

Spring 5-1-2022

A Memorial and Remonstrance Against Taxation of Churches

Reece Barker

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Recommended Citation

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A Memorial and Remonstrance Against Taxation of Churches

Reece Barker*

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INTRODUCTION

In 1784, the Virginia General Assembly considered a bill directing tax money to the support of Christian ministers in the state.¹ In opposition to the proposed law, James Madison wrote his famous *Memorial and Remonstrance Against Religious Assessments*.²

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1. MICHAEL S. ARIENS & ROBERTO A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 63 (1996).

2. *Id.* at 64.

The *Memorial* received broad support from the people of Virginia and the tax bill was never passed; instead, the Assembly enacted the Virginia Bill for Religious Liberty.³

The assertions in the *Memorial* form the heart of the First Amendment's Religion Clauses: its reasoning has been used to analyze the constitutionality of many religious liberty issues because its author drafted and advocated for the First Amendment.⁴

As discussed in this Note, Madison's *Memorial* makes it clear that taxation of religious organizations'⁵ non-commercial income and property⁶ violates the Religion Clauses because it treads on the church's and the state's autonomy.⁷ Case law, statutory law, and historical practice all affirm this argument. Therefore, the Religion Clauses mandate—not merely permit—income and property tax exemption on religious organizations' non-commercial income and property.⁸ Under this mandate, not only are religious organizations' income and property exempt from taxation but the

3. *Id.* at 69.

4. *Id.* at 64 (“The *Memorial and Remonstrance* . . . has become one of the most influential documents in the history of law and religion, and has been embraced as by the Supreme Court as a key indicator of the meaning of the First Amendment.”); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (“[*Memorial and Remonstrance*’s] strongly held convictions . . . are reflected in the first Clauses of the First Amendment of the Bill of Rights, which state that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”).

5. “Churches” is a generic term that includes all religious groups, not just Christians, and is used interchangeably with “religious organizations.” This Note does not take a specific stance on how broad the definition of “church” or “religious organization” should be construed.

6. Throughout the paper, the phrases “taxation of religion,” “religious taxation,” and “taxation of religious organizations’ non-commercial activities” are used interchangeably. All these phrases refer to the same concept: taxation of religious organizations’ non-commercial income and property.

7. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 190 (2012) (stating that the Religion Clauses restrict “government interference with an internal church decision that affects the faith and mission of the church itself”); *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (“The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches.”); see also Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1232 (2004) (“[T]he primary purpose underlying the Establishment Clause and Free Exercise Clause of the First Amendment is the preservation of autonomy—of the state, of religious institutions, and of individuals.”).

8. The First Amendment’s restriction on the government’s religious taxation powers does not extend to commercial activities. See *infra* Section II.A.2. See generally *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Furthermore, religious individuals are not exempt from taxation. See *infra* Section II.A.2.

curtailment on their internal doctrine under the Johnson Amendment must be narrowed, and the removal of an exemption for public policy reasons under *Bob Jones University v. United States* must be limited to racial discrimination.

Although religious organizations are currently exempted from taxation, this issue is important because there is a growing appetite to remove the exemptions. For example, many view religion as an untapped source of revenue for cash-strapped governments.⁹ Others think they can coerce religious organizations to bend to the will of popular opinion through revocation of tax exemption.¹⁰ But whether the tax is designed to increase revenue or to align doctrine with popular opinion, religious taxation is off the table. It is off the table because tax exemption for religious organizations is not a reward, benefit, tax break, or legislative prerogative; it is a right rooted in the First Amendment. A right that acts as a crucial bulwark of society because it enables state and church autonomy that protects each from exercising undue influence over the other.

Part I of this Note shows that tax exemption for religious organizations is constitutionally mandated by looking at it through Madison's *Memorial*. Part II provides the case law, statutory law, and historical practice supporting that assertion. Part III looks at this constitutional right's effect on the Johnson Amendment and the *Bob Jones* public policy standard.

9. See Laura McCrystal, *\$29.6 Billion of Philly Real Estate Is Exempt from Property Taxes. Should Nonprofits Be Asked To Pay Up?*, PHILA. INQUIRER (Sept. 30, 2019), <https://www.inquirer.com/news/philadelphia-nonprofit-exempt-property-tax-pilots-penn-aramark-20190930.html>; Anya Zoledziowski, *There Are Growing Calls to Finally Tax the Catholic Church*, VICE (July 7, 2021, 10:44 AM), <https://www.vice.com/en/article/m7ep4x/there-are-growing-calls-to-finally-tax-the-catholic-church>; Stephanie Strom, *States Move to Revoke Charities' Tax Exemptions*, N.Y. TIMES (Feb. 27, 2010), <https://www.nytimes.com/2010/02/28/us/28charity.html>.

10. See Tim Hains, *Beto O'Rourke: Churches That Oppose Same-Sex Marriage Should Lose Tax-Exempt Status*, REALCLEARPOLITICS (Oct. 11, 2019), https://www.realclearpolitics.com/video/2019/10/11/beto_orourke_churches_that_oppose_same-sex_marriage_should_lose_tax-exempt_status.html ("There can be no reward, no benefit, no tax break for anyone or any institution, any organization in America that denies the full human rights and the full civil rights of every single one of us.").

I. MEMORIAL AND REMONSTRANCE AGAINST TAXATION OF
CHURCHES

James Madison's *Memorial* was written in 1785 in response to a Virginia religious assessment bill creating a property tax and funneling that revenue to church leaders for the support of ministers and houses of worship.¹¹ Those who supported the bill – including Patrick Henry, George Washington, and John Marshall – viewed the contemporary decline in church attendance and religiosity as dangerous to the fiber of society; this bill was a way to stop the slide away from religiosity.¹² While some of those motives were perhaps noble, the opposition to the bill snuffed out the bill's underlying threat to society. Foremost amongst the opposition was James Madison, then a member of the Continental Congress.

Madison's opposition was recorded and distributed in the form of the *Memorial and Remonstrance Against Religious Assessments*. In the *Memorial*, Madison penned fifteen reasons why the bill for support of religion was "a dangerous abuse of power."¹³ First listed was that the worship of God must be left to the conscience of every person and exempt from the grasp of civil society. Because the bill presumed that the worship of God is within the grasp of civil society, Madison saw many latent dangers in the bill. One latent threat, according to Madison, was the power within the bill to establish religion and coerce religious conformity.¹⁴

Continuing his *Memorial*, Madison attacked the state as an incompetent judge of religious truth and called its use of religion as an engine of civil policy a "perversion of the means of salvation."¹⁵ Salvation was not assisted by the state, yet the bill implied that religion, which is upheld by the Creator, needs support from the powers of this world. In reality, whenever a church has been supported by the state, it has led to "pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition,

11. ARIENS & DESTRO, *supra* note 1, at 63–64.

12. *Id.* at 63; Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison, and Assessment Establishment*, in JAMES MADISON ON RELIGIOUS LIBERTY 157, 161–62 (Robert S. Alley ed., 1985).

13. JAMES MADISON, A MEMORIAL AND REMONSTRANCE (1785), *reprinted in* ARIENS & DESTRO, *supra* note 1, at 64 [hereinafter MEMORIAL AND REMONSTRANCE].

14. *Id.* at 65–66.

15. *Id.* at 66.

bigotry and persecution.”¹⁶ And neither does the state need a connection to the church in order to thrive. Establishments of religion have, rather, resulted in spiritual tyranny and been an easy conduit for tyrants to undermine public liberties.¹⁷ Better, Madison says, is to protect every person in their worship by not invading any religion and preventing religions from invading one another. Yet this bill for the support of religion did just that and was, therefore, contrary to the promise of the American continent, a place where the religiously persecuted could flee and enjoy liberty.¹⁸ Instead of promising repose, the bill’s interference with religion added motivation to emigrate away from the American continent, the same motivator that has depopulated other formerly great nations.¹⁹

Wrapping up his *Memorial*, Madison mourned over the destruction that the bill would cause to Virginia’s religious harmony. The best antidote to religious conflict in society, said Madison, is the “relaxation of narrow and rigorous policy,” as opposed to inhibiting religious freedom.²⁰ Yet this bill for the support of religion would be so obnoxious to a great deal of citizens it would work a general enervation of the laws and strain the political system.²¹

Virginians received these arguments favorably. Because of the widespread support, the bill was scrapped.²² To this day, Madison’s *Memorial* stands as a definitive interpretation of religious liberty: extolling church-state autonomy and liberal policies toward conscience, but also warning against church-state entanglement and invading conscience because of their likelihood to lead to tyranny, societal disruption, emigration, and America’s failure as a place of liberty.²³

16. *Id.* at 67.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 68.

21. *Id.* at 67.

22. *Id.* at 64.

23. *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 37 (1947) (Rutledge, J., dissenting) (stating that the *Memorial* is “Madison’s complete, though not his only, interpretation of religious liberty”); Patrick McKinley Brennan, *Free Exercise! Following Conscience, Developing Doctrine, and Opening Politics*, 74 NOTRE DAME L. REV. 933, 945 (1999)

Stepping away from the *Memorial*'s arguments against taxes to support religion, its rationales also persuade against taxation of religions' non-commercial income and property. Indeed, taxation of religious organizations poses grave dangers to society because it would reduce the autonomy of the church and the state, trample on conscience, increase disruptions and divisions in society, and thereby tarnish America's image as a land of religious liberty. Taxation of churches to support the state is equally extreme and egregious as what Madison fought in his day—state taxation to support religion—and should be rejected.

Rejecting taxation of religion, like Madison's rejection of the religious assessment bill, is based on two things. First, that the church is outside the cognizance of the state. And second, that entanglement of the two poses great threats to each. This section looks closer at those bases vis-à-vis taxation of religion.

A. The Church Is Not Within Cognizance of the State's Taxation Power

To James Madison, "[r]eligion [is] not within the cognizance of Civil Government" and even less so is it subject to society's legislative body.²⁴ In addition, religious liberty is the equal right of every citizen and a "gift of nature," which the legislature must leave "untouched and sacred."²⁵ It is a natural right,²⁶ which is retained from the government.²⁷

The government has no right to interfere with this natural right, religion being "perfectly free and unshackled" such that the government has no jurisdiction over religion.²⁸ This unshackling preserves religious liberty and benefits society by protecting "temporal institutions from religious interference" and "religious liberty from the invasions of the civil authority."²⁹ By rescuing these

(calling the *Memorial* a "panegyric to the good of the free exercise and the evils of establishment of religion").

24. MEMORIAL AND REMONSTRANCE, *supra* note 13, at 67, 65.

25. *Id.* at 68–69.

26. *Id.* at 71.

27. *Id.* at 69.

28. *Everson*, 330 U.S. 1 at 38–39 (Rutledge, J., dissenting) (quoting V WRITINGS OF JAMES MADISON 132, 176 (Gaillard Hunt ed., 1904)).

29. *Id.* at 15 (majority opinion) (quoting *Watson v. Jones*, 80 U.S. 679, 730 (1871)).

institutions from each other, religion becomes personal and beyond the scope of government to either hinder or support.³⁰

These protections were enshrined in the First Amendment, which gives “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”³¹ This avoids mixing state and church in a manner that “jumbles heaven and earth together, the things most remote and opposite,” two spheres that are “in their original, end, business, and in everything perfectly distinct and infinitely different from each other.”³²

For an example of jumbling heaven and earth, look no further than financial ties between church and state. In fact, numerous early battles over religious liberty in America were fought over church-state financial entanglement.³³ By severing this financial tie, churches gained control over their leaders, doctrines, and other internal matters, and the state was free to ignore the church’s demands to impart to their members political and government privileges and penalize citizens who did not conform to their doctrinal requirements.³⁴ Madison’s *Memorial* went to the heart of this issue,³⁵ and the Virginia Bill for Religious Liberty denounces these financial relationships because they defile religion by bribing those who will conform to popular opinion.³⁶ As a result, the

30. See *id.* at 39–40 (Rutledge, J., dissenting).

31. *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

32. John Locke, *John Locke Letter Concerning Toleration 1689*, FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/documents/1651-1700/john-locke-letter-concerning-toleration-1689.php> (last visited Oct. 19, 2021).

33. See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1550 (2004) (“[T]he defeat of religious assessments . . . [was] achieved in state after state.”); *id.* at 1435 (Isaac Backus opposing religious assessments in New England); *id.* at 1509 (John Leland opposing religious assessments in Connecticut); *id.* at 1489–90 (Protestant opposition defeating religious assessments in Maryland); *id.* at 1497 (Georgia constitutional amendment eliminating religious assessments).

34. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1098 (2002).

35. Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123, 1131–32 (1995) (“Madison drafted an argument that was widely and anonymously circulated as a petition against the proposed general assessment bill.”).

36. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM, reprinted in ARIENS & DESTRO, *supra* note 1, at 70.

autonomy of the church and the state in America was directly related to economic independence.³⁷

In sum, the state does not have cognizance over religious organizations' wealth and financial resources. Taxation impermissibly gives the state such cognizance, thereby intermingling church and state and subjecting each to the invasions, interference, control, and manipulations of the other.

B. The Dangers of Taxing Religious Organizations

There are many dangers in giving the state cognizance over the church, and Madison lays them out in his *Memorial*. First among them is the state subjecting one religion to another and creating establishments.³⁸ Through this the government would eliminate the equality of "those whose opinions in Religion do not bend to those of the Legislative authority."³⁹ Such actions would harm numerous citizens, weaken the laws in general, and "slacken the bands of Society,"⁴⁰ thereby destroying the moderation and harmony produced by government refusing to intermeddle with religion.⁴¹ The ensuing disharmony and revocation of religious liberty would be a motivation for emigration, the same result that has "dishonoured and depopulated flourishing kingdoms."⁴²

These same dangers would present themselves if the state had tax cognizance over religion. This section addresses these dangers in turn.

First, taxation would eliminate necessary separation between church and state. In fact, current tax exemptions were created to avoid the latent dangers inherent in taxing churches,⁴³ restrict the church and state's fiscal relationship, and "complement and

37. Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 975 (1999).

38. See MEMORIAL AND REMONSTRANCE, *supra* note 13, at 67 ("[T]he same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects[.] That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]"). *Id.* at 65-66.

39. *Id.* at 67.

40. *Id.* at 68.

41. *Id.* at 67.

42. *Id.*

43. *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

reinforce the desired separation insulating each from the other.”⁴⁴ Indeed, taxation of religions would expand church-state involvement through financial reporting, lobbying, audits into operations and finances, valuation of church property, tax liens, tax foreclosures, garnishment, and the confrontations and conflicts that follow from legal processes,⁴⁵ including the seizure and sale of church property to satisfy delinquencies.⁴⁶

Moreover, payment of taxes would transfer money donated for religious purposes to secular purposes, thus giving to Caesar what belongs to God, even though donors already render to Caesar through their personal taxes.⁴⁷ This hampers a church’s ability to finance its missionary work, educational institutions, health care, care for the poor, and saving for future financial downturns, possibly confining churches to narrow activities that fall only within the realm of worship services.⁴⁸ This would ultimately curtail churches’ missions and make their missions subservient to the aims of the state, a hierarchy that was dismissed with the Religion Clauses’ ratification.

Another danger of taxation is its power to destroy religion. “An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”⁴⁹ This power to destroy is “a reason why the right to tax should be confined to subjects which may be lawfully embraced therein.”⁵⁰ This power is a weapon that “in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.”⁵¹ Just as religious freedom is harmed when the

44. *Id.* at 676.

45. *Id.* at 674.

46. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 44 (1989) (Scalia, J., dissenting).

47. “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.” *Matthew 22:21* (King James).

48. *Walz*, 397 U.S. at 692 (Brennan, J., concurring). Higher-education leaders expressed similar worries when they wrote to Congress in objection to the endowment tax. HIGHER EDUCATION LETTER TO CONGRESS (Mar. 7, 2018), https://www.insidehighered.com/sites/default/server_files/media/3-7-18%20Universities%20letter%20re%20endowment%20tax.pdf.

49. *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819). Later it was said that the power to tax “is not the power to destroy while this Court sits,” but the taxation power remains a threat to inhibit religious liberty. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

50. *McCray v. United States*, 195 U.S. 27, 59–60 (1904); see *supra* Section I.A.

51. *Follett v. Town of McCormick*, 321 U.S. 573, 579 (1944) (Murphy, J., concurring).

government uses its taxing power to aid one religion over another,⁵² religious liberty is harmed when the government employs its taxing powers to inhibit religion. Thus, the First Amendment “operates as a specific constitutional limitation upon the exercise by Congress of the taxing [power].”⁵³

History is not devoid of examples of taxation’s destruction of religion. One prominent example is the Dissolution of the Monasteries in sixteenth-century England.⁵⁴ After King Henry VIII was declared the Church of England’s supreme head, he set to work in exercising his authority over religion.⁵⁵ He saw in Catholic monasteries both a source of dissent and a source of wealth for his war-consumed reign.⁵⁶ After assessing the value of the monastic properties and conducting a publicity campaign to set the monasteries in a bad light, he commenced a regime that, in under five years, led to the wholesale confiscation of monastic property and wealth to the benefit of the Crown.⁵⁷

As demonstrated during the Dissolution of the Monasteries, government control over church resources increases the financial pressure for churches to abandon their free-exercise rights. Society’s wrath can quickly be turned against unfavorable religions—or all religions—if federal, state, or local governments could wield the tax power against churches.

Several recent examples also illustrate this. A presidential candidate introduced a platform that would strip religious organizations of their exemption because they oppose

52. *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968) (holding that using taxpayer money to fund religious schools violated the First Amendment).

53. *Id.*

54. *See, e.g., King, supra* note 37, at 975 (“[M]uch has been written about Henry VIII’s decision to confiscate the vast wealth of the Church once he severed ties with Rome in the sixteenth century. A century later Oliver Cromwell, too, would levy stiff taxes on church property. These and other examples demonstrate the very real threat to a church’s existence when the ability to tax is wielded by a sovereign bent on destruction (or at least subordination) of the institution.”).

55. *See* LUCY WOODING, *HENRY VIII* 216–30 (2d ed. 2015).

56. *Id.*; Ben Johnson, *Dissolution of the Monasteries*, HISTORIC UK (last visited Oct. 19, 2021), <https://www.historic-uk.com/HistoryUK/HistoryofEngland/Dissolution-of-the-Monasteries/>; Mark Cartwright, *Dissolution of the Monasteries*, WORLD HIST. ENCYCLOPEDIA (May 13, 2020), https://www.worldhistory.org/Dissolution_of_the_Monasteries/.

57. *See Dissolution of the Monasteries, in* THE CONCISE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH (E.A. Livingstone ed., Oxford Univ. Press 2d rev. ed. 2006); Cartwright, *supra* note 56.

same-sex marriage.⁵⁸ And one legal scholar called for taxation of religious organizations that do not allow women to have leadership positions because “keeping women out of leadership positions denies women the opportunity to participate in society as equals.”⁵⁹ Another legal scholar urges total denial of exempt status to religious organizations because “[c]hurches remain free to refuse to hire women and minorities as ministers or to deny membership to any group they wish to exclude.”⁶⁰ If taxation of religious organizations were permitted, then these individuals could use the tax code to financially coerce religious organizations to change their doctrines and internal governance.

In this way, taxation of churches would have many of the same pitfalls as Congress’s recent decision to tax the endowments of previously exempt higher-education institutions. As part of the Tax Cuts and Jobs Act, a 1.4% net investment income tax was imposed on education institutions that have investment assets with an aggregate fair value of \$500,000 per student,⁶¹ effectively taxing only Harvard, Yale, Stanford, and around forty-three other wealthy universities.⁶² This tax was passed because many in Congress disagree with how large universities use their endowments, and likely because the institutions are viewed by conservative legislators as producing and advocating liberal viewpoints.⁶³

58. Hains, *supra* note 10.

59. Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 485 (1992).

60. Judith C. Miles, *Beyond Bob Jones: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions*, 8 HARV. WOMEN’S L.J. 31, 33–34 (1985).

61. I.R.C. § 4968.

62. Rick Seltzer, *How Much Are Most Colleges Paying in Endowment Tax?*, INSIDE HIGHER ED (Feb. 18, 2020), <https://www.insidehighered.com/news/2020/02/18/wealthiest-universities-are-paying-big-endowment-tax-bills-how-much-are-others-who> (“NACUBO data show 46 institutions with per-student endowment assets of more than \$500,000 on a full-time equivalent basis.”).

63. Jamie D. Halper, *Harvard To Pay ‘Unprecedented’ Endowment Tax*, HARV. CRIMSON (Dec. 20, 2017), <https://www.thecrimson.com/article/2017/12/20/endowment-tax-passed/> (“I think there are more people in the Republican party than in the Democratic party who believe that higher education is failing the public—that it’s full of liberals teaching things that are irrelevant to getting a job.”); John K. Wilson, *Why the Endowment Tax Is Unconstitutional*, INSIDE HIGHER ED (Jan. 16, 2018), <https://www.insidehighered.com/views/2018/01/16/tax-college-endowment-unconstitutionally-targets-institutions-opinion> (“[I]t’s clear that the point of the endowment tax is not to tax wealthy universities. It’s to send a warning shot at all colleges and universities to restrain academic freedom or risk further economic assaults on higher education.”).

If churches were taxable, it is easy to imagine Congress unleashing a similar tax against religious organizations because Congress may disagree with how their funds are used or with their religious viewpoints. Lobbying could also come into play as taxed churches will no doubt seek representation, leaving the possibility for religious favoritism in new tax bills. This happened in the net-investment income tax where members in Congress worked to carve out a tax exemption for Hillsdale College—long seen as a conservative bastion in higher education.⁶⁴ Through lobbying, loopholes, and influence, taxation of churches could quickly become a throwback to America’s colonial establishments, where only the established—or politically well-connected—church was exempt and other churches were taxed.⁶⁵

The harm of taxing churches does not end there. Income and property taxation of churches would also disadvantage poor religions, further creating religious inequality and inhibiting religion. Taxation would have its “most disruptive effect on those with the least ability to meet the annual levies assessed against them.”⁶⁶ Less wealthy churches could find it hard to carry out their mission or expand in new areas, whereas wealthier churches would not have the same problem. By increasing the cost of operations, taxation would reduce religious plurality.⁶⁷ In addition, tax legislation and IRS regulations could be increasingly manipulated to disfavor outsider religions—such as the IRS’s decision, since

64. Wilson, *supra* note 63; Adam Harris, *The Brief Life and Undignified Death of the ‘Hillsdale Carve-Out’*, CHRON. OF HIGHER EDUC. (Dec. 4, 2017), <https://www.chronicle.com/article/the-brief-life-and-undignified-death-of-the-hillsdale-carve-out/>.

65. John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 536 (1992) (“Colonial tax exemptions from assessments for support of state-established churches, if allowed, were apparently provided only for state-established churches, and dissenting religions were taxed.”).

66. *Walz v. Tax Comm’n*, 397 U.S. 664, 692 (1970) (Brennan, J., concurring).

67. This was particularly important to Madison, who was a proponent of plurality to decrease the power of factions. THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961). He viewed lack of plurality as a threat to liberty because if one faction obtained too much power it would exercise tyranny over other factions. To Madison, plurality was a key constraint on factions because through the multiplicity of parties and interests it would be difficult to form dominant factions. THE FEDERALIST NO. 51, *supra*, at 351–53 (James Madison).

reversed, to deny the Church of Scientology charitable contribution deductions that are given to other churches.⁶⁸

The culmination of all these factors leads to divisions, disruptions, and enervation of the laws, destroying the harmony and moderation between religions that exists because of tax exemption. Federal, state, and local government taxation of churches could become a political tool used for or against religious groups. All this would work to stir up religions and citizens against each other in attempts to use religion as an engine of civil policy.⁶⁹ As groups felt targeted and became victims of this politization of rights, their leaders and members would begin to protest. They would begin to distrust the laws because they are a tool for their subjugation.

What is the result of all of this? America's claim as a place of liberty would be tainted and the persecuted would be motivated to emigrate and find other locations where they can enjoy liberty and harmony, and where they can use their income and property to promote their religious missions.

These dangers demonstrate how religious taxation disintegrates state and church autonomy, allowing each to exercise undue influence over the other. This undue influence violates autonomy principles at the core of the Religion Clauses. As Madison said, "relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease" of religious discord.⁷⁰ Exemption does exactly that.

68. *Hernandez v. Comm'r*, 490 U.S. 680, 704 (1989) (O'Connor, J., dissenting) ("The Court today acquiesces in the decision of the Internal Revenue Service (IRS) to manufacture a singular exception to its 70-year practice of allowing fixed payments indistinguishable from those made by petitioners to be deducted as charitable contributions. Because the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings, I respectfully dissent."). This has since been rectified but the example shows how the taxing power can be wielded against unpopular and new religions.

69. MEMORIAL AND REMONSTRANCE, *supra* note 13, at 66 ("[T]he Bill implies . . . that the Civil Magistrate . . . may employ Religion as an engine of Civil policy [This is] an unhallowed perversion of the means of salvation.").

70. *Id.* at 68. Reducing government restrictions on religion reduces social strife related to religion. Brian J. Grim & Vegard Skirbekk, *Religious Deregulation: A Key to Understanding Whether Religious Plurality Leads to Strife*, POPULATION ASS'N AM. 1 (2011).

C. Counterarguments

The counterarguments against these points are meritless. For instance, it could be argued that using the *Memorial* to reject church taxation is inapt because it was written to oppose state support of churches, an entirely different purpose. There are two points against that argument. First, just like state financial support of churches, church financial support of the state is detrimental to religion and civil society.⁷¹ As shown in this section, church support of the state runs into the same problems that Madison warned about when he decried state support of churches: intermingling, establishment, discrimination, disharmony, and treading on natural rights. Second, rejection of one extreme—state support of churches though taxation—is grounds to reject the opposite extreme—church support of the state through taxation.

A further complaint is that Madison himself wrote the *Detached Memoranda*, a note about the danger of churches and corporations accumulating wealth.⁷² In the note, Madison worried about the dangerous precedent of “indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.”⁷³ He points to the abuses of European churches who had amassed half of the property in their nations, and he considers putting a limit on the amount of time and value of religious corporations’ property.⁷⁴

Nonetheless, the *Memoranda* does not justify state taxation of churches. First, the *Memoranda* does not advocate taxation of churches; it merely muses about the problems of churches and corporations owning too much property in perpetuity. Second, Madison himself was a member of the Virginia General Assembly that exempted churches from property taxes.⁷⁵ Third, the *Memoranda* lacks relevance and authority. The private note was released to the public a century after it was written and contains Madison’s thoughts thirty-plus years after writing his *Memorial* and

71. *Walz*, 397 U.S. at 675 (“The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches . . .”).

72. JAMES MADISON, *DETACHED MEMORANDA*, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 89 (Robert S. Alley ed., 1985) [hereinafter *DETACHED MEMORANDA*]. The note was not discovered until 1946. *Id.*

73. *Id.* at 91.

74. *Id.*

75. *Walz*, 397 U.S. at 684 (Brennan, J., concurring) (citation omitted).

decades after passage of the Virginia exemption and the First Amendment.⁷⁶ It also expresses unpopular views for the time period. For instance, his note argues against practices that began with the Founders and continue to this time, such as the appointment of chaplains for the two houses of Congress, Army, and Navy, and religious proclamations by executives.⁷⁷ Taxation of churches was also an unpopular view at the founding.⁷⁸ In sum, this private note's post hoc, narrowly accepted interpretation of religious liberty does not diminish the relevant, authoritative, and widely accepted view of religious liberty in the *Memorial*.⁷⁹

II. THE HISTORICAL PRACTICE OF EXEMPTING CHURCHES FROM INCOME AND PROPERTY TAXATION

A. Case Law History

The United States Supreme Court has annunciated the state's lack of religious taxation power and the dangers to society if the state possessed that power. Although the Court has never definitively held that there is a constitutional right to income and property tax exemption for religious organizations, the Court's case law supports the assertion.

What follows is a review of the Supreme Court's jurisprudence on the question, examining first religious-autonomy cases, then examining taxation-of-religion specific cases. Both sets of cases – by analogy to taxation – support Madison's views that the church is outside the state's cognizance and that entanglement of church and state poses great threats to each.

76. *Id.* at 684 n.5.

77. DETACHED MEMORANDA, *supra* note 72, at 91–94.

78. See Carl Zollmann, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646, 648 (1916) (“The practice exempting [church property] was universally considered to be proper . . .”).

79. *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014) (noting that Madison's *Detached Memorandum* was in opposition to the Court's holding that legislative prayer did not violate the Establishment Clause yet legislative prayer had broad support at the founding); see also *Walz*, 397 U.S. at 685 (Brennan, J., concurring) (“It is unlikely that two men [Jefferson and Madison] so concerned with the separation of church and state would have remained silent had they thought . . . exemptions established religion.”).

1. *Religious autonomy*

In its religious-autonomy cases, the Court has hearkened to the *Memorial's* principles: the state lacks certain authorities over the church, and such authority, if possessed, creates dangers to church-state autonomy. While religious organizations' constitutional right to tax exemption has never been directly addressed by the Court, the Court's decisions addressing church property and employment touch upon the issue indirectly and confirm that church non-commercial income and property taxation are impermissible.⁸⁰ Because the state has no authority over churches' internal governance—thus far the Court has addressed property and employment decisions—the state has no authority over church resources (i.e., income and property).

The Court first addressed these issues in *Watson v. Jones*,⁸¹ where it refused to question a church-governing-body's property allocation decision between two congregational factions. The Court held that legal tribunals must accept as binding church judicatories' decisions on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."⁸² Structured this way, the First Amendment protects autonomy of the state and of the church. According to the Court, "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."⁸³ The *Watson* decision "radiate[d]... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."⁸⁴

80. Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 185 (2012) ("This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers.").

81. *Watson v. Jones*, 80 U.S. 679 (1871).

82. *Id.* at 727.

83. *Id.* at 730.

84. *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

The Court reiterated religious organizations' independence from secular control in later cases. In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, the Court held that a New York law interfered with strictly ecclesiastical matters when it selected a U.S. faction to control a domestic cathedral instead of the foreign faction anointed by the religious organization's highest governing body.⁸⁵ A similar holding came in a later case, when the Court rejected an Illinois court's inquiry into whether a church followed its own laws and procedures in deciding a property dispute.⁸⁶

The Court's refusal to interfere with religious organizations' autonomy under the Religion Clauses was extended beyond property disputes to employment disputes in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.⁸⁷ In that case, the Court held that requiring a church to accept or retain an unwanted minister – whether or not the termination decision violated the Americans with Disabilities Act – interfered with the internal governance of the church.⁸⁸ Interfering with the church's decision, the Court stated, violates both Religion Clauses. The Free Exercise Clause, because it interfered with a church's "right to shape its own faith and mission," and the Establishment Clause, because it "prohibits government involvement in such ecclesiastical decisions."⁸⁹

That the state does not have authority over the church's internal governance forms the heart of the Religion Clauses and Madison's *Memorial*. In that essay, Madison delineated the church as separate and distinct from the commonwealth. Religion is "not within the cognizance of Civil Government," he wrote.⁹⁰ Just as this principle stops interference with religious organizations' internal governance in property and employment decisions, the principle also stops interference with religious organizations' resources through income and property taxation. Protection from income and property taxation ensures religious organizations' power to shape

85. *Id.*

86. *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976).

87. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171, 185 (2012).

88. *Id.* at 188–89.

89. *Id.* at 173.

90. MEMORIAL AND REMONSTRANCE, *supra* note 13, at 67.

their own faith and mission and prohibits the government's involvement in church financial decisions.

While the Court's religious autonomy cases established the state's lack of authority over internal church governance, the cases have, like the *Memorial*, also warned of the dangers to civil and religious liberty if such authority was possessed. In particular, *Hosanna-Tabor* harkened back to the English crown, which had authority over the church in England. At that time, the King exercised control over the church's internal governance matters by appointing ministers over the objections of clergy.⁹¹ This practice deprived state-church autonomy and motivated Puritans, Quakers, and others to flee England in search of a place to follow their conscience.⁹² The *Watson* decision also warily looked back to England where the English Court of Chancery was essentially a representative of the established church. That court used its authority to engage in theological and internal governance disputes, one of England's numerous "oppressive forms" of dealing with religious beliefs.⁹³

These grave threats to civil and religious liberties from interference with religious autonomy were a focus of Madison's *Memorial*. In the essay he warns about subjugation of religions, disharmony, and motivation for emigration resulting from interfering with religion.⁹⁴ These threats to autonomy are just as real with taxation as with other religious autonomy issues. Under a religious income and property tax regime, the separation of church and state is weakened, religious organizations' means and missions become subservient to the state, religious rights are at the mercy of political debate, poor religions are disadvantaged, and disruption and divisions in society increase, with the end result of emigration. England can be looked back to again for a harrowing church-taxation example: before this nation's founding the English Crown used its taxation authority and apparatus to confiscate Catholic monastic wealth across England.⁹⁵

An objection to this autonomy argument is that the Free Exercise Clause permits a government to pass generally and

91. *Hosanna-Tabor*, 565 U.S. at 182.

92. *Id.*

93. *Watson v. Jones*, 80 U.S. 679, 727-28 (1871).

94. ARIENS & DESTRO, *supra* note 1, at 65-69.

95. *See supra* Section I.B.

neutrally applicable tax laws and requires religious organizations to submit to such laws.⁹⁶ But the standard under the Free Exercise Clause of generally and neutrally applicable laws declared in *Employment Division, Department of Human Resources of Oregon v. Smith*⁹⁷ applies only to government regulation of outward physical acts.⁹⁸ Taxation, in contrast, involves government interference with internal church decisions and resources that affect the faith and mission of the church itself.⁹⁹ The contention that generally applicable tax laws foreclose the right of tax exemption rooted in the Religion Clauses has no merit.¹⁰⁰

And even if the rule of generally and neutrally applicable laws did apply, it offers little protection for religion. This is because a tax that discriminates against certain religions can be made to appear generally and neutrally applicable.¹⁰¹ And a religious tax, even if it is generally and neutrally applicable,¹⁰² cannot avoid diminishing church-state autonomy and its resultant degradation of civil and

96. Dominic Rota, *And on the Seventh Day, God Codified the Religious Tax-Exemption: Reshaping the Modern Code Framework to Achieve Statutory Harmony with Other Charitable Organizations and Prevent Abuse*, 5 CONCORDIA L. REV. 56, 70 (2020) (“[S]o long as a generally applicable tax does not burden the individual’s practice of his or her religion, the government could *theoretically* levy a tax on the church, as there is no violation of the Free Exercise Clause.”).

97. Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

98. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n, 565 U.S. 171, 190 (2012) (“*Smith* involved government regulation of only outward physical acts.”).

99. *Cf. id.* (“The present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself.”).

100. *Cf. id.* (“The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.”).

101. Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419, 463–64 (2012) (“[A]lthough a law appears innocent on its face, it may have harmful effects in the real world that raise serious constitutional concerns. Rules of general applicability, clothed in neutrality, may appear to be innocent, but appearances, after all, can be deceiving.”); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL’Y 627, 629, 644–52 (2003) (“[T]he protection [general applicability] provides is sporadic, idiosyncratic, unprincipled, and unpredictable.”).

102. For instance, if the tax also applied to all I.R.C. § 501(c)(3) organizations (i.e., qualifying charitable, scientific, testing for public safety, literary, or educational organizations) or all 501(c)(3)s with a certain amount of wealth. Any religious tax that provides a single exemption yet no exemption for religious purposes is unlikely to be generally and neutrally applicable. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (“[T]he inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual nondiscrimination requirement not generally applicable.”).

religious rights. Trusting these delicate rights to generally and neutrally applicable laws is akin to stating that church and state autonomy is protected sufficiently by the Free Exercise Clause alone. It is not.¹⁰³

To summarize, the Court's religious-autonomy reasoning extends to taxation. Because the state has no authority over churches' internal governance, it has no authority over church income and property. And if the state had such authority, it would be dangerous to both religious and civil liberties.

2. Religious taxation

The Supreme Court's religious taxation jurisprudence has announced these same principles in cases addressing religious organizations' exemption from license taxes and property taxes. The Court has, however, spelled out the taxability of religious item sales, nonreligious property, and religious individuals' income.

In 1943, the Supreme Court held that the First Amendment is a limitation on the government's taxing authority. In *Murdock v. Pennsylvania*, the Court held that a flat tax required to obtain a license for canvassing and soliciting violated the First Amendment when it was applied to itinerant preachers who donated and sold religious materials in the course of their door-to-door preaching.¹⁰⁴ In that case, the town of Jeannette, Pennsylvania required all persons soliciting sales to purchase a license.¹⁰⁵ Under this law, several itinerant Jehovah's Witness preachers were convicted for door-to-door solicitation of religious materials without a license.¹⁰⁶ The Court struck down the city's licensing requirement because it was "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment."¹⁰⁷ The Court could not sanction a law that required a payment to exercise this constitutionally guaranteed right.¹⁰⁸ Nor could the court allow an ordinance that had the

103. Cf. *Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with [internal church governance].").

104. *Murdock v. Pennsylvania*, 319 U.S. 105, 106-07 (1943).

105. *Id.*

106. *Id.*

107. *Id.* at 114.

108. *Id.* at 115.

potential to suppress religious minorities and crush the spreading of religious beliefs.¹⁰⁹

A year later, the Court addressed the same type of license tax in *Murdock*, but with a slight twist in facts. In *Follett v. Town of McCormick*, the defendant was not an itinerant preacher, but minister living in town and making his living selling religious materials.¹¹⁰ The Court readily extended the *Murdock* holding to the preacher. And, in concurrence, Justice Murphy argued that the Court's striking down of the tax "give[s] substance" to religious freedom.¹¹¹ After all, he wrote, "the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."¹¹²

While *Murdock* and *Follett* stand for the proposition that no tax can be leveled as a precondition to religious exercise, their reasoning extends to non-license taxes such as property and income taxes. This is because there is little difference between a tax leveled to obtain a license to operate a religion and a tax on actual religious operations. While one tax would be leveled before the religious operations and the other leveled after, the taxes have the same effect: taxation on religious operations with civil and criminal penalties for evasion of those taxes.

Three decades after *Murdock* and *Follett*, the Court addressed a New York citizen's complaint that property tax exemption for religious organizations violated the Constitution. In *Walz v. Tax Commission of the City of New York*, the Court rejected the challenge and held that the exemption was permitted.¹¹³ Because the plaintiff was not a religious organization being taxed, but rather an individual citizen suing the state tax commission, the Court only

109. *Id.* ("[I]f the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village."); *see also* *Jones v. Opelika*, 316 U.S. 584, 623-24 (1942) (Black, J., dissenting) ("[This ordinance] suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis* took against the same religious minority, and is a logical extension of the principles upon which that decision rested." (citation omitted)).

110. *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944).

111. *Id.* at 579 (Murphy, J., concurring).

112. *Id.*

113. *Walz v. Tax Comm'n*, 397 U.S. 664, 679-80 (1970).

had to address whether the exemption was *permitted* by the Constitution. But this does not rule out a future holding that tax exemption of religious organizations is mandated.

Indeed, *Walz* advanced several ideas in support of mandating tax exemption for religious organizations. Most importantly, the *Walz* Court recognized that exemption reflects a belief—one in place since the founding of the country—that taxation presents danger to church and state autonomy: “The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches”¹¹⁴

Picking up on this same concept, Justice Brennan, in concurrence, argued that taxation would “involve extensive state investigation into church operations and finances.”¹¹⁵ He further points out that taxation would have its greatest negative effect on poorer churches who have less ability to pay taxes. Even so, he wrote, diverting church funds to the government would limit all churches’ involvement in social-benefit programs.¹¹⁶ Providing another perspective, Justice Harlan’s concurrence noted that tax exemption protects against the “kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.”¹¹⁷ Preventing fragmentation and strife in society is a key policy behind the Religion Clauses.¹¹⁸

Despite holdings that license taxes on religious exercise violate the First Amendment and property-tax exemptions do not offend the First Amendment, recent decisions have held that religious organizations are not exempt from sales taxes.¹¹⁹ In *Texas Monthly, Inc. v. Bullock*, a Texas magazine publishing religious and non-religious media challenged a state sales-tax that exempted religious periodicals and books distributed by religious faiths but denied a like exemption for its magazine.¹²⁰ The Court’s majority agreed that

114. *Id.* at 675 (“We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.”). *Id.*

115. *Id.* at 691 (Brennan, J., concurring).

116. *Id.* at 692.

117. *Id.* at 694 (Harlan, J., concurring).

118. *See id.*

119. A flat license tax that acts as a precondition to the free exercise of religious beliefs is different from a tax that applies to all sales of tangible personal property. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 387 (1990).

120. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5–6 (1989).

this exemption violated the Constitution, but they could not come to a uniform opinion as to why. A year later in *Jimmy Swaggart Ministries v. Board of Equalization of California*, the Court doubled down on subjecting religious organizations to sales taxes. Thus, the state of California was permitted to levy sales tax on over \$1,700,000 in sales of Bibles, Bible study manuals, printed sermons, audiocassette tapes of sermons, religious books and pamphlets, and songbooks, tapes, and records of religious music.¹²¹

Justice Brennan's *Texas Monthly* plurality opinion, which was joined by three other justices, was expansive in its holding: it dismissed precedent from *Murdock v. Pennsylvania*¹²² and *Follett v. Town of McCormick*¹²³ and declared that exemption is an unconstitutional direct subsidy to religion.¹²⁴ While none of the Justices' rationales are binding in this plurality opinion,¹²⁵ together they explain why the exemption on religious organizations' sales violated the Establishment Clause: the exemption favors religious over non-religious entities when both are engaged in the same commercial activity.¹²⁶

This rationale is important in understanding the limits of religious organizations' tax exemption. When religious organizations engage in commerce,¹²⁷ they leave behind their Religious Clause taxation protections and enter the state's taxation cognizance. Having entered the state's taxing cognizance, the religious organization's commercial activity must be subject to similar taxation standards as other commercial entities¹²⁸ or it

121. *Jimmy Swaggart*, 493 U.S. at 383.

122. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding that a tax for a license to preach is unconstitutional).

123. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (holding that a tax for a license to preach is unconstitutional).

124. *Texas Monthly*, 489 U.S. at 16, 18.

125. *Gaylor v. Mnuchin*, 919 F.3d 420, 433 (7th Cir. 2019).

126. *Texas Monthly*, 489 U.S. at 17 (A sales tax exemption for periodicals promulgating the teaching of religious sects "lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and . . . it effectively endorses religious belief").

127. In addition to religious operations, religious organizations' charitable and educational operations are not commercial activities. See I.R.C. § 501(c)(3) (exempting from taxation "[c]orporations . . . organized and operated exclusively for . . . charitable . . . or educational purposes").

128. That is the current practice in federal tax law. I.R.C. § 512(a)(1) (Unrelated business taxable income); 26 C.F.R. § 1.513-1(b) (2020) ("The primary objective of adoption of the

offends the Establishment Clause by favoring religious organizations. In other words, unlike religious organizations receiving donations, using those donations for their mission, owning property for religious purposes, and investing those donations to save for their future religious mission, religious organizations' commercial activities are within the state's taxing cognizance. Therefore, when the state exempts a religious organization's commercial activity and the benefits from that commercial activity inure to the religious organization, the state subsidizes religion.

It is for this reason that the *Texas Monthly* and *Jimmy Swaggart* holdings are limited to commercial activity. Indeed, these cases address only religious organizations' commercial activities.

Another case dealing with commercial activity of religious organizations is *Gibbons v. District of Columbia*.¹²⁹ In that 1886 case, the Supreme Court addressed the District of Columbia's tax-deficiency sale of land owned by a church but leased for nonreligious purposes. The Court permitted the sale because the statute exempting churches did not exempt land unnecessary for or not used for religious purposes.¹³⁰

Like the sales tax cases—*Texas Monthly* and *Jimmy Swaggart*—*Gibbons* shows a religious organization's commercial activities are not protected from taxation. Yet *Gibbons* does not approve property taxation on land used for religious purposes, since it addressed land owned by a church but not used for religious purposes. Nor did it address how the Religion Clauses limit Congress's taxing power.¹³¹ Those issues are addressed by religious-autonomy cases, *Walz*, *Follett*, and *Murdock*.

unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete."); Michael S. Knoll, *The UBIT: Leveling an Uneven Playing Field or Tilting a Level One?*, 76 *FORDHAM L. REV.* 857, 864 (2007) ("The UBIT, thus, levels what would otherwise be an unlevel playing field. It works by placing both for-profit and nonprofit entities on similar tax terms when they engage in commercial activities."); *id.* ("The legislative history of the UBIT contains numerous statements that the purpose behind the tax is to protect for-profit businesses from unfair competition from tax-exempt businesses.").

129. *Gibbons v. District of Columbia*, 116 U.S. 404 (1886).

130. *Id.* at 406-07.

131. *Id.* at 408.

Another aspect of tax exemption clarified by case law is that religious individuals are not exempt from taxation. In *United States v. Lee*, the Court held that there can be no religious conscientious objection to social security taxes when it required an Amish business owner to pay social security tax for his employees against his religious objection.¹³² The government's crucial interest in maintaining a tax system was a compelling reason to disregard First Amendment-grounded objections to social security taxes.¹³³ But this case does not rule out using the First Amendment as a constraint on an income or property tax levied on religious organizations. There is a difference between a tax on a religious person and a tax on a religious organization. Exempting private individuals from taxation would make it nearly impossible to raise revenue and maintain a tax system, but religious organizations already exist outside the tax system, so there is no argument that the tax system would fail without their participation. In addition, churches as organizations have autonomy protections that ordinary citizens do not have.¹³⁴

The Supreme Court has not addressed head-on whether property or income taxation of religious organizations violates the First Amendment. But case law supports the proposition, especially the holdings and rationales in religious-autonomy cases, *Walz*, *Follett*, and *Murdock* that point to the state's lack of church taxation authority and the dangers if the state possessed that authority.

132. *United States v. Lee*, 455 U.S. 252, 252 (1982).

133. *Id.* at 258–59.

134. *See supra* Part I. Additionally, in a letter to the town of Providence, Roger Williams, a foremost religious freedom advocate in the American Colonies, described the duties of religious persons to pay taxes by analogizing the state to a transport boat:

If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace or preservation . . . I say, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel, and punish such transgressors, according to their deserts and merits.

Roger Williams to the Town of Providence, U. CHI. PRESS, https://press-pubs.uchicago.edu/founders/documents/amendI_religions6.html (last visited Jan. 14, 2022) (emphasis added).

B. Statutory Law History

These rationales against taxation of religious organizations are borne out of historical practice. Looking at our nation's tax-exemption history demonstrates that tax exemption serves to avoid the struggle for supremacy between the church and the state,¹³⁵ which is further support for the constitutional right to tax exemption for religious organizations.

Concerns over the church-state financial relationship were a core issue for early Americans who wanted to avoid the struggle for supremacy between the church and the state.¹³⁶ These Americans viewed independence of both church and state as a way to keep the church from being subordinate to the state and the state from being subordinate to the church.¹³⁷ Indeed, when early Americans were creating independence between church and state, they left in place or enacted tax exemptions: Delaware in 1796, Connecticut in 1808, and, at the beginning of the nineteenth century, both New York and Virginia passed religious tax-exemption statutes at the time that they repealed statutes that established churches.¹³⁸ Importantly, the Virginia statute was passed when James Madison was a member of the General Assembly.¹³⁹ This action by Virginians carries great weight because Virginia led the fight to eliminate church-state interdependence.

But even as time went on, this viewpoint was a mainstay in debates over church tax exemption. For example, at the 1891 Kentucky state constitutional convention it was argued that

135. *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) ("Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.").

136. Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 130 (2000).

137. King, *supra* note 37, at 975-76.

138. *Id.* at 978-79; see also Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 109 (1991); Zollmann, *supra* note 78, at 648 ("The practice of exempting [church property] was universally considered to be proper . . ."). See generally CHESTER JAMES ANTIEAU, PHILLIP MARK CARROLL & THOMAS CARROLL BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 123-24 (1965) (discussing state constitutional clauses providing for tax exemption to churches and church-related institutions).

139. *Walz*, 397 U.S. at 684 (Brennan, J., concurring); Appellee's Brief, *Walz*, 397 U.S. 664 (1969) (No. 135), 1969 WL 119910 at *7.

separation of church and state precluded taxing churches.¹⁴⁰ Similarly, at the 1850 Indiana Convention for the Revision of the State Constitution it was argued that church taxation violated religious autonomy principles.¹⁴¹

Federal practice tracked that of the states. The practice of exempting churches from taxation began in 1802 during the presidency of Thomas Jefferson, when Congress exempted churches within the County of Alexandria from property taxation, patterned after the Virginia statutory pattern.¹⁴² Several years later in 1813, at a time when most government revenue was collected by customs duties, Congress exempted from taxation duties paid by religious societies on religious articles.¹⁴³ Two years later, a Congressional tax on household furniture was enacted, but it exempted the property of religious organizations.¹⁴⁴ During the same period, the District of Columbia exempted church property from real and personal property tax assessments.¹⁴⁵

Exemption of churches from property and custom taxes continued from that time until today. The first federal income tax, passed in 1863, exempted religious organizations.¹⁴⁶ In 1864, a tax on lottery receipts exempted religious organizations.¹⁴⁷ And an additional property tax, passed in 1870 in the District of Columbia, continued the practice of exempting churches.¹⁴⁸

The Revenue Act of 1894, which was later found unconstitutional for different reasons, exempted religious

140. Paul J. Weber & Janet R. Olson, *Religious Property Tax Exemptions in Kentucky*, 66 KY. L.J. 651, 655 (1978) (“Representative Thomas Pettit of Daviess County contended that the principle of separation of church and state precludes taxing the church.”).

141. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1290 (1850) (“I consider our civil and religious liberty and prosperity, is so inseparably connected to each other . . . for these reasons, and others that might be named, I hope the [church taxation] proposition may be voted down.”); *id.* at 1289 (“Now suppose the taxes are not paid; are you going to sell these churches? Will you put them up at auction to the highest bidder, in order to raise the amount levied in the way of tax? Certainly not.”).

142. *Walz*, 397 U.S. at 677.

143. Whitehead, *supra* note 65, at 541.

144. *Id.*

145. *Walz*, 397 U.S. at 677.

146. Whitehead, *supra* note 65, at 541.

147. *Id.*

148. *Id.* at 541–42.

organizations from taxation.¹⁴⁹ After the Sixteenth Amendment was passed in 1913, the Revenue Act of 1913 exempted religious organizations from taxation.¹⁵⁰ This exemption is the same that exists today. Also existing to this day are state income and property exemptions for religious organizations in all fifty states.¹⁵¹

The justification for religious organizations' constitutional right to tax exemption comes from historical practice that sought to end the struggle for supremacy between the church and the state.¹⁵²

III. THE JOHNSON AMENDMENT AND *BOB JONES* PUBLIC POLICY STANDARD UNDER THE CONSTITUTIONAL RIGHT TO TAX EXEMPTION

Since tax exemption of churches is a constitutional right secured by the First Amendment, not only are religious organizations exempt from taxation, but also two specific areas of the current tax-exempt regime are called into question: the Johnson Amendment and the *Bob Jones* public policy standard. The Johnson Amendment conditions tax-exempt status upon religious organizations refraining from endorsing or opposing a political candidate. And the *Bob Jones* public policy standard allows revocation of tax-exempt status for operations in conflict with existing public policy.

Regarding the Johnson Amendment, it is state interference in church government, faith, and doctrine. As such, the state cannot revoke exemption for the mere expression of support for or opposition to a candidate, it can only revoke exemption for religious organizations' other actions in support of or in opposition to a candidate. As for the *Bob Jones* public policy standard, its use should be limited to ending racial discrimination.

A. *The Johnson Amendment*

The Johnson Amendment revokes tax-exempt status when a religious organization endorses or opposes a candidate running for

149. *Id.* at 542.

150. *Id.*

151. 4 WILLIAM W. BASSETT, W. COLE DURHAM, JR., ROBERT T. SMITH & MARK GOLDFEDER, *RELIGIOUS ORGANIZATIONS AND THE LAW* §§ 33:8, 33:50 (2020).

152. This Note does not deny that religious organizations' public benefits are also a historic rationale for tax exemption.

public office.¹⁵³ Before the Johnson Amendment, the 1934 Congress enacted a law that revokes the tax-exempt status of religious organizations substantially involved in influencing legislation.¹⁵⁴ In 1954, the prohibition against endorsing or opposing candidates was added.¹⁵⁵

The most high-profile use of the Johnson Amendment occurred in 1998,¹⁵⁶ when the IRS revoked Branch Ministries' exempt status after the organization took out full-page newspaper advertisements in USA Today and the Washington Times opposing the candidacy of Bill Clinton.¹⁵⁷ Each advertisement contained the following statement: "This advertisement was co-sponsored by the Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted."¹⁵⁸ The advertisements resulted in numerous country-wide contributions to the church.¹⁵⁹

The United States Court of Appeals for the D.C. Circuit upheld the IRS's exemption revocation because it was not a substantial burden on Branch Ministries' free exercise.¹⁶⁰ Proceeding on the assumption that tax exemption is a "conditional privilege" granted by the government, the court found no First Amendment issue with the requirement that Branch give up its participation in political activities to secure exemption, because a withdrawal from electoral politics did not violate its beliefs.¹⁶¹ All that was required was for the church to "renounce[] future involvement in political campaigns."¹⁶²

Instead of the *Rossotti* court assuming that tax exemption is a conditional privilege under the Free Exercise Clause, it should have

153. I.R.C. § 501(c)(3).

154. Roger Colinvax, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RESV. L. REV. 685, 693 (2012).

155. *Id.*

156. Mark A. Goldfeder & Michelle K. Terry, *To Repeal or Not Repeal: The Johnson Amendment*, 48 U. MEM. L. REV. 209, 227 (2017). There has not been a revocation since, even though there have been clear violations of the Johnson Amendment. *Id.* at 231. This is likely because the rules around enforcement are so ambiguous, politically fraught, and burdensome that enforcement is avoided. *See id.* at 224–27, 231.

157. *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).

158. *Id.*

159. *Id.*

160. *Id.* at 144.

161. *Id.* at 142.

162. *Id.* at 143.

taken the approach found in the Supreme Court's religious autonomy jurisprudence. In these cases, the Court held that religious organizations are "independ[ent] from secular control or manipulation," and therefore have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."¹⁶³ Thus, the proper analysis is whether the government is interfering in matters of church government, faith, and doctrine by instituting an outright ban on religious organizations endorsing or opposing a candidate for public office. That question is answered in the affirmative: a religious organization's decision to endorse or oppose a candidate for public office is a matter of church government, faith, and doctrine.¹⁶⁴ As such, it should be free from state interference.

Although the state should not interfere with the decision, the state has an interest in not subsidizing political speech.¹⁶⁵ To protect these interests without also violating religious autonomy, the state can limit the extent of religious organizations' actions in support of or in opposition to a candidate's campaign.¹⁶⁶ *Rossotti* gives a proper illustration of this power: the IRS revoked a church's tax exemption after the church advertised its views on a candidate in newspapers and requested political donations. Thus, even under an autonomy argument in *Rossotti*, Branch Ministries would have lost its exempt status.

Nonetheless, the government's ability to limit religious organizations' involvement with and actions for or against a political candidate cannot outright prohibit the mere expression of and explanation for support or opposition to a candidate for public

163. *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

164. Government regulation of a religious organization's position on a candidate involves government interference with internal church doctrine, subjecting it to the constraints of the autonomy doctrine, whereas the Free Exercise jurisprudence used in *Rossotti* applies only to government regulation of outward physical acts. See *supra* Section II.A.1.

165. See *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 548 (1983) ("Congress has not violated . . . First Amendment rights by declining to subsidize . . . [lobbying] activities."); Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1, 9-10 (2018) ("[N]o duty to subsidize doctrine."); cf. Colinvaux, *supra* note 154, at 704 ("[T]he Rule is one of the few bright-lines that places a meaningful limit on the charitable purpose requirement and so constrains the scope of the charitable tax benefits.").

166. See *Regan*, 461 U.S. at 548.

office. This approach provides safety for churches who merely state and explain their beliefs on particular candidates without taking other actions in support or opposition to a candidate for public office.¹⁶⁷

In sum, this approach would narrow the Johnson Amendment so that religious organizations can be independent from state interference, control, or manipulation on this matter of church government, faith, and doctrine. At the same time, the state can prevent political speech subsidization.

Moreover, this approach treats religious organizations similar to how they were treated before 1934.¹⁶⁸ Numerous religious organizations in this nation's history devoted efforts to enact societal change through legislation and elections. One example is Virginia Baptists who, under John Leland, endorsed James Madison's campaign for the Virginia Ratifying Convention and U.S. House of Representatives – a crucial factor in passing the First Amendment – and Thomas Jefferson's campaign for President.¹⁶⁹ But religious support for societal movements goes back even earlier: ministers' sermons were a dominant force behind the very revolution that established the Union.¹⁷⁰ And, although the Union was tainted by the "original sin" of slavery, it was religious organizations that called for its abolition.¹⁷¹ Their efforts created the

167. However, there is no certainty that free of the Johnson Amendment, churches would become involved in politics. See Colinvaux, *supra* note 154, at 705–06 ("To the extent that the consumers of charity do not want charities to become involved in politics, many, if not most, charities will respond to this sentiment and remain aloof. It is easy to imagine a charity, dipping a toe in the political water to endorse a candidate for the first time, only to hear from angry donors and others that the activity was inappropriate. A charity's stakeholders might also accuse the charity of endorsing the wrong candidate, or argue that the charity should not even risk endorsing a losing candidate, for fear of jeopardizing the charity's standing in the community as an opponent of an elected official.").

168. Goldfeder & Terry, *supra* note 156, at 211–12; Cordes, *supra* note 136, at 112–13, 129 ("[T]here is little reason to believe that the religion clauses were intended to exclude religion from the public square. Rather, the history leading up to and surrounding the adoption of the First Amendment suggests that the religion clauses were ratified in order to avoid compelled religious worship and financial support for churches."); Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN ST. L. REV. 733 (2009).

169. See Scarberry, *supra* note 168, at 789.

170. Cordes, *supra* note 136, at 123–24.

171. David F. Forte, *Spiritual Equality: The Black Codes and the Americanization of the Freedmen*, LOY. L. REV. 569, 578 (1998) ("Radical abolitionism began and remained until the end of the Civil War, a movement born of, connected to, and sustained by religious principles

idea of the equality of the races, which was later enshrined in law through the Thirteenth and Fourteenth Amendments and early civil rights legislation.¹⁷² The Civil Rights Act of 1964, the most momentous legislation regarding equality in America, was brought about through the steady efforts of black churches.¹⁷³ Besides race relations, religious organizations also drove the nation towards equal rights for women.¹⁷⁴

These examples point out that there are issues in society that religious organizations should not keep silent on. Their conscience instructs them to speak out on certain issues, legislation, and candidates.¹⁷⁵ With the perspective of religious organizations, the Union was founded on strong principles and continually worked toward a more perfect Union.

One further point is that there is no contradiction in prohibiting churches from lobbying for tax incentives¹⁷⁶ while still permitting

and fervor. Whatever notion of equality between the races that may have entered the legal debate was distinctly religiously founded.”).

172. *Id.* at 610 (“It was a theological doctrine from which we derived our notion of equality in the Reconstruction Amendments.”).

173. ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 4 (1984) (“The black church functioned as the institutional center of the modern civil rights movement. Churches provided the movement with an organized mass base; a leadership of clergymen largely economically independent of the larger white society and skilled in the art of managing people and resources; an institutionalized financial base through which protest was financed; and meeting places where the masses planned tactics and strategies and collectively committed themselves to the struggle.”).

174. MARK A. NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 180–85 (1992) (“[R]evivals encouraged women to play a more active part not only in narrowly spiritual matters but also in the larger arenas of social reform. Often in the context of revival women stove mightily against slavery (Sarah and Angelina Grimké), for better treatment of the mentally ill (Dorothea Dix), for educational opportunities for women (Catherine Beecher), and later in the temperance crusade (Fances Willard) and social work in the cities (Jane Adams). . . . The first formal call for fuller women’s rights in society, including the right to vote, was issued from Seneca Falls, New York, in July 1848, when active abolitionists, men and women, white and black, issued an appeal for the public rights of women.”). *Id.* at 183–84.

175. “Open thy mouth for the dumb in the cause of all such as are appointed to destruction. Open thy mouth, judge righteously, and plead the cause of the poor and needy.” *Proverbs* 31: 8–9 (King James); “But if the watchman see the sword come, and blow not the trumpet, and the people be not warned; if the sword come, and take any person from among them, he is taken away in his iniquity; but his blood will I require at the watchman’s hand.” *Ezekiel* 33:6 (King James); “Therefore to him that knoweth to do good, and doeth it not, to him it is sin.” *James* 4:17 (King James). Although, of course, not all religious organizations interpret their sacred texts as requiring this kind of engagement.

176. *See supra* Section II.B.

churches to state their beliefs on important political issues. This Note advocates against the taxation of churches, in part, because taxation requires more representation, giving churches the right to direct government policy and resources. Or, in other words, the right to use religion as an engine of civil policy. With exemption, on the other hand, religious organizations' mere expression of its view has no authority over the state.

B. The Bob Jones Public Policy Standard

In *Bob Jones University v. United States*, the Supreme Court considered the actions of the IRS in revoking the tax-exempt status of two religious colleges who, due to their religious beliefs, had racially discriminatory admissions policies.¹⁷⁷ The Court held that the United States' tax-exemption code was rooted in English treatment of charitable trusts, and, as such, organizations receiving exemptions must serve a public purpose and not act contrary to established public policy.¹⁷⁸ Nevertheless, the revocation of charitable status can only be done "where there can be no doubt that the activity involved is contrary to a fundamental public policy."¹⁷⁹ While recognizing that removing the schools' tax-exempt status was a burden on religious freedom, the Court recognized that the government's interest in eradicating racial discrimination in education was substantially overriding because "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination," and long-standing, unequivocal policies from the all three branches of the federal government forbade the practice.¹⁸⁰

In approving the revocation, the *Bob Jones* Court correctly recognized taxation's burden on religious liberty. And, in general, the Supreme Court recognizes that exerting power over religious education offends religious autonomy.¹⁸¹ With these important

177. *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983).

178. *Id.* at 588.

179. *Id.* at 592.

180. *Id.* at 603–04.

181. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064–66 (2020) (stating there is a "close connection that religious institutions draw between their central purpose and educating the young in the faith," and "[r]eligious education is vital to many faiths practiced in the United States"); *id.* at 2060 ("[T]he Religion Clauses protect the right

rights at stake, a religious school's exempt status should indeed only be revoked in limited circumstances with compelling government interests. Ending racial discrimination in education is one of those circumstances because of this nation's history of slavery, racism, and discrimination and its unanimous and unequivocal policies against it. Truly, there is no comparison to race-based discrimination in this country.¹⁸² Additionally, the Court has given religious-based racial bias little credibility.¹⁸³

On the other hand, when the Court has addressed other forms of discrimination intersecting with religious belief, religious beliefs have been protected. While that is far from condoning discrimination, the Court has recognized – in a way different from its racial discrimination cases – the important religious interests at stake. For instance, the Court has refused to expand discrimination laws to govern ministers¹⁸⁴ and recognized that sincere faith-based opposition to same-sex marriage is protected.¹⁸⁵

of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.”) (quotations omitted); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 189 (2012) (“[T]he First Amendment . . . gives special solicitude to the rights of religious organizations.”); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (“[T]he First and Fourteenth Amendments prevent the State from compelling [Amish parents] to cause their children to attend formal high school to age [sixteen].”).

182. Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL’Y 255, 311–12 (2017) (“The history of race-based slavery in this country, and the pattern of systematic racial discrimination that followed formal emancipation systematically and with official sanction in public institutions, including schools, have no true parallel.”).

183. See, e.g., *Bob Jones Univ.*, 461 U.S. at 575.

184. See *Hosanna-Tabor*, 565 U.S. at 196 (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069.

185. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (“The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.”); *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (“Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”); *id.* at 679–80 (“[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”); *Masterpiece Cakeshop, Ltd. v.*

This different treatment of other forms of discrimination makes *Bob Jones* inapposite beyond racial discrimination. For example, consider *Bob Jones's* application to religious colleges' enforcement of standards governing sexual conduct. As opposed to racial discrimination, the Court has protected similar beliefs. Nor are there long-standing government policies from all three branches of government forbidding religious schools' attempts to regulate sexual conduct on campus.¹⁸⁶ Therefore, *Bob Jones* does not apply to this scenario.¹⁸⁷

Furthermore, the *Bob Jones* Court's recognition that the United States' practice of tax exemption has underpinnings in English charitable trust law is more reason to limit the use of public policy standards against religious organizations. For a considerable portion of its existence, England's charitable use law was used as a tool of religious persecution.¹⁸⁸ Courts frequently discriminated against non-established churches by voiding gifts given to non-established religions and diverting them to the established church.¹⁸⁹ And trusts benefiting non-established

Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018) (“[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”). Other First Amendment rights received the same protections; see, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 640 (2000) (“[A]pplying New Jersey’s public accommodations law [to require admission of homosexual individuals] violates the Boy Scouts’ First Amendment right of expressive association.”).

186. Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 327 (2016) (“Forty years into the Title IX game, the score is 285 to 0, religious exemptions recognized versus those denied”); Buckles, *supra* note 182, at 308 (“If the fundament factors are analyzed in the case of religious schools maintaining sexual conduct policies in the same manner that the factors were analyzed in *Bob Jones*, religious schools remain exempt from tax. The United States lacks long-standing, consistent policies announced by the highest institutions and offices of the three branches of the federal government that attempt to stamp out efforts by schools to discourage pre-marital sex or to promote traditional marriage.”).

187. Herman D. Hofman, *For Richer or for Poorer: How Obergefell v. Hodges Affects the Tax-Exempt Status of Religious Organizations That Oppose Same-Sex Marriage*, 52 GONZ. L. REV. 21, 56 (2017).

188. *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 304–06 (1939); see also *Attorney-General v. Baxter*, 1 Vern 248 (1684) (striking down a trust of non-conformist clergymen and diverting its use to the established church because its non-conformist use was superstitious); *De Costa v. Da Paz*, 1 Dick 259 (1754) (striking a bequest and diverting the funds to a hospital because its use for Jewish religion was superstitious); *Carry v. Abbott*, 7 Ves Jun 491 (1802) (voiding a disposition for Roman Catholic education because its use was superstitious). See generally Matthew Harding, *Trusts for Religious Purposes and the Question of Public Benefit*, 71 MODERN L. REV. 159, 161–62 (2008) (describing several seventeenth-century English cases where trusts were struck down for public policy reasons).

189. *A Revaluation of Cy Pres*, *supra* note 188.

churches were declared illegal because their use was “superstitious.”¹⁹⁰ Herein lies the importance of limiting public-policy revocation of exempt status so that it does not become a tool to establish or punish religions.

Taken together, revocation of tax exemption should be limited to racial discrimination in education to avoid violating the First Amendment and abusing the public policy tool.

CONCLUSION

Religious organizations’ tax-exempt status is a constitutional right rooted in the Religion Clauses of the First Amendment. The principles at the core of the Religion Clauses – as declared by James Madison in his *Memorial and Remonstrance* and supported by case law, statutory law, and historical practice – forbid federal, state, and local governments from levying income and property tax against religious organizations’ non-commercial income and property. This avoids intermingling of church and state, threatening free exercise, disadvantaging poor religions, tarnishing America’s image as a land of religious liberty, and increasing disruptions and divisions in society. Recognition of this constitutional right avoids taxation, but it also calls for adjustments to some current tax-exempt law, specifically, narrowing the Johnson Amendment and the *Bob Jones* public policy standard. Further questions remain and will need to be addressed in this complicated and sensitive area. For instance, the definition and breadth of religious, non-commercial income and property need further clarification. This further clarification may expand or shrink the current tax benefits religious organizations receive, but the constitutional right to tax exemption dismisses once and for all the threat to tax the non-commercial property and income of religious groups.

190. *Id.* at 305.