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STANDING, SPENDING, AND SEPARATION: HOW THE
NO-ESTABLISHMENT RULE DOES (AND DOES NOT)
PROTECT CONSCIENCE

RICHARD W. GARNETT*

I.

THE First Amendment's "Establishment Clause"—or, its "nonestablishment norm"¹—is widely thought to protect "conscience." Justice Anthony Kennedy wrote, for example, in *Lee v. Weisman*,² that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."³ The no-establishment rule, he suggested, removes this "risk" to the freedom of "conscience" by prohibiting the imposition or enforcement of such "orthodoxy."⁴ More recently, Justice David Souter observed that the Establishment Clause's presumed ban on public spending in direct support of religion "translated into practical terms the right of conscience."⁵ And, in her new book, *Liberty of Conscience*, Professor Martha Nussbaum contends that our constitutional tradition has been animated by, among other things, a "Respect-Conscience Principle," which itself requires an additional "principle" of "Nonestablishment."⁶ Many more illustrations are available, but the basic points are clear and, I suspect, noncontroversial: The Establishment Clause, many believe, safeguards conscience; the fact that it does is, many believe, a justification both for the Clause and for its energetic judicial enforcement; and the Supreme Court's construction of the Clause has been guided, at least in part, by its conclusions about what

* Professor of Law, University of Notre Dame. I am grateful to Paul Horwitz, Steve Smith, and Nicole Garnett for their reactions to, and suggestions for, this paper, and to Professor Patrick M. Brennan for including me in the program of the 2009 John F. Scarpa Conference on Law, Politics, and Culture.

1. The "free exercise norm" and the "nonestablishment norm" are, in Professor Michael Perry's words, the "two principal matrices of the constitutional law of religious freedom." Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 550 (2003).

2. 505 U.S. 577 (1992).

3. *Id.* at 592. "One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Id.* See generally NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005).

4. See *Lee*, 505 U.S. at 591-92.

5. See *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 638 (2007) (Souter, J., dissenting).

6. See MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 25 (2008).

the well-being of conscience requires. We are not entirely sure what the liberty of conscience is, means, or requires, but, nevertheless, it is, as Professor Steven Smith has observed, “central to the modern discourse of religious freedom” and, indeed, “to the modern self-understanding generally.”⁷

This “modern” centrality is not a recent innovation. It is established that concern for conscience was at the heart of many Americans’ thinking at the Founding about religious liberty and church-state relations. Indeed, “liberty of conscience,” Professor John Witte has explained, “was the general solvent used in the early American experiment in religious liberty. It was almost universally embraced in the young republic—even by the most rigid of establishmentarians.”⁸ According to Professor Noah Feldman, the Founding-era commitment to conscience was the “principled reason” for the proposal and ratification of the First Amendment’s Free Exercise and Establishment Clauses.⁹

But how does this relationship work? That is, how exactly do—and do not—the anti-establishment norm and the “separation of church and state” vindicate the freedom of conscience? Roger Williams famously connected the protection of conscience with the maintenance of a wall between the “Garden” of religious faith and the “Wilderness” of civil power and public affairs.¹⁰ But again, how exactly does this wall, this separation, shield conscience against violation?

In my view, the no-establishment rule, correctly understood and well applied, does indeed promote and protect religious liberty, and does safeguard conscience, but not—or, at least, not only—in the ways we usually think.

The hero of Professor Nussbaum’s *Liberty of Conscience* is Roger Williams.¹¹ Williams was the founder of the colony of Rhode Island. He was a fierce and fiery critic of the “soule rape” of religious persecution,¹² contemptuous of both clumsy and cruel attempts by civil authorities to prop up or privilege a congenial orthodoxy. He was also, as heroic and pro-

7. Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 580 (2003) [hereinafter Smith, *Conundrums of Conscience*].

8. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 39 (2000).

9. See FELDMAN, *supra* note 3, at 20; see also WITTE, *supra* note 8, at 48.

10. See MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); cf. Steven D. Smith, *Separation and the Fanatic*, 84 VA. L. REV. 213, 216 (1999) [hereinafter Smith, *Separation and the Fanatic*] (“Roger Williams turns out to be an outspoken advocate of freedom of conscience and church-state separation, . . . [b]ut Williams’s version of separation is not something with which current separationists will be happy.”).

11. See NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 6, at 37. For a helpful study of Williams, see, e.g., TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998); Smith, *Separation and the Fanatic*, *supra* note 10 (reviewing HALL, *supra*).

12. See NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 6, at 37.

phetic figures often are, reasonably regarded by many as a smug crank and a tiresome nuisance.

Another venerated (and misunderstood) hero of conscience—who, as it happens, does not have a role, or even a mention, in Professor Nussbaum’s account—is St. Thomas More, the friend and chancellor to King Henry VIII, one of the most renowned humanist intellectuals of his day, and—according to Samuel Johnson—“the person of the greatest virtue that [the British] islands ever produced.”¹³ More went to his death—citing “conscience”—for refusing to endorse either the King’s casting aside of his long-suffering wife, Catherine of Aragon, or his claim to supremacy over the Church in England. More, it can be said, died for the principle of church-state separation, as he understood it. Friends and family alike pleaded with him to go along, “for friendship’s sake,”¹⁴ and to take the oaths that so many clergy and co-religionists had apparently found less burdensome than prison or death. But he refused. “I would . . . leave every man to his conscience,” he told his daughter, Margaret, “and me thinketh in good faith that so were it good reason that every man should leave me to mine.”¹⁵ He died, as he said, “the king’s good servant, but God’s first.”¹⁶ (Actually, “and God’s first.”)¹⁷

Now, most of what most of us know—or think we know—about More comes from Robert Bolt’s *A Man for All Seasons*.¹⁸ For Bolt, More is not so much a pious son of Rome—let alone an enthusiastic scourge of Protestant heretics—but a “hero of selfhood.”¹⁹ Indeed, what attracted Bolt to More—it was probably not More’s zeal for combating Lutheranism—was his “adamantine sense of his own self.”²⁰ More is—to Bolt, and to many of us—an exemplar of and martyr for conscience, not because of his resolve to adhere to what he saw as the “‘common faith’ of Christendom,”²¹ but because, as Professor Smith puts it, he was “concerned to remain loyal to his beliefs, not because he is confident they are *true*, but because they are *his*, and hence are constitutive of his very *self*.”²²

Now, this image of More certainly makes for good drama, and it connects well with the spirit and pieties of our age. It has the disadvantage, though, of being “almost surely wrong.”²³ More could, I suspect, have

13. For a recent and very engaging biography of St. Thomas More, see PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1999).

14. ROBERT BOLT, *A MAN FOR ALL SEASONS* 72 (1960).

15. Letter from Thomas More to Margaret Roper (Apr. 1534).

16. ACKROYD, *supra* note 13, at 405.

17. *A THOMAS MORE SOURCE BOOK* 357 (Gerard B. Wegemer & Stephen W. Smith eds., 2004).

18. BOLT, *supra* note 14.

19. *See id.* at xiv.

20. *See id.* at xii.

21. Smith, *Conundrums of Conscience*, *supra* note 7, at 600 (internal quotations omitted).

22. *Id.* at 593.

23. *Id.*

happily endorsed Polonius's advice—"to thine own self be true"—as a helpful life-lesson, but it is quite unlikely that, for him, this maxim captured the demands, aims, and nature of conscience. For More, "conscience was inseparably connected to truth" and its value—the reason it should be honored, and the reason why the political authority should accommodate it—was also "connected to the sacred value of truth."²⁴

But even if Bolt got More wrong, his play is still compelling, and his error is instructive. And if, as Professor Nussbaum proposes, Roger Williams's life and example provide a useful point of entry into the contemporary conversation about the American traditions of fairness and equal respect, the martyrdom of More can help us to better understand how the no-establishment-of-religion norm, which the Establishment Clause proclaims, does (and does not) serve and help to flourish the freedom of religious conscience, which the Free Exercise Clause protects.

II.

Before proceeding, a few caveats and reservations: It seems right to say, again, that the "freedom of conscience" is "central to the modern discourse of religious freedom."²⁵ This centrality has become—as Justice Robert Jackson memorably declared and as Professor Nussbaum reminds us—the "fixed star" in our constitutional tradition.²⁶ Still, it is possible to venerate and value conscience while at the same time perceiving, and regretting, its "progressive cheapening," perhaps even its "degradation," as more and more drives, urges, preferences, and desires are baptized in its waters.²⁷ As Professor Marie Failinger has written, the freedom of conscience "began as an argument that government must ensure a free response by the individual called distinctively by the Divine"—or, even before that, that the individual is duty-bound to adhere freely to the Truth revealed by God and taught by the Church—but now she says "has come to mean very little beyond the notion of personal existential decision-making."²⁸ For many, it seems, the "freedom of conscience" is reducible to "the sacredness of consumer preferences."²⁹

So, even as we celebrate the freedom of conscience and its protection under law, we might well wonder if "we have any idea what we are talking

24. *See id.* at 603.

25. *See id.* at 580.

26. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

27. *See* Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 325 (2005) [hereinafter Smith, *Tenuous Case*].

28. *See* Marie A. Failinger, *Wondering After Babel: Power, Freedom, and Ideology in U.S. Supreme Court Interpretations of the Religion Clauses*, in LAW AND RELIGION 81, 93-94 (R. Ahdar ed., 2000).

29. RONALD BEINER, *PHILOSOPHY IN A TIME OF LOST SPIRIT: ESSAYS ON CONTEMPORARY THEORY* 29 (1997).

about,”³⁰ and if we are *really* talking about the same thing for which More went to the scaffold and in whose defense Williams charged the Massachusetts Bay Puritans with “soule rape.”³¹ We might also want to be sensitive to the possibility, as Professor Philip Hamburger put it, in another context but with similar purpose, that “more is less,” and that by expanding too much the concept of “conscience,” we risk making a platitude of a principle, and make conscience both harder to protect and—as expansively and imprecisely defined—less worthy of protection.³²

Another, related caveat: There is, in the literature and in the relevant cases, a longstanding debate over whether the “freedom of conscience” is, for constitutional purposes, limited to the freedom of *religious* conscience.³³ In my view, there are solid reasons for believing that respect for conscience should *not* be “limited to religiously shaped or informed consciences” or confined to specifically religious questions and contexts.³⁴ That said, I am inclined to agree with Professor Smith’s observation that our modern reverence for the freedom of conscience is “parasitic on older”—indeed, on religious—“ways of thinking that many of those who invoke conscience today might find problematic.”³⁵ Alasdair MacIntyre, in *After Virtue*, famously flagged a similar possibility with respect to the entirety of modern moral discourse.³⁶ The freedom of conscience, it seems to me, requires for its foundation a certain “moral anthropology.”³⁷ Cer-

30. Smith, *Tenuous Case*, *supra* note 27, at 326 (“Or are we just exploiting a venerable theme for rhetorical purposes without any clear sense of what ‘conscience’ is or why it matters?”).

31. In *Liberty of Conscience*, conscience is defined as “the faculty in human beings with which they search for life’s ultimate meaning.” NUSSBAUM, *LIBERTY OF CONSCIENCE*, *supra* note 6, at 19.

32. See Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004).

33. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (“[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.”); see also NUSSBAUM, *LIBERTY OF CONSCIENCE*, *supra* note 6, at 102-03, 164-74; Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006).

34. See Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 930 (2005) [hereinafter Smith, *What Does Religion Have to Do with Freedom of Conscience*]. See generally ROBERT VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (forthcoming).

35. Smith, *Tenuous Case*, *supra* note 27, at 358.

36. ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984).

37. See Richard W. Garnett, *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191, 1216 (2004) (“[B]y ‘moral anthropology’ I mean ‘an account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated.’” (quoting Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 543 (2003))). In this same piece, I wrote that

In the Psalmist’s words, “Lord, what is man . . . that thou makest account of him?” This is not only a prayer, but a starting point for jurisprudential

tain things need to be true, about the universe, and about the person and her destiny, in order for it to also be true that “conscience” is not merely our wants in fancy dress but is instead sacred and therefore capable of making demands on self and society.³⁸

If John Searle and other naturalistic thinkers are correct, if the world “is made up entirely of physical particles in fields of force,”³⁹ some of which have become organized into “certain higher-level nervous systems,”⁴⁰ then it is not obvious to me that our conscience-talk has the moral heft we think it does. If we are merely meat puppets moving through particle-clogged space, then our “liberty of conscience” story seems little more than a pretty fiction, and our present-day defenders of that liberty are doing little more than “whistling in the dark, . . . trying to make secure to reason what reason cannot finally underwrite.”⁴¹

III.

That is a gloomy thought, so let’s put it aside.⁴²

reflection. After all, as John Courtney Murray once observed, “[i]n the end, every structure of moral doctrine and decision rests on a concept of the nature of man.” All moral problems are anthropological problems, because moral arguments are built, for the most part, on anthropological presuppositions.

Garnett, *supra* (citations omitted).

38. A similar point has been made in recent years regarding the morality of human rights. See generally NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (2007); Michael J. Perry, *The Morality of Human Rights: A Non-Religious Ground?*, 54 EMORY L.J. 97 (2005).

39. JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 86-87 (1994).

40. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 6 (1995). In a recent essay, Christian Smith describes the “features of a naturalistic universe”: “There is no divinity, no transcendent natural law, no ultimate spiritual meaning or destiny that transcends human invention during the blip of cosmic time humans have occupied. Reality consists of various conglomerations of infinitesimally small particles pulled together by physical forces but which are in constant state of flux.” Christian Smith, *Does Naturalism Warrant a Moral Belief in Universal Benevolence and Human Rights?*, in *SCIENTIFIC, PHILOSOPHICAL, AND THEOLOGICAL REFLECTIONS ON THE ORIGIN OF RELIGION* 292, 298 (J. Schloss & M. Murray eds., 2009).

41. RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* 5 (2d ed. 2000) (quoted in Michael J. Perry, *Morality and Normativity* (2007), on file with author); cf. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979). Paul Horwitz suggested to me in correspondence that our talk of conscience can still pack moral heft, “if we believe we *may* be meat puppets but aren’t sure.”

42. Perhaps, Professor Nussbaum has suggested, we ought to welcome the chance to “put . . . aside” the thought:

If we really think of the hope of a transcendent ground for value as uninteresting or irrelevant to human ethics, as we should, then the news of its collapse will not change the way we think and act. It will just let us get on with the business of reasoning in which we were already engaged.

Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 740 (1994). On the other hand, there is Nicholas Wolterstorff’s observation:

The “freedom of conscience”—whatever it might owe, foundationally, to a worldview that we no longer accept (or are not willing to admit we accept)—just *is* central to our understanding of religious liberty and to the construction of our First Amendment; it *is* a fixed star in our constitutional tradition. It is, as Professor Witte has shown, one of the several related and reinforcing “essential rights and liberties of religion” cherished by the Founding generation,⁴³ the “cardinal principle for the new experiment in religious liberty.”⁴⁴ Others included, Professor Witte argues, the “separation of church and state” called for the “disestablishment of religion.”⁴⁵

What, again, do these latter ideas and principles have to do with the liberty of conscience? And, how should we understand and apply these principles, to best enable them to serve that liberty? How does—and does not—the Constitution’s no-establishment rule protect conscience?

I believe that an underappreciated answer to this last question can be found in the martyrdom of St. Thomas and the usurpation by Henry VIII. Although Roger Williams was certainly no fan of the Roman Catholic Church or things “popish,” he should have regarded Henry’s assertion of supremacy over the Church, his suppression of the monasteries and confiscation of the Church’s property, and his attacks on the independence of ecclesiastical law as brutish invasions of the “Garden” by the master of the “Wilderness.” Just as St. Thomas feared, after Henry’s power grab, few were able to “stand upright,” in conscience, in “the winds that blew” once the powers competing with the sovereign were cut down.⁴⁶ This is because the “separation of church and state” is a powerful *structural* principle; it is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state and thereby clears out and protects a social space, within which persons are formed and educated, and without which the liberty of conscience is vulnerable. And so, it turns out that the no-establishment rule protects the liberty of conscience primarily by respecting and protecting the independence of non-state authority.

Before fleshing out this claim, it makes sense to consider other ways—more familiar ways, perhaps—that we might think church-state separation and non-establishment shore up the liberty of conscience. *First*, and most

Our moral subculture of rights is as frail as it is remarkable. If the secularization thesis proves true, we must expect that the subculture will have been a brief shining episode in the odyssey of human beings on earth. A melancholy conclusion . . . if one believes the secularization thesis[.] I do not believe the thesis.

WOLTERSTORFF, *supra* note 38, at 393.

43. WITTE, *supra* note 8, at 39-42.

44. *Id.* at 42.

45. *Id.* at 48-58.

46. See BOLT, *supra* note 14, at 65-66. I discuss this passage in more detail in Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).

obviously, we could say, as Justice Kennedy did in the graduation-prayer case, that the First Amendment does not permit coerced prayers or professions of faith.⁴⁷ Certainly, we should say this. The Declaration on Religious Freedom promulgated by the Second Vatican Council put the matter plainly and well: The freedom of religion, to which the human person has a right, grounded in his or her dignity, means “that all men are to be immune from coercion.”⁴⁸ It is not at all clear, however, that this no-coercion rule depends in any significant way on the non-establishment norm.⁴⁹ True, a state with a legal establishment of religion might well be more likely to attempt to coerce people in matters of conscience. It might, however, just as well refrain from such attempts. In any event, in our own context, the Constitution’s Free Exercise and Free Speech Clauses seem to more obviously and directly forbid “coercion” in such matters.

Second, we might think—with Justice Sandra Day O’Connor, for example—that the no-establishment rule protects and respects conscience by prohibiting actions by government that “endorse” religion and thereby “send a message to non-adherents that they are not full members of the political community.”⁵⁰ This idea is often at work in cases and controversies surrounding public displays and monuments—the Ten Commandments,⁵¹ for example, or a holiday display.⁵² As Professor Nussbaum observes in her book, these cases can be difficult, and the messages such displays and symbols communicate might, in some cases, be in tension with a deep commitment to political and civil equality.⁵³ At the same time, these cases are some distance removed from threats to, or the liberty of, *conscience*. There are, certainly, many good reasons—civic-friendship reasons—to worry, in a pluralist society, about clunky or insulting endorsements of religion (just as there are reasons to worry about excessive hostility or sensitivity to religious expression in the public square or to official acknowledgment of religious traditions). But the policing of displays, monuments, declarations, and the like for suggestions of favoritism or endorsement is a judicial activity that protects conscience—if at all—only indirectly.

47. See *Lee v. Weisman*, 505 U.S. 577 (1992).

48. See SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ [DECLARATION ON RELIGIOUS FREEDOM] ¶ 2 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html [hereinafter DIGNITATIS HUMANAЕ].

49. Cf. NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 6, at 225 (noting, as one “danger” posed by religious establishment, “danger of coercion, as an official religion or religions might curtail the conscience space of those who don’t join”).

50. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); see also, e.g., NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 6, at 227 (“Government must not make statements . . . that a reasonable observer could construe as saying that a given group of citizens is ranked above another group.”).

51. See *Van Orden v. Perry*, 545 U.S. 677, 746 (2005) (Souter, J., dissenting).

52. See, e.g., *Lynch*, 465 U.S. 671-72.

53. See NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 6, at 224-72.

Third, some believe that the Establishment Clause protects conscience by limiting so-called “morals legislation,” and by requiring that all laws passed and demands made by the civil authority have a “secular purpose,” rather than a religious one.⁵⁴ Justice John Paul Stevens, for example, has often suggested that laws regulating abortion, or laws outlawing physician-assisted suicide, are unconstitutional because they involve the imposition of “religious” beliefs and therefore burden the freedom of conscience.⁵⁵ Similarly, as the debates over and reactions to California’s Proposition 8 illustrated, some believe that resistance to the legalization of same-sex marriage is in tension with the no-establishment rule—and so also with our commitments to conscience and equal liberty—because the bases for this resistance sound in religious teaching, rather than public reason.⁵⁶

Now, there are good reasons—indeed, there are *religious* reasons, entirely orthodox ones—to avoid overreaching when it comes to morals legislation.⁵⁷ It was not just John Stuart Mill, but also St. Thomas Aquinas, who believed that the law should not require every virtue or outlaw every vice. It is, for example, “black letter” Roman Catholic teaching that the law ought to allow the greatest space possible for freedom, even when that freedom is not exercised in accord with moral truth, consistent with the just demands of public order.⁵⁸ “As much state as necessary, as much freedom as possible,” is how John Courtney Murray once put it.⁵⁹ That said, it is a mistake to tie the morals-legislation debate too closely to church-state separation. Disestablishment and an appropriate distinction between ecclesiastical and political authority do not limit the kinds of reasons that citizens and legislators may deploy when debating the proper use of the police power. There are, indeed, moral limits on morals legislation, but the conversation about those limits is more about justifiable constraints on liberty than the implications or content of the Establishment Clause.

54. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (applying secular-purpose rule and invalidating state law dealing with teaching of evolution).

55. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566 (1989) (Stevens, J., dissenting) (“I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution.”).

56. See, e.g., Geoffrey Stone, *Democracy, Religion, and Proposition 8*, THE HUFFINGTON POST, May 17, 2009, http://www.huffingtonpost.com/geoffrey-r-stone/democracy-religion-and-pr_b_144103.html.

57. See, e.g., Gregory A. Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INT’L DISC. L.J. 1 (2006).

58. See generally, e.g., Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship between Civil and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATH. SOC. THOUGHT 231 (2004).

59. John Courtney Murray, S.J., *The Problem of State Religion*, 12 THEOLOGICAL STUD. 155, 158 (1951); see also John Courtney Murray, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 521, 521 (1964) (“Let there be as much freedom, personal and social, as is possible; let there be only as much coercion and constraint, personal or social, as may be necessary for public order.”).

Fourth, financial support by the government for religion is often said to violate the conscience of those who are compelled to contribute, through taxes, to the public purse. Thomas Jefferson put the matter memorably and influentially: “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.”⁶⁰ A similar view motivated Jefferson’s collaborator, James Madison, to pen his famous *Memorial and Remonstrance Against Religious Assessments*, and to insist that conscience is offended by any law that would “force a citizen to contribute three pence . . . for the support of any one establishment.”⁶¹

The claim that the no-establishment rule protects the liberty of conscience by regulating the disbursement of public funds is and has long been attractive and rhetorically powerful. It is, however, mistaken. The no-establishment rule does protect and nurture the formation and freedom of conscience, but in a different way, one that a recent 5-4 decision by the Supreme Court can help us to appreciate.

IV.

Two years ago, in *Hein v. Freedom from Religion Foundation*,⁶² the Court, in Linda Greenhouse’s words, “closed the courthouse door on a lawsuit challenging the Bush administration’s use of taxpayer money to support its Office of Faith-Based and Community Initiatives.”⁶³ Should the “door” have been open to this challenge? Certainly, whether public funds may and should be used to pay for social-welfare services provided by religiously affiliated institutions is an interesting, important, and difficult question. The answer provided by the Justices in *Hein* was that the Constitution did not authorize the Court to hear this particular challenge, brought by this particular challenger, because the Freedom from Religion Foundation (“Foundation”) lacked “standing.”⁶⁴ In other words, the *Hein* case was (or, at least, purported to be) more about the Court’s power to decide a legal question than about the answer it should give.

To oversimplify: It is, for better or worse, well established that federal courts may not—not merely because it is awkward or inconvenient, but because they really may not—use the “judicial power of the United States”⁶⁵ to ponder engaging hypotheticals or solve moot court riddles. Instead, as Justice Stevens has put it, “[t]he Constitution limits federal-

60. Thomas Jefferson, *The Virginia Statute for Religious Freedom* (1779).

61. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), reprinted in *CHURCH AND STATE IN THE MODERN AGE* 59-60 (J.F. Maclear ed., 1995).

62. 551 U.S. 587 (2007).

63. Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. TIMES, June 26, 2007, <http://www.nytimes.com/2007/06/26/washington/26faith.html?pagewanted=print>.

64. *Hein*, 551 U.S. at 599-609.

65. U.S. CONST. art. III.

court jurisdiction to ‘Cases’ and ‘Controversies.’⁶⁶ Still, many worry that, if courts focus too much on the plaintiff, and not enough on her complaint, some important problems will go unsolved and some wrongs will go un-righted, at least in the courts.⁶⁷ “If no one has standing to call [the government] to account,” the fear is, “it can disregard the law with impunity—a result that would make an ass of the law.”⁶⁸ In *Hein*, for example, the Foundation warned of the possibility that, enabled by too-restrictive standing rules, “a federal agency could use its discretionary funds to build a house of worship” or “to make bulk purchases of . . . crucifixes . . . for use in its offices” and yet evade judicial correction of its constitutional error.⁶⁹ And why would we ever take the chance that constitutional error will evade judicial correction?⁷⁰

“[P]erhaps our oldest question of constitutional law,” Justice O’Connor once observed, “consists of discerning the proper division of authority between the Federal Government and the States.”⁷¹ Similarly well pedigreed is the challenge of working out both the “real world” and doctrinal implications of the fact that our Constitution separates the legislative, executive, and judicial “power[s],” and “vest[s]” them in Congress, the President, and the federal courts, respectively.⁷² We have, in other words, been wrestling for a long time with “the law governing the structure of, and the allocation of authority among, the various institutions of the national government.”⁷³ Behind, underneath, or somehow prior to these venerable problems of horizontal and vertical structuring is another big and similarly credentialed question: *Why?* That is, why is “authority” divided—i.e., why did those who composed and ratified the Constitution divide the authority granted by “We the People”—“between the Federal Government and the States,” and why is the national government’s authority allocated as it is?

66. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting U.S. CONST. art. III).

67. *Cf., e.g., Schlessinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”).

68. Richard A. Epstein, *Standing and Spending: The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 3 (2001) (quoting WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* (7th ed. 1994)).

69. *See Hein*, 551 U.S. at 614.

70. *See Flast v. Cohen*, 392 U.S. 83, 112 (1968) (Stevens, J., concurring) (“When the judiciary is no longer ‘a great rock’ in the storm, as Lord Sankey once put it, when the courts are [miserly] in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.”) (citation omitted).

71. *New York v. United States*, 505 U.S. 144, 149 (1992). For an important treatment of the case, and this “oldest question,” see generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

72. U.S. CONST. arts. I-III.

73. Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 885 (2005).

One plausible answer to this question would be (something like) “to protect human freedom and promote human flourishing.” Certainly, a political community could, through its constitution, pursue these worthy ends in a number of ways. It could, for example, charge its government, explicitly and positively, with providing its members with various material and other goods. The Constitution of the United States, though—unlike many others⁷⁴—“is largely silent on positive rights.”⁷⁵ A community could, instead, or in addition, opt to constrain government officials and lawmakers, using express individual-rights protections, from burdening the liberties of persons and associations: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner,”⁷⁶ “No Bill of Attainder or ex post facto Law shall be passed,”⁷⁷ and so on. Or, it could constitute the government in such a way that its very structure—by itself, apart from any positive welfare-promoting requirements or negative liberty-protecting constraints—served the above-mentioned goals of freedom and flourishing.⁷⁸

Particularly in recent years, courts and commentators have emphasized the extent to which our Constitution reflects this third strategy.⁷⁹ It is said that our constitutional experiment reflects, among other things, the belief that the structure of government matters for, and contributes to, the good of human persons.⁸⁰ “Th[e] constitutionally mandated division of authority,” Chief Justice William Rehnquist once wrote, “was adopted by the Framers to ensure protection of our fundamental liberties.”⁸¹ Indeed, “the promise of liberty,” Justice O’Connor suggested, lies in this “tension

74. See generally, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 236-37 (2004) (discussing positive-rights provisions in state constitutions); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 524 (1992); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898-1908 (2004).

75. A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9, 13 (2007).

76. U.S. CONST. amend. III.

77. U.S. CONST. art. I, § 9, cl. 3.

78. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (noting that, at Founding, “[l]imitations were . . . placed upon both federal and state governments in the form of both a division of power and express protection for individual rights”).

79. See, e.g., J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1687 (2004) (“Americans properly revere our Constitution for its protection of individual rights. We tend to overlook, however, that the Constitution also provides a blueprint for our governmental structure.”).

80. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (insisting that Framers were “convinced . . . that liberty of the person inheres in structure”).

81. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (internal quotations and citations omitted). For a careful examination, and strong defense, of the Court’s decision and premises in *Lopez*, see, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995). For my own examination of the Rehnquist Court’s “New Federalism,” see Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11-38, 84-94 (2003).

between federal and state power[.]”⁸² Similarly, “the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one Branch[.]”⁸³ The “[s]eparation of powers,” in other words, “was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.”⁸⁴

One could go on and on, of course, gathering observations by Madison and Montesquieu, Tocqueville and Tiebout; expounding on “checks and balances,” subsidiarity, localism, and pluralism; and compiling imposing citation lists in support of the proposition that our Constitution was designed to protect individual liberty by dividing, enumerating, and reserving governments’ powers and authority. There is no need, however, to belabor the point: “The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.”⁸⁵ And, this particular feature, or “genius,” of our Constitution suggests an interesting, possibly illuminating, way of thinking not only about the decision in *Hein*, but also about the relationship between nonestablishment and the liberty of conscience.

In *Hein*, again, the Justices considered a relatively narrow question: whether the Foundation—a group of people “opposed to government endorsement of religion”—had standing to challenge, on Establishment Clause grounds, certain activities of the White House Office of Faith-Based and Community Initiatives.⁸⁶ As Justice Samuel Alito observed, writing for a three-Justice plurality, “[t]he only asserted basis for standing was that the individual respondents are federal taxpayers who are ‘opposed to the use of Congressional taxpayer appropriations to advance and promote religion.’”⁸⁷ Now, generally speaking, it is not enough to satisfy the Constitution’s standing requirement⁸⁸ that a would-be party seeking to challenge in federal court the constitutionality of a federal-government action pays

82. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

83. *Id.* at 458.

84. *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); see also, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (“The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed.”).

85. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155 (1992).

86. See *Hein v. Freedom of Religion Found., Inc.*, 551 U.S. 587, 595 (2007).

87. *Id.* at 596 (quoting appellant’s petition for certiorari).

88. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 63-64 (1997) (“Standing to sue or defend is an aspect of the [Constitution’s] case or controversy requirement.”) (citations omitted).

taxes.⁸⁹ In *Flast v. Cohen*,⁹⁰ though, the Justices announced a “narrow exception to the general rule against federal taxpayer standing,” and the Foundation sought to take advantage of this exception.⁹¹

The Foundation contended in its lawsuit that President Bush and others had violated the First Amendment’s Establishment Clause by giving “speeches that used ‘religious imagery’ and praised the efficacy of faith-based programs in delivering social services.”⁹² In addition, the Office organized conferences whose content “sent a message to religious believers ‘that they are insiders and favored members of the political community’ and . . . to nonbelievers that ‘they are outsiders’ and ‘not full members of the political community.’”⁹³ The Justices did not reach the merits of the Foundation’s First Amendment claims, though, because they concluded that it was not entitled to the benefit of the *Flast* exception.

In something of a change from recent, high-profile church-state cases, the dispute in *Hein* produced only four opinions.⁹⁴ Justice Alito announced the Court’s judgment, in an opinion which was joined only by Chief Justice John Roberts and Justice Kennedy. “‘No principle,’” he insisted, “‘is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.’”⁹⁵ He refused, therefore, to extend the *Flast* exception to reach the Foundation’s claims. For Justice Alito, any expansion of *Flast* runs the risk of “deputiz[ing] federal courts as ‘virtually continuing monitors of the wisdom and soundness of Executive action.’”⁹⁶ That, “most emphatically, ‘is not the role of the judiciary.’”⁹⁷

The Court did not, however, abandon *Flast*. The Establishment Clause, Justice Kennedy insisted in his concurring opinion, “expresses the Constitution’s special concern that freedom of conscience not be compromised by government taxing and spending in support of religion” and, he

89. See, e.g., *Hein*, 551 U.S. at 599 (“As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing.”); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923).

90. 392 U.S. 83, 88 (1968).

91. See *Hein*, 551 U.S. at 593 (citing *Flast*, 392 U.S. at 88).

92. *Id.* at 592 (quoting appellant’s petition for certiorari).

93. *Id.* at 595-96 (quoting appellant’s petition for certiorari).

94. See, e.g., *Rehnquist Praised for Service to Court*, USA TODAY, Sept. 4, 2005, http://www.usatoday.com/news/washington/2005-09-04-rehnquist_x.htm (reporting that, after Chief Justice Rehnquist announced litany of separate opinions in one of Ten Commandments cases handed down that day, he said, “I didn’t know we had that many people on our court”).

95. *Hein*, 551 U.S. at 598 (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (internal quotations omitted).

96. *Id.* at 612 (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

97. *Id.* (quoting *Allen*, 468 U.S. at 760).

stated, it is this concern that justifies the “result reached in *Flast*,” which was “correct and should not be called into question.”⁹⁸

Justice Antonin Scalia, however, was less impressed. For him, a review of the taxpayer-standing precedents confirmed his grim diagnosis: *Flast* itself was confused, and “[c]oherence and candor have fared no better” in its progeny.⁹⁹ In his view, the case’s rule must, in logic, be either expanded or rejected.¹⁰⁰ That said, Justice Scalia was also unimpressed with the arguments advanced by the Foundation for extending *Flast*. The “logical consequence” of these arguments—that is, that “[a]ny taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause”—“finds no support in this Court’s precedents or our Nation’s history.”¹⁰¹

Justice Souter dissented pointedly, and emphasized the “deep historical roots” of the claim that an objecting taxpayer is injured when public funds are spent in aid of religion.¹⁰² After all, Madison had asserted that the just government of a free people will not “force a citizen to contribute three pence only of his property for the support of any one establishment” of religion.¹⁰³ This assertion was a “translat[ion] into practical terms [of] the right of conscience,” which dictates, among other things, that “[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”¹⁰⁴ And, Justice Souter insisted, “[a]s a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause.”¹⁰⁵

98. *Id.* at 616 (Kennedy, J., concurring); *cf.* *Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) (noting that “lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce”).

99. *Hein*, 551 U.S. at 625 (Scalia, J., concurring).

100. *See id.* at 628 (“[T]here are only two logical routes available to this Court. We must initially decide whether *Psychic Injury* is consistent with Article III. If it is, we should apply *Flast* to all challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power; if it is not, we should overturn *Flast*.”).

101. *Id.* at 632.

102. *Id.* at 638 (Souter, J., dissenting).

103. *Id.* (quoting 2 THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901) (1787)).

104. *Id.* (quoting THE WRITINGS OF JAMES MADISON, *supra* note 103, at 184).

105. *Id.* (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 n.22 (2002) (Souter, J., dissenting)) (internal quotations omitted). In addition to his own dissent in *Zelman*, Justice Souter also cited here the recent, widely noted work by his former law clerk, Professor Noah Feldman. *See* FELDMAN, *supra* note 3, at 48 (“The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support.”); *cf.* Richard W. Garnett, “*Modest Expectations*”?: *Civic Unity, Religious Pluralism, and Conscience*, 23 CONST. COMMENT. 241 (2006) (reviewing FELDMAN, *supra* note 3, and KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA* (2005)).

The centrality of the taxpayer's right of conscience, and the Madisonian claim that public funding in aid of religion implicates that right, indicated clearly to Justice Souter that "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution"; this, he thought, distinguishes Establishment Clause objections from other "generalized grievances."¹⁰⁶ *Flast*, Justice Souter conceded, is "in a class by itself,"¹⁰⁷ but this fact is explained and justified by the asserted "Madisonian relationship between tax money and conscience" and also by the Founders' "pragmatic conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions."¹⁰⁸

Hein was not what many observers seemed to want or expect, i.e., another headline-grabbing installment in the Supreme Court's *Lemon*-and-"endorsement" jurisprudence. The case went from being billed, early in the Term, as the year's big church-state case—with the drama of a challenge to the Bush Administration's "God-soaked" policies thrown in for good measure—to one that, if it was mentioned in the end-of-the-year round-ups, had to be translated from the register of separation-of-powers to the more accessible one of separation-of-church-and-state. On the other hand, it did present another 5-4 split among the Justices, divided along the familiar, if overhyped, ideological lines.¹⁰⁹ And, of course, it provided a vehicle for the *frisson* that comes, for some, with watching Justice Scalia tear into one of his philosophical allies.¹¹⁰

In addition, *Hein* raises, yet again, this question: Was Madison right? Is Justice Souter's view—i.e., that *Flast*'s Establishment Clause exceptionalism is justified because it is necessary to vindicate conscience—plausible?¹¹¹ Is it *true* that the direction of even "three pence . . . of his property for the support of any one establishment" invades an individual's personal, protected liberty of conscience, and therefore conflicts squarely with a basic Founding-era commitment?¹¹² It was, Professor Feldman reports, widely believed that "[c]ompelled taxes to support religion . . . *always* violate religious liberty, even when the taxpayer does not directly object."¹¹³ But, were those who believed this correct?

106. See *Hein*, 551 U.S. at 638 (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring)); see also *Flast*, 392 U.S. at 116 (Fortas, J., concurring) ("The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause.").

107. See *Hein*, 551 U.S. at 641.

108. *Id.* at 643 (internal quotations and citations omitted).

109. See Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 431 (2007).

110. See Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007, at A1, available at <http://www.nytimes.com/2007/06/28/washington/28memo.html>.

111. See *Hein*, 551 U.S. at 637-39 (Souter, J., dissenting).

112. See *supra* note 61 and accompanying text.

113. FELDMAN, *supra* note 3, at 37.

Certainly, theirs was not the only view. In 1810, a Massachusetts judge considering that state's constitutionally authorized tax assessments in support of religion rejected the argument that "when a man disapproves of any religion, . . . to compel him by law to contribute money for public instruction in such religion or doctrine, is an infraction of his liberty of conscience[.]"¹¹⁴ Even with the benefit of a quarter-century's time to reflect on Madison's *Memorial and Remonstrance Against Religious Assessments*, this judge insisted that this objection "seems to mistake a man's conscience for his money and to deny the state a right of levying and appropriating the money of the citizens, at the will of the legislature, in which they are all represented."¹¹⁵ The "great error," the judge continued, "lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection."¹¹⁶

Why should we think, even if Madison thought, that the freedom of conscience is unjustly burdened, and the Religion Clauses therefore violated, simply by the use of public funds raised through taxes to pay for conferences intended to assist religiously affiliated social-welfare organization in applying for generally available contracts and grants?¹¹⁷ After all, such a situation does not present—not really—an "establishment" of religion like those with which those who ratified the First Amendment, and debated religious liberty in the late 18th century, were familiar.¹¹⁸ True, Jefferson's earlier-mentioned proclamation that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"¹¹⁹ packs a lot of rhetorical weight, but it is not reflected at all in the reality of politics and government today. Every taxpayer furnishes money for the "propagation of opinions which he disbelieves"; indeed, every taxpayer funds all sorts of government actions to which he has serious objections in conscience. But, as Professor Smith

114. *Barnes v. First Parish in Falmouth*, 6 Mass. 400 (1810), reprinted in MICHAEL W. MCCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION 18-22* (2d ed. 2006). The author of *Barnes*, Theophilus Parsons, had served as a Massachusetts delegate to the Constitutional Convention.

115. MCCONNELL ET AL., *supra* note 114, at 21.

116. *Id.*

117. *Cf., e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 711-16 (2002) (Souter, J., dissenting) (concluding that Cleveland's school-voucher program is unconstitutional because it burdens consciences of those who object to spending public money in ways that, in effect, support religious instruction).

118. See *Van Orden v. Perry*, 545 U.S. 677, 692-94 (2005) (Thomas, J., concurring) (discussing original understanding of religious establishments); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."); MCCONNELL ET AL., *supra* note 114, at 15-16 (discussing various legal features of English establishment).

119. Thomas Jefferson, *A Bill for Establishing Religious Freedom* § 1 (1779).

has observed, good explanations simply have not yet been given “for why the burden on conscience applies when a taxpayer objects . . . to expenditures that may benefit religion but not when a taxpayer objects on religious or conscientious grounds to expenditures that run contrary to the taxpayer’s beliefs.”¹²⁰

There are good reasons to be cautious about public support of religious activities and institutions.¹²¹ The best reason, however, is not because such support violates taxpayers’ “consciences”—it does not. *Flast* was wrongly decided, and the no-establishment rule does not protect the liberty of conscience primarily by authorizing taxpayer standing to challenge disbursements of public funds.¹²² It does, however, protect conscience in an important way, a way that connects interestingly with the debate over “standing” in *Hein*.

V.

I mentioned earlier that we tend to think, and have long thought, that there is a connection—a cooperative, supporting one—between the no-establishment rule, on the one hand, and the flourishing and protection of conscience, on the other. But how, exactly, does this relationship work? How is this support delivered? The brief discussion above of several possible accounts was enough to warrant the suggestion that they are, at least, incomplete. Is a better account available? I think so. It is one that is illustrated and inspired by the work of John Courtney Murray and by the Second Vatican Council’s *Declaration on Religious Liberty*.¹²³

Murray is best known today for his work in grounding the freedom of religious conscience from government coercion on the dignity of the

120. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, *supra* note 34, at 913-14 & n.13.

121. See generally, e.g., Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

122. To say that *Flast* was wrongly decided is not to say that the Justices in *Hein* offered persuasive distinctions between the two cases. For a thorough analysis and critique of *Hein* see, e.g., Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc., and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115 (2008). I should also note that Paul Horwitz has argued recently that an appropriate emphasis on the independence and “sovereignty” of First Amendment institutions should result in generous, *Flast*-type standing for taxpayers seeking to “enforce the Establishment Clause” and to “preserve and maintain the integrity of religious entities as sovereign spheres.” Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 130 (2009). I have been heavily influenced by Professor Horwitz’s scholarship. See, e.g., Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008). I did not have the benefit of *Of Sovereignty and Spheres* at the time this paper was being prepared, but I hope to engage it with the care it deserves in future work.

123. For an expanded discussion of some of the ideas and claims that follow, see, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

human person.¹²⁴ What is sometimes overlooked is his emphasis on one particular “Great Idea”—the “Freedom of the Church”—as a crucial, structural protection for conscience.¹²⁵ This idea, or principle, of what in American constitutional law is often called “church autonomy” was not merely a spin-off of his dignity-based case for immunity from coercion in matters of religious conscience; it is the linchpin of that argument. Murray insisted that we are not really free if “[our] basic human things are not sacredly immune from profanation by the power of the state[.]”¹²⁶ The challenge, then, is to find the limiting principle that can “check the encroachments of civil power and preserve these immunities”; and, he thought, “[w]estern civilization first found this norm in the pregnant principle, the freedom of the Church.”¹²⁷ This principle supplied, in other words, what Murray called the “new Christian theorem,” namely, that the Church “stood between the body politic and the public power, not only limiting the reach of the power over the people, but also mobilizing the moral consensus of the people and bringing it to bear upon the power.”¹²⁸ For Murray, it was the freedom of the Church that furnished a “social armature to the sacred order,” within which the human person would be “secure in all the freedoms that his sacredness demands.”¹²⁹

He worried, though—as we should—that we are living off the capital of this idea. We enjoy, embrace, and depend upon its freedom-enabling effects, but without a real appreciation for or even a memory of what it is, implies, and presumes.¹³⁰ That which furnishes for us today the “social armature to the social order,” the principle or idea that does the work of affirming and ensuring that the state is not “all in all,” is not the freedom of the Church, but is instead the freedom of the individual conscience.¹³¹ In our religious-freedom doctrines and conversations, it is more likely that the independence and autonomy of churches, or of religious institutions

124. See, e.g., *DIGNITATIS HUMANAE*, *supra* note 48, ¶ 2 (“[T]he right to religious freedom has its foundation in the very dignity of the human person as it is known through the revealed word of God and by reason itself. . . . [T]he right to religious freedom has its foundation not in the subjective disposition of the person but in his very nature.”).

125. See JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 202 (1960) (noting that “freedom of the Church” was a “Great Idea, whose entrance into history marked the beginning of a new civilizational era”).

126. *Id.* at 204.

127. *Id.*

128. *Id.* at 205.

129. *Id.*

130. See *id.* at 215 (“On the one hand, modernity has denied (or ignored, or forgotten, or neglected) the Christian revelation that man is a sacredness, and that his primal *res sacra*, his freedom, is sought and found ultimately within the freedom of the Church. On the other hand, modernity has pretended to lay claim to the effects of this doctrine . . .”).

131. See *id.* at 206 (“The freedom of the individual conscience, constitutionally guaranteed, would supply the armature of immunity to the sacred order, which now became, by modern definition, precisely the order of the private conscience.”).

and associations generally, are framed as deriving from, or existing in the service of, the free-exercise or conscience rights of individual persons than as providing the basis or foundation for those rights.

The *Declaration on Religious Freedom*, mentioned earlier, famously affirmed the dignity of the human person and the inviolability of the human conscience, and insisted on immunity from external coercion in matters of religious belief. However, the Council Fathers did not stop there, and neither should we. They connected this claim about immunity and inviolability with another one, about the state, and about what Murray called the “ontological structure of society.”¹³² Its definition of religious freedom had, as one scholar has put it, “a *public*, as well as personal meaning.”¹³³

Only a state with limited and defined powers could acknowledge that there was a *sanctum sanctorum* in every conscience where state power ought not tread. Only a state with no pretensions to omniscience could acknowledge its incompetence in matters theological. Only a state which understood that it existed to service society could acknowledge the priority and integrity of the free associations of civil society, including religious associations.¹³⁴

The point is worth underscoring: The Declaration’s claim is not only that (though it is that) religious freedom includes both immunity from coercion in matters of “private” belief and a right to express that belief in community through worship and otherwise.¹³⁵ It is not only that religious faith and experience have a communal dimension, but also that religious freedom requires for its flourishing a social structure, and a legal order, in which the state has constitutionally limited and defined powers and, in a way, competes with other associations and institutions. More particularly, it calls for recognition by the state of the freedom of the Church—for itself, and not simply as a proxy for the religious-liberty rights of individuals. True, the Declaration insists that there is a “harmony” between individuals’ “civil right not to be hindered in living their lives according to their consciences” and the “independence” from state oversight in matters of religion claimed for the church.¹³⁶ But again, the freedom to be enjoyed by religious communities is not defended merely as a vehicle for or incident of individuals’ private religious expression. Rather, the “freedom

132. *See id.* at 199.

133. George Weigel, Lecture, *The Moral Foundations of Freedom* (Oct. 23, 2000), http://www.cis.org.au/events/acton/acton_2000.pdf.

134. *Id.*

135. *See, e.g.*, *DIGNITATIS HUMANAE*, *supra* note 48, ¶ 4 (“Religious communities are a requirement of the social nature both of man and of religion itself.”).

136. *See id.* ¶ 13.

of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order."¹³⁷

The key point here is that the freedom of the Church is framed as a structural feature of social and political life—one that promotes and enhances freedom by limiting government—and also as a moral right to be enjoyed by religious communities. It is not simply an effect or implication of private, individual claims to freedom of conscience and immunity from government coercion in matters of religious belief. In Murray's view, the immunity of conscience from coercion in religious matters depends on, and is nourished by, church autonomy. He believed, in other words, that "the protection of . . . aspects of life from the inherently expansive power of the state . . . depended historically on the freedom of the Church as an independent spiritual authority."¹³⁸ He worried, though, that the modern tendency was to substitute autonomous individuals' consciences—whose designated protector would be the liberal state—for the freedom of the Church as the guarantor of the social space necessary for meaningful pluralism; that modern freedom of religion is attacking its own foundations; and that, in a way, the immunity of conscience is eating itself.

VI.

Return, now, to the *Hein* case: There, the Justices in the majority emphasized their view that the Court's standing rules reflect and implement the Constitution's liberty-protecting, power-checking structural principles. They held up for our consideration and embrace the basic claim that features of the Constitution's design, no less than litanies of specific prohibitions on particular government actions, protect freedom. This claim, I believe, is instructive with respect to the question posed at the outset of this paper, that is, how do the no-establishment rule, and the separation of church and state, *actually* protect the liberty of conscience? They do so by committing us to the idea that there are, and ought to be, multiple, rival authorities. Protecting and respecting the freedom of conscience requires protecting and respecting the competing associations, institutions, and authorities that both clear out the space in which conscience is formed and engage in the formation of consciences. A constitutional state that truly cherishes the liberty of conscience will allow these non-state formers-of-conscience to flourish, will acknowledge their appropriate independence, and will not aspire to remake them in its own image.

137. *Id.*

138. Francis Canavan, S.J., *Religious Freedom: John Courtney Murray, S.J. and Vatican II*, FAITH AND REASON, Summer 1987, available at <http://www.ewtn.com/library/HUMANITY/FR87203.TXT>.

