

## CONSCIENCE, SPEECH, AND MONEY

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*The Establishment Clause is often interpreted as prohibiting taxation to promote religion on the grounds that such taxation infringes on taxpayers' freedom of conscience. Critics have argued that this idea, called the "Jeffersonian proposition," is open to two objections. The equality objection says that taxation to promote religion does not violate the freedom of conscience any more than taxation to promote other views to which taxpayers may conscientiously object. But if the Jeffersonian proposition is construed broadly to cover any government speech with which taxpayers disagree, it faces an anarchy objection. No government can function properly without support for government speech. So proponents of the Jeffersonian proposition face a dilemma: either discriminate against those with non-religious conscientious claims or confront the anarchical consequences of a general right of conscientious objection to government speech. Most proponents of the Jeffersonian proposition have grasped the first horn of this dilemma by denying the equality objection. Rejecting that approach, this Article confronts the anarchy objection by developing a balancing account of the freedom of conscience. According to this account, the state may override claims of conscience when it has a legitimate interest in compelling support for speech. When it comes to religious speech, however, the state may not have any countervailing interest to balance against freedom of conscience. Under those circumstances, the Jeffersonian proposition may be vindicated. By showing how this argument is consistent with much of existing compelled support doctrine under the Free Speech Clause of*

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*the First Amendment, and by defending it against objections that compelled support does not implicate the freedoms of conscience, association, or speech, this Article argues for the Jeffersonian proposition's continued place in our understanding of the First Amendment.*

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#### INTRODUCTION

A traditional argument against state financial support for religion is that such support violates taxpayers' freedom of conscience. Just as compelling religious speech or worship infringes on religious liberty so, too, does requiring citizens to pay for religious expressions they find objectionable. Religion should be supported only through voluntary contributions and not with funds raised through government coercion. As Thomas Jefferson famously wrote in the preamble to the Virginia Bill for Religious Freedom, "To compel a man to furnish contributions of money for the

propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.”<sup>1</sup>

Proponents of this “Jeffersonian proposition”<sup>2</sup> tend to make three types of claims about it—historical, normative, and legal. First, they argue on historical grounds that the proposition captures the original meaning of the Establishment Clause. The Framers of the First Amendment included a nonestablishment provision to protect religious liberty and freedom of conscience, which by general agreement encompassed a right against compelled support for religious views with which taxpayers disagreed.<sup>3</sup> Second, proponents of the Jeffersonian proposition claim that it is normatively justified. The argument here tends to be that government spending to advance religion imposes special burdens on the freedom of conscience in a way that other controversial government expenditures do not.<sup>4</sup> Third, those who advance these historical and norma-

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<sup>1</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 *The Papers of Thomas Jefferson* 545, 545 (Julian P. Boyd ed., 1950) (citation and emphasis omitted).

<sup>2</sup> This phrase is from Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 *Const. Comment.* 365, 374 (2006).

<sup>3</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 & n.22 (2002) (Souter, J., dissenting) (claiming that taxation to promote religion violates freedom of conscience and that “[a]s a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause”); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 *N.Y.U. L. Rev.* 346, 351 (2002) (“Establishment of religion, the Framers’ generation thought, often had the effect of compelling conscience . . . [T]he Framers’ generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.”) (citation omitted); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 *Wm. & Mary L. Rev.* 837, 958 (1995) (“[P]rotection of freedom of conscience lay at the base of two great and emerging principles: free exercise of religion and the destruction of religious establishments by government.”).

<sup>4</sup> Given its historical significance and continued prominence in arguments against state funding of religion, surprisingly little has been written to defend the normative claim that taxation to support religion violates the freedom of conscience. But see 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* 5 (2008) (“[P]erhaps there is something special about being forced to support what one believes are misguided forms of worship.”); Steven H. Shiffrin, *The Religious Left and Church-State Relations* 88 (2009) (“Nonetheless, however easy it may be to exaggerate the issue, it seems clear that taxpayer compulsion presents an Establishment Clause concern.”); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 *Cornell L. Rev.* 783, 801 (2002) (“That all of us see our taxes put to uses to which we object does not justify ignoring the distinctive political strains that are introduced when religious sensitivities

tive claims argue that certain legal conclusions follow from them, namely, that the government may not use taxpayer funds for the purpose of advancing religion,<sup>5</sup> or even if the government has discretion to fund religious programs in some circumstances, it may decline to provide such funding to avoid infringing on taxpayers' freedom of conscience.<sup>6</sup> Concerns about freedom of conscience have also been invoked as the basis for an exception to Article III

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are added to the equation.”); Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. Det. Mercy L. Rev. 463, 475 (2001) (“[F]orcing individuals to support the religious beliefs of others—through the power of taxation—involves a particularly difficult violation of conscience.”).

Noah Feldman has argued at length that compelled support of religion violates the freedom of conscience, but it is unclear whether he continues to support this view. Compare Feldman, *supra* note 3, at 421 (arguing that “[t]here are some good reasons to think that state action implicates the taxpayer’s conscience”), with Noah Feldman, *The Framers’ Church-State Problem—and Ours*, in *The Constitution in 2020*, at 225, 227 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“Many of us still balk at the idea of paying to support religious teachings with which we disagree or even which we abhor . . . . But on the whole, it is today difficult fully to credit the argument that my tax dollars should express my conscience when it comes to religion, and to nothing else. The government does many things with our taxes that we do not like, yet we do not generally believe this violates our conscience.”).

<sup>5</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) (“[C]ompelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison’s and Jefferson’s now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it.”); see also Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 Wm. & Mary L. Rev. 2193, 2207 (2008) (arguing against government funding of religion in part because “it is wrong to be coerced to give our tax dollars to religions we do not believe in”); Laura S. Underkuffler, *Vouchers and Beyond: The Individual As Causative Agent in Establishment Clause Jurisprudence*, 75 Ind. L.J. 167, 191 (2000) (same); Jesse H. Choper, *Securing Religious Liberty* 17–18 (1995) (same); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 209–10 (1992) (same).

<sup>6</sup> See *Locke v. Davey*, 540 U.S. 712, 722 (2004) (upholding a state scholarship program’s exclusion of funding for devotional theology because, historically, “Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of conscience and should be opposed” (quoting Frank Lambert, *The Founding Fathers and the Place of Religion in America* 188 (2003))); Nelson Tebbe, *Excluding Religion*, 156 U. Pa. L. Rev. 1263, 1273–74 (2008) (arguing that even if the Establishment Clause permits support of religion, the government may decide not to aid religion because “funding sacred practices might reasonably be seen to impede the religious freedom of taxpayers who object to supporting institutions with which they differ as a matter of conscience”).

standing requirements for the purpose of allowing challenges to government expenditures under the Establishment Clause.<sup>7</sup>

Of course all three of these claims are controversial. But while an enormous amount of attention has been focused on the histori-

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<sup>7</sup> Taxpayer status is ordinarily insufficient for standing to challenge the constitutionality of expenditures by the federal government. See *Frothingham v. Mellon*, 262 U.S. 447 (1923). In *Flast v. Cohen*, 392 U.S. 83, 84 (1968), however, the Supreme Court recognized a narrow exception for taxpayers asserting violations of the Establishment Clause. Recently, in *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), the Court limited that exception to cases involving specific congressional appropriations. Justice Kennedy, who supplied the fifth vote for the judgment in *Hein*, wrote separately to explain his view that *Flast* was correctly decided. He stated that separation-of-powers principles implemented by Article III standing requirements “must accommodate the First Amendment’s Establishment Clause” and that “the clause expresses the Constitution’s special concern that freedom of conscience not be compromised by government taxing and spending in support of religion.” *Id.* at 615–16 (Kennedy, J., concurring); see also *id.* at 638 (Souter, J., dissenting) (defending taxpayer standing for Establishment Clause challenges on the ground that “[t]he right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another”); Martha Nussbaum, John F. Scarpa, Conference on Law, Politics, and Culture: Reply, 54 *Vill. L. Rev.* 677, 701 (2009) (arguing that taxpayer standing in Establishment Clause cases protects against the “threat to equal liberty of conscience posed by the use of taxpayer money for religious purposes”). See generally Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: *Hein v. Freedom from Religion Foundation, Inc.* and the Future of Establishment Clause Adjudication, 2008 *BYU L. Rev.* 115 (2008) (discussing and criticizing recent developments in taxpayer standing under the Establishment Clause).

It should be noted, however, that if a concern for freedom of conscience supports the *Flast* exception, the same concern can be invoked to narrow that exception to cases in which taxpayers’ money is spent to support religion. For example, as this Article was in preparation, the Supreme Court heard argument in *Arizona Christian School Tuition Organization v. Winn*, 562 F.3d 1002 (9th Cir. 2009), cert. granted, 130 S. Ct. 3350 (mem.) (U.S. May 24, 2010) (No. 09-987), involving whether taxpayers have standing to challenge a tuition tax credit under the Establishment Clause. On behalf of the United States, the Acting Solicitor General, Neal Katyal, asserted that the respondents lacked standing because “*Flast* recognized a special . . . solicitude for taxpayers when money is taken out of their pocket and used to fund religion against their conscience,” and because, given the structure of the tax credit at issue, “[n]ot a cent of [the Respondents’] money is going to fund [religion].” See Transcript of Oral Argument at 53–54, *Winn*, 130 S. Ct. 3350 (No. 09-987), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-987.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-987.pdf). This argument for further limiting the *Flast* exception, which resonates with Justice Kennedy’s concurring opinion in *Hein*, strongly suggests a conscience-based theory of taxpayer standing motivated by the Jeffersonian proposition.

cal and legal claims,<sup>8</sup> critics have only recently begun to address the normative argument.<sup>9</sup> They claim that even if Americans at the Founding, or at the ratification of the Fourteenth Amendment, believed something like the Jeffersonian proposition, the idea that taxation to support religion violates dissenters' freedom of conscience faces serious objections.

First, it is unclear why taxpayers' freedom of conscience is violated only when government provides financial support for religion. Taxpayers are required to pay for all sorts of government programs they find morally objectionable. Except when it comes to funding religion, however, they have no constitutional recourse to oppose such programs. Why should taxation to promote religion be singled out for special disability? This argument against the Jeffersonian proposition is an *equality objection*. Citizens with sincere and conscientious objections to government funding of religion may, at least in some cases, find their claims vindicated under the Establishment Clause. But citizens with equally sincere and conscientious—and, we might add, religiously grounded—objections to nonreligious government programs have no recognized constitutional basis on which to make their claim.<sup>10</sup> Since both protests against government funding are based on conscientious objections, allowing only the protest against support for religion seems discriminatory and perhaps even hostile toward religion.<sup>11</sup>

At this point, a proponent of the Jeffersonian proposition might respond that the freedom of conscience does not protect only those who object to government support for religious opinions. The freedom of conscience may be violated whenever the government requires a citizen to pay for “the propagation of opinions which he

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<sup>8</sup> Citations here could fill volumes. For commentary on debates about the historical and legal meaning of the Establishment Clause, see, e.g., 2 Greenawalt, *supra* note 4, at chs. 2–4.

<sup>9</sup> See, e.g., Smith, *supra* note 2; Richard W. Garnett, Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience, 54 *Vill. L. Rev.* 655, 664 (2009) (rejecting the claim that government support of religion violates taxpayers' conscience).

<sup>10</sup> See *United States v. Lee*, 455 U.S. 252, 260 (1982) (rejecting a religious exemption from Social Security taxes on the ground that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief”).

<sup>11</sup> See Smith, *supra* note 2, at 379–80.

disbelieves and abhors.”<sup>12</sup> Jefferson’s claim is not explicitly restricted to *religious* opinions.<sup>13</sup> And even if Jefferson intended the prohibition on compelled support to apply only to the propagation of religious beliefs, we might today interpret his claim more liberally to cover support for any moral, philosophical, or religious views with which citizens sincerely and conscientiously disagree.

The problem with extending the prohibition on compelled support in this way should be obvious. The government funds all kinds of speech that conflicts with the sincere and conscientious beliefs of its citizens. If citizens could block government expenditures supporting speech—to say nothing of government programs that only incidentally propagate speech—on the grounds that they find such speech abhorrent to their moral or religious principles, the government might be severely constrained in its ability to explain and justify its actions and, more generally, in its power to pursue programs favored by democratic majorities. Perhaps some extreme libertarians and anarchists would favor restricting government in this way, but that is exactly the nature of the objection. Granting taxpayers a right to withhold their tax contributions on the basis of conscientious objections to funding government speech would threaten the government’s ability to function properly. As with claims for religious exemptions under the Free Exercise Clause and, for that matter, with all forms of conscientious objection to general laws, the concern here is that every citizen would “become a law unto himself.”<sup>14</sup> This is what might be called the *anarchy objection* to the Jeffersonian proposition.

Together the *equality* and *anarchy* objections create a dilemma for those who believe that taxation to support religion violates dissenting taxpayers’ freedom of conscience. On the one hand, it

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<sup>12</sup> Jefferson, *supra* note 1, at 545 (emphasis omitted).

<sup>13</sup> Although, in fairness, it seems clear from the context of Jefferson’s statement that he was referring to religious opinions. As noted above, the statement appears in the Virginia Bill for Religious Freedom, and Jefferson describes the types of opinions at issue when he says “that our civil rights have no dependance on our *religious* opinions, any more than our opinions in physics or geometry.” See *id.* at 545–46 (emphasis added) (citation omitted). But cf. Steven D. Smith, What Does Religion Have to Do with Freedom of Conscience?, 76 U. Colo. L. Rev. 911 (2005) (interpreting Jefferson’s statement as applying to religious and nonreligious opinions).

<sup>14</sup> Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

might be possible to avoid the anarchy objection by limiting claims of conscience to those that conflict with funding support for religion. But that option runs directly into the equality objection. Why should those who have conscientious objections to funding religion have cognizable claims, when those who have conscientious objections to nonreligious government speech do not? On the other hand, if the answer is that conscientious claims of both types deserve recognition, then we are back to the anarchy objection, and the prospects for the Jeffersonian proposition look bleak.

This Article offers a possible defense of the Jeffersonian proposition. Most proponents of the proposition have grasped the first horn of the dilemma created by the equality and anarchy objections, arguing that there is something special about religious conscience, which in turn generates objections to compelled funding of religious opinions.<sup>15</sup> Although this strategy draws support from the history of religious disestablishment in the Founding era, the idea that there is something distinctive about *religious* conscience, or that claims of conscience can only be religious in nature, has become normatively untenable. Religion may still have a special status in the law, but that status does not rest on the idea that there is something morally distinctive about religious as opposed to non-religious claims of conscience.<sup>16</sup>

If the Jeffersonian proposition cannot be justified by a religious conception of the freedom of conscience, another way to argue for the prohibition on compelled support for religion is to tackle the second horn of the dilemma by confronting the anarchy objection. A potential solution is to adopt an account of compelled support that balances claims of conscience against the government's interests in promoting speech. In most cases, the government will have legitimate interests sufficient to override taxpayers' claims, especially when such claims are grounded in objections to general taxation. In cases involving religious speech, however, the government may have no legitimate interest, and so there may be nothing to balance against taxpayers' freedom of conscience.<sup>17</sup>

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<sup>15</sup> See, e.g., Feldman, *supra* note 3, at 417–27; Underkuffler, *supra* note 4, at 475–77.

<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Section II.B.



In addition to offering a normative defense of the Jeffersonian proposition, this argument may also provide a plausible and more coherent account of compelled support doctrine under both the Establishment and Free Speech Clauses of the First Amendment. In the free speech context, the Supreme Court has interpreted the right “not to speak” to include a right against compelled funding of others’ speech. The Court has developed this doctrine of “compelled subsidy” or “compelled support”<sup>18</sup> to deal with the anarchy objection, or its conceptual equivalents, in two ways. First, in cases involving coerced subsidies for *private* speech (for example, by unions, integrated bar associations, industry advertising campaigns, and student organizations),<sup>19</sup> the Court has balanced free speech interests, including the freedom of conscience, against competing state interests. In most cases, but not all,<sup>20</sup> the Court has allowed the government to compel subsidies when it has demonstrated a valid regulatory interest. But when the government has advanced no legitimate interest, the Court has interpreted the First Amendment to prohibit compelled support for speech.<sup>21</sup>

In cases involving compelled support for *government* speech, however, the Supreme Court has taken a second and more radical approach to guarding against the threat of anarchical tax protests. Rather than balancing taxpayer free speech interests against those of the state, the Court has adopted a stringent rule according to

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<sup>18</sup> I shall use the terms “compelled subsidy” and “compelled support” interchangeably in reference to cases involving compelled financial contributions to promote speech by private associations or by the government.

<sup>19</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (unions); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (state bar associations); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997) (industry advertising associations); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (student organizations). These cases are discussed below in Section III.A.

<sup>20</sup> As many commentators have noted, the Court’s development of compelled support doctrine has not been entirely consistent, nor has the Court coalesced around a theory justifying the doctrine. See, e.g., Robert Post, *Compelled Subsidization of Speech: Johanns v Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195 (2005) (“The resulting [compelled subsidization of speech] cases have raised conceptually difficult and complex First Amendment questions, which the Court has proved unable to master.”); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. Davis L. Rev. 1087, 1090 (2005) (“The root cause of the current confusion is the Supreme Court’s failure to provide a coherent account of the First Amendment harm of compelled subsidization.”).

<sup>21</sup> See *infra* Section III.A.

which taxpayers have no First Amendment right to challenge the use of their money to support government speech.<sup>22</sup> In short, when it comes to government speech, the Court has repudiated the Jeffersonian proposition, except when the speech at issue is religious. The government speech exception to compelled support doctrine thus makes a theoretical anomaly out of one of the core prohibitions of the Establishment Clause.

The Supreme Court has given no explanation for how the government speech exception to compelled support doctrine fits with the prohibition on compelled support for religious speech. This has led to some speculation that the government speech doctrine might swallow the Establishment Clause bar against taxation to promote religious speech.<sup>23</sup> But short of that outcome, which still seems unlikely, it makes sense to look for an interpretation of the compelled support cases that preserves some place for freedom of conscience while explaining the general rule against forced contributions to promote religious expression.

To develop a normative and legal account of this kind, this Article proceeds as follows: Part I rehearses the equality objection and explains why existing attempts to defeat it are unsuccessful. Part II responds to the anarchy objection by presenting an account of freedom of conscience that balances individual and government interests. Part III shows how this account is reflected in compelled support doctrine. I do not claim that this account is consistent with all of the doctrine. Indeed, it provides reasons to be critical of the Supreme Court's most recent decision involving compelled support for government speech. But the argument advanced below fits with

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<sup>22</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 550–51 (2005). For discussion, see *infra* Section III.B.

<sup>23</sup> See, e.g., Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 *St. Mary's L.J.* 41, 91 (2009) (“[T]he use of the government speech doctrine in the context of the Establishment Clause may cause us to reshape our understanding of the religion clauses of the Constitution.”); Carol Nackenoff, *The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause*, 69 *Md. L. Rev.* 132, 132, 147 (2009) (“[A]n expansion of the government speech doctrine is likely to have a significant impact on Establishment Clause jurisprudence . . . . If few or none can conceivably raise Establishment Clause challenges to government spending programs or government speech activities, then short of government's establishment of a national church, the Establishment Clause could be rendered nearly as irrelevant to the Constitution as the Privileges or Immunities Clause of the Fourteenth Amendment.”).

much of the existing doctrine, and it provides a more unified and normatively plausible explanation of compelled support doctrine under the Free Speech and Establishment Clauses of the First Amendment. Part IV takes up three related objections to the idea of a right against compelled support, including that it “seems to mistake a man’s conscience for his money,”<sup>24</sup> that the connection between taxpayers and government speech funded from general revenues is too attenuated, and that it rests on the false claim that “money is speech.” These are powerful objections, but none of them are decisive, which is part of the reason why the doctrine of compelled support and the Jeffersonian proposition remain important aspects of the First Amendment.

### I. THE EQUALITY OBJECTION

As introduced above, the Jeffersonian proposition is the claim that compelled support for opinions with which taxpayers disagree infringes on their freedom of conscience. This proposition can take a more or less restricted form, depending on the types of opinions to which it applies. What we might call the narrow or *restricted* Jeffersonian proposition says that taxpayers have a right, grounded in the freedom of conscience, not to pay taxes for the support of *religious* speech with which they disagree. A broader or *unrestricted* form of the proposition simply omits the religious qualifier, such that taxpayers have a right not to pay taxes to support *any* speech with which they disagree as a matter of conscience.

For the moment, we can set aside the unrestricted proposition (which is the subject of Part II) and focus on the restricted version, which bars coerced funding only of religious opinions. This narrower version of the Jeffersonian proposition faces an immediate and difficult objection, which is that it discriminates against those who oppose funding of what they take to be objectionable nonreligious speech.

The equality objection says that *as a matter of freedom of conscience*, claims against compelled support for religious and nonreligious opinions should be treated equally. Either all such claims

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<sup>24</sup> *Barnes v. First Parish of Falmouth*, 6 Mass. 401, 408 (1810).

should be recognized or none of them.<sup>25</sup> Consider the example of Al, the agnostic, who objects to government funding of religious speech (for example, funding of religious symbols, rituals, or prayers),<sup>26</sup> and Betty, the religious believer, who objects to subsidizing secular opinions that conflict with her religious beliefs (for example, teaching evolution or sex education in public schools).<sup>27</sup> Under the restricted Jeffersonian proposition, Al has a right to object to the government using his money, while Betty does not.<sup>28</sup>

According to the equality objection, the burden on Al's conscience is no different from the burden on Betty's. Both are forced to pay for government speech with which they disagree. To the extent they each have sincere and conscientious grounds for objecting to government-funded speech, if Al's claim is recognized, then Betty's should be as well. If that conclusion seems impractical because it would invite conscientious challenges to all government-subsidized speech with which citizens disagree (hence the anarchy objection), then perhaps that is a reason to reject both of their claims. But while it might make sense to recognize both claims, or

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<sup>25</sup> It is important to see that, as stated above, the equality objection is a claim about the freedom of conscience. It says only that there is no reason *based on the freedom of conscience* to recognize objections to funding religious opinions, as opposed to morally objectionable nonreligious opinions. As I suggest below, however, there may be other reasons, which are not based on the freedom of conscience, for rejecting government support for religious opinions, while allowing support for nonreligious opinions that citizens may find morally objectionable. See *infra* Section II.B. If there are such reasons, they do not run afoul of the equality objection as presented above, for the reason that they do not distinguish between religious and nonreligious opinions *as a matter of conscience*.

<sup>26</sup> See, e.g., *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (involving a challenge to a state-sponsored Latin Cross on Mount Soledad); *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008) (involving taxpayer challenge to legislative prayer).

<sup>27</sup> This example is borrowed, in a slightly modified form, from Smith, *supra* note 2, at 365–68.

<sup>28</sup> In addition to Al and Betty, we might also imagine Connie, the secular agnostic who objects to some secular speech, and David, the believer who objects to religious speech that conflicts with his religion. These examples complete a set of categories involving two types of speech—religious and nonreligious—and two types of objections to those types of speech, again religious and nonreligious. Considered schematically, the categories are: (1) religious objections to religious speech, (2) religious objections to secular speech, (3) secular objections to religious speech, and (4) secular objections to secular speech. Although I focus mainly on examples drawn from categories (2) and (3), the equality objection seems to apply with equal force to examples from the other categories. My thanks to Fred Schauer for helpful comments on this point.

to reject both claims, the one option that cannot be justified is to privilege Al's claim over Betty's.<sup>29</sup>

The equality objection has obvious intuitive appeal. Taxpayers disagree with all kinds of government policies, including programs aimed at explaining or justifying government decisions. It is hard to see how the value of freedom of conscience can be used to distinguish between taxpayers' myriad conscientious objections to coerced support for government speech. For example, some taxpayers may protest the government's use of tax money to build up public opinion for a war they believe is deeply unjust. They may believe that any support for the war violates their moral or religious principles. According to the restricted Jeffersonian proposition, however, these protesters have no claim based on their conscientious objection to the war, regardless of whether they are motivated by secular or religious beliefs. But if they were protesting coerced subsidies for direct aid to religious schools or for scholarships to promote studies in devotional theology, they would have stronger claims. At least as a matter of freedom of conscience, this result seems difficult, and perhaps impossible, to justify.<sup>30</sup>

Those who defend the restricted Jeffersonian proposition offer two main arguments for the asymmetrical treatment of religious and nonreligious opinions. First, they claim it is justified as a matter of original understanding. Second, they argue that "translating" the Founders' religious conception of the freedom of conscience into a broader secular conception threatens to undermine modern protections for religious liberty. The next two Sections suggest that neither of these arguments for the restricted Jeffersonian proposi-

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<sup>29</sup> See Smith, *supra* note 2, at 367. Professor Smith considers the additional possibility that Betty may have a claim, even if Al does not. Unlike Al, Betty can argue that compelling her to support the state's secular message (for example, teaching evolution in public schools) violates her religious principles. This might provide the basis for a Free Exercise claim, allowing Betty to argue for an exemption from taxation burdening her religious conscience. Since Al is not religious, he can make no comparable claim. But as Smith elsewhere notes, existing Free Exercise doctrine does not recognize Betty's claim. See Smith, *supra* note 13, at 913 n.13 (noting the existence of religious opposition to government speech and that "current law gives the objectors no remedy in their role as taxpayers—or, for that matter, in their role as parents or students or in any other role").

<sup>30</sup> See Shiffrin, *supra* note 4, at 88 ("But if I could be forced to support what I regarded as murder by my government, I do not think it obvious that an alleged right not to support religious education should have a more privileged position.").

tion is persuasive. The first is subject to serious moral objections; the second either begs the question against the equality objection or collapses into the anarchy objection, which is addressed in Part II below.

*A. The Originalist Response*

The originalist argument is that the Establishment Clause was designed to protect the liberty of conscience by prohibiting taxation to promote religious views with which taxpayers disagreed. This argument rests on the claim that, at the time of the Founding, it was widely, if not universally, believed that coerced funding of religion violated the freedom of conscience.<sup>31</sup> Admittedly, according to this historical account, there was some dispute during the Founding era, and especially in Congregationalist New England, over whether taxpayers could be required to support ministers and churches of their own faiths, but there was little disagreement on the principle that forcing taxpayers to support denominations other than their own infringed on their religious liberty.<sup>32</sup> Furthermore, on this view, the Founders distinguished between objections to compelled support for religion and objections to taxation aimed at promoting other controversial government policies, including, for example, military conscription. A central purpose of the Establishment Clause was to prevent the federal government from taxing to promote religion, but nothing barred the imposition of taxes on those who were opposed in conscience to policies otherwise within the federal government's jurisdiction.<sup>33</sup>

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<sup>31</sup> See Feldman, *supra* note 3, at 418 (“[T]he broadly shared eighteenth-century view—that it was wrong to coerce payment of taxes for religious purposes against conscience—could plausibly be presented as central to the Framers’ goal in enacting the Establishment Clause.”).

<sup>32</sup> *Id.* at 416 (“There was broad agreement that coercive taxes for religious purposes would, in principle, violate liberty of conscience. But there was no agreement about whether it was coercive to collect such taxes when the law provided for everyone to designate the religion of his choice as the recipient of his taxes.”).

<sup>33</sup> *Id.* at 424 (“The Framers were familiar with Quaker pacifism, for example; but they never doubted that Quakers could be made to pay taxes that funded government actions that included violence . . . [T]he Constitution never suggested that individual liberty of conscience should be protected from government actions that on their face have nothing to do with religion.”).

According to this originalist account, the Founders defined liberty of conscience as an inalienable right to form religious beliefs and to engage in religious practices without coercive government interference.<sup>34</sup> The argument for this right, which followed along Lockean lines,<sup>35</sup> depended on a number of religious assumptions. First, every person was thought to have a higher duty—what Madison described as a duty “precedent, both in order of time and in degree of obligation, to the claims of Civil Society”<sup>36</sup>—to pursue religious salvation according to the dictates of one’s conscience. The right to perform this higher duty could not be delegated or entrusted to anyone else, because only genuine or sincere religious belief was sufficient to discharge it.<sup>37</sup> Following Locke’s view, many (and perhaps most) late eighteenth-century Founders believed that it was impossible to coerce genuine religious belief, which could be reached only through a combination of reason and persuasion.<sup>38</sup> Moreover, since government was defined by its exercise of coercive power, and since coercion was useless in obtaining salvation, it followed that the government had no authority to dictate matters of religion, including taxation to support the propagation of religious opinions.<sup>39</sup>

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<sup>34</sup> See John Witte, Jr., *Religion and the American Constitutional Experiment* 39 (2000) (“[F]or most founders, liberty of conscience protected voluntarism[,] . . . the unencumbered ability to choose and to change one’s religious beliefs and adherences.”) (emphasis omitted).

<sup>35</sup> See Feldman, *supra* note 3, at 373 (describing the “broad agreement in postrevolutionary America on a Lockean concept of liberty of conscience”).

<sup>36</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *James Madison: Writings* 30 (Jack N. Rakove ed., 1999).

<sup>37</sup> See John Locke, *A Letter Concerning Toleration* 26 (James H. Tully ed., Hackett Publishing 1983) (1689) (“[N]o man can so far abandon the care of his own Salvation, as blindly to leave it to the choice of any other, whether Prince or Subject, to prescribe to him what Faith or Worship he shall embrace. For no Man can, if he would, conform his Faith to the Dictates of another. All the Life and Power of true Religion consists in the inward and full perswasion of the mind; and Faith is not Faith without believing.”).

<sup>38</sup> See Micah Schwartzman, *The Relevance of Locke’s Religious Arguments for Toleration*, 33 *Pol. Theory* 678, 690–93 (2005) (discussing Locke’s argument that genuine religious belief cannot be coerced); see also Feldman, *supra* note 3, at 378 (concluding that “[b]y the late eighteenth century, some version of Locke’s basic view . . . had been formally embraced by nearly every politically active American writing on the subject of religion and state”).

<sup>39</sup> For this conclusion, see, e.g., Madison, *supra* note 36, at 30 (“We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil

For proponents of the restricted Jeffersonian proposition, part of the appeal of this account is that it explains why the Establishment Clause prohibits funding of religious opinions, without addressing the funding of what we might now consider to be comparable non-religious views.<sup>40</sup> The Lockean conception of freedom of conscience distinguishes sharply between religious interests, which are outside the government's jurisdiction, and civil interests, which fall squarely within it. If this conception forms the central basis of the Establishment Clause, then the answer to the equality objection is that the Founders opposed religious taxation because they believed that the use of coercion to promote religious opinions would not, as Locke put it, "help at all to the Salvation of their Souls"<sup>41</sup> and indeed might imperil them by compelling acts against the dictates of their consciences. The freedom of conscience, on this view, protects against state interference with the exercise of higher-order religious duties. It has little, if anything, to say about attempts by the state to promote ideas that do not concern the pursuit of salvation.

Even if this account accurately captures the original meaning of the Establishment Clause,<sup>42</sup> however, it cannot serve as an adequate response to the equality objection, that is, to the claim that liberty of conscience is no more violated when the government taxes to promote religious opinions than when it taxes to promote other views with which taxpayers disagree as a matter of conscience. The equality objection is a *moral* objection to the Jeffersonian proposition, and to the extent it serves as a response to that objection, the content of the originalist account must itself be mor-

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Society and that Religion is wholly exempt from its cognizance."); see also Feldman, *supra* note 3, at 384–98 (describing similar conclusions reached by others during the Founding era).

<sup>40</sup> See Feldman, *supra* note 3, at 424–25.

<sup>41</sup> Locke, *supra* note 37, at 27.

<sup>42</sup> As a historical matter, this claim is controversial. Compare, e.g., Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17 (1995) (arguing that the Establishment Clause was originally intended as a jurisdictional constraint and not as a provision to protect any substantive principle of religious liberty), and Smith, *supra* note 2, at 375 ("So the historical claim that Americans largely *converged* in believing that public monetary support for religion violates the consciences of taxpayers turns out to [be] unpersuasive . . ."), with Feldman, *supra* note 3, at 405, 411 ("[T]he Framers could and did agree on a principle to justify the Establishment Clause: the protection of liberty of conscience at the federal level.").



ally defensible.<sup>43</sup> The Lockean account attributed to the Founders, however, is open to at least two serious criticisms, namely, that it rests on a sectarian conception of freedom of conscience, and consequently, that it discriminates against those whose claims of conscience are based on nonreligious moral views.

First, the Founders' conception of freedom of conscience is based on theological assumptions with which many people reasonably disagree. At the very least, atheists, agnostics, and nontheists have little, if any, reason to support a principle of religious liberty premised on the existence of a God-given duty to pursue salvation.<sup>44</sup> Religious justifications are simply too sectarian to serve as the public basis for constitutional principles in a society marked by a wide range of pluralism with respect to religious, nonreligious, and anti-religious views.<sup>45</sup> Moreover, to the extent that the legal and moral legitimacy of such principles turns on whether they can be justified to those who adhere to competing and conflicting religious and philosophical doctrines, they must be based on public values rather than on appeals to religious (or anti-religious) commitments.<sup>46</sup>

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<sup>43</sup> Here one could argue that, even if the content of the originalist account is morally indefensible, that is what the Framers meant, and their meaning has content-independent moral authority, subject of course to constitutional amendment. For some originalists, this might be a sufficient answer. But even for those who think that original meaning is fixed and authoritative, there is still a question about whether that meaning is an occasion for moral regret, all things considered. For that reason, even originalists may have an interest in the arguments presented above.

<sup>44</sup> See Douglas Laycock, *Religious Liberty as Liberty*, 7 *J. Contemp. Legal Issues* 313 (1996), *reprinted in* 1 *Religious Liberty: Overviews and History* 67 (2010) ("Theistic arguments for religious liberty can neither persuade nontheists nor speak equally to all the varieties of theistic religious experience."); 2 Greenawalt, *supra* note 4, at 492 ("A person who rejects religious premises will believe religious justifications are irremediably flawed by mistaken belief. Similarly, a person who accepts one set of religious premises will not think radically competing religious premises are sound.").

<sup>45</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1262 (1994) ("In a nation with many groups, many values, and many views of the commitments by which a good life is shaped, the shared understanding among *some* groups that they are each bound by the commandments of a (different) god . . . is unacceptably sectarian as a basis for the constitutional privileging of religion."); Schwartzman, *supra* note 38, at 681–82 (discussing the objection that theological arguments cannot serve as legitimate justifications for religious toleration in a liberal democratic society).

<sup>46</sup> I recognize that this claim is controversial. Here I simply register my view that constitutional principles are legally and morally legitimate only if they can be justified

Second, in addition to being grounded in sectarian claims, an interpretation of the Religion Clauses based on a religious conception of conscience would discriminate against those motivated by non-religious moral views. According to the originalist account, the Religion Clauses were meant to prohibit government coercion of religion, including in the form of taxation to promote religion, for the purpose of protecting the right to perform religious duties according to the dictates of one's conscience. This account does not extend protection to conscientious objectors motivated by secular moral commitments. It only recognizes claims answering to some higher, transcendent, or extra-human source of authority.<sup>47</sup> This is

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without relying on values drawn from particular comprehensive religious, ethical, or philosophical doctrines. As a legal matter, the Supreme Court has repeatedly endorsed and never formally repudiated a principle of neutrality between religious and nonreligious views. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). See generally Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 Val. U. L. Rev. 37 (1992), reprinted in 1 Religious Liberty: Overviews and History 634–42 (2010) (surveying Supreme Court precedent affirming the principle of neutrality). For public officials to invoke a religious conception of freedom of conscience would violate this principle of neutrality. See, e.g., 2 Greenawalt, supra note 4, at 493 ("If Supreme Court justices explicitly relied on a Baptist justification for the religion clauses . . . they would be endorsing and promoting the Baptist religious view, just what the religion clauses forbid."); Laycock, supra note 44, at 67 ("[R]eligious beliefs cannot be imputed to the Constitution without abandoning government neutrality on religious questions."); William P. Marshall, Truth and the Religion Clauses, 43 DePaul L. Rev. 243, 262–63 (1994) (same).

As a matter of political morality, constitutional principles are legitimate only if they can be justified to all reasonable people. Given the fact of reasonable disagreement about comprehensive doctrines, we should not expect a religious justification for freedom of conscience to satisfy this principle of legitimacy. See John Rawls, *The Idea of Public Reason Revisited* (1997), in *Collected Papers* 573, 578–79 (Samuel Freeman ed., 1999) [hereinafter Rawls, *The Idea of Public Reason Revisited*]; John Rawls, *Political Liberalism* 136–37, 217–18 (1996) (discussing the liberal principle of legitimacy) [hereinafter Rawls, *Political Liberalism*]; see also Schwartzman, supra note 38, at 699 (arguing that although religious justifications may support an overlapping consensus in favor of a liberal principle of toleration, "it is no longer legitimate to found political institutions on any particular religion").

<sup>47</sup> Some Founders were apparently quite explicit in making this point. See Feldman, supra note 3, at 424–25 ("To the eighteenth-century mind . . . it was, following Locke, literally 'absurd, to speak of allowing Atheists Liberty of Conscience,' because conscience necessarily related to one's salvation, in which atheists presumably disbelieved altogether." (quoting Moses Dickinson, *A Sermon Preached Before the General Assembly of the Colony of Connecticut* 35 (Hartford, Timothy Green 1755))) (citation omitted); see also Michael W. McConnell, *The Origins and Historical Understanding*

most evident in the context of regulatory exemptions under the Free Exercise Clause, where, following something like the originalist view, the Supreme Court has twice indicated, in dicta, that only those with religious motivations may receive constitutionally mandated exemptions.<sup>48</sup>

If we set aside arguments from original meaning<sup>49</sup> and those based on theological premises,<sup>50</sup> the main argument for understanding the

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of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1500 (1990) (arguing that non-believers are not entitled to exemptions under the Free Exercise Clause).

<sup>48</sup> See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713 (1981) (holding that a Jehovah's Witness was entitled to unemployment compensation after quitting his job in an armament factory, and indicating that protection under the Religion Clauses extends only to "beliefs rooted in religion" and not "personal philosophical choice"); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (granting the Amish a religious exemption from compulsory school attendance laws and stating that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief," rather than "subjective evaluation" or mere "personal preference").

It is worth noting, however, that when actually faced with cases involving non-theistic and secular claims of conscience, the Supreme Court has extended the scope of religious exemptions to include them. See *Welsh v. United States*, 398 U.S. 333, 340 (1970) (interpreting a statute exempting religious pacifists from military service to include anyone whose "opposition to war stem[s] from . . . moral, ethical, or religious beliefs about what is right and wrong" and who holds those beliefs "with the strength of traditional religious convictions"); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (interpreting the statutory exemption from military service for conscientious objection based on "religious training and belief" to cover any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption").

<sup>49</sup> See *supra* note 43 and accompanying text. There are conflicting views in the literature on whether the original meaning of the Religion Clauses authorizes claims for exemptions based on non-theistic beliefs. Compare Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 12 (2000) (inferring from the fact that the Framers of the First Amendment considered and rejected a provision protecting "rights of conscience" that they only meant to protect religious views), with Laycock, *supra* note 44, at 80–83 (criticizing McConnell's inference from the historical record and arguing that the Religion Clauses should be interpreted expansively to protect non-theistic beliefs), and Rodney K. Smith, *Conscience, Coercion, and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary*, 43 Case W. Res. L. Rev. 917, 945–48 (1993) (arguing that protecting rights of conscience under the Religion Clauses "is consistent with the framers' nonestablishment of religion intentions"). But cf. Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 73 (2007) ("Despite pious proclamations to the effect that we must follow the text and history wherever they lead, commentators seem invariably to find that text and history lead to exactly those conclusions that they elsewhere defend on normative grounds. We suspect that their normative convictions are doing the real work here . . . Those normative questions are the ones we ought to be arguing about . . .").

<sup>50</sup> See *supra* notes 44–48 and accompanying text.

value of liberty of conscience to single out religious claims for special treatment is that religious believers experience greater anguish or suffering when compelled to act against their consciences.<sup>51</sup> When the state requires religious believers to violate duties to God, they are faced with an impossible choice. They can either break God's law and suffer damnation, or they can break the law of their political community, with whatever punishment that entails. By contrast, those motivated by secular claims of conscience do not face such stark choices. For them, the stakes are simply not as high. Because they are not answerable to any transcendent authority, they are not in the same position as religious believers.<sup>52</sup> Moreover, according to this argument, even those who are not religious may sympathize with the plight of religious believers caught between their religious duties and their obligations under positive law. Nonbelievers who recognize how important religious duties are to their fellow citizens can endorse, on that basis, an account of freedom of conscience that provides special protections for religion.<sup>53</sup>

This justification for privileging religiously motivated claims has rightly met with considerable skepticism in the existing literature on religious exemptions.<sup>54</sup> As many critics have pointed out, it is substantially overinclusive and underinclusive. It is overinclusive because many religious believers do not fear extra-temporal or di-

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<sup>51</sup> See John H. Garvey, *What Are Freedoms For?* 53 (1996) ("From a religious point of view . . . [t]he harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary). That is what justifies restricting this special kind of freedom to religious claimants alone.").

<sup>52</sup> McConnell, *supra* note 49, at 30.

<sup>53</sup> *Id.* at 30–31 ("We give respect to the obligations of others to carry out duties to the authorities in their lives, even when we ourselves do not recognize or agree with those authorities. On this ground, even those who do not recognize the existence or authority of a God may well believe that the nation should guarantee the free exercise of religion.").

<sup>54</sup> See, e.g., Eisgruber & Sager, *supra* note 49, at 78–120; Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L.J. 555, 562–63 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 321 (1991) [hereinafter Marshall, *Free Exercise Revisionism*]; William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 Ind. L.J. 193, 205 (2000).

vine punishment<sup>55</sup> and because believers may seek protection for actions that are not, strictly speaking, motivated by religious duties.<sup>56</sup> It is underinclusive because some nonbelievers may be more strongly committed to acting according to their secular moral views than some believers are to fulfilling their religious duties. For example, a secular pacifist may have a stronger commitment to not killing than a religious believer has to observing certain ritual practices. More such examples could be (and have been) given,<sup>57</sup> but the main point is that religious belief is not the only powerful source of moral motivation. Recognizing this fact does not trivialize the experience of religious believers who must choose between acting according to their consciences and following the law. It merely extends a comparable level of sympathy and respect to nonbelievers who may confront similarly difficult circumstances.

### *B. The Anti-Translation Response*

If there is no principled, nonsectarian justification for the religious conception of conscience that forms the basis of the originalist response,<sup>58</sup> it might be possible to interpret that conception to include deeply held secular moral views. One could argue that since the Founders did not anticipate claims of conscience that were not religiously motivated, their concerns about protecting conscience ought to be “translated” to account for the modern recognition that theistic belief does not provide the only source of motivation for acts of conscience.<sup>59</sup>

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<sup>55</sup> See Gedicks, *supra* note 54, at 562; 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 131 (2006).

<sup>56</sup> Marshall, *Free Exercise Revisionism*, *supra* note 54, at 321.

<sup>57</sup> See Eisgruber & Sager, *supra* note 49, at 103; Gedicks, *supra* note 54, at 562; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 *Case W. Res. L. Rev.* 357, 383–84 (1989).

<sup>58</sup> See Feldman, *supra* note 3, at 426 (admitting that “[t]here is probably no principled answer that would satisfy someone who takes seriously the idea of protecting conscience”).

<sup>59</sup> See, e.g., Laycock, *supra* note 44, at 83 (“I would expand the traditional meaning of ‘religion’ to include beliefs that secularists agree cannot be discriminated against relative to the traditional religious beliefs that are most explicitly protected. That is, I read the constitutional term to include newly emerged beliefs that were not socially significant in the Founders’ time but that fall easily into a category—beliefs about the nature of God—that we know the Founders meant to protect.”). The translation contemplated in the text above would go beyond contemporary analogues to “beliefs

Against such “translation” proposals, those sympathetic to what I have been calling the restricted Jeffersonian proposition argue that interpreting the originalist account of conscience to cover secular moral views would have the effect of undermining religious liberty. This argument takes two forms: one focusing on protections for religious free exercise, the other on prohibitions of religious establishment.

The first argument says that if we deny that religion is special with respect to government funding, we must also deny that religion is special as a matter of free exercise. According to this argument, there is a balance between the two Religion Clauses: religion is specially disabled under the Establishment Clause, and it is specially protected under the Free Exercise Clause.<sup>60</sup> The cost of giving up the idea that there is something different about religious conscience that requires a prohibition on government funding of religion is that we must also give up the idea that religious conscience deserves special protection. To deny restrictions on religion on one side is to imperil religious liberty on the other.<sup>61</sup> Thus, if we are concerned about protecting religious liberty, it would be a mistake to disrupt this balance.<sup>62</sup>

The problem with this argument is that it begs the question against those who reject the idea that religion should receive special protection under the Free Exercise Clause.<sup>63</sup> There are two

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about the nature of God” to cover a significantly larger category of activity related to protecting individual conscience.

<sup>60</sup> See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *Yale L.J.* 1611, 1633–35 (1993); McConnell, *supra* note 49, at 9–10.

<sup>61</sup> See Underkuffler, *supra* note 4, at 476 (“[I]f we reject the idea that religion or freedom of conscience has any special power or value which justifies the imposition of particular legal *prohibitions*—then we must also reject the idea that religion or freedom of conscience has any special power or value which justifies the extension of particular legal *protections*.”).

<sup>62</sup> See *id.* at 478; see also Smith, *supra* note 49, at 950 (“[I]f recognizing conscience under the Establishment Clause attenuates and ultimately dilutes religious freedom by providing for such a broad protected category . . . that government is reluctant to provide any accommodation, . . . much more will have been lost than will have been gained.”).

<sup>63</sup> There is a further objection to this argument, which is that it assumes that the qualities of religion that justify special disability under the Establishment Clause are the very same qualities that entitle religion to special treatment under the Free Exercise Clause. See Underkuffler, *supra* note 4, at 476 (“The same special characteristics that justify special treatment in one context drive special treatment in the other.”).

main positions consistent with the view that religion should not receive special protection in relation to secular claims of conscience. The first “levels down” by denying that religiously motivated conduct is entitled to constitutionally mandated exemptions from otherwise neutral and generally applicable laws. If conduct motivated by secular conscience is not entitled to such exemptions, then neither is conduct motivated by religion.<sup>64</sup> The second position “levels up” by extending exemptions to cover both religious and secular claims of conscience.<sup>65</sup> For those who hold either of these positions,<sup>66</sup> the argument against “translating” or extending the originalist account to include secular claims of conscience will not carry any independent weight. Without some principled, nonsectarian argument for privileging religion, the claim that “translation” undermines religious liberty is empty.

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But this assumption may be mistaken. Even if there is no reason to treat religious and secular claims differently with respect to freedom of conscience under the Free Exercise Clause, other considerations may support prohibiting the government from funding religious ideas under the Establishment Clause, even though it may promote many (though not all) secular ideas. See *infra* Section II.B.

<sup>64</sup> See, e.g., Marshall, *supra* note 57, at 388–94. For an argument against leveling down, see Laycock, *supra* note 44, at 75–76.

<sup>65</sup> See Laura S. Underkuffler-Freund, *Yoder and the Question of Equality*, 25 Cap. U. L. Rev. 789, 796 (1996) (arguing that “religion” should be defined to include “the exercise of individual conscience, broadly defined—if the ‘religious’ is the ability, and responsibility, of individuals to make personal, reasoned, moral inquiry”). Underkuffler’s positions on free exercise and establishment seem to be in some tension with one another. With respect to free exercise, she defines religion broadly to encompass what is otherwise a secular account of moral agency. *Id.* at 797 (“Conscience is . . . of a distinctly moral character; it is . . . the ability and responsibility of individuals to make personal, reasoned, moral inquiry.”). But given her argument that what makes religion special as a matter of free exercise is what makes it special for disestablishment, it does not seem entirely consistent to claim that the state ought to extend exemptions to secular conscience, while maintaining a position of disestablishment only with respect to matters of religion, defined more narrowly to exclude matters of secular moral concern. See Underkuffler, *supra* note 4, at 476 (distinguishing religion from “social programs, or foreign policy, or other uses with which one disagrees”). Perhaps these positions can be reconciled by appealing to a distinction between “religion,” defined to include believing and acting according to conscience, and secular matters that do not involve matters of conscience. But even if the position can be reconciled in this way, any view that prohibits government funding of opinions that conflict with conscience must confront the anarchy objection, as discussed in the text below.

<sup>66</sup> A third position is possible. One could argue for a regime in which religious and secular claims are “leveled up” or “leveled down” in tandem. If religious claims receive protection, then so do comparable secular claims, and vice versa. This is basically the position defended by Eisgruber & Sager, *supra* note 49, at 78–120.

The second argument against “translating” the Founders’ conception of conscience to account for nontheistic moral beliefs is that it would be far more difficult, and perhaps even impossible, to define and justify the contours of the Establishment Clause. Under the restricted Jeffersonian proposition, the content of the Establishment Clause’s prohibition on funding religion is fairly clear. The government may not use coercive power to support religious opinions, where “religious” is defined in relation to a theistic conception of conscience. The justification for this prohibition is also relatively clear. The Founders believed that coercion, including taxation, in matters of religion infringed on the freedom of conscience by compelling dissenters to contribute to the promotion of religious beliefs with which they disagreed.<sup>67</sup> But if we start to tinker with this justification and with the constitutional rule it supports, it quickly becomes implausible. Once the Establishment Clause is read to prohibit taxation to support any opinion with which taxpayers disagree as a matter of conscience, the government is no longer merely prohibited from coercively supporting religion. It must be prohibited from coercively supporting all kinds of speech, programs, institutions, and so forth, that taxpayers find morally objectionable. But since it is untenable to prohibit any government action that conflicts with conscience, the only reasonable response to “translating” the Founders’ conception of conscience to include secular claims is to deny the unrestricted Jeffersonian proposition, that is, to deny the claim that government taxation to support opinions with which taxpayers disagree is an infringement on their freedom of conscience.<sup>68</sup>

This, of course, is simply a restatement of the anarchy objection, which argues that giving taxpayers an exemption from taxation promoting views they find morally objectionable would make every person “a law unto himself,” impose enormous administrative costs, and threaten the government’s ability to function properly. If we are unwilling to accept these outcomes, then we have only two options: reject the equality objection and fall back on a religious conception of conscience, or give up the idea that coercive

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<sup>67</sup> Feldman, *supra* note 3, at 417.

<sup>68</sup> See *id.* at 426 (“Suddenly, there is no clear rationale for allowing government to take any action of any kind where it violates conscience; or alternatively, all attempts to protect conscience look unjustifiable.”).



support of religious opinions infringes on freedom of conscience. Claiming that the latter option undermines religious liberty, proponents of the restricted Jeffersonian proposition argue that we ought to embrace the former.<sup>69</sup> Yet for those inclined to accept the equality objection, this way of framing the problem raises the question of whether the anarchy objection is sound. Does it compel the conclusion that freedom of conscience does not protect taxpayers against coerced support for government speech they find morally objectionable? The next two Parts address that question by focusing directly on the anarchy objection (Part II) and by considering some responses to it in the context of the compelled support doctrine under the Free Speech Clause of the First Amendment (Part III).

## II. THE ANARCHY OBJECTION

The last Part focused mainly on the *restricted* Jeffersonian proposition, which says that government taxation to promote religious opinions infringes on the freedom of conscience. If we accept the equality objection, however, we must reject this narrow version of the Jeffersonian proposition in favor of the *unrestricted* version, which applies to taxation promoting any opinions with which taxpayers disagree in conscience.

As we have seen, the unrestricted Jeffersonian proposition is open to the objection that allowing taxpayers to protest compelled support for opinions with which they morally disagree would have anarchical consequences. The anarchy objection takes its name from the fear that recognizing a right of exemption based on conscience elevates individual moral judgment above that of political society. If acting according to conscience is a sufficient basis for setting aside the law, then no person will be bound by the collective decisions reached by a democratic majority, at least not when those decisions involve matters of moral significance. The Supreme Court expressed this concern most starkly in *Reynolds v. United States*, when it held that religious exemptions would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto

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<sup>69</sup> See *id.* at 424–26; Underkuffler, *supra* note 4, at 475–77.

himself.”<sup>70</sup> More than one hundred years later, the Court repeated and reinforced this objection in *Employment Division v. Smith*, holding that neutral and generally applicable laws that incidentally burden religious practices are not, for that reason, presumptively invalid or subject to strict scrutiny.<sup>71</sup> Writing for the majority and relying on *Reynolds*, Justice Scalia stated that a rule requiring the state to demonstrate a compelling interest for any law incidentally burdening religion “would be courting anarchy.”<sup>72</sup>

Although the main force of the anarchy objection is based on concerns about conflicts over legal and political authority—over who decides whether a law is morally binding—the objection is often combined with arguments about the feasibility of administering an exemption regime. Even if a political society were willing, in principle, to tolerate departures from general laws, it might be prohibitively expensive to manage a fair system for allowing conscientious objections. First, there is the problem of false or insincere claims. The government must have a procedure for sorting out who is legitimately entitled to receive an exemption.<sup>73</sup> As an evidentiary matter, inquiries into sincerity are notoriously difficult, and they may raise concerns about invasions of privacy.<sup>74</sup> To avoid such concerns, the state may have to allow more exemptions than are actually deserved. Second, assuming the government can sort out sincere and insincere claims, the availability of exemptions (especially tax exemptions) may create incentives for people to form beliefs over time that allow them to claim the benefit of those exemptions.<sup>75</sup> In some cases, these beliefs may not be sincere, but in others there may be no reason to doubt them. Conscientious objection may raise the profile of issues and causes, attracting new supporters who may then claim, with perfect sincerity, that they, too,

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<sup>70</sup> 98 U.S. 145, 167 (1879).

<sup>71</sup> 494 U.S. 872, 885 (1990).

<sup>72</sup> *Id.* at 888.

<sup>73</sup> See generally 1 Greenawalt, *supra* note 55, at 109–23 (discussing the need for and the various problems created by inquiries into sincerity).

<sup>74</sup> See Joseph Raz, *The Authority of Law: Essays of Law and Morality* 287–88 (1979) (noting that preventing fraud in exemption claims inevitably requires “some degree of public intrusion into the private affairs of individuals”).

<sup>75</sup> See *Smith*, *supra* note 2, at 366 (“We can appreciate the problem if we let our imaginations run just a little and suppose that Al’s and Betty’s argument were actually accepted by the courts: millions of citizens who have been thus encouraged to develop bloated consciences might thereby excuse themselves from all manner of taxes.”).

deserve exemption from the law. In this way, the scope and size of an exemption regime may increase and become proportionally more expensive, in terms of the costs of the exemptions and the costs of administering them.

The twin concerns of the anarchy objection—democratic authority and administrative feasibility—are familiar from long-standing and ongoing debates about whether the First Amendment should be interpreted to require constitutional accommodations of religion.<sup>76</sup> As applied to the unrestricted Jeffersonian proposition, however, these concerns may have special or added force. After all, compared to the restricted Jeffersonian proposition, which supports taxpayer objections to government funding of religious opinions, the unrestricted version supports a much broader exemption. It contemplates a right not to pay taxes that support opinions with which one disagrees as a matter of conscience. An exemption of this kind would be incredibly broad in scope, covering state-subsidized speech on any subject that might be the focus of moral and religious disagreement.<sup>77</sup>

This type of taxpayer exemption is troubling along both dimensions of the anarchy objection. With respect to democratic authority, the exemption empowers moral and religious minorities to withdraw their support from policies, including those promoting government speech, that are the outcome of what we can assume are otherwise legitimate democratic procedures. This raises a number of concerns. First, legislative majorities can argue with considerable force that democratic procedures are the appropriate institutional mechanism for resolving reasonable disagreements about controversial moral and political matters. Accordingly, minorities have an obligation to support democratic outcomes, just as those in

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<sup>76</sup> Again, the literature here is vast. Compare, e.g., Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 *U. Pitt. L. Rev.* 75, 76–79 (1990), with Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *Geo. Wash. L. Rev.* 685, 720–25 (1992).

<sup>77</sup> According to some expressive theories of law, government sends a message or opinion by enacting and enforcing legislation, in which case the Jeffersonian proposition might authorize exemptions for nearly all state action. But even if we distinguish between government conduct and government speech, an exemption from compelled funding of morally objectionable government speech would still be very broad and open to the objections discussed above.

the majority would have an obligation to support outcomes they morally disfavor were they on the losing side.<sup>78</sup> Second, deliberative democrats and justificatory liberals have argued that governments must provide public justifications for their actions as a condition of political legitimacy.<sup>79</sup> Widespread exercise of a general exemption from compelled support of government speech might undermine a government's ability to meet that condition. Third, even if we set aside the idea that the government is morally required to engage in public deliberation by providing justifications for its decisions, government speech is still required to carry out, explain, and defend government policies, all of which are necessary government functions on any theory of democracy. Unless state actors have the freedom and the financial support to speak about their views on matters of public concern, they can neither govern effectively nor provide the public with sufficient information to hold them democratically accountable.<sup>80</sup>

As a matter of administrative cost and feasibility, the idea of a general exemption from compelled support of morally objectionable state-sponsored speech has been widely condemned in the existing academic literature.<sup>81</sup> Even if it were technically possible to develop a system of opt-outs or pro rata refunds for objecting tax-

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<sup>78</sup> For a similar argument, see Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 *Tul. L. Rev.* 163, 183–84 (2002).

<sup>79</sup> See, e.g., Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 100–01 (1996); Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* 147–51 (1996); Micah Schwartzman, *Judicial Sincerity*, 94 *Va. L. Rev.* 987, 1001–12 (2008).

<sup>80</sup> On the necessity and value of government speech, see, e.g., Abner S. Greene, *Government of the Good*, 53 *Vand. L. Rev.* 1, 8–18 (2000) (defending government speech against taxpayer objections to compelled support); Steven Shiffrin, *Government Speech*, 27 *UCLA L. Rev.* 565, 606 (1980) (same); Wasserman, *supra* note 78, at 184–90 (same). See generally Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (1983) (discussing the legitimacy and limits of government speech).

<sup>81</sup> See, e.g., Wasserman, *supra* note 78, at 189 (“It would be prohibitively costly to demand that government speak only with fees collected from its supporting majority or that it establish a scheme of opt-outs or pro rata refunds for taxpayers.”) (collecting citations); Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 *Rutgers L. Rev.* 3, 24 n.125, 26–27 (1984) (same); Greene, *supra* note 80, at 13 (same). But see Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 *Land & Water L. Rev.* 101, 106–07 (1999) (arguing that taxpayers should be “entitled to the same dissenters’ rights as the Court recognized in *Aboud*”).

payers, the government would face constantly shifting democratic minorities making claims across countless instances of government speech. The impracticality of administering this system, and the cost of investigating and adjudicating claims to prevent fraud, make it difficult to accept the idea of a general opt-out, except perhaps as a matter of rather ideal normative theory.<sup>82</sup>

Despite these objections, which might be decisive with respect to a general exemption for objecting taxpayers, it is nevertheless worth exploring what, if anything, can be said in response to the anarchy objection and on behalf of the Jeffersonian proposition in either of its forms. The remainder of this Part suggests that the anarchy objection can be answered by adopting a balancing approach to claims based on the freedom of conscience. Section II.A discusses the balance of individual and government interests in the context of compelled speech and compelled support. Building on this account, Section II.B completes the response to the anarchy objection by showing how an argument might be advanced on behalf of the *restricted* and perhaps even the unrestricted version of the Jeffersonian proposition. Section II.C anticipates and replies to the objection that this response makes freedom of conscience irrelevant in arguing for the disestablishment of religion. Part III then argues that a balancing approach to freedom of conscience is consistent with the Supreme Court's decisions involving compelled support for *private* speech under the Free Speech Clause of the First Amendment, but *not* with the Court's decisions governing compelled support for *government* speech, which reject balancing

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<sup>82</sup> Cf. Eric Beerbohm, *In Our Name: The Ethics of Representative Democracy* (forthcoming 2011) (manuscript at ch. 9, on file with author). Beerbohm has proposed an opt-out scheme for conscientious objectors that would control for fraud by requiring objectors to pay an excise tax of an amount larger than the objectionable tax contribution. *Id.* This proposal follows an earlier and intriguing discussion of taxpayer exemptions in Robert Nozick, *The Examined Life: Philosophical Meditations* 290 (1989) ("We do not want to allow objections that are frivolous . . . . So a system might be instituted in which a person could opt out of paying taxes for some programs he found morally objectionable if he substituted somewhat more than that (perhaps 5 percent more) in tax payments toward some other public program."). A proposal along these lines might also require conscientious objectors to cover the cost of administering the opt-out. I doubt that this system would be financially feasible, but even if it were, a general opt-out still faces the objection that legislative majorities in a well-functioning democratic society have a legitimate claim to the support of minorities, even for programs that minorities find morally objectionable.

in favor of a rule requiring deference to the government. Although this rule-based approach is an understandable response to the anarchy objection, it goes too far. A balance of individual and government interests can explain the need for deference, while preserving a place for freedom of conscience. This approach may also explain how the Jeffersonian proposition can provide a unified basis for claims under the Free Speech and Establishment Clauses.<sup>83</sup>

### A. *Balancing Conscience*

To meet the anarchy objection, it must be possible to explain why compelled support for objectionable speech implicates the freedom of conscience in a way that does not entail absurd conclusions about taxpayer rights against any and all coerced payments to the government. The most plausible explanation is a balancing approach, which weighs individual claims of conscience against gov-

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<sup>83</sup> The argument here may bear some resemblance to the strategy of “reducing” free exercise claims to free speech claims. Some have called this the *reduction principle*, which operates by “reducing” religious beliefs to ordinary beliefs and then determining whether those beliefs are protected under constitutional provisions outside of the Religion Clauses. See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 *Loy. U. Chi. L.J.* 71, 73–84 (2001) (arguing as a descriptive matter that nearly all protections under the Free Exercise Clause are, after *Smith*, redundant with respect to protections provided under other constitutional doctrines, especially the Free Speech Clause). In the context of free exercise exemptions, a normative version of the reduction principle says that free exercise claims are entitled to protection only if they would receive independent protection under the Free Speech Clause. See William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 *Minn. L. Rev.* 545, 584–88 (1983) (arguing that courts should apply free speech doctrine in determining whether to grant religious exemptions); see also Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 *Geo. Wash. L. Rev.* 925, 930 (2000) (arguing that “religious exercise should not be protected *as* speech, but rather *like* speech”). We might perform a similar reduction in the Establishment Clause context by asking whether tax objectors would be vindicated under compelled speech doctrine. As we shall see, however, there are important differences between the reduction principle and the argument presented below (especially in Section II.B). First, as a descriptive matter, existing doctrine would rule out a straightforward reduction. After *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, compelled support of government speech cannot be challenged under the Free Speech Clause. See *infra* Sections III. B & III.C. Second, as a normative matter, some Establishment Clause considerations ought to factor into whether the government interest in promoting a policy is sufficient to outweigh freedom of conscience. For that reason any reduction will be incomplete.

ernment interests.<sup>84</sup> An account of this kind must specify the interests on both sides and then provide some way to adjudicate between them. This is where balancing accounts tend to run into trouble. It is difficult to weigh competing interests and values without falling into some form of consequentialism or, alternatively, ad hoc intuitionism. There are real problems here, but at least in the context of compelled support, it may be possible to avoid some of them by carefully describing the competing interests. If it turns out, as suggested below, that individuals have a relatively weak interest in not being compelled to pay for speech they find objectionable and if, as suggested above, the government often has quite strong interests in compelling support, then striking the appropriate balance may not be difficult. Of course, when the government has no interest to compete with claims of conscience, the determination may be even simpler.

The main question, then, is: how strong is our interest, grounded in the freedom of conscience, in not being compelled to provide financial support for speech with which we disagree? To address this question we can compare different infringements on the freedom of conscience, work out the various interests that are implicated in each type of infringement, and attempt in a rough way to assess their relative significance. For present purposes, and before turning to the case law under the First Amendment, consider three schematic examples involving compelled speech, compelled support for private speech, and compelled support for government speech. Assume for the sake of simplicity that all of the individuals involved in these examples share the same deeply held moral views and hold them with the same level of intensity.

(1) *Compelled speech*: The state requires *X* to recite affirmations of a moral doctrine, *D*. If she fails to recite *D*, she is subject to punishment by the state. *X* believes that *D* conflicts with her own deeply held moral views, and she refuses to recite *D* on the

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<sup>84</sup> For an early and underappreciated attempt to understand compelled support doctrine in this way, see David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995, 1014–17 (1982).

grounds that doing so would be inconsistent with the dictates of her conscience.<sup>85</sup>

(2) *Compelled support for private speech*: The state requires *Y* to pay mandatory fees to a private organization, whose mission is to espouse *D*. If *Y* fails to pay the fees, she is subject to punishment by the state. *Y* believes that *D* conflicts with her deeply held moral views, and she refuses to pay the fees on the grounds that doing so would be inconsistent with the dictates of her conscience.<sup>86</sup>

(3) *Compelled support for government speech*: The state requires *Z* to pay general income taxes to the state, which uses a portion of the tax (however miniscule) to fund government speech promoting *D*. If *Z* fails to pay general income taxes, she is subject to punishment by the state. *Z* believes that *D* conflicts with her deeply held moral views, and she refuses to pay the tax on the grounds that doing so would be inconsistent with the dictates of her conscience.<sup>87</sup>

Intuitively, these examples are arrayed from the most serious infringement on the freedom of conscience, in the first example, to the least serious infringement, in the third. Other examples might be given to develop a spectrum between (1) and (3). In between (1) and (2), instead of requiring *X* to utter affirmations of *D*, the state might require *X* to post a sign on her property espousing *D*,<sup>88</sup> or the state might allow others to use her physical property to espouse *D*

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<sup>85</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down a mandatory flag salute and recitation of the Pledge of Allegiance); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (striking down a religious test for public office).

<sup>86</sup> See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977) (holding that nonunion employees cannot be compelled to subsidize union political and ideological activities); *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990) (holding that attorneys cannot be compelled to subsidize a state bar association's expressive activities).

<sup>87</sup> See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 599–602, 616–18 (1989) (involving a taxpayer challenge to religious holiday displays); *Lynch v. Donnelly*, 465 U.S. 668, 680–82 (1984) (same).

<sup>88</sup> See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (upholding a challenge to display of a state motto on license plates).



and other views she rejects.<sup>89</sup> Moving further along the spectrum, between (2) and (3), the state might require *Y* to pay a general income tax, a portion of which is distributed to private actors to espouse *D* or other objectionable views;<sup>90</sup> or the state might require *Y* to pay a special tax to the state for the purpose of supporting government speech espousing *D*.<sup>91</sup> Further examples might also be given to extend the spectrum beyond (1) and (3) in either or both directions.<sup>92</sup>

Comparisons between these examples—especially paired comparisons of (1) against (2) and (2) against (3)—show that compelled support for government speech is the least serious infringement on the freedom of conscience. Although this may be an obvious conclusion, reviewing the individual interests at issue in these examples helps explain the diminished status of claims against government speech and, perhaps less obviously, why there may be residual claims based on the freedom of conscience when the government lacks an interest in promoting speech.

In comparing (1) against (2), the right against compelled speech may implicate freedom of conscience in ways that rights against compelled support do not.<sup>93</sup> In particular, *X* may complain that the

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<sup>89</sup> See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding a state law allowing exercise of free speech rights in private shopping centers).

<sup>90</sup> Cf. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (involving a challenge to restrictions on federal funding of the arts).

<sup>91</sup> See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562–63 (2005) (rejecting a challenge to compelled support for government speech promoting the beef industry).

<sup>92</sup> A more serious infringement than compelled affirmation of objectionable moral or religious beliefs would be imprisonment of anyone suspected of holding contrary views. A less serious infringement than compelling financial support of government speech might include strong, though perhaps noncoercive, incentives to provide such support.

<sup>93</sup> Rights against compelled speech and compelled support may also be justified on moral grounds that do not directly involve freedom of conscience. In particular, a standard concern about compelled speech is that audiences may mistakenly attribute speech to speakers who would prefer not to be associated with it. To the extent speakers have an autonomy interest in exerting control over their personal identities, or over how they are perceived in public, false attribution imposes burdens on that interest. To avoid attribution, coerced speakers may have to correct public misperceptions by disclosing their own views or by affirmatively distancing themselves from the government's message; or if those options are too costly, they may be forced to associate with whatever it is they have been compelled to say (or support). Note, however, that the interest in avoiding false attribution is not necessarily one grounded in the freedom of conscience. Speakers may prefer to avoid association with messages even

government has violated her freedom of thought, which is an aspect of the freedom of conscience that protects against coercive interference with the formation and revision of thoughts and beliefs. To the extent government coerces speech for the purpose of changing what speakers believe, which is one way of describing indoctrination, it infringes on this aspect of their freedom of conscience. It does not attempt to persuade people by presenting information and arguments for their consideration but instead circumvents the process of rational thought made possible by open deliberation. The government relies on the tendency of speakers over time to reduce “cognitive dissonance” by bringing what they believe into line with what they say. Thus, one argument against compelled expression is that it fails to respect, and indeed subverts, rational belief formation. It attempts to change thoughts and beliefs, including those that comprise the source or content of conscience, without engaging speakers’ critical capacities for rational thought and deliberation.<sup>94</sup>

While *X* can claim that the state has violated her freedom of conscience by interfering with her interest in preserving the integrity of her thought process, *Y* cannot make the same argument. At most she is forced to participate in the government’s promotion of speech, either by the government itself or through private intermediaries, but this is unlikely to have any direct effect on how she forms her beliefs. She might argue that the government distorts belief formation indirectly by creating the false impression that its views have more support in the market for information and ideas than they can muster through voluntary means.<sup>95</sup> But arguably ob-

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when they either agree with those messages or when their disagreements are based on personal preferences, rather than on deeply held moral or religious commitments. Even if speakers’ disagreements are based on their preferences, rather than on something more binding, they may still have an autonomy interest in avoiding attribution. See Gaebler, *supra* note 84, at 1004–07 (distinguishing between interests in defining personal identity and freedom of conscience).

<sup>94</sup> For more fully developed versions of this argument, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *Constitutional Law Stories* 409, 433–40 (Michael C. Dorf ed., 2009); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 *Nw. U. L. Rev.* 839, 854–64 (2005).

<sup>95</sup> See Klass, *supra* note 20, at 1129 (“The government also distorts public political discourse when it subsidizes (or forces others to subsidize) one viewpoint or interest at the expense of others.”).

jections about market distortion can be met by requiring some level of government transparency in promoting speech<sup>96</sup> and by regulating or prohibiting government attempts to monopolize or dominate markets for speech.<sup>97</sup> More fundamentally, this argument is not based on the freedom of conscience but rather on more general concerns about the effects of government speech and government-funded speech on public discourse.<sup>98</sup> Such concerns may be quite important, but they do not tell us much, if anything, about the weight we should assign to claims of conscience in responding to the anarchy objection.

The argument from freedom of thought is not, however, the only objection to compelled speech and compelled support. In the case of compelled speech, *X* has a more direct and perhaps also a more fundamental objection, which is that by compelling her to speak, the state forces her to choose between disobeying the law and publicly affirming a moral doctrine she rejects. *X* may believe that insincere affirmations of *D*, the moral doctrine she finds objectionable, are wrong for at least two reasons. First, public affirmation may associate her with that doctrine. The problem here is not (or not necessarily) that others might think she believes in *D*, but rather that *X* would perceive her own failure to reject *D*, and the legal requirement to espouse it, as a form of acquiescence in, or complicity with, the government's view. Acceding to the demand for compelled speech amounts to a form of self-renunciation or self-abnegation in which one submits to the power of the state.<sup>99</sup> As Professor David Gaebler has observed, the depth of feeling in cases of compelled speech may be motivated by the speaker's sense that he would be "humiliated and ashamed that he did not stand up for his own beliefs."<sup>100</sup> Second, even if *X* does not have strong feelings about the doctrine she is required to affirm, she may hold the view that saying what she does not believe violates a principle of

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<sup>96</sup> See Greene, *supra* note 80, at 49–53 (discussing the problem of "ventriloquism" and the need for transparency in government speech).

<sup>97</sup> See *id.* at 27–39 (discussing concerns that government speech monopolizes or skews public discourse); Frederick Schauer, *Is Government Speech a Problem?*, 35 *Stan. L. Rev.* 373, 380–83 (1983) (criticizing the claim that government speech monopolizes or distorts the speech market).

<sup>98</sup> See generally Yudof, *supra* note 80, at 178–79.

<sup>99</sup> See Gaebler, *supra* note 84, at 1005.

<sup>100</sup> *Id.*

sincerity.<sup>101</sup> In effect, the state is demanding that she lie about her moral views, and she may reasonably refuse to satisfy that demand as a matter of conscience.

Can *Y* make a similar argument with respect to compelled support? Although *Y* is not required to speak, she is legally obligated to pay fees to a group whose purpose is to espouse *D*. If *X* can claim that it violates her conscience to be forced to choose between disobeying the law and publicly affirming *D*, it seems like a short step for *Y* to claim that a financial obligation targeted for the support of *D* similarly associates her with that doctrine. Again, the issue is not whether the public believes she supports *D* (although that might be an independent cause for concern), but rather that *Y* believes that giving in to the state's demands would be tantamount to negating her own moral views. Alternatively, *Y* might claim that just as *X* can reasonably refuse to speak insincerely or to lie about her views, *Y* may reasonably refuse to act in a way that violates her sense of personal integrity. If she is morally opposed to *D*, she cannot provide financial support for its propagation without risking hypocrisy. On this view, integrity of action (that is, not providing financial support) is morally equivalent to sincerity of utterance (that is, not making public affirmations). It seems artificial to draw a line permitting freedom of conscience to cover the latter but not the former.

Of course, once freedom of conscience is extended to cover certain types of speech-promoting actions, it is difficult to identify precisely the limit of that freedom. If *Y* has at least a prima facie right not to compromise her moral integrity by providing financial support for speech promoting *D*, perhaps *Z* can take the argument one step further. There are, however, some important differences between examples (2) and (3). *Y* is required to pay special fees to an organization aimed at promoting *D*. By contrast, *Z*'s obligation is to pay general income taxes, which are not used specifically for promoting speech. Her association with the state's message is mitigated by the generality of her contribution, which might be used for any government purpose. For that reason, her connection to

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<sup>101</sup> See Micah Schwartzman, *The Sincerity of Public Reason*, J. Pol. Phil. (forthcoming), available at <http://www3.interscience.wiley.com/journal/123348851/abstract> (defending a principle of public sincerity).

the government's speech seems significantly more attenuated, impersonal, and bureaucratic. It lacks the direct, physical intimacy of being required to say something, or even to give a specific amount of money to another person to say something. Thus, *Z*'s argument seems substantially weaker than *X*'s and even *Y*'s.

Nevertheless, *Z* can claim that these distinctions are largely formalistic. There may be no difference in the amount of money *Y* and *Z* contribute to promoting *D*. And the fact that *Y*'s money flows through a private intermediary should not distract attention from the presence of state action in both examples. In *Y*'s case, the government has merely delegated the task of speaking to a private entity. But the government is still ultimately responsible for that speech, at least in the sense that, without state support, it would not be possible, at least not to the same extent. In *Z*'s case, the government has merely cut out the intermediary. Instead of promoting its interests by coercing payments to support third party speech, the government promotes its interests more directly by funding its own speech. From *Z*'s perspective, there may be no interesting moral difference between these cases. In both, *Y* and *Z* are required to compromise their moral views by funding speech with which they fundamentally disagree.

The logic of *Z*'s argument returns us to the anarchy objection. But we may now be in a better position to see how the freedom of conscience might be limited. Unlike *X*, who can claim that compelled speech violates a core aspect of the freedom of conscience—namely, the right to form and revise one's thoughts and beliefs without coercive state interference—*Y* and *Z* must argue that freedom of conscience extends to speech-promoting actions that compromise their moral integrity. As we have seen, however, this argument is potentially boundless. The state cannot be required to provide a compelling interest to overcome every claim against compelled support, at least not without sacrificing the value of democratic authority and incurring significant administrative costs. But that is not to say that *Y* and *Z* have no interest whatsoever. In the case of compelled speech, we recognize that *X* has an interest not only in securing the conditions of rational belief formation. She also has an interest in not speaking insincerely. That interest is grounded in the value of acting according to her moral views and in the value of adhering to a principle of sincerity. Similarly, *Y* and *Z*

have an interest in following their moral values and in adhering to a principle of integrity. In many cases, those interests may not be sufficient to entitle them to protection. But they are not simply and altogether extinguished by the fact that the state has powerful, countervailing interests in both democratic authority and the proper administration of decisions that follow from exercises of that authority. When the state lacks proper authority, or when it has little or no interest in administering its decisions, individuals may rightfully assert their claims of conscience to prevent the state from requiring them to act against their fundamental moral commitments.

As a normative matter, a balancing approach can distinguish between different types of infringements on the freedom of conscience. For example, as we have seen, compelled speech infringes on conscience in ways that compelled support does not. The approach described here also recognizes the need to limit claims based on the right to act with moral integrity, except when the state has no legitimate interests in promoting speech, whether expressed by private intermediaries or by the government itself. By balancing individual interests against those of the state, it is possible to preserve a place for the freedom of conscience, however limited, without giving way to anarchy.

### *B. Anarchy, Equality, and Religion*

The answer, then, to the anarchy objection is that taxpayers have an effective right against compelled support of private or government speech only when the government has no legitimate interest in promoting that speech. It might be objected that this response dilutes the freedom of conscience, allowing it to be overridden whenever the state has a rational basis for its actions. But at least when their protests are aimed at general taxation, taxpayers' First Amendment interests *are* significantly attenuated, and the government's interest in promoting its policies will ordinarily be sufficient to overcome them.

In some cases, however, the government may not have any interest to balance against taxpayers' assertions that compelled support infringes on their freedom of conscience. In particular, the state may have no legitimate interest in compelling support for promoting religious opinions. Many familiar arguments support

this conclusion. First, there is no reason to think that the government has any special competence in matters of religious doctrine.<sup>102</sup> Government officials are in no better position than individuals to determine religious truths. Second, even if it turned out that government officials had some religious insight, there is no need for them to act on it. Pluralistic democratic societies have proven capable of operating in a well-ordered manner without government endorsements of particular religious doctrines.<sup>103</sup> Third, government sponsorship of religion has a long and painful history of leading to religious factionalism and political divisiveness.<sup>104</sup> Religion may not be unique in this regard. Government sponsorship of other ideas may also lead to political conflict. But given the special historical significance of conflicts over religion, there are strong prudential grounds for denying governmental interests in promoting religious doctrines. Fourth, given the history of discrimination against religious minorities, government endorsement of religious messages is likely to have the effect of excluding vulnerable groups. Attempts by majorities to promote their religious ideas may violate principles of antidiscrimination or equality.<sup>105</sup> Fifth, and finally, coercive state action ought to be justifiable to all reasonable people, as free and equal citizens who adhere to a wide diversity of comprehensive religious, philosophical, and ethical views. Given this diversity of views, the government may not invoke any particular religious doctrine to justify its actions. It must appeal to values that

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<sup>102</sup> See, e.g., 2 Greenawalt, *supra* note 4, at 10 (“People elected to government in modern liberal democracies have no special competence in respect to religion.”); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. Ill. L. Rev. 571, 590 (2006).

<sup>103</sup> See Laycock, *supra* note 44, at 59; Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373, 380 (“In the case of religion, no one has to rule. There is no need for the government to make decisions about . . . religious rituals at all.”).

<sup>104</sup> See, e.g., Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 120–24 (2005) (claiming that avoidance of religious divisiveness is a “critical value underlying the Religion Clauses”); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. Contemp. Legal Issues 357, 362 (1996) (“In order to avoid the political disharmony of religious factionalism in politics, we have disabled the state from responding to particular needs and demands of religious communities.”).

<sup>105</sup> See Eisgruber & Sager, *supra* note 49, at 51–53.

citizens can share solely by virtue of their identity as citizens and not as believers in any particular religious or ethical doctrine.<sup>106</sup>

All of these arguments are, of course, controversial and contested. I believe that, taken together, they make a powerful case for the view that the state has no legitimate interest in promoting religious doctrines.<sup>107</sup> Yet even if some of these arguments are mistaken, whether because they are overinclusive or underinclusive or for some other reason, the argument here can be framed conditionally. If it turns out that one or more of these reasons for denying the legitimacy of state sponsorship of religious opinions is sound, then the state has no valid interest to balance against taxpayers' conscientious objections to compelled support for religion. Under those circumstances, a restricted version of the Jeffersonian proposition might be vindicated. Moreover, if the state has no legitimate interest in promoting comprehensive ethical or philosophical doctrines, which might extend beyond traditional definitions of theistic religion, then it might be possible to make the case for a more expansive, if not completely unrestricted, version of the Jeffersonian proposition.

With this argument for the Jeffersonian proposition in place, it should now be possible to address the equality and the anarchy objections together. Recall the example of Al, the agnostic who objects to government funding of religious speech (including symbols, rituals, and prayers), and Betty, the believer who objects to public support for teaching evolution and sexual education. Against the restricted Jeffersonian proposition, Betty raises the equality objection. Why is Al's freedom of conscience implicated by compelled support when hers is not? The answer to this objection is simply to concede the point. Betty is right. Her freedom of conscience is in-

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<sup>106</sup> See Rawls, *Political Liberalism*, supra note 46, at 223; Rawls, *The Idea of Public Reason Revisited*, supra note 46, at 576–79.

<sup>107</sup> Although my focus here is mainly on state *interests*, the arguments of the preceding paragraph also support restrictions on the *means* by which government can promote its interests. Even if the government can be said to advance legitimate, nonreligious interests (for example, promoting civic unity) for supporting religious speech, it may be restricted or even prohibited from using such speech as a means to accomplish otherwise permissible ends. Thus, claims based on the Jeffersonian proposition might be vindicated not only when the state has no legitimate interest but also when it has no legitimate means (or more precisely, when it has adopted illegitimate means to achieve legitimate interests). I thank Chip Lupu, Bob Tuttle, and Tom Colby for pressing this point.



fringed upon in the same way as Al's. They both have claims of conscience against being forced to pay for speech with which they disagree. But this does not mean that both of their claims must be vindicated. The anarchy objection forces us to recognize that objections to compelled support of government speech threaten important values, including democratic deliberation and decision making and, if generalized, are administratively impractical. For these reasons, such objections can succeed only when the state has no legitimate interest in promoting speech. Thus, in Betty's case, her objection is defeated by the state's interest in promoting scientific education and public health. Al's case is more complicated. If the state has no legitimate interest in promoting religious opinions, as when the state uses public funds to espouse a particular religious doctrine, his claim ought to be vindicated. But there may be circumstances in which taxpayer funds are used to promote speech in a general way for purposes other than promulgating religious ideas. When the state has a legitimate interest (for instance, in creating a public forum<sup>108</sup> or in promoting education<sup>109</sup>), Al's claims may be defeated.

### *C. Why Conscience Matters*

At this point, one might object that the freedom of conscience is doing no real work in these examples. Whether Al or Betty has a claim turns on whether the state has a legitimate basis for its action, and the freedom of conscience does not contribute directly to analysis of *that* question, nor could it without making the argument for the Jeffersonian proposition circular.<sup>110</sup> If freedom of con-

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<sup>108</sup> See, e.g., *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000) (rejecting a First Amendment challenge to mandatory student activity fees used to fund student speech); *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995) (holding that the Establishment Clause does not justify the University's denial of funding for student religious speech).

<sup>109</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (upholding facially neutral school voucher program). My claim here is not that school vouchers are constitutionally permissible, all things considered, but only that conscience-based objections to such programs can be defeated *if* the state has a legitimate interest in promoting them and does so using legitimate means.

<sup>110</sup> If the freedom of conscience factors into whether the state has a legitimate interest, then the argument for the Jeffersonian proposition includes the freedom of conscience on both sides of the balancing inquiry. In effect, the argument would be that the state has no legitimate interest because no interest that infringes on conscience is

science is not part of the determination of whether the state has a legitimate end, it may seem irrelevant in evaluating state support of religion.

The first answer to this objection is that even if other Establishment Clause values and principles are necessary to complete an argument against state support of religion, claims based on the freedom of conscience may trigger an inquiry that brings those other values and principles into consideration. In this way, freedom of conscience plays a clear role in the argument against compelled support. In acting without a legitimate reason, the state may violate individual rights of conscience. Preserving this role for freedom of conscience serves as a reminder that the state has limited powers and that arbitrary action may infringe on individual rights, however diffuse or attenuated.

A second answer is that whenever conscientious objectors raise claims against the state, they are liable to be overridden by competing state interests. For example, when a pacifist refuses to fight, the state may compel him regardless of his moral or religious convictions. If the state's reasons for going to war are illegitimate, we may conclude that there is no good reason to compel the pacifist. Under those circumstances, the burden on his conscience may be lifted. But that does not mean that his claim of conscience is irrelevant or doing no work in the argument against forcing him to fight. The burden on his conscience does not disappear when the state's interest turns out to be a valid one. It remains, justifiable perhaps, but present nonetheless.

Lastly, it is important to emphasize that arguments against state support of religion may be overdetermined. For example, Al's objection to state funding of religious speech might be based on the claim that the state has improperly endorsed religion or that it has violated a principle of neutrality between religion and nonreligion. Nothing in the argument above precludes the possibility that there might be multiple sufficient grounds for claims under the Establishment Clause. If they exist, however, the presence of such claims is not embarrassing to the Jeffersonian proposition, which provides

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legitimate. But this argument is either circular or it leaves proponents of the Jeffersonian proposition with no response to the anarchy objection.

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an independent basis for objecting to certain forms of compelled support.

### III. CONSCIENCE, COMPELLED SUPPORT, AND GOVERNMENT SPEECH

If the argument above is successful, then a balancing approach to the freedom of conscience may provide a normative answer to the anarchy objection. It may also help to make sense of compelled support doctrine under both the Free Speech and Establishment Clauses of the First Amendment. As a doctrinal matter, the Supreme Court has confronted the anarchy objection and similar line-drawing concerns by adopting two competing strategies with respect to rights against compelled support under the Free Speech Clause. In its decisions involving compelled support for *private* speech, the Court has balanced individual interests against those of the state, following something like the model described above. When confronted with challenges to compelled support for *government* speech, however, the Court has adopted a rule-based approach that rejects any First Amendment protection for the freedom of conscience. This Part reviews the Court's decisions, shows how a balancing model is consistent with much of the existing doctrine, and argues that the rule-based approach to compelled support of government speech is unnecessarily restrictive and difficult to reconcile with conscience-based justifications for the Establishment Clause prohibition on compelled support for government-sponsored religious speech.

#### *A. Compelled Support for Private Speech*

At least with respect to compelled support for *private* speech, it is possible to interpret the Supreme Court's decisions as responding to the anarchy objection by balancing individual claims of conscience against state interests. Indeed, from its inception in *Abood v. Detroit Board of Education*,<sup>111</sup> the right against compelled support has been subject to explicit interest balancing. *Abood* involved public school teachers who challenged an "agency shop" provision in the collective bargaining agreement that set the terms of their

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<sup>111</sup> 431 U.S. 209 (1977).

employment. Adopted pursuant to state law, the agency shop provision required teachers who were not members of the teachers' union to pay service fees equivalent to union dues.<sup>112</sup> The fees were levied to prevent "free riding" on the union's collective bargaining activities on behalf of all public school teachers.<sup>113</sup> Some teachers objected that this arrangement forced them to support unionization and union policies with which they disagreed. They also objected to the union's use of compulsory fees to support political and ideological activities, including political campaigning and lobbying, which were unrelated to collective bargaining. All of this, they claimed, violated their rights under the First and Fourteenth Amendments.<sup>114</sup>

The Court held that nonunion teachers could be compelled to pay service fees to support the union's collective bargaining activities.<sup>115</sup> But it also held that forcing teachers to subsidize the union's political and ideological activities, which were not "germane" to collective bargaining, violated their rights to freedom of speech and association.<sup>116</sup> The Court arrived at these divergent outcomes by balancing the teachers' First Amendment interests against those of the state.

In evaluating the teachers' claims, the Court began by establishing that compelled support for union activities implicated First Amendment interests. First, the Court noted that after *Buckley v. Valeo*,<sup>117</sup> money is "speech" in the sense that financial contributions to support political expression are protected under the First Amendment.<sup>118</sup> Second, following *West Virginia State Board of Education v. Barnette*,<sup>119</sup> the Court held that compelling speech is no different for constitutional purposes than restricting it.<sup>120</sup> *Barnette* had announced a First Amendment right "not to speak"

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<sup>112</sup> Id. at 211.

<sup>113</sup> Id. at 221–22.

<sup>114</sup> Id. at 212–13.

<sup>115</sup> Id. at 222–23.

<sup>116</sup> Id. at 234.

<sup>117</sup> 424 U.S. 1, 23 (1976) (holding that limitations on political contributions "implicate fundamental First Amendment interests").

<sup>118</sup> *Abood*, 431 U.S. at 234.

<sup>119</sup> 319 U.S. 624 (1943).

<sup>120</sup> *Abood*, 431 U.S. at 234 ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.").

or at least a right against being compelled to say what one does not believe.<sup>121</sup> In *Abood*, the Court synthesized that right with the holding in *Buckley* to ground a right against being compelled to *support* saying what one does not believe. The Court stated that “[t]his view has long been held,”<sup>122</sup> and it quoted Jefferson’s proposition from the Bill for Establishing Religious Freedom, as well as Madison’s famous statement about government having no authority to “force a citizen to contribute three pence only of his property for the support of any one establishment.”<sup>123</sup>

Once it determined that compelled support infringed on First Amendment interests, the Court then had to decide whether those interests were strong enough to outweigh the state’s interests. At this point, there were two main issues: first, whether the state could compel teachers to contribute financially to the union’s efforts at collective bargaining, and second, whether it could compel support for the union’s political and ideological activities. With respect to collective bargaining, the Court acknowledged that “[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.”<sup>124</sup> Nonunion members might have moral and religious objections to various union policies, including, for example, medical plans covering abortion, prohibitions on discrimination in the workplace, or even to unionism itself.<sup>125</sup> The Court nevertheless held that any interference with the teachers’ freedom of belief or association was “constitutionally justified” by the state’s interest in preventing non-union members from taking unfair advantage of the benefits provided by union representation.<sup>126</sup>

The Court reached the opposite conclusion on the question of compelled support for political and ideological activities. The state could justify compulsory service fees for collective bargaining activities on the basis of its interest in promoting peaceful labor relations.<sup>127</sup> But that interest did not extend to the union’s political and

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<sup>121</sup> *Barnette*, 319 U.S. at 642.

<sup>122</sup> *Abood*, 431 U.S. at 234 n.31.

<sup>123</sup> *Id.* (quoting 2 The Writings of James Madison 186 (1901)).

<sup>124</sup> *Id.* at 222.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 222–23.

<sup>127</sup> *Id.* at 224–26.

ideological activities, which the Court determined were not “germane” to its responsibilities as the teachers’ designated representative in collective bargaining.<sup>128</sup> Since the state’s interests were focused exclusively on collective bargaining, there was therefore nothing to counterbalance the burden imposed by the state on the teachers’ First Amendment interests.<sup>129</sup>

It is not entirely clear what level of scrutiny applied under the First Amendment in *Abood*. The Court did not rigorously scrutinize the state’s purported interest in preventing nonunion members from becoming “free riders” on the union’s collective bargaining activities. Relying heavily on precedent,<sup>130</sup> the Court stated that promoting peaceful labor relations involved “important government interests,”<sup>131</sup> but it did not inquire into whether the agency shop provision was narrowly tailored to meet those interests.<sup>132</sup> This omission did not go unnoticed by other members of the Court. Justice Powell criticized the majority for failing to apply “exacting scrutiny,”<sup>133</sup> which would have required the government to “shoulder the burden of proving that its action is justified by overriding state interests.”<sup>134</sup> Instead of placing the onus on the government to show that its interest was “paramount, one of vital importance,”<sup>135</sup> the Court adopted a more relaxed standard according to which the government only had to demonstrate that its policy was justified by a legitimate, and perhaps important, regulatory interest.

Since deciding *Abood*, the Supreme Court has considered claims against compelled support of private speech outside the union context in cases involving integrated bar associations, student activity

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<sup>128</sup> Id. at 234–36.

<sup>129</sup> See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 242 (2000) (Souter, J., concurring) (noting that, in *Abood* and *Keller*, “there was no governmental interest in mandating union or bar association support beyond supporting the collective bargaining and professional regulatory functions of those organizations”); Gaebler, *supra* note 84, at 1000–01 n.42, 1022 (discussing the *Abood* Court’s reasoning for determining that political and ideological activities were not “germane” to the state’s interest in promoting collective bargaining).

<sup>130</sup> *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Employees’ Dep’t v. Hanson*, 351 U.S. 225, 233 (1956).

<sup>131</sup> *Abood*, 431 U.S. at 225.

<sup>132</sup> Gaebler, *supra* note 84, at 1015.

<sup>133</sup> *Abood*, 431 U.S. at 259 (Powell, J., concurring).

<sup>134</sup> Id. at 263. (Powell, J., concurring).

<sup>135</sup> Id. at 259. (Powell, J., concurring).

fees, and industry advertising associations. In nearly all of these cases, the Court has largely followed the logic of *Abood*, first by acknowledging that compelled support of speech implicates First Amendment interests and then by asking whether the state has a valid reason for infringing on those interests. Except on one occasion (discussed below), whenever the Court has found a legitimate state interest, it has rejected claims against compelled support.

For example, in *Keller v. State Bar of California*, a unanimous Court held that the State Bar of California could maintain an “integrated bar” requiring all lawyers practicing in the state to join the bar and pay dues to support it.<sup>136</sup> The bar could not, however, use those dues to fund political and ideological activities to which members of the bar objected.<sup>137</sup> The Court’s reasoning here was identical to its reasoning in *Abood*. The state had legitimate interests in improving the quality of the legal profession, and it could require all attorneys practicing in the state to contribute their fair share to promote those interests.<sup>138</sup> What the state could not do was appropriate dues for political and ideological activities unrelated to its legitimate purposes.<sup>139</sup>

The Court’s reasoning in *Board of Regents of the University of Wisconsin System v. Southworth*,<sup>140</sup> which involved university student activity fees, followed a similar pattern. A public university required students to pay mandatory activity fees into a general student fund, which then distributed the money to facilitate the expressive activities of various student organizations. Some students complained that their fees were being used to support speech they found objectionable. As it had in *Abood*, the Court first acknowledged that the mandatory fees implicated the students’ First Amendment interests.<sup>141</sup> It then considered the university’s coun-

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<sup>136</sup> 496 U.S. 1, 13–14 (1990).

<sup>137</sup> *Id.* at 14.

<sup>138</sup> *Id.* at 12.

<sup>139</sup> *Id.* at 14.

<sup>140</sup> 529 U.S. 217 (2000).

<sup>141</sup> *Id.* at 231 (“The proposition that students . . . cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases . . . . It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State’s corresponding duty to him or her.”).

tervailing interest in providing students with a wide array of extra-curricular activities that might benefit their educations. The Court held that the university had “the important and substantial purpose[]” of promoting a range of student speech.<sup>142</sup> For that reason, students could be compelled to pay into the student activity fund, even if their fees were used to facilitate what they considered to be objectionable speech.<sup>143</sup>

In *Southworth*, the Court departed from *Abood* and *Keller* only with respect to whether the speech funded by mandatory fees had to be germane to the state’s legitimate interest. Since the university’s purpose in compelling support was to fund a diversity of competing and conflicting political and ideological views,<sup>144</sup> speech from any point of view was germane to that purpose, rendering the requirement pointless or “unworkable.”<sup>145</sup> Instead, the Court held that the university could compel support for student speech provided it adhered to a rule of viewpoint neutrality in funding that speech.<sup>146</sup> This, too, was consistent with the university’s purpose, which was, after all, to fund a wide diversity of speech.<sup>147</sup> Thus, the requirement of viewpoint neutrality should not detract from the central holding in *Southworth*, which was that despite infringement on students’ freedom of speech and association, compelled support for speech with which students disagreed was justified by the state’s legitimate interest in promoting that speech.

Lastly, the Court has addressed on three occasions the issue of compelled support for industry advertising, in which the state requires producers of various goods to provide financial support for generic promotional campaigns. (Some famous examples include “Got Milk?” and “Beef. It’s What’s for Dinner.”) The first two cases, *Glickman v. Wileman Bros. & Elliott, Inc.*<sup>148</sup> and *United*

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<sup>142</sup> Id. at 231.

<sup>143</sup> Id. at 233.

<sup>144</sup> Id. at 222–23 (“In the University’s view, the activity fees ‘enhance the educational experience’ of its students by ‘promoting extracurricular activities,’ . . . enabling ‘participat[ion] in political activity,’ . . . and providing ‘opportunities to develop social skills,’ all consistent with the University’s mission.”).

<sup>145</sup> Id. at 231.

<sup>146</sup> Id. at 233.

<sup>147</sup> As Justice Souter noted in his concurring opinion, the parties in *Southworth* stipulated that the University activity fee program required viewpoint neutrality and distributed funds in accordance with that principle. Id. at 236 (Souter, J., concurring).

<sup>148</sup> 521 U.S. 457 (1997).



*States v. United Foods, Inc.*,<sup>149</sup> represent conflicting approaches to the doctrine of compelled support. *Glickman* mainly followed the logic of *Abood* and *Keller*, while *United Foods* marked a serious departure from the earlier line of cases, one which raised concerns about the limits of compelled support doctrine and, as some commentators have suggested, led the Court to abandon interest balancing in favor of a rule-based approach in the third, and most recent, of the industry advertising cases, *Johanns v. Livestock Marketing Ass'n*,<sup>150</sup> which is discussed below (in Section III.C).

In *Glickman*, the Court held that the federal government could compel producers of stone fruits (for example, peaches and plums) to pay for generic advertising as part of a system of regulation to maintain marketing conditions for the industry.<sup>151</sup> Some of the producers objected to both the content of the advertising and having to contribute to it in the first place.<sup>152</sup> Like the plaintiffs in *Abood* and *Keller*, they claimed that compelled support for speech with which they disagreed violated their First Amendment rights. The Court rejected this claim in its entirety. First, it held that the producers' First Amendment interests were not infringed because they did not disagree with the content of the advertising,<sup>153</sup> and even if they did, their disagreements were trivial, such that they "cannot be said to engender any crisis of conscience."<sup>154</sup> Moreover, even if the producers' objections were political or ideological, rather than grounded in policy differences about marketing strategy, they were compelled to support speech germane to the government's interest in regulating and promoting the industry.<sup>155</sup> The Court made it clear that *Abood* and its progeny did not stand for the broad proposition that the First Amendment prohibited compelled support of any speech to which one objected but instead allowed the government to require financial contributions for speech pursuant to its legitimate ends.<sup>156</sup>

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<sup>149</sup> 533 U.S. 405 (2001).

<sup>150</sup> 544 U.S. 550 (2005).

<sup>151</sup> 521 U.S. 457 (1997).

<sup>152</sup> *Id.* at 467–68.

<sup>153</sup> *Id.* at 471 ("With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree.").

<sup>154</sup> *Id.* at 472.

<sup>155</sup> *Id.* at 473.

<sup>156</sup> *Id.*

From *Abood* to *Glickman*, the Court followed an approach that balanced infringements of First Amendment interests, admittedly attenuated in cases of compelled support, with various legitimate state interests. In *United Foods*, however, the Court deviated from this pattern in a case with facts nearly identical to those in *Glickman*. Instead of stone fruit producers, this case involved mushroom handlers who objected to a federal statute compelling them to subsidize generic advertising to promote the mushroom industry.<sup>157</sup> This time the Court upheld the plaintiffs' claims against compelled support. First, the Court refused to follow *Glickman* in describing commercial disagreements about the content of industry advertising as trivial, nonideological, or otherwise insufficient to trigger First Amendment protection under *Abood*.<sup>158</sup> Second, the Court distinguished *Glickman* on the facts by suggesting that the coerced subsidy in *Glickman* was ancillary to a comprehensive regulatory scheme, whereas the mandatory assessment for mushroom producers was an isolated regulation not connected to any broader government program.<sup>159</sup> This fact also served to distinguish *United Foods* from *Abood* and *Keller*, in which the state compelled support for speech germane to a legitimate associational purpose (for instance, collective bargaining).<sup>160</sup> The Court stated that, in those cases, the government was justified in requiring involuntary membership in an association and any compelled support for speech was merely ancillary to the purpose of that association. In this case, however, the state did not require membership in an organization for any purpose other than to compel the advertising in question. The Court held that the state could not compel speech "in the context of a program where the principal object is speech itself."<sup>161</sup> If compelled speech only had to be germane to the state's interest in promoting speech, *Abood* and *Keller* would have no meaning.<sup>162</sup>

The Court's decision in *United Foods* is open to numerous criticisms. First, as Justice Breyer noted in dissent, the majority's holding makes First Amendment protection turn on how heavily the

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<sup>157</sup> *United Foods*, 533 U.S. 405, 408–09 (2001).

<sup>158</sup> *Id.* at 410–11.

<sup>159</sup> *Id.* at 412.

<sup>160</sup> *Id.* at 413–14.

<sup>161</sup> *Id.* at 415.

<sup>162</sup> *Id.*

government regulates an entity. The more heavily regulated, the less protection.<sup>163</sup> This relationship creates an incentive for the government to expand its regulation to come within the Court's holding in *Glickman*.<sup>164</sup> Second, the Court misdescribed the state's interest in *United Foods* as principally about funding speech. But this misses the point of the compelled subsidy, which was to prevent free riding on coordinated efforts to promote the industry.<sup>165</sup> The government's interest in *United Foods* was the same as its interest in *Glickman*, where the Court had no trouble finding a valid regulatory purpose. Third, even if the state's purpose was to promote speech by private actors, *United Foods* does not explain why that interest is necessarily illegitimate. Justice Breyer gave the examples of charging tobacco companies to fund public health advertising about the dangers of smoking or using a portion of museum entry fees to promote the arts.<sup>166</sup> Other similar examples are easy to imagine. Given that the state might have interests in promoting private speech, it remains unclear after *United Foods* why taxpayers cannot be called upon to fund that speech, even when they find it objectionable.

The most fundamental difficulty with *United Foods* is that it does not explain why the plaintiffs' First Amendment interests outweigh the interests of the state. In *Abood*, *Keller*, *Southworth*, and *Glickman*, the plaintiffs succeeded in avoiding compelled support only when the speech at issue was not related to the state's interest—in other words, only when the state had *no* interest in promoting that speech. Although the plaintiffs' expressive interests were weak, there was simply nothing to offset them. The Court did not have to engage in any serious balancing. After *United Foods*, in cases involving compelled support for private speech, the Court must explain when, exactly, state interests are sufficient to override

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<sup>163</sup> Id. at 422 (Breyer, J., dissenting) (“It is difficult to see why a Constitution that seeks to protect individual freedom would consider the absence of ‘heavy regulation’ . . . to amount to a special, determinative reason for refusing to permit this less intrusive program.”); see also *Klass*, supra note 20, at 1107.

<sup>164</sup> *United Foods*, 533 U.S. at 429 (Breyer, J., dissenting).

<sup>165</sup> Id. at 421 (Breyer, J., dissenting) (“[T]he advertising here relates directly, not in an incidental or subsidiary manner, to the regulatory program’s underlying goal of maintaining and expanding existing markets and uses . . . .”) (internal quotations omitted).

<sup>166</sup> Id. at 428 (Breyer, J., dissenting).

claims for freedom of expression and association. It must give a more complete account of the underlying interests on both sides of the balance.

### *B. Compelled Support for Government Speech*

The reverse of the criticism of *United Foods* is that the Court has also not explained why compelled support for *government* speech causes a person's First Amendment interests to vanish completely. But that was precisely the holding in *Johanns*, the last of the industry advertising trilogy, which involved facts nearly identical to those in *United Foods*.<sup>167</sup> The major difference between the cases is that, in *Johanns*, the government argued that mandatory assessments from the beef industry were used to sponsor government speech, rather than speech by private industry associations, which is how the issue was presented in *Glickman* and *United Foods*. In *Johanns*, the Justices divided over whether the government properly identified itself as the speaker. But once the Court determined that the case involved government speech,<sup>168</sup> it held that the First Amendment does not protect against compelled subsidies for government speech.<sup>169</sup> A five-Justice majority, led by Justice Scalia, also rejected the claim that targeted assessments impose greater burdens on First Amendment interests than compelled subsidies funded by general revenues.<sup>170</sup> As Justice Scalia put it, "The First Amendment does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding . . . does not stem from the Government's mode of accounting."<sup>171</sup> After *Johanns*, then, the rule is clear: no matter how the government decides to fund its speech, taxpayers have no right against compelled support for that speech under the First Amendment.

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<sup>167</sup> *Johanns*, 544 U.S. at 558 ("We agree . . . that the beef checkoff is, in all material respects, identical to the mushroom checkoff at issue in *United Foods*.") (internal quotation marks omitted).

<sup>168</sup> *Id.* at 560–62.

<sup>169</sup> *Id.* at 562 ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.")

<sup>170</sup> *Id.* at 564 n.7 ("[R]espondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments . . .").

<sup>171</sup> *Id.* at 562–63.

The problem with *Johanns* is that it does not explain why taxpayers' First Amendment interests are strong enough to defeat compelled support for private speech but are suddenly and wholly extinguished when exactly the same speech is characterized as controlled by the government. Writing for the majority in *Johanns*, Justice Scalia recognized that "being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy."<sup>172</sup> But he continued, "Such a violation does not occur when the exaction funds government speech."<sup>173</sup> The question is how to reconcile these two positions, and the majority in *Johanns* provides no explanation, except to point out the formal distinction between private and government speech, as if that alone would supply the answer. Here, however, the distinction between private and public is not sufficient, because government coercion is equally present in both cases. From the taxpayer's perspective, the only difference is in who does the speaking—a private association selected by the government or the government itself. Either way, the harm to conscience seems to be the same.

Dissenting in *Johanns*, Justice Souter confronted this problem more directly, although without fully resolving it. He claimed that the Jeffersonian proposition, which he cited approvingly in its unrestricted form,<sup>174</sup> applies to all instances of compelled speech. In other words, taxpayers' First Amendment interests are implicated whenever they are forced to pay for the propagation of opinions they disbelieve. On Justice Souter's view, however, this was not sufficient to trigger judicial protection under the First Amendment. Instead, he claimed that when taxpayers are compelled to support government speech, their objections are appropriately addressed through the democratic process.<sup>175</sup> Justice Souter offered two arguments to support this conclusion. First, the government must be able to voice its views without "a First Amendment heckler's

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<sup>172</sup> Id. at 565 n.8.

<sup>173</sup> Id.

<sup>174</sup> Id. at 572 (Souter, J., dissenting).

<sup>175</sup> Id. at 575 (Souter, J., dissenting) ("[T]he First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say . . . . Democracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what the government says, the next election will cancel the message.").

veto,”<sup>176</sup> which is a fairly straightforward invocation of the anarchy objection (and also the most likely explanation of the majority’s position). Second, taxpayers have an attenuated interest in subsidies raised through general taxation. Accordingly, “Outrage is likely to be rare, and disagreement tends to stay temperate.”<sup>177</sup> By contrast, when compelled subsidies are raised using special taxes or targeted assessments, taxpayers are more likely to perceive a closer association with the speech they find objectionable and, consequently, to “suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say.”<sup>178</sup>

In recognizing that any form of compelled subsidy may infringe on First Amendment interests, Justice Souter’s view comes closer to the balancing approach suggested above. But like the majority in *Johanns*, he leaves no room for challenges to compelled support for government speech funded from general revenues. This is puzzling for two reasons. First, it is not clear why the democratic process should be trusted to correct infringements on the freedom of conscience (or the value of personal autonomy) in cases of government speech, any more than in compelled support for private speech.<sup>179</sup> Second, Justice Souter’s position with respect to compelled support for government speech, at least when funded from general revenues, is inconsistent with his appeal to the Jeffersonian proposition as an objection to compelled support for government religious speech under the Establishment Clause.<sup>180</sup> If taxpayers have only an attenuated interest in money raised through general taxation, and if the democratic process is a sufficient remedy for objections to how that money is spent, then it seems to follow that objections to government religious speech funded from general revenues should be addressed as political matters, rather than as legal ones.

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<sup>176</sup> Id. at 574 (Souter, J., dissenting).

<sup>177</sup> Id. at 575 (Souter, J., dissenting).

<sup>178</sup> Id. at 575–76 (Souter, J., dissenting).

<sup>179</sup> See Post, *supra* note 20, at 206–07 (criticizing Justice Souter along the same lines); see also Kamenshine, *supra* note 81, at 106 (“When it is expression . . . that is at issue, reliance on the functioning of the democratic process does not provide a comparable excuse for ignoring dissent.”).

<sup>180</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (2002) (Souter, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 870–71 (2000) (Souter, J., dissenting).

*C. Compelled Support for Religious Speech*

One might try to rescue Justice Souter's position by arguing that although taxpayers have no right under the Free Speech Clause to challenge compelled support for religious speech, they can still bring claims under the Establishment Clause. But to the extent the Establishment Clause is understood to protect freedom of conscience, this response must fail. To see why, we need only observe that, in *Johanns* and elsewhere, Justice Souter does not restrict the Jeffersonian proposition to its religious form. He invokes the unrestricted version of the proposition, which covers anyone who opposes paying money to support speech with which he disagrees as a matter of conscience. In other words, at least with respect to freedom of conscience, Justice Souter appeals to exactly the same principle to explain what is wrong with compelled support under both the Free Speech Clause and the Establishment Clause. If that principle does not provide protection under the former, it cannot do any independent work under the latter. As a result, after *Johanns*, it becomes mysterious why the freedom of conscience has any role to play under the Establishment Clause.

The rule in *Johanns* against First Amendment protection for compelled support of government speech, which is shared by the majority and the dissent at least with respect to speech funded by general revenues, is an understandable attempt to avoid the need for balancing after *United Foods* and to ward off anarchical tax protests to government speech. But in abandoning the balancing approach of *Abood* and its progeny, the Court has failed to provide a satisfactory explanation for why taxpayers' First Amendment interests receive no protection even when the state has no legitimate interest in compelling support for government speech. The *Abood* line of cases suggests a different model, in which taxpayers can press their claims against the government, even if the state often has legitimate interests sufficient to outweigh what are admittedly rather more attenuated claims. Where taxpayers can raise their claims, however, they at least have the opportunity to test whether the government has some legitimate interest for imposing burdens on their freedom of conscience.

## IV. THREE MISTAKES ABOUT MONEY

A normative and legal account of freedom of conscience that authorizes claims against compelled support arising from taxation, especially in a general rather than targeted form, must confront a number of related objections. The common theme among them is that taxpayers' connection to the speech they find morally objectionable is not strong enough to warrant any legal remedy. Although I have already touched on this concern (in Part II above), this objection deserves careful attention. This Part distinguishes three arguments in this family of criticisms and attempts to show that while they have considerable force, none of them are decisive.

A. *Money Isn't Conscience*

One of the earliest criticisms of the idea that compelled support violates the freedom of conscience is that taxpayers who assert this objection have confused their money with their consciences. This criticism was leveled against religious dissenters even before Jefferson expressed his famous proposition in the Bill for Establishing Religious Freedom. In 1774, Jonathan Parsons, a leading Presbyterian minister in Massachusetts, inveighed against taxation to promote religion on the grounds that such taxation violated dissenters' freedom of conscience.<sup>181</sup> In response, John Tucker, a Congregationalist pastor from the same parish, ridiculed Parson's argument, writing that "from an uncommon lurch for money, the gentleman has unhappily mistaken mens purses for their consciences, though they are things so essentially different, that a blind man might distinguish them."<sup>182</sup> To be sure, though, Tucker offered an extended

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<sup>181</sup> Jonathan Parsons, *Freedom from Civil and Ecclesiastical Slavery, the Purchase of Christ 7* (1774) ("[F]or all those that *forcibly* take away the money or property from their honest neighbours to support a minister which they cannot in conscience attend are guilty of spiritual tyranny: They take away their money or lay a tax upon them without their consent, and disenable them to support the worship of God agreeable to the dictates of their own consciences. And if this is not enslaving men in their most important interests, in the name of wonder, what is?").

<sup>182</sup> John Tucker, *Remarks on a Discourse of the Rev. Jonathan Parsons, of Newbury-Port 10* (1774). Later in his remarks, Tucker continued, "How are the consciences of Calvinists, or of any other oppressed? Why some honest men, as Mr. Parsons calls them, have their money taken from them without their consent, to support a minister they disapprove of. Be it so, yet I see not that the province laws, by virtue of



argument for distinguishing conscience from money. First, dissenters were not compelled to attend any ministry to which they objected, nor were they required to observe any forms of ritual or worship against their beliefs. To that extent, their freedom of conscience was protected. Beyond that, however, all members of civil society were understood to have consented to part with some of their money in the form of taxation, which the majority could use as it deemed necessary for the general welfare. Tucker further argued that ministerial taxes were justified on political grounds. They were not “designed to affect mens consciences, which ought always to be left to God and themselves, but to promote the good order and welfare of the state, by making men better members of *civil society*.”<sup>183</sup> Since the state’s purpose in promoting religion was not to save souls, but to improve public welfare, it followed that the state had as much right to pass ministerial taxes as it did any other.<sup>184</sup> Finally, in an early example of the anarchy objection, Tucker claimed that the argument from conscience would allow anyone to avoid paying money to the state which “would lead to all manner of confusion.”<sup>185</sup>

Tucker’s arguments seem to have resonated in Congregationalist New England. More than thirty years later, Theophilus Parsons, the Chief Justice of the Massachusetts Supreme Court and (aptly named) proponent of New England’s religious establishment, repeated them in *Barnes v. First Parish of Falmouth*,<sup>186</sup> which in-

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which this money is taken, have anything to do with mens consciences, any more than with their coats or periwigs, nor indeed so much.” *Id.* at 10–11.

<sup>183</sup> *Id.* at 14.

<sup>184</sup> *Id.* (“Viewing the laws in this light, the province has the same right to provide for the support of a public ministry, as it has for the support of schools, or to enact any thing which it judges beneficial to civil society.”). Tucker quoted the English dissenter, Dr. Phillip Doddridge, who reasoned to the same conclusion: “If it be asked whether such Dissenters may regularly be *forced* by the magistrate and majority, to assist in maintaining established teachers, whom they do not approve; it is answered, that this will stand upon the same footing with their contributing towards the expense of a war, which they think not necessary or prudent.” *Id.* at 15. Interestingly, Doddridge also argued that allowing an exemption from taxation would invite fraudulent claims. See 4 *The Works of Rev. P. Doddridge* 504 (1803) (“If no such coercive power were admitted, it is probable, that covetousness would drive many into dissenting parties, in order to save their tithes or other possessions. So that none can reasonably blame a government for requiring such general contributions . . .”).

<sup>185</sup> Tucker, *supra* note 182, at 14.

<sup>186</sup> 6 Mass. 401, 401 (1810).

volved a challenge to the system of ministerial taxes established under Article III of the Massachusetts Bill of Rights. The plaintiff in the case argued that “when a man disapproves of any religion . . . to compel him by law to contribute money for public instruction in such religion or doctrine, is an infraction of his liberty of conscience.”<sup>187</sup> Parsons responded that this objection “seems to mistake a man’s conscience for his money.”<sup>188</sup> He argued, as Tucker had, that the state did not compel religious instruction or participation in worship to which dissenters objected. It merely exercised its right to tax for the general welfare, a power no one could legitimately refuse without undermining the state’s authority.<sup>189</sup> Moreover, anticipating aspects of Justice Scalia’s opinion in *Johanns v. Livestock Marketing Ass’n* by nearly two hundred years, Parsons denied that the form of taxation was relevant to the outcome of the case. It did not matter that dissenters were required to pay a special tax to support the religious minister chosen by the majority of their parish. The state could instead have supported ministers from funds raised through general revenues. Whatever the level of taxation, Parsons concluded, “The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.”<sup>190</sup>

The Tucker-*Barnes* response to the Jeffersonian proposition basically reduces to a version of the anarchy objection. The first part of the response says that the state has a legitimate interest in promoting religion. Public support for religious education is not about converting dissenters to true belief. The state’s aims are civic, rather than salvational. Secondly, if taxpayers can invoke their consciences to opt out of laws that promote civic ends, then they are, in effect, denying the state’s authority to fulfill its central purposes. The result would be anarchy.

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<sup>187</sup> Id. at 408.

<sup>188</sup> Id.

<sup>189</sup> Id. at 409 (“And if any individual can lawfully withhold his contribution, because he dislikes the appropriation, the authority of the state to levy taxes would be annihilated; and without money it would soon cease to have any authority.”).

<sup>190</sup> Id.

Given the argument for the Jeffersonian proposition developed above, there are two answers to the Tucker-*Barnes* objection, corresponding to its two main parts. The first answer is to deny that the state has authority to promote religious ideas. Even if the state does not aim to convert nonbelievers or bring about true belief, there are many reasons to oppose state sponsorship of religious doctrines. I have already rehearsed some of these reasons above, so they need not be repeated here. The main point is that, although the state may have a secular purpose for supporting religion, that may not be sufficient to justify its authority to endorse particular religious doctrines or even religion more generally.<sup>191</sup> This, of course, is a controversial claim, but it is important to see that Tucker's and Parsons's arguments rest, in part, on the contestable view that a civic justification for promoting religion is sufficient to ground the state's authority.

The second response is that if the state lacks authority, then there is nothing to counterbalance the claim that payment of taxes infringes on conscience. Under these conditions, the anarchy objection simply loses its force. Here, it might be objected that this response begs the question against Tucker and Parsons, who argued that taxpayers have no right of conscience in refusing to pay their taxes. But at least as far as Tucker and Parsons are concerned, they give no other reason to support the slogan that the Jeffersonian proposition "mistake[s] a man's money for his conscience." In this case, there is simply no further question to beg.

It is important to note that Tucker and Parsons did not argue that taxpayers are not closely enough associated with their tax payments to make out a claim of conscience. Nor could they have made that argument, and it would be anachronistic to attribute it to them. In *Barnes*, the plaintiff sought to recover a specific sum of money paid to a local parish to support an identifiable religious minister. The taxpayers knew exactly where their money was going. This might explain why Parsons denied that the form of the taxation was relevant to the case, but he did not argue that the use of general revenues would mitigate taxpayers' connection to the funding of religious opinions to which they objected. He instead re-

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<sup>191</sup> A secular purpose may, however, be a necessary condition. See Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 95–98 (2002).

lied on the seemingly related, but nevertheless distinct, claim that every citizen has a duty to pay taxes to support the general welfare. That argument is not about the attenuated nature of the taxpayers' claim, but rather about the anarchical consequences of allowing any such claims to go forward, whether directed against special assessments or more general income taxes.

### *B. Money Isn't Association*

Of course, if Tucker and Parsons did not argue about the attenuated nature of taxpayers' claims, modern critics of the Jeffersonian proposition have developed this criticism with considerable force.<sup>192</sup> It is perhaps the most serious and difficult objection, in part because it raises fundamental questions about the nature of collective responsibility in a democratic society.

To support the Jeffersonian proposition, taxpayers might argue that paying for speech that conflicts with their fundamental moral or religious views implicates them in immoral or unethical beliefs and practices. For example, those who are morally opposed to abortion might say that their tax money should not be spent to fund abortion counseling. When their money is used in that way, they become morally complicit in funding abortions. They might argue that being forced to give abortion counseling would violate their consciences, and so, too, does being forced to pay someone else to do the same.<sup>193</sup>

The objection here is that paying taxes, at least in the form of general income taxes, is not sufficient to associate taxpayers with government speech. Since such speech cannot be attributed to them in any meaningful sense, there is no basis for the view that taxpayers are morally complicit in or culpable for how the government spends their money.

This argument against equating money, at least in the form of taxes, with association or complicity draws on a number of powerful moral intuitions. First, attitudes about moral complicity are strongly influenced by the idea that we are morally responsible for

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<sup>192</sup> See Smith, *supra* note 2, at 375–76.

<sup>193</sup> Smith describes the general form of this argument: “If it would be a violation of your conscience to *do X*, it should similarly be a violation of conscience if you *pay other people* to do *X*.” *Id.* at 375.

harms only if (1) our actions have made a difference in causing those harms, and (2) we have some control over creating or preventing them.<sup>194</sup> Furthermore, complicity may require (3) intentionality, since we are morally responsible only for those harms that we intend to cause, and not those harms that are merely foreseeable consequences of actions that are not intended to cause harm.<sup>195</sup> Lastly, moral responsibility requires that we undertake our actions (4) voluntarily, such that they are not the product of coercion or duress.

Each of these conditions of moral responsibility—making a difference, having control, intentionality, and voluntariness—may seem lacking in the case of taxpayers funding government speech to which they object. At least with respect to the state and federal governments, and probably also most municipalities, no individual taxpayer's contribution makes a difference to whether the government funds a particular program. Nor do individual taxpayers have control over how their money is used. Taxpayers may not know what the government does with their money,<sup>196</sup> and even if they did

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<sup>194</sup> Here I follow Christopher Kutz's description of two commonsense principles of individual moral accountability. The Individual Difference Principle holds that "I am accountable for a harm only if what I have done made a difference to that harm's occurrence . . . . I am accountable only for the difference my action alone makes to the resulting state of affairs." The Control Principle says that "I am accountable for a harm's occurrence only if I could control its occurrence, by producing or preventing it . . . . I am accountable only for those harms over whose occurrence I had control." Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* 116–17 (2000). Kutz extensively criticizes both principles as inadequate for reasoning about moral complicity in the context of collective and cooperate action. He argues instead for what he calls the Complicity Principle, which holds that "I am accountable for what others do when I intentionally participate in the wrong they do or harm they cause . . . . I am accountable for the harm or wrong we do together, independently of the actual difference I make." *Id.* at 122. Even the Complicity Principle may not be sufficiently strong to account for the moral responsibilities of democratic citizens, who may not intend to participate in all of the wrongs that may be reasonably attributed to them. For criticism along these lines, see Beerbohm, *supra* note 82.

<sup>195</sup> See Smith, *supra* note 2, at 376. The distinction between harms that are intended and harms that are not intended but merely foreseeable is part of the doctrine of "double effect." For a useful overview of this doctrine, its complications, and potential difficulties, see Alison McIntyre, *Doctrine of Double Effect*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/double-effect/> (last modified June 29, 2009).

<sup>196</sup> Lack of knowledge might not absolve taxpayers of moral responsibility if they ought to possess the relevant knowledge. See generally George Sher, *Who Knew?: Responsibility Without Awareness* (2009).

know, they might not intend those uses. They may pay into the public treasury to promote what they consider to be legitimate uses of their funds, without intending, although perhaps foreseeing, that the state might sometimes use a portion of their money for ends they find objectionable.<sup>197</sup> Citizens might prefer that their money not be used in such ways, but that, at any rate, is the price of citizenship in a democratic society.

Although this objection has considerable force, it relies on principles and intuitions about moral responsibility that may not be suitable for evaluating our involvement in large scale collective and cooperative action, including participation in systems of democratic governance. Take the requirements that our actions make a difference in whether harms occur and that we have some control over producing or preventing those harms. As Christopher Kutz has argued, these conditions of responsibility fail to account for situations in which we intentionally participate with others to produce certain harms. Consider a philosophical example: the state asks you to participate in a firing squad composed of a million citizens.<sup>198</sup> Participation entails pressing a computer button, which leads to the deaths of many people in what amounts to a mass execution.<sup>199</sup> Suppose no individual's participation makes a difference to whether anyone is killed, and also that since enough others have already signed up to participate, no individual participant controls the harm caused by the execution. The outcome is, *ex hypothesi*, wholly overdetermined. Nevertheless, it seems intuitive to say that anyone who participates in a scheme of this kind is morally responsible for the outcome. The principles of making a difference to the harm caused and having control over its production or prevention do not seem sufficient to account for this case or, for that matter, other examples of collective action involving large numbers of people.

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<sup>197</sup> Smith, *supra* note 2, at 376.

<sup>198</sup> See Beerbohm, *supra* note 82.

<sup>199</sup> If this example seems overly fanciful, consider Kutz's lengthy discussion of the Dresden firebombing during World War II. He argues convincingly that the principles of individual difference and control fail to explain our intuitions about the moral complicity of individual participants in the bombing. See Kutz, *supra* note 194, at 117–45.

The requirements of intentionality and voluntariness may also not be sufficient to explain away moral complicity. Suppose in the mass execution example that the state requires citizens to participate or face punishment by fine or imprisonment. Still, we would probably conclude that anyone who participates in an evil of this kind is morally culpable. We might also expect citizens to suffer some form of punishment to avoid going along with the state's demand. If the level of coercion were high enough, participants might be justified in foregoing conscientious objection. In either case, however, citizens can legitimately object that they are forced to choose between obeying the law and acting according to their consciences.

None of this, of course, is meant to equate paying taxes with being forced to participate in a mass execution. The example is only intended to draw our attention to the shortcomings of some common sense intuitions and principles as applied to participation in large scale collective action. We should not assume that those intuitions and principles can be transposed easily to situations involving large numbers of participants acting at some distance from one another. We may need a different or revised set of principles to account for moral complicity under these types of circumstances.<sup>200</sup>

Another way to answer the objection that taxpayers are not associated or complicit with how the government spends their money is by appealing to the idea that, in a reasonably well-ordered democratic society, citizens ought to see themselves as contributing voluntarily to support the state. They are not primarily motivated by coercion but by the idea that the state represents them, that it acts in their name.<sup>201</sup> In a democratic society, citizens are thus encouraged to identify with their governmental institutions and to share in the responsibility for how they are managed.<sup>202</sup> To deny

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<sup>200</sup> Id. at 137–38.

<sup>201</sup> See Beerbohm, *supra* note 82; Nozick, *supra* note 82, at 289 (“A particular individual might prefer to speak only for himself. But to live in a society and to identify with it necessarily lays you open to being ashamed of things for which you are not personally responsible . . . . A society sometimes speaks in our names.”).

<sup>202</sup> For a similar line of argument, see Feldman, *supra* note 3, at 422–23 (“[I]n a democracy, one ought not understand the actions of the government as entirely disconnected from the actions of the citizens. There is a difference between what the government does with my money and what the retailer does with my money once I have paid for my goods. The government acts on my behalf.”). But see Steven Shiffrin,

that citizens have a significant connection to how their taxes are spent is to suggest that they should not assume moral responsibility for actions taken on their behalf. This is not to say that taxpayers and citizens have the same level of responsibility as their representatives or other public officials. They obviously do not. Nevertheless it seems extreme to say that they have no responsibility whatsoever for how their contributions are used by their government.

A full answer to the objection considered here requires a theory of democratic complicity or an account of when citizens and taxpayers are morally accountable for the actions of their fellow citizens and the public officials who represent them. This is obviously a large subject that cannot be fully addressed here, but, as I have tried to suggest, there are nevertheless moral intuitions and principles that can be used to work up a plausible basis for the claim that taxpayers have some morally significant relationship to how their funds are spent, which in turn may support some limited forms of conscientious objection.

### *C. Money Isn't Speech*

A third objection to the Jeffersonian proposition targets the link between money and speech. As we have seen, the claim that taxation infringes on the freedom of conscience can be defended as a form of compelled support under the Free Speech Clause of the First Amendment. The general logic of compelled support doctrine is fairly straightforward. It begins with the premise that the government cannot force people to speak. It then relies on the Supreme Court's campaign finance cases for the proposition that "money is speech," which is to say that financial contributions for expressive purposes are treated either as intrinsically expressive or as facilitating expression.<sup>203</sup> It follows that, if the government can-

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Dissent, Democratic Participation, and First Amendment Methodology, *Va. L. Rev.* (forthcoming 2011) (manuscript at 3, on file with the Virginia Law Review Association) (arguing that citizens in a mass democracy should not think of themselves as "authors" of laws enacted by the government).

<sup>203</sup> In *Abood*, the Court cites *Buckley v. Valeo* for the proposition that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) ("Because '[m]aking a contribution enables like-minded persons to pool their resources in furtherance of common political goals' . . . limitations upon the freedom to contribute 'implicate fundamental First Amendment interests.'").



not force people to speak, and if money talks (so to speak), then the government cannot force people to give money, at least not for expressive purposes. Compelled support is tantamount to compelled speech, which is prohibited under the First Amendment.<sup>204</sup>

We have seen, however, that perhaps with the exception of a single case (*United Foods*), the Court has not treated compelled support as the doctrinal equivalent of compelled speech. Where the state has forced people to utter affirmations of beliefs they find objectionable, the Court has applied rigorous scrutiny, holding that individuals have strong interests in the freedom of conscience and that the state has little or no interest in requiring compelled affirmations.<sup>205</sup> By contrast, in cases of compelled support, the Court has applied much weaker forms of review, allowing the government to justify recognized infringements on the freedom of conscience by appealing to legitimate, but not necessarily compelling, state interests.<sup>206</sup>

Nevertheless, one might argue that the compelled support doctrine rests on a mistake. To the extent courts recognize any expressive interest in forced subsidies, that is only because they accept the fundamental premise that giving money to enable speech has some expressive or associational value that is, or at any rate ought to be, covered by the First Amendment. If that premise is wrong,<sup>207</sup> then there is no basis for claiming that compelled support implicates expressive interests, including the freedom of conscience.

Without attempting to resolve the question of whether giving and spending money to promote speech ought to receive First Amendment protection, consider two responses to the objection that “money isn’t speech” as an argument against the Jeffersonian proposition. First, those who make this objection must be willing to embrace it more generally. If giving money does not implicate expressive or associative interests when it comes to funding religion, the same must be true for restrictions on campaign contributions,

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<sup>204</sup> See *supra* Section III.A.

<sup>205</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

<sup>206</sup> Gaebler, *supra* note 84, at 1014–16 (noting the Court’s application of rigorous scrutiny in compelled speech, but not compelled support, cases).

<sup>207</sup> For a recent argument to this effect, see Deborah Hellman, *Money Talks But It Isn’t Speech*, 95 *Minn. L. Rev.* 953 (2011).

compelled subsidies for private associations, and a range of other First Amendment contexts.<sup>208</sup> Of course, this argument runs in the other direction as well. Those who defend the Jeffersonian proposition as a form of compelled support are equally committed to the claim that giving money, or being compelled to give money, involves expressive interests that deserve protection in other areas of the First Amendment. Whether we deny or accept the central premise of *Buckley v. Valeo*, and the way in which we do so, has consequences for both the Free Speech and Religion Clauses.

Second, even *Buckley's* critics recognize that giving money can be a form of expression, and no one denies that spending money can facilitate speech.<sup>209</sup> The question is whether laws that restrict the use of money in these ways ought to be subject to varying levels of constitutional scrutiny under the First Amendment. But the defense of the Jeffersonian proposition offered here does not call for the application of strict scrutiny in cases of compelled support. At most, it suggests a much weaker standard, closer to rational basis review. Although taxpayers have some interest in how their funds are spent, that interest is admittedly attenuated. It exists, and it may provide a limited check on state efforts to promote religion or other comprehensive philosophical and ethical doctrines. But when the state has legitimate interests, the Jeffersonian proposition must give way to the value of democratic authority and the practical need for administrative feasibility.

#### CONCLUSION

The Establishment Clause has long been associated with the idea that government taxation to promote religion infringes on the freedom of conscience. Indeed, there is a decent historical argument for the view that this idea captures the original meaning of the Clause. Many, if not all, members of the Founding generation believed that forcing taxpayers to support religions other than their

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<sup>208</sup> See Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 316–17 (1998) (“Any blanket reversal of *Buckley's* premise that restrictions on political money implicate the First Amendment thus would bring down a great deal of law in its wake.”).

<sup>209</sup> See, e.g., Hellman, *supra* note 207, at 955 (“Money is clearly important to speaking . . . . Sometimes giving money also is itself expressive . . . . So, spending money facilitates speaking and giving money can be expressive itself.”).

own was inconsistent with religious liberty. But the original arguments for this view are difficult to sustain. They rest on controversial religious premises that many citizens now reasonably reject. It is, for that reason, difficult and perhaps impossible to explain why taxation to promote religion infringes on conscience any more than taxation to promote other ideas and opinions with which people have fundamental and profound moral disagreements. This is what I have been calling the equality objection, and the best response may be simply to concede it.

If the Jeffersonian proposition cannot be defended on the grounds that there is something special about religious claims of conscience, the only other option is to argue for the broader claim that compelled support for morally objectionable speech infringes on the freedom of conscience, or what I have called the unrestricted version of the Jeffersonian proposition. Most proponents of the Jeffersonian proposition have resisted moving in this direction, no doubt because of the intractability of the anarchy objection. But if the original underpinnings of the Jeffersonian proposition, and perhaps of the Establishment Clause, cannot be defended along religious lines, then there is no alternative but to confront the prospect of allowing taxpayers to claim a right of conscientious objection against support for government speech.

Perhaps there is no satisfying answer to the anarchy objection, in which case it may be necessary to abandon the Jeffersonian proposition. But before doing away with it completely, it is worth considering a balancing approach to compelled support that might account for a limited right to challenge government speech funded by taxation, at least where the government cannot produce a legitimate interest to justify its speech. In some cases, the government may not have an interest in promoting religious speech. Under those circumstances, taxpayers may succeed in vindicating their rights of conscience.

The Jeffersonian proposition cannot be justified in its original form. And when broadened to accommodate nonreligious conceptions of conscience, it cannot be applied with the stringency that the Founders might have intended. In its expanded but weakened form, it might be tempting to reject it entirely. The argument above suggests a way to avoid that option, and, although perhaps imper-

fect, it is hard to see any alternative that preserves the Founders' original concern for freedom of conscience.