1788) (reprinted in 5 FOUNDERS’ CONSTITUTION 89).

93 See Witte, supra note __, at 64-72 (explicating various formulations of the religion clauses during the House committee debates).
But these general contextual points are merely suggestive. More persuasive is a consideration of what Madison was actually arguing in the *Memorial*, an argument in which the three pence idea figured as one part, but only one part. Simply put, with regard to taxpayers, Madison appears to have been making what we would today call a “free exercise” claim, as opposed to an “establishment” claim. Madison was asserting that the General Assessment violated the Virginia Declaration of Rights.\(^4\) As to religious liberty, that 1776 Declaration provided that, since “religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence, […] therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience.”\(^5\) This is the general point around which Madison’s *Memorial* arguments converge, and, in fact, Madison quoted this language at the very beginning of the *Memorial*.\(^6\) Those attacking the 1785 Assessment, as Professor Thomas Curry explains, considered the tax to violate the “free exercise” rights enshrined in the 1776 Declaration—rights which the Assessment controversy had enabled them to deepen and refine.\(^7\) Far less important, however, was whether the Assessment constituted a religious “establishment.” While both proponents and opponents of the measure may have considered it to be some novel form of an “establishment,” that was not the issue: the principal ground of dispute was over what we would identify today as “free exercise” values. “Whether the assessment bill violated the Declaration of Rights,” Curry asserts, “not what kind of establishment it represented or even whether it represented an establishment at all, provide to be the crux of the dispute.”\(^8\) Disputes over ministerial taxes in other states clarify the point. Religious

\(^4\) As Professor Blasi explains, “[e]ight years earlier [in 1776] [Madison] had helped to draft and steer to enactment the religious liberty clause of the new Virginia Constitution. Madison viewed the General Assessment as a patent violation of that constitutional commitment and a profound threat to Virginia’s experiment in republican government.” Blasi, at 784; see also Curry, supra note __, at 143 (the *Memorial* “declared that the proposed bill violated the free exercise of religion guaranteed by the Declaration of Rights”).

\(^5\) 5 *FOUNDERS’ CONSTITUTION* 70 (reprinting *VIRGINIA DECL. OF RTS.* § 16 (12 June 1776)).

\(^6\) *Memorial* at 82.

\(^7\) Curry, supra note __, at 146 (explaining that, “in the decade following the Declaration of Independence, Virginians debated and clarified for themselves the meaning of the *free exercise of religion,*” and that in the later Assessment controversy, “a majority of the people construed the *free exercise clause* of the Declaration of Rights to mean that religion had to be supported by voluntary means, and that state support of churches was incompatible with religious liberty”) (emphasis added); see also Blasi, supra note __, at 793 (explaining that “[Madison’s] concern was that the clumsy effort to use religion to teach public virtue interjected the civil mechanism of compulsory taxation into the relationship of voluntary support that some denominations considered of the essence”). *But see* Bradley, supra note __, at 38 (arguing that Madison’s “interpretation of section 16 [of the Declaration of Rights] was certainly not the accepted one in Virginia”).

\(^8\) Curry, supra note __, at 148; see also id. at 191 (“Concerned primarily to show that it did not violate the free exercise of religion, proponents of a general assessment showed no consciousness of a need to develop such a distinction [i.e., between a ‘preferential’ and a ‘non-preferential’ establishment].”). Along these lines, in a draft of his Bill Exempting Dissenters from Contributing to the Support of the Church, Thomas Jefferson wrote that dissenters “consider the Assessments and Contributions which they
dissenters, such as Baptists in the Northeastern states, commonly attacked ministerial taxes as interfering with their ability freely to exercise their religion.\textsuperscript{99} The interference sprang in large part from the fact that the assessments were earmarked for support of ministers. Dissenters argued that this hampered religious exercise by tainting what they believed was a sacred, voluntary relationship between pastor and congregation.\textsuperscript{100} As Curry explains, “like their counterparts in other states, [Massachusetts dissenters] opposed the system primarily as a violation of religious freedom, rather than as an establishment of religion.”\textsuperscript{101}

How does this historical context help determine whether the \textit{Memorial} supports, on its own terms, general taxpayer standing to adjudicate Establishment Clause violations? To achieve the \textit{Flast} result, one must paint Madison’s three pence argument as a broad-based mandate for “taxpayers in general.” But this overstates Madison’s argument in the \textit{Memorial}, literalizing Madison’s verbiage and stripping it of context. Madison is better understood as championing \textit{those particular taxpayers} who had a precise personal and theological complaint against the interference in their religious practice caused by the ministerial tax. This reading would make Madison’s arguments mesh with the general tenor of arguments in Virginia and elsewhere against ministerial taxation schemes. Seen this way, Madison’s three pence argument vindicates a peculiar type of religious injury—specifically, an injury to freedom of association between ministers and congregation that is inflicted by the operation of the assessment tax system. What it does not do is lodge a generalized complaint about the “religious” use of tax revenues. The function of the three pence argument was instead to show that the assessment wrongly impacted particular individuals’ religious exercise.

On this view, Madison’s three pence argument looks more like a modern “free exercise” claim than a modern “establishment” claim. Modern establishment clause doctrine, as is well known, agonizes over which kinds of taxation schemes amount to a

\begin{itemize}
\item have been hitherto obliged to make towards the support and Maintenance of the [Church of England] and its Ministry as grievous and oppressive, and an Infringement of their religious Freedom.”
\end{itemize}

\textsuperscript{99} See generally Curry, \textit{supra} note \underline{__}, at 168-77 (detailing opposition by Massachusetts Baptists against ministerial taxes); \textit{id.} at 172 (noting that “Massachusetts’s voluminous discourse on Church-State matters during the revolutionary period focused almost entirely on the meaning of freedom of religion” and that dissenters “generally did not raise the issue of an establishment of religion”).

\textsuperscript{100} See, \textit{e.g.}, Curry, \textit{supra} note \underline{__}, at 168 (explaining that Massachusetts Baptists “fundamentally disagreed with Congregationalists on the narrow ground of organization and support of churches” and that, among other things, “both church and minister should be supported voluntarily”); \textit{id.} at 175 (explaining that “[t]o Baptists, who ‘owned that religion must at all times by a matter between God and individuals,’ the very idea of state support—even impartial state support—was by nature wrong and an imposition of the Congregational way of religion”); Bradley, \textit{supra} note \underline{__}, at 25 (explaining that, given the “Baptist disavowal of professional clergy” that that “they chose ministers from their own congregation to serve without compensation … Baptists therefore did not need the system at all, and its burdens fell on them with no immediate tangible benefit”); Blasi at 806 (“A crucial source of [Madison’s] concern was the claim by some denominations, especially the more evangelical Christian sects such as the Baptists, that compulsory support of their clergy impaired the fundamental relationship that must obtain between preachers and their congregations.”).

\textsuperscript{101} Curry, \textit{supra} note \underline{__}, at 169.
forbidden establishment. But free exercise doctrine has been comparatively clearer. The imposition of a tax, by itself, rarely amounts to a free exercise violation. Even in the days of Sherbert balancing, the Supreme Court found, for instance, that paying sales taxes on religious publications or paying social security taxes did not even amount to the “substantial burden” on religious exercise that would trigger balancing. But what does this mean for standing? For standing purposes, a free exercise argument based on taxation would demand the particular person whose religious exercise is burdened by the tax. This would rule out granting standing to any taxpayer qua taxpayer because of a generalized complaint about the allegedly unconstitutional operation of the tax system. Consequently, when we translate Madison’s three pence argument into modern doctrinal categories, it fails to support an exception to the ban on generalized taxpayer standing. In other words, we should not read Madison’s three pence rhetoric as literally calling on public authorities to track down every religiously extracted penny. Instead, the argument was Madison’s effective way of dramatizing the harm to free exercise rights of those whose religious relationships the assessment threatened to corrupt.

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

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

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104 Blasi at 789-91; see, e.g., Memorial at 82 (“We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance”).

105 Blasi at 790.
of functions and purposes, not some quixotic attempt to achieve a hermetically sealed spatial separation.\footnote{Id. at 791.}

On this view, the modern reading of Madison’s three pence argument—the one explicitly invoked to support \textit{Flast}—mistakes the “three pence” of taxes for the religious establishment itself. But to Madison, the central flaw in the assessment scheme was the cooperative relationship set up between government and Christian teachers—one that, to be sure, was underwritten by mandatory tax levies. The “government cognizance” angle thus illuminates Madison’s three pence argument just as the free exercise angle did. Madison was not seeking to empower private attorneys general to demand every religiously-tinged penny back from government coffers. Instead, he was drawing attention to what he believed was a dangerous structural union between government and churches. A taxpayer standing argument based on the three pence language therefore ignores Madison’s actual target.

In sum, whether we reconstruct Madison’s substantive argument as championing free exercise rights, or as targeting an institutional alliance between church and state, the function of his three pence argument comes into focus. Specifically earmarked taxes were underwriting the forbidden scheme, and that useful fact allowed Madison to make his rhetorically powerful argument: extracting the tiniest trickle of tax funds today \textit{to fund this establishment} would be precedent for forcing you to give up larger amounts tomorrow \textit{to fund future establishments}.\footnote{This is, not to put too fine a point on it, precisely what Madison wrote in the \textit{Memorial}: “Who does not see … that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?” The “three pence” here was not the “establishment” itself, but rather a seemingly innocuous and minimal burden that a taxpayer might not notice and therefore not object to. Madison was arguing, in effect, “You \textit{should} object to the establishment underwritten by the Assessment, even though you might not notice the burden.” He was \textit{not} arguing, “The three pence, in and of themselves, are the establishment.” Professor Blasi makes a similar point. \textit{See} Blasi at 791 & n. __, \textit{supra}.} Essentially, it is the same argument that politicians make today (less artfully, of course) when they criticize a government program on the basis that “Your tax dollars are being used to fund [insert politically unpopular project], and you should object.” But the central thrust of Madison’s argument was \textit{not} the naked fact that minuscule amounts of tax funds were being levied for a purpose that some taxpayers might object to on religious grounds. That is the construction placed on Madison’s words by \textit{Flast}, but as we have seen, such a construction is plausible only if one reads Madison in a literalistic fashion and abstracts his rhetoric from the substance of his argument.

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

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

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

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

Thus, as advocate for the new Constitution, Madison downplays judicial review of specific constitutional guarantees as a means of protecting religious liberty. But this is

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108 5 FOUNDERS’ CONSTITUTION 88 (reprinting Madison’s remarks at the Virginia Ratifying Convention on June 12, 1788).

109 Id.

110 THE FEDERALIST: THE GIDEON EDITION 270-72 (Federalist no. 51) (George W. Carey & James McClellan, eds., 2001); see also id. 42-49 (Federalist no. 10) (setting out general theory of checking function of numerous factions in an extended republic).

111 Id. at 270.
unsurprising given Madison’s “pensant for thinking about issues of liberty and legitimacy in structural terms.”112 Professor Blasi elucidates this aspect of Madison’s approach to protecting religious freedom:

[Madison] had little faith in legalistic guarantees—“parchment barriers” he dismissively called them. Instead, he focused on such matters as institutional incentives, checks and balances, object lessons from the past, and scenarios of decay and abuse. [...] He sought to forestall and contain abuses of power be means of perspicacious institutional design. His approach to the subject of church and state was in this spirit.113

None of this suggests that Madison was pressing broad-gauged adjudication and judicial review as the bulwark of religious liberty in the federal constitution.114 It does not matter that today we prefer such means. But it does matter that the Flast court uncritically drafted Madison as the spokesman for an exceptionally broad form of such a remedy, and pressed his three pence argument into service as its ur-text.

When in 1790 Madison changed hats, yet again, and proposed amendments to the Constitution in the First Congress, his overall strategy and recorded comments during the debates further undermine the notion that Madison was pressing an aggressive version of his three pence argument at the national level. At that point, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broader support. Madison would likely have supported far-reaching alterations in church-state relationships at the federal and state level, but, as Professor Thomas Curry observes, “[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification....”115 According to Professor Gerard Bradley, “[t]he truth is that Madison’s personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause.”116 In the House debate, Madison minimized the substance of, and even the necessity for, the religion clauses.117

112 Blasi at 788.

113 Id. at 789.

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

115 Curry at 205

116 Bradley, supra note __, at 87.

117 In the debate, Madison commented that “[w]hether the words [of the religion clauses] were necessary or not, he did not mean to say, but they had been required be some of the State Conventions,” who feared the implications of Congress’ Necessary and Proper powers. 5 FOUNDERS’ CONSTITUTION 93.
Even more revealing was Madison’s response to Benjamin Huntington of Connecticut during the debate. Huntington feared that a broad interpretation of the religion clauses would grant a federal court jurisdiction to interfere in New England states’ enforcement of compulsory support for ministers’ salaries. But Madison assured him it would not. Huntington, as Professor Bradley explains, “was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment.” Madison “alleviated this fear, clearly indicating that there was no conflict.” Admittedly, Madison’s somewhat cryptic response might be interpreted along federalism lines: the religion clauses would have had nothing to do with New England states’ arrangements, and federal courts would not have likely had jurisdiction to meddle in them. But Madison’s response shows he was talking about more than federalism—he was in fact addressing the substance of what he thought the Establishment Clause outlawed. Madison proposed that the word “national” be inserted before “religion,” since, as Madison explained,

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

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

The implications for the “three pence” question are evident. Had Madison intended to import his three pence idea into the Establishment Clause, his response to Huntington would have been completely different. After all, the scheme Huntington was concerned to protect was “much more coercive” than the 1785 Assessment Madison had defeated in Virginia. But in response to Huntington, Madison seemed to shrug—the federal clauses, he said in effect, have nothing to do with such matters, whether precisely because of their federal character, or because the anti-establishment prohibition would not be triggered by the New England taxation scheme. If matters stood otherwise, merely proposing the religion clauses would have immensely complicated the cause of the new Constitution. At the time, opinions diverged sharply in the states about whether religion should be supported by taxation. People even disagreed over whether mandatory

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

119 Bradley, supra note __, at 91.

120 Id.

121 Witte, supra note __, at 67.

122 Bradley, supra note __, at 91.
assessments really amounted to full-blown “establishments” at all. A politician of Madison’s skill would have been urging a federal constitutional right empowering every single taxpayer in the country to contest federal taxation schemes based on whether they amounted to an “establishment of religion.” Madison, it is true, knew how to introduce progressive measures into the Constitution. He had unsuccessfully proposed an amendment binding the states themselves to respect freedom of conscience. So it is not out of the question that he would have sought to include an aggressive anti-taxation right as part of the federal constitution. But the important point is that Madison’s recorded comments during the drafting of the religion clauses betrayed the opposite intention. He was seeking to build consensus for the new Constitution, and to placate the fears of those who were attached to church-state relationships that Madison himself deplored. Madison the Virginia legislator was willing to fight for political goals at the state level that Madison the constitutional advocate sought to avoid at the federal level. Even if the Virginia legislator had been advocating for the modern equivalent of general taxpayer standing for anti-establishment claims (which is doubtful, as seen), the notion that the constitutional advocate was pushing such goals beggars belief.

Concluding Reflections: The History of a Bad Investment

As for the merits of Flast’s defense of its taxpayer standing doctrine, all that remains to be said is: the thing is bankrupt. No interest has accrued in forty years on the Court’s original investment of three pence, even though borrowed from James Madison’s pocket. But this should come as no surprise. No scholar has made a sustained attempt to spruce up the Court’s historical justification, although it is commonly asserted that

123 See generally, e.g., Curry at 202, 219-220.
124 See, e.g., Curry at 205; Bradley at 88-89.
125 See, e.g., Witte, supra note __, at 65-66.
126 For instance, although criticizing Flast’s standing analysis, Professor Steven Winter seems to accept the Court’s historical assertions about the Establishment Clause at face value. He notes that “Ms. Flast was arguing that the establishment clause protected her from a society in which tax monies would be used for impermissible, religious purposes,” and that “[i]n support of this point, the majority invoked the legislative history of the establishment clause.” Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV. 1371, 1467 & n.543 (1988) (emphasis added). Immediately thereafter, he correctly notes that the Court’s actual support for its holding was Madison’s three pence language, which, as this article and many other commentators have explained, forms no part of the “legislative history” of the Establishment Clause. Id. at 1467 & n.544. In the same vein, Professor William Fletcher agrees with Flast (and would in fact extend it) on the basis that “the protection provided by the establishment clause cannot be fully realized unless there is easy and unrestricted access to the courts to challenge federal expenditures or grants that might violate the clause.” He does not attempt to support that conclusion, however, with any evidence beyond the Court’s own “historical argument that the clause was enacted to prevent the forced exaction of moneys for the support of state-sponsored religion.” See William P. Fletcher, The Structure of Standing, 98 YALE L. J. 221, 267-69 (1988). Professor Carl Esbeck argues that the existence of Flast standing shows that the Establishment Clause is better understood as a structural restraint on government power, rather than as a guarantee of individual rights. See Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1, 33-40 (1998). It is more than plausible to see the Clause as principally structural. But that is not a reason in and of itself
some form of taxpayer standing is necessary to vindicate the Establishment Clause. 127

More broadly, perhaps it is true that the standing inquiry is inextricable from the underlying merits, and any attempt to separate the two ends in incoherence. 128 Perhaps the Court was wrong in the first place to make an Article III “case or controversy” depend on the existence of a personal injury. 129 Such profound questions are beyond the scope of this article. Instead, the point here has been to explore the question raised but left unanswered in Hein: whether the taxpayer standing exception created by Flast stands on its own historical merits. The answer is no. This concluding section briefly places that failure in the larger context of Establishment Clause jurisprudence.

Dramatic fallacies of historiography are nothing new in this area. The modern Establishment Clause project itself is based, say many scholars, on a misunderstanding of the function the Clause was meant to perform in our constitutional structure. 130 On that
to require general taxpayer standing to enforce the Clause (nor does Professor Esback seem to be making that point). In any event, Professor Esbeck does not attempt to rehabilitate Flast’s historical credentials in his article.

127 See, e.g., Tribe § 3-17, at 423-24 (criticizing the Court’s failure in Valley Forge to extend Flast to Congress’s disposition of property under Article IV); Chemerinsky § 2.5.5, at 94-95 (same); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 91-92 (1991) (arguing that “a taxpayer may suffer more through the unconstitutional disposition of property … than through a budgetary expenditure”). For instance, in criticizing the same decision, Professor David Dow argues that the majority opinion “simply paid no heed to the nature of the establishment clause,” because “[h]ad the right at issue been analyzed, it would have been clear that whenever the clause is violated, the resulting injury is necessarily widely shared.” David R. Dow, Standing and Rights, 36 Emory L. J. 1195, 1208 (1987). But in support of those propositions about the “nature of the establishment clause” and the “right” at issue in the case, Professor Dow cites only Justice Brennan’s Valley Forge dissent. Id. at 1208 n.40. At bottom, however Justice Brennan’s dissent, while lengthy, merely reiterates the Flast’s historical rationale for allowing generalized taxpayer standing in Establishment Clause cases. See Valley Forge Christian Academy v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 500-510 (1982) (Brennan, J., dissenting).

128 See, e.g., Chemerinsky § 2.5.1, at 61 (arguing that “[u]ltimately, the law of standing turns on basic normative questions about which there is no consensus”). Chemerinsky here quotes Professor Fletcher for the proposition that the standing inquiry “should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.” Id. at 61 n.16 (quoting Fletcher, supra note __, at 229); see also Tribe § 3-15, at 399 (noting that “the question of what it means to be ‘injured’ itself entails a complex and value-laden judgment).

129 See, e.g., Raoul Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement? 78 YALE L. J. 816, 840 (1969) (concluding “the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded”); see also Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432, 1479 & n.229 (1988) (noting originalist doubts about personal injury requirement for Article III “case or controversy”); Tribe § 3-15, at 393 (observing that “[h]istorically, whether members of the public who had no suffered concrete or particularized injury could sue turned on whether substantive law … conferred a cause of action upon them, not on any inquiry into ‘injury in fact’”).

130 See, e.g., Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 56 EMORY L. J. 19, 22-23 & nn.15-16 (2006) (noting that “a number of commentators have similarly argued that the Establishment Clause should never have been applied to the states, or that courts should apply a relaxed version of the religion clauses to government beneath the federal level) (citing Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995); Akhil Reed
view, the Clause originally served to quarantine church-state issues at the state level, preventing such irresolvable questions from exploding onto the national scene. Such a jurisdictional provision did not, and could not, embody any grandiose “theory” of substantive church-state relationships useful for adjudicating particular controversies. To the extent that view is correct, what the Supreme Court did in 1947 by applying the Clause to the States was, as Steven Smith argues, effectively to repeal it. To the extent this jurisdictional thesis is wrong, many still admit that the Supreme Court’s understanding of the Clause’s history was grievously flawed. Here, for instance, are the instructive comments of a prominent religion clause scholar in a recent essay:

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

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131 See generally Smith, *supra* note __, at 3-34 (summarizing the case for a jurisdictional understanding of the Establishment Clause).


Given that state of affairs, Flast’s own historical flaws—flaws that concern the same historical materials, no less—are par for the course.

But Flast’s failings raise the stakes of bad history. Standing is supposed to be, at least in some sense, distinct from the merits, and to serve distinct values such as separation of powers, judicial efficiency, and judicial competency. § 134 It would seem anomalous, then, to make standing turn on highly contested questions about the merits of the provision sought to be enforced. § 135 But Flast did just that: its standing exception subsumes a host of murky questions about Establishment Clause doctrine and history. Consequently, Flast undercut whatever salutary restraining role that standing doctrine could play in constitutional adjudication of the Establishment Clause, with predictable effects on the coherence of the resulting jurisprudence.

It is an understatement to note that Establishment Clause jurisprudence has generated many controversial, persistent, and seemingly intractable questions. § 136 The area of public funding alone has its own zip code. What is the relationship between the Establishment Clause and government taxing-and-spending? May the government spend tax money for “religious” purposes? May public funds end up in the pockets of churches, synagogues, pastors, rabbis, or other religious associations and persons? Does it matter what path the funds take? May an evenhanded public welfare program fund religious organizations directly? May it do so indirectly, through private choices? May it provide in-kind aid to such organizations directly? Indirectly? § 137

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

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

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

136 See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106-112 (1985) (Rehnquist, J., dissenting) (asserting that “in the 38 years since Everson our Establishment Clause cases have been neither principled nor unified,” and describing the disarray at length); see also Michael Stokes Paulsen, Religion, Equality & the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 315 (1986) (asserting that “[f]or nearly four decades … the Supreme Court has meandered through the province of church-state relations, leaving behind a serpentine trail of constitutionality”).

extent that standing, and other justiciability doctrines, indicate that judicial enforcement is appropriate and effective.

But, whatever the proper restraints on Establishment Clause adjudication might be, *Flast* swept those concerns under the rug through the historical sleight-of-hand described in this article. Prior to any merits question, *Flast* deputized every taxpayer to litigate taxing-and-spending issues based on the sole, undefended premise that every taxpayer must have a cognizable Establishment Clause injury linked to taxing-and-spending. This is the case no matter how small the amount of the tax, no matter how or why the tax was levied, and no matter how or why the money was spent. Embedded in *Flast*, then, is an essentially undefended resolution to contestable disputes about the scope of the Establishment Clause, about what sorts of “rights” or “interests” the Clause protects, and (most importantly to this article) about the proper use of historical materials to answer such questions.\(^{138}\)

The Court deployed these *sub silentio* decisions to create a standing exception unheard of, and explicitly rejected, in every other area of law. And, as we have seen, the sole support the Court relied on was a single phrase from an historical document with precious little relevance to the question. In its recent *Hein* decision, the Court did little to remedy this anomaly in the law of standing, but at least the case raised the question again after a long interlude. Perhaps *Hein*’s real significance will become evident only in a future case, when a majority of the Court finally takes a fresh and honest look at the strange doctrine created in *Flast*.\(^{139}\) The Court could then rectify yet another instance of shoddy law office history in Establishment Clause cases. Those are my two cents’ worth, anyway.

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\(^{138}\) *Cf.*, *e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 Harv. L. Rev. 2276, 2288 (1998) (arguing that, while “a coherent concept of standing grows out of a clear definition of the relevant injury,” in voting rights cases, “the Supreme Court has failed to articulate any theory of injury that coherently accounts for the standing rule it has produced”).

\(^{139}\) *See*, *e.g.*, Steven G. Gey, *Life After the Establishment Clause*, 110 W. Va. L. Rev. 1, 1-2 (2007) (noting that “*Hein* may be the harbinger of further restrictions on standing in other types of Establishment Clause cases, such as cases involving government endorsement of sectarian religious principles and symbols”).