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Reasonable Accommodation: James Madison and Governmental Noncognizance of Religion

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Abstract: Scholars have long contested James Madison's position on religious liberty. Madison believed in governmental noncognizance of religion. The dominant view, voiced by Vincent Muñoz, interprets that to mean that government should take no notice of religion either to target it or to allow religious objectors exemptions from neutral and generally applicable laws. While there is much to commend Muñoz's view, it fails to accurately convey Madison's position. Noncognizance, for Madison, meant not that government should not notice religion, but that it should assume no authority over it. Consequently, Madison believed government should not interfere with religious duties unless to achieve important ends via carefully tailored policies.

"That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business." So wrote a young and irate James Madison in 1774. "There are at this [time?] in the adjacent County not less than 5 or 6 well meaning men in close Goal [jail] for publishing their religious Sentiments which in the main are very orthodox." He finished with a confession of ill-spirits. "I have neither patience to hear talk or think of anything relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience. So I leave you to pity me and pray for Liberty of Conscience [to revive among us.]"[1] Squabbling and scolding would not be characteristic of Madison over the course of his long career, but the intensity of his concern for the protection of religious freedom would. Religious conscience was a reserved right for

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[1]James Madison to William Bradford, January 24, 1774, in *The Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago: University of Chicago Press and Charlottesville: University of Virginia Press, 1962–), 1:106. Henceforward *PJM*.

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Madison—a sphere of inalienable authority incapable of inclusion in a social contract and forever remaining under the control of each individual person. This belief would spur his fight against religious assessments in the Virginia legislature, press him to some controversial vetoes during his term as president, and, most durably, affect his choice of the freedoms he sought to protect in the Bill of Rights he introduced into Congress in 1789.

General discussion about the boundary between an individual's right to religious free exercise on the one hand and governmental authorities' right to govern on the other frequently resolves itself into a more specific and intensely practical one of how facially neutral and generally applicable laws fit into the nexus of such concerns. The question whether individuals are obligated to obey such laws even if doing so requires violating deeply held religious convictions or whether rulers are obligated to accommodate such convictions has generated intense scholarly debate.

Michael McConnell argues that Founding Era cultural developments and political practice indicate that those who framed and ratified the First Amendment would have understood religious free exercise to be a natural right that the state could not infringe absent grave necessity.[2] He stresses the evangelical nature of the push for religious freedom—it was not the least pious but the most who strongly sought state and federal free exercise guarantees.[3] He also notes that the state constitutional free exercise provisions adopted throughout the United States prior to ratification of the Bill of Rights uniformly rejected Thomas Jefferson's perspective that only beliefs were protected and instead protected practice, exercise, and action, whether restricted to acts of worship or understood more broadly.[4] Central to McConnell's case is an investigation of the conditions under which state constitutional provisions permitted the government to interfere with religious free exercise. Typically, such provisions contained a proviso permitting state interference with actions that infringed the rights of other individuals or disturbed the peace and order of the community. McConnell argues this indicates a founding consensus that where a law did not safeguard private rights or public order, exemptions from it for religious free exercise purposes would have been required.[5] He further argues that the founding generation's practice of accommodating those who had religious scruples against taking oaths, serving in the militia, or contributing to religious assessments confirms that it saw the need to accommodate religious beliefs as a serious one.[6]

McConnell's analysis provoked a response from Philip Hamburger, who argues that Founding Era thought and practice militate *against* religious

[2]Michael McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (May 1990): 1409–1517.

[3]Ibid., 1437–43.

[4]Ibid., 1455–61.

[5]Ibid., 1461–66.

[6]Ibid., 1466–73.

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liberty exemptions to generally applicable laws. All illegal activity, Hamburger notes, was commonly described in the late eighteenth century as an offense against the peace. He concludes that the provisos to state free exercise protections, which excepted from protection acts disturbing the peace of the society and on which McConnell placed so much emphasis, applied to all religiously motivated acts in violation of neutral and generally applicable laws.[7] As for laws exempting conscientious objectors from oaths, militia service, or assessments, these are explicable as instances of legislative grace and therefore do not provide evidence of Founding Era belief in a constitutional right to such an exemption.[8]

Vincent Muñoz takes yet another approach. Stressing the Founders' disagreements among themselves, Muñoz analyzes the thought of three specific Founders (Madison, Washington, Jefferson), suggesting that adherence to one theory or the other depends on the arguments' inherent persuasiveness rather than on the authoritative character of a Founding Era consensus.[9] He claims that Madison believed in governmental noncognizance of religion: religion was not a part of the social contract that legitimated civil government, and consequently the latter institution could not take notice of religion or make distinctions between citizens on a religious basis. Neutral application of generally applicable laws therefore exhausts the government's obligation to respect religious conscience rights.

I engage Muñoz's characterization of Madison in this article, because I take his account to be both the most persuasive and the dominant articulation of Madison's beliefs about religious free exercise in the literature. It is correctly rooted in Madison's social contract theory and comes close to capturing Madison's true position with its recognition that religious believers could not simply demand full exemption from political obligations. The caution of Muñoz's approach, with its sensitivity to differences of opinion within the Founding generation, is also valuable. Muñoz's work has been cited scores of times by authors studying religious liberty,[10] and to my knowledge only one article has directly challenged his reading of Madison. That article is a useful and erudite exploration of Madison's thinking by Jeffrey Sikkenga that accepts Muñoz's interpretation of noncognizance but argues that it is

[7]Philip A. Hamburger, "Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60, no. 4 (April 1992): 918–21.

[8]Ibid., 929–31.

[9]Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (Cambridge: Cambridge University Press, 2009), 3–5.

[10]E.g., Ivan Strenski, "Reflections on Religious Liberty, Free Exercise, and Culture, with Special Attention to James Madison," *Religio et Lex* 3, no. 1 (2020); Adam Lamparello, "Contextualizing Free Exercise of Religion," *Florida Law Review* 69, no. 3 (2018): 702–3; Steven J. Heyman, "Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause," *Journal of Constitutional Law* 23, no. 1 (2021): 115.

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both implied and limited for Madison by the deeper requirement that government have no religious agency.

Sikkenga's alternative is problematic for several reasons, however. First, it is based on Muñoz's mistaken interpretation of noncognizance (see below). Second, Sikkenga's proposal creates a flaw in Madison's argument: forbidding government from interfering with religion does not entail a rule against governmental awareness of it. Finally, while Sikkenga does an excellent job of identifying evidence in Madison's record that militates against Muñoz's reading, he understates the degree of protection that Madison believed religious liberty deserved.[11]

Like Sikkenga, I believe Muñoz's perspective on Madison, despite its strengths, is in need of revision, for it squares poorly with some key aspects of Madison's thought and action. This article does three things. First, I attempt to articulate Muñoz's noncognizance interpretation of Madison as persuasively as possible. Second, I argue that Muñoz does not come to grips with three important aspects of Madison's thought about religious free exercise. His account incorrectly interprets noncognizance to refer to government awareness of (instead of jurisdiction over) religion, and thus fails to fully appreciate the implications of social contract theory for religion's independence of civil government, as articulated by Madison in the "Memorial and Remonstrance." In addition, Muñoz fails to account for Madison's actions in the Virginia Constitutional Convention of 1776, where he sought to raise the bar for government interference with religiously motivated actions. Finally, Muñoz's interpretation of Madison is explicitly contradicted by the latter's contributions to the debate over militia policy in the First Congress. For Madison, noncognizance meant that religion occupied an inalienable sphere of individual authority independent of government, and consequently government must interfere with religious free exercise only in the service of deeply important objectives—and even then it was required as a matter of natural right to provide reasonable accommodation to conscientious objectors.

In conclusion, I briefly trace the history of Supreme Court jurisprudence interpreting the First Amendment's Free Exercise Clause and indicate the implications of the present analysis for the continued evolution of that jurisprudence. Courts and scholars have long turned to Madison for aid in explicating the meaning of the constitutional language he helped to draft—in particular, the First Amendment's charge that "Congress shall make no law. . . prohibiting the free exercise [of religion]." Like many of the Constitution's majestic generalities, this one has been the focus of significant jurisprudential controversy—controversy that mirrors very closely the academic debate over Madison's beliefs. A substantial corpus of Supreme

[11]See Jeffrey Sikkenga, "Government Has No 'Religious Agency': James Madison's Fundamental Principle of Religious Liberty," *American Journal of Political Science* 56, no. 3 (2012): 745–56.

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Court decisions interprets the clause to demand exemptions from generally applicable laws for those whose religious beliefs would be violated by compliance, unless the government can show that the law is narrowly tailored to further a compelling governmental interest. Yet the Court's current standard, articulated in *Employment Division v. Smith*, reverses this body of law, holding that religious free exercise rights include no such protection. Under the *Smith* standard, state and federal governments are under no obligation to respect religious free exercise so long as they do not target it specifically. Generally applicable laws must be obeyed even if they infringe fundamental religious beliefs. The Court has begun to rethink this position, however, and—I will argue on Madisonian grounds—it should.

My reassessment of Madison's views on religious free exercise is thus significant from a number of angles. It improves our understanding of the systematicity of Madison's constitutional thought as derived from his social contract theory and challenges a reigning paradigm that I argue is lacking both in its fit with Madison's overall theory of government and with key pieces of evidence about Madison's politics of religious liberty. Further, as just indicated, its significance extends far beyond the academic realm, bearing directly on one of the highest-level controversies currently being worked out by the judiciary. It also seeks to resolve a long-standing controversy within originalist constitutional interpretation, since McConnell and Hamburger (and to some extent Muñoz) are originalist scholars. Like Muñoz, however, I stress the limited nature of my argument. This is not a slam-dunk case for overturning *Smith*. It is a deeper exploration of the views of one member of the founding generation. To the extent that Madison is relevant to the interpretation of the Free Exercise Clause, this argument does militate in favor of increased protection for religious free exercise rights. But my goal is not to provide a final word on the clause's meaning or to claim any broader founding consensus. It is to clarify our understanding of this one important individual, whose views are of interest both for their own sake and for their broader and continuing relevance.

Muñoz on Noncognizance

Muñoz articulates a widely influential understanding of Madison's beliefs about religious free exercise that has the capacity to justify the *Smith* standard. He argues that, for Madison, the state may not cognize religion, in the sense that it may never recognize it as a relevant distinction between citizens—it is to remain "religion blind."[12] Muñoz is explicit about the fit between his reading and contemporary jurisprudence, asking, "Can the state adopt laws that indirectly criminalize religious exercises? (*Reynolds*, *Smith*) Yes."[13]

[12]Muñoz, *God and the Founders*, 12.
[13]Ibid., 179. Italics in original.

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Muñoz's perspective is grounded in large part in Madison's argument for religious liberty in his "Memorial and Remonstrance," in which Madison argued that religious free exercise is an "unalienable right" in the strict sense of the term.[14] Madison gave two reasons for the inalienability of freedom of religious worship. The first was that true worship depends upon opinion, which it is quite simply not possible for state power to control: "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men."[15] The law cannot force a person to believe a doctrine because, metaphysically, opinion derives only from the individual's perception of the relevant evidence. A person of necessity believes what seems true to him and therefore cannot believe otherwise on command. Individuals are incapable of delegating to society the authority to do something that society is by its nature incapable of doing. Thus, authority over this area remains with the individual.

Madison's second reason for the inalienability of freedom of worship is that this right is in fact a duty. "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him." Each person is morally required to worship God as his conscience dictates. He is not at moral liberty to allow society to choose for him whether he shall do his duty or not, so he is incapable of delegating the right to control this area of life. A person's duty to God is a political duty to a higher sovereign that overrides duties to a lower sovereign. "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign." Just as a citizen cannot join a club that requires him to violate his duties as a citizen, so a human being cannot join a society that requires him to violate his duties as a human, and thus a subject of the Highest Sovereign. Duty to God must be given priority over civil duties. It "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." And therefore society never has, and never can have, any authority to infringe on religious duties. "We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."[16]

Muñoz's account recognizes the need to interpret this argument through the lens of Madison's social contractarianism, which defined his thought about governmental authority in general. As Muñoz notes, the argument

[14]James Madison, "Memorial and Remonstrance against Religious Assessments," ca. June 20, 1785, in *PJM*, 8:299.
[15]Ibid.
[16]Ibid.

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just described "follows Lockean social compact theory."[17] A government receives such authority as it possesses only when individuals voluntarily alienate to it their right to govern themselves. This is vital, because for Madison, as just described, the whole religious domain is *in-alienable*, and so government is never capable of possessing any authority over it. In Muñoz's words, "Because man's religious right is inalienable, it does not become part of the social compact. Literally, it is not alienated; men retain what they possessed in the state of nature."[18] This focus on contractarianism helps Muñoz avoid errors into which other scholars have fallen, such as Donald Drakeman's misconception that it was only the blending of religious and governmental institutions to which Madison objected.[19] As Muñoz correctly recognizes, it is not institutions but the whole religious realm that is at issue. One can quibble with some aspects of Muñoz's account of the reasons for religion's inalienability. For example, he describes religion as being, for Madison, "essentially opinion,"[20] whereas what Madison actually says is that religion can only be directed by "reason and conviction" because opinions are incapable of being changed by "force or violence." Opinion, in other words, is an integral part of and foundation for religion and vital to its correct exercise. But Madison says nothing about opinion constituting religion's essence—a description which would excise from the heart of religion relational qualities like duties to the Creator that Madison was so keen to emphasize. Such quibbles aside, Muñoz traces Madison's argument well, and from this reasoning, he draws his conclusion: "religion, Madison says, 'is wholly exempt from its [civil society's] cognizance,'" which he defines as "'knowledge,' 'perception,' or 'the state of being aware of.'"[21] Madison's contractarianism also explains why he held to such stringent standards on the separation of religion and governance, as Muñoz notes. Should government meddle in areas of life not handed over to its control via the social contract, it was literally engaged in tyranny—governing without the consent that is the only basis for legitimate rule. "Madison's point is that every encroachment of the social compact, even a popular one, usurps power."[22]

Muñoz account is highly persuasive but can be made even stronger. For, as Alan Gibson notes, one of Madison's chief ideals in government was justice understood as impartiality.[23] Governments must neither favor nor

[17]Muñoz, *God and the Founders*, 23. Though deviating from Locke in important ways (see below).

[18]Ibid., 25.

[19]Donald L. Drakeman, "Religion and the Republic: James Madison and the First Amendment," *Journal of Church and State* 25, no. 3 (1983): 443–45.

[20]Muñoz, *God and the Founders*, 24.

[21]Ibid., 26.

[22]Ibid.

[23]Alan Gibson, "Madison's Great Desideratum: Impartial Administration and the Extended Republic," *American Political Thought* 1, no. 2 (Fall 2012): esp. 191. For an excellent treatment of the concept of impartiality in Madison's thought, see Alan

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inordinately burden any part of the community but must do justice by impartially seeing to it that all share equally in both the benefits and burdens of governance. Madison described the ideal rule of law as "equal laws protecting equal rights."[24] He wrote in a draft of a proposed veto message, should Washington choose to kill rather than sign Hamilton's Bank Bill, that "it is in all cases the duty of the government to dispense its benefits to individuals with as impartial a hand as the public interest will permit."[25] And he continued in the party press essays to argue that "that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[26] Similarly, in economic policy, one abuse of tariffs, Madison noted, was specifically "partiality."[27] Tariffs must be laid on a variety of goods so that they would bear equally on all sections of the country and on all classes of citizens.[28] And in the Philadelphia Convention, Madison had argued that the Senate was to serve as a special bastion of impartiality in government. Divorced from the immediate concerns of their constituents by their extended terms, senators would be free to act as "the impartial umpires and Guardians of justice and the general good."[29]

Noting the pervasive emphasis on impartiality in Madison's thought bolsters a theme that is already present in Muñoz's argument. Muñoz hints at the importance of impartial equality to Madison when he writes that it is a "corollary to the doctrine of noncognizance" that individuals of "different religions may not be treated differently," as differential treatment would involve taking notice of their religious affiliation.[30] As he puts it in his

Gibson, "Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth 'Federalist' Paper," *History of Political Thought* 12, no. 2 (Summer 1991): 276–82. Gibson explicitly makes the connection that impartiality is a form of justice in "Inventing the Extended Republic: The Debate over the Role of Madison's Theory in the Creation of the Constitution," in *James Madison: Philosopher, Founder, and Statesman*, ed. John R. Vile, William D. Pederson, and Frank J. Williams (Athens: Ohio University Press, 2008), 79.

[24]Madison to Jacob de la Motta, August 1820, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: Putnam, 1900), 9:30. Henceforward *WJM*.

[25]Madison, Draft Veto of the Bank Bill, February 21, 1791, in *PJM*, 13:395.

[26]Madison, "Property," March 29, 1792, in *WJM*, 6:102. Emphasis in original.

[27]Madison to Joseph C. Cabell, March 22, 1827, in *WJM*, 9:287.

[28]Madison to Reynolds Chapman, January 6, 1831, in *WJM*, 9:432.

[29]Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), 1:427–28. "Equal" treatment did not mean "identical" treatment regardless of morally relevant differences, for Madison. People had equal rights, and those rights must be equally protected, but this very equality could demand different treatment of persons in different circumstances. E.g., justice required progressive taxation apportioned according to citizens' ability to pay (Madison, "Import Duties," April 17, 1789, in *PJM*, 12:86).

[30]Muñoz, *God and the Founders*, 27.

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earlier article, "Madison explains, no man or class of men is to be invested with particular privileges or subject to particular penalties on account of religion. . . . Religious citizens are to be treated the same as all other citizens, with no distinctions made on the basis of religious affiliation. Civil government is to be blind to religion as such."[31] Blind to religion, "the state may neither privilege nor penalize religious institutions, religious citizens, or religiously motivated conduct as such."[32] Muñoz's argument thus provides a theoretical foundation for Paul Weber's earlier insight that Madison's views on religious liberty were defined by his rejection of "all political privilege, coercion or disability based on religious affiliation, belief or practice," and an embrace of "equality before the law for all people irrespective of their religious beliefs."[33] Yet Muñoz's awareness of Madison's contractarianism protects him from Weber's mistaken view that, for Madison, religious liberty was simply one ordinary right among many.[34] Madison's emphasis on equal treatment of the governed seems to fit well with Muñoz's view that an ideal Madisonian government would treat citizens identically without regard for religious belief.

Although Madison's actions seem at times to support Muñoz's understanding, much of Muñoz's evidence for this point is relatively weak. He points to Madison's vetoes of congressional incorporation of churches that included meddling in church government and donating land to a particular sect,[35] but these are explicable on a wide range of First Amendment theories and say little about Muñoz's interpretation specifically. The same can be said of Madison's objection to stripping ministers of the right to serve in government. Madison's objection to identifying ministers in the national census seems at first to be stronger evidence that even merely identifying a religious classification is problematic, but the text is fundamentally ambiguous. Not only does Madison object only that the federal government "may be thought" to overstep its bounds by others—leaving indeterminate whether he is articulating his own view of the matter—it is also unclear whether his objection is to noting ministers' occupation per se or that doing so will foment suspicion that the government intends to interfere inappropriately in religious matters.[36]

On the other hand, Madison's argument in the "Memorial" that the Virginia tax for the support of Christian ministers was problematic, in part, because it

[31]Vincent Phillip Muñoz, "James Madison's Principle of Religious Liberty," *American Political Science Review* 97, no. 1 (February 2003): 25.

[32]Ibid., 17.

[33]Paul J. Weber, "James Madison and Religious Equality: The Perfect Separation," *Review of Politics* 44, no. 2 (1982): 168.

[34]Ibid., 170. Hamburger, "Constitutional Right," 947, also notes the potential argument against exemptions from the standpoint of civil inequality.

[35]Muñoz, "James Madison's Principle," 27–28.

[36]Ibid., 27.

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gave special privileges to Quakers and Mennonites does seem at first to support Muñoz's view. As noted, law was to restrict rights equally, not taking morally irrelevant characteristics into account. In the "Memorial," Madison treated religious denomination as just such an irrelevant difference upon which the law should not predicate distinctions. "As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable?"[37] The proposed assessment exempted Quakers and Mennonites, which Madison identified as a violation of the requirement of societal equality. Madison's denunciation of this could easily be read as an endorsement of Muñoz's articulation of the noncognizance approach. Indeed, sometimes Madison seemed more or less to state Muñoz's thesis directly, as when he spoke of religion being "essentially distinct from Civil Gov[ernment] and exempt from its cognizance."[38]

Given the dominant account in the literature today, then, it appears that *Smith* may be justified from a Madisonian perspective—a Madisonian understanding of the religion clauses might justify the sort of impartial application of generally applicable laws that *Smith* demands. This conclusion is too hasty, however. It overlooks an unjustified assumption about Madison's meaning as enunciated thus far and Madison's own words in contradiction of Muñoz's interpretation.

Reasonable Accommodation: Rethinking Noncognizance

Muñoz's argument depends to a substantial extent on an unjustified restriction of the semantic range of the word "cognizance." As noted above, Muñoz assumes that Madison uses the word as indicating awareness—the state is forbidden to notice religion and/or to make religious distinctions among its citizens. But as Muñoz recognizes, there is another sense in which "cognizance" refers not to awareness but to jurisdiction—the authority to govern an area of life.[39] Nor was the jurisdictional use of "cognizance" an unusual one. Samuel Johnson's authoritative dictionary of the English language published in 1755 gives as the first meaning of "cognizance" "Judicial notice; trial; judicial authority," and illustrates it with sentences such as the following: "Happiness or misery, in converse with others, depends upon things which human laws can take no *cognizance* of."[40]

[37]Madison, "Memorial and Remonstrance," 300. See the discussion in Muñoz, "James Madison's Principle," 21–24, 27–29.

[38]Madison to Edward Everett, March 19, 1823, in *PJM*, Retirement Series, 3:16.

[39]Muñoz, *God and the Founders*, 26.

[40]Samuel Johnson, *A Dictionary of the English Language* (1755), s.v. "cognizance," https://johnsonsdictionaryonline.com/views/search.php?term=cognizance, accessed March 14, 2022. Emphasis in original.

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Obviously the point here is not that the laws may not notice the elements of human life which constitute happiness, but that they have no legal authority over them. At a minimum, this common usage means as a linguistic matter that it is possible that Madison's point is that the state may classify individuals on the basis of religion so long as it does not assume jurisdiction over religious matters. As will become clear, this is far from the distinction without a difference it may at first seem.

Madison's usage throughout his career aligns with this jurisdictional reading of "cognizance." As early as 1781, he introduced into the Confederation Congress a resolution defining cognizance in jurisdictional terms. States, not the Confederation Congress, had authority over land claims within their borders, he argued, and consequently, "the jurisdiction of Congress in territorial questions being confined to an adjustment of the conflicting claims of different States . . . Congress are interdicted by the Confederation from the cognizance of such claims."[41] Congress may not assume jurisdiction over (cognize) land claims within states' borders, because its jurisdiction (cognizance) is restricted to claims between states. He spoke during ratification about federal courts having "cognizance of disputes between citizens of different states" and referred to "their cognizance in admiralty and maritime cases" as necessary to uniform decisions in cases involving other nations, which "can only be done by giving the federal judiciary exclusive jurisdiction" over such cases.[42] Here again, "cognizance" is a clear synonym for "jurisdiction." The terms are used in parallel and the issue is not whether federal courts can notice particular sorts of cases, but whether they may assume the power of governing them. The speech goes on: "The most material part [of the Constitution's organization of the judicial power] is the discrimination of superior and inferior jurisdiction, and the arrangement of its powers; as, *where* it shall have original, and where appellate cognizance."[43] Again, the usage is obvious.

Perhaps the example that most blatantly differentiates between the awareness and the jurisdictional senses of the term "cognizance" is a letter Madison wrote as secretary of state about the case of a suspected criminal who had the cover of diplomatic immunity. Joseph Cabrera had been imprisoned for forgery but it was quickly discovered that he was present in the United States as a member of a Spanish diplomatic mission. As such, he claimed "to be exempted from the cognizance of our laws."[44] Though the courts would undoubtedly refuse to hear an American prosecution for that

[41]Madison, "Motion of Virginia Delegates on Western Lands," October 16, 1781, in *PJM*, 3:291.

[42]Madison, "Judicial Powers of the National Government," June 20, 1788, in *PJM*, 11:159–60.

[43]Ibid., 161. Emphasis in original.

[44]Madison to Alexander J. Dallas, October 30, 1804, in *PJM*, Secretary of State Series, 8:236.

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reason, as Madison recognized, this was no cause for Cabrera's release. Instead, "it is desireable for the sake of the public security that he should nevertheless be detained until arrangements can be concerted for returning him to Spain for trial."[45] In short, the United States might not have cognizance of Cabrera's case, understood as jurisdiction over it, but that was far from meaning that the nation must remain officially unaware of the facts—it could even take action on the basis of them to the extent of imprisoning Cabrera until his removal. While it is possible to find Madison using the term "cognizance" to indicate mere awareness, such instances are extremely rare.[46] With very few exceptions, Madison appears to have used it exclusively in its jurisdictional sense. This too should leave us skeptical of Muñoz's presumption that Madison adopted a mere awareness meaning of "cognizance" when he denied the state the right to take cognizance of religion.

Not only is the jurisdictional reading of "cognizance" linguistically possible, and not only is it the sense in which Madison consistently used the term, but it also makes a good deal more sense of Madison's argument about religious freedom. As described above, and as Muñoz recognizes, Madison's point in the part of the "Memorial" where he denies civil society cognizance of religion has nothing to do with intellectual awareness and everything to do with authority. It is a social contractarian argument about which areas of life civil government possesses the authority to govern. Madison's argument is that the authority to govern a person's religious agency is inalienable—it is an area of life over which authority always remains with the individual. This is why it constitutes a "trespass on the rights of the minority" when government seeks to interfere with such an area of life, over which it has not been granted authority.[47] As Madison put it in his "Detached Memoranda" at the end of his political career, the right to govern such areas is "no part of the trust delegated to political rulers." Inalienable rights like religious free exercise are the

[45]Ibid.

[46]The question of how rare is complicated by the inherent ambiguity of some Madisonian uses and the irreducible element of individual judgment in determining which usage is in play. A word search of the Madison archives at founders.archives.gov for "cogni*" turns up approximately seventy documents containing "cognizance" and its variants. Of these, only one seems to me to clearly refer to awareness of a subject. Madison to Thomas W. Gilmer, September 6, 1830, *Founders Online*, National Archives, https://founders.archives.gov/?q=%20Author%3A%22Madison%2C%20James%22%20cogni%2A&s=1111311113&r=68, accessed June 11, 2021. In perhaps half a dozen instances it seems to me that one could plausibly argue for the awareness understanding, though all seem reasonably explicable on the jurisdictional understanding. In the majority of cases, Madison is speaking of a government or branch or body thereof having jurisdiction of a case or subject.

[47]Madison, "Memorial and Remonstrance,"299.

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"natural rights of Man excepted from the grant on which all political authority is founded."[48]

Finally, and most blatantly, Madison characterized his position on religious liberty in jurisdictional terms in 1822 while complimenting Edward Livingston on the code of laws he had devised for the state of Louisiana. "I observe with particular pleasure," he wrote, "the view you have taken of the immunity of Religion from Civil Jurisdiction, in every case where it does not trespass on private rights or the public peace."[49] Muñoz's assumption that Madison's use of noncognizance requires governmental lack of awareness of religion is not only unjustified, but highly implausible. Madison's typical usage and the nature of his argument both indicate that he instead meant noncognizance to imply a governmental lack of jurisdiction over the religious sphere, and the parallel language he used elsewhere in articulating the same point had explicitly to do with jurisdiction and authority, not mere intellectual awareness.

Madison's contractarian focus on authority raises deep problems for the theory that government's obligation to respect religious free exercise is fulfilled when it neutrally enforces generally applicable laws. It is not just that the jurisdiction reading of noncognizance fails to support *Smith*, as Muñoz's awareness reading does. Something stronger than a duty merely to abstain from targeting religion flows naturally from Madison's claims. Because reserved rights have not been granted to government, for Madison, the more natural implication is not that government may only infringe upon them if it does so unintentionally, but that government may not infringe upon them at all. Thus, Madison wrote of "the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed."[50] Jefferson's distinction between actions (which are subject to the jurisdiction of society) and opinions (which are not),[51] is irrelevant to the logic of this argument, and Madison does not raise it. Instead, his language indicates that a society may not require individuals to violate their duties toward the highest authority—whether duties of action or belief. To try to limit this to the latter kind of duty would add to Madison's argument in a most arbitrary and incongruous fashion.

Compelling Interests in Revolutionary Virginia

A second problem for Muñoz's interpretation is that Madison's proposed amendment to the Virginia Declaration of Rights during the state constitutional

[48]Madison, "Detached Memoranda," January 31, 1820, in *PJM*, Retirement Series, 1:611.

[49]Madison to Edward Livingston, July 10, 1822, in *PJM*, Retirement Series, 2:543.

[50]Madison, "Sovereignty," 1835, in *WJM*, 9:571.

[51]See discussion of the Supreme Court's use of this distinction below. For discussion of the distinction in Jefferson's thought, see Muñoz, *God and the Founders*, 77.

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convention of 1776 included an attempt to restrict the government's ability to impose on religious free exercise to instances in which what would now be termed compelling governmental interests were at stake. To say that Madison recognized religious free exercise as an independent sphere of authority is not to say, of course, that he would shield any behavior no matter how obnoxious from governmental control. Thus, when Madison introduced his proposed language to safeguard freedom of religion in the Virginia Declaration, he made clear that there was a limit to the degree of freedom the state should recognize: free exercise should be allowed "unless the preservation of equal liberty and the existence of the State are manifestly endangered."[52]

Madison's record during the Revolutionary War provides some indication of what such manifest endangerment might look like. In 1775, Madison reported that a loyalist minister who "pleaded Conscience" had refused to participate in a fast day declared by Congress. Called upon for an explanation, the parson took a rather fiery stand, stating that it was his duty to ignore "unconstitutional authority" like that of Virginia's new revolutionary rulers. With obvious approval, Madison reported that the minister's salary had been cut off and his church boarded up.[53] Conscience rights could be abridged to maintain the safety of the state, and a threat apparently need not be massive, immediate, and existential to justify such an abridgment. Low-level treasonous interference with a society's right to replace its governors could in the right circumstances be suppressed even if it attempted to clothe itself in religious garb.

And yet Madison did not countenance the abridgment of religious free exercise for just any augmentation of the public good. The language quoted above from his amendment to the Virginia Bill of Rights was intended to replace an exemption clause that protected religious freedom "unless under colour of religion, any man disturb the peace, the happiness, or safety of society."[54] Madison's amendment required a higher standard of justification to legitimate interference with actions based in religious belief. No longer need these merely infringe the peace or happiness of society to be prohibited. Religious free exercise could only be overridden when it could legitimately be said to "manifestly" threaten the existence of the state or the equal rights that the state existed to secure.

Madison's shift in language militates against Hamburger's claim that provisos limiting free exercise guarantees were mere boilerplate indicating that the guarantee did not extend to illegal action. If it were true that the caveats "permitted government to deny religious freedom . . . upon the occurrence of [any] illegal action,"[55] then there would be no point to Madison's change to the original language of the proviso. Madison's first change to George Mason's original language, protecting a right of religious freedom

[52]Madison, "Amendments to the Declaration of Rights," ca May 29, 1776, in *PJM*, 1:174–75.

[53]Madison to William Bradford, July 28, 1775, in *PJM*, 1:161.

[54]*PJM*, 1:179n8.

[55]Hamburger, "Constitutional Right," 919.

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rather than merely extending state toleration, has received far more attention in the literature, but his second change, raising the bar for state interference with religious practice, is just as significant. As McConnell notes, the change in wording only make sense if it were to have some effect, which is incompatible with the Hamburger thesis. And if it had any effect, it was to restrict the range of situations in which the state could infringe on religious free exercise. "This is obviously a much narrower state interest exception than Mason's," says McConnell. Whereas Mason's original language was "as compendious as all of public policy," Madison advocated "a standard that only the most critical acts of government can satisfy."[56] Madison's interposition in the Virginia Constitutional Convention of 1776 indicates that he believed religious liberty should be protected unless what would now be called compelling governmental interests overrode them.

One would wish, if possible, to define more precisely what constitutes a governmental interest compelling enough that Madison would be willing to override religious beliefs, and given that Madison's theory follows Locke's in many ways, one might wonder whether additional clarity could be supplied by reference to Locke's doctrine of toleration. Unfortunately, Madison does not appear to provide a more precise standard, nor is Locke helpful. Madison follows Locke, of course, in adopting his contractarian framework, but Locke famously denied any exemptions to generally applicable laws.[57] By appealing to a prepolitical duty to the Creator to explain that individuals cannot alienate any rights over their religious lives, Madison deviates from Locke substantially. While Locke did not question that an individual should obey the deity rather than the state should she believe the two to conflict, he left the burden of civil disobedience and acceptance of its attendant punishment on that individual. Madison puts the burden on the state to justify interference by depriving it of contractarian authority over the entire religious realm. Madison was not following Locke here, so appeal to Locke does not clarify his thought, and to my knowledge no instance in Madison's own career provides further clarity. Madison's own standard—manifest endangerment of "equal liberty" and "the existence of the State"—may be the clearest formula that one can generate, at which point, inevitably, individual judgment must determine when a state interest is important enough to constitute necessity and override a right.[58]

[56]McConnell, "Origins," 1462–63. This is the same argument made by Justice O'Connor in *Boerne v. Flores* (Vincent Philip Muñoz, "The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress," *Harvard Journal of Law and Public Policy* 31 [2008]: 1083–1120). So far as I know it has never been expressly confronted in the literature by advocates of the no-exemptions view.

[57]John Locke, *Two Treatises of Government and A Letter concerning Toleration*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003), 236, 243

[58]See Jonathan Ashbach, "Against Every General Principle: Prudence in the Constitutional Statesmanship of James Madison," *American Political Thought* 10, no. 3 (2021): 363–89.

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Narrow Tailoring and Conscientious Objection

A final problem for Muñoz is that Madison directly contradicted the no-exemptions thesis when dealing with the question of conscientious objection from military service. As described above, the logic of Madison's contractarianism, with its insistence that religious rights are never delegated to government, suggests that government has no authority to override the directives of religious conscience unless under the impulse of necessity. Madison's treatment of compulsory military service twice confirms that reading. First, his proposed draft of what would become the Second Amendment not only protected the right "to keep and bear arms," but also provided that "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."[59] This would have written a religious distinction between citizens into America's fundamental law. The wording was eventually cut, but Madison had not been convinced that this was appropriate, for in a speech in Congress in 1790, well after the amendments had been approved and sent off to the states for ratification, he again confirmed his endorsement of religious exemptions from military service. Careful attention to Madison's argument—or rather arguments—is necessary, for some parts of his reasoning are clearly pragmatic, and part of the benefit that he wished to extend to religious pacifists would explicitly have been an exercise of legislative grace, not a recognition of religious rights. But the inmost core of Madison's argument clearly demands accommodation of conscientious objectors as a matter of respect for the inalienable natural right of religious conscience.

As noted, Madison's argument was partially pragmatic. Presumably speaking with the Pennsylvania Quakers in mind, he argued that their character had earned a degree of toleration for their pacifism. Were the rights of the objectors less clear, he argued, "it would be a sufficient motive to indulge these men in the exercise of their religious sentiments—that they have evinced by an uniform conduct of moderation, their merit, and deserving of the high privilege."[60] The Quakers knew religious freedom's "value, and generously extended it to all men, even when possessing the plentitude of legislative power, they are the only people in America who have not abused the rights of conscience, except the Roman Catholics, who anticipated them by an earlier settlement, in establishing a toleration of all religions in their governments in the United States." Further, he argued that drafting pacifists would do no good. "Compulsion being out of the question, we must, therefore, from necessity, exempt them; if we are actuated by no more generous motive." Even this practical argument hints at a deeper moral justification, however, represented by more generous motives. Thus, Madison continued: "Let us then make a virtue of this necessity, and grant the exception. By penalties we may oppress them, but by no means hitherto discovered, can you make

[59]Madison, "Amendments to the Constitution," June 8, 1789, in *PJM*, 12:201.

[60]Madison, "Militia," December 22, 1790, in *PJM*, 13:328–29.

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them undertake the defense of this nation."[61] Madison's main point is that it is fruitless to try to coerce pacifists into conformity, but his reference to coerced enlistments as oppression and the virtue that he wishes Congress to embrace of necessity may be a reference to his moral argument against it, too.

Part of Madison's argument also constituted an appeal to legislative grace. His willingness to exempt conscientious objectors from military service raised the question of justice as equal treatment. As stressed above, Madison's fundamental political morality demanded stringent impartiality: it forbade granting special burdens and privileges to members of the social contract, such as a special exemption from participation in the common defense. From Madison's perspective, though, the question of equality could be easily dealt with by imposing some form of compensation for refusing to bear a common burden. Nonpacifistic sects could justly demand "an equivalent," that is, payment for a replacement, from those refusing to render military service in person. As a matter of legislative grace, however, pacifists might be forgiven even this equivalent. If other sects were willing to voluntarily waive their right, rather than demanding strict justice, Madison avowed himself happy to grant the exemption without recompense: "could I reach to them this exemption, from the performance of what they conceive to be criminal, with justice to the other sects in the community, or if the other sects were willing to withdraw their plea for an equivalent, my own opinion would be, to grant them privilege on terms perfectly gratuitous."[62]

Madison's treatment of equivalents illustrates the divergence between the awareness and jurisdiction readings of noncognizance and clarifies how the latter squares with Madison's additional belief in equality. As noted above, allowing the state to make religious distinctions among citizens while forbidding it to assume jurisdiction over the religious sphere is not pointless. The state could exempt citizens whose beliefs would be infringed from cooperation with an objectionable law so long as it demanded an equivalent from them. In doing so, it would cognize their religion in the intellectual but not in the jurisdictional sense. The state would also be meeting Madison's rigorous equality requirements by demanding some form of equivalent from those who could not in conscience assume complicity in an objectionable policy.

Madison was clear, however, that those exemptions were a matter of natural right. The core of his argument was neither pragmatic nor an appeal to legislative grace. His opening words made clear that he saw the exemptions in question as a matter of securing rights, and the rights of religious conscience in particular. Madison began his argument for exempting conscientious objectors from military duty with a direct appeal to the need to remain consistent with the United States' unique history of respect for natural rights. It "is the glory of this country, the boast of the revolution,

[61]Ibid., 329.
[62]Ibid.

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and the pride of the present constitution, that here the rights of mankind are known and established on a basis more certain, and I trust, more durable, than any heretofore recorded in history, or existing in any other part of this globe." It was emphatically the rights of mankind, not pragmatism, that governed Madison's argument. And "above all, it is the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[63] Again unequivocally, Madison identified the specific rights at stake as conscience rights. It was only after making clear that such rights were at stake that he went on to argue that "were these things [the rights of mankind] less clear," pragmatic reasons would turn the scales in the same direction.[64] These things were not less clear, obviously, so Madison was comfortable staking his case for an exemption on rights as well as pragmatic considerations.

Madison's demand that exemptions even from neutral and generally applicable laws be granted to religious objectors as a matter of natural right, at least upon the provision of an equivalent, is a nuance that Muñoz's view does not capture. Indeed, Muñoz acknowledges that Madison's treatment of conscientious objection contradicts his thesis. "Madison did not propose the rule of noncognizance for what would become the First Amendment." But he claims that "his proposed conscientious objector provision facially violated his principle of noncognizance."[65] Walter Berns also sees Madison's treatment of conscientious objectors as a "flat violation of his no-cognizance principle."[66] To the contrary, however, Madison's accommodation of religious pacifists contradicts Muñoz's awareness interpretation of the meaning of noncognizance, but it is demanded by Madison's own jurisdictional understanding of the term. In securing exemptions upon the provision of an equivalent, Madison required what might now be referred to as narrow tailoring of laws overriding religious free exercise. That exercise was protected as a matter of natural right, so a law could only override it if narrowly drawn to infringe that exercise as little as possible. The government was required to honor the separate sphere of authority occupied by religion by tailoring its actions (e.g., via equivalent services) to avoid usurping ungranted free exercise rights. Legislative grace could go even further. Not as a matter of respect for rights, but as a matter of generosity, the rest of a society could voluntarily waive its just claims if it so chose and allow conscientious objectors to go their way subject to no penalty at all.

[63]Ibid., 328.

[64]Ibid., 328–29.

[65]Muñoz, *God and the Founders*, 38.

[66]Walter Berns, "James Madison on Religion and Politics," in *James Madison and the Future of Limited Government*, ed. John Samples (Washington, DC: Cato Institute, 2002), 135–45, esp. 140.

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Conclusion

Beyond its relevance to an ongoing scholarly debate, Madison's view of religious liberty is of great and highly practical relevance to the interpretation of the First Amendment's Free Exercise Clause. The precise credence one lends him will vary by interpretive theory, but Madison's claims to attention are manifold. They include at least his authorship of the original version of the clause, his intimate involvement—from authorship to advocacy to exposition—in the adoption of the Bill of Rights generally, and his status as perhaps the founding generation's most systematic thinker about the social contract theory that shapes US constitutionalism. Thus, as Drakeman puts it, Madison's views are not "dispositive," but for various reasons "should be accorded substantial weight."[67]

The meaning the Supreme Court has derived from the Free Exercise Clause has varied greatly over time. In *Reynolds v. United States*, its first major case interpreting the provision, the Court took it to provide rather minimal protection. It faced the question "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[68] The Court's answer was no. Somewhat oddly citing Thomas Jefferson, who it acknowledged was not involved in crafting either the Constitution or the First Amendment, as an authoritative voice on the meaning of free exercise, the Court held that the clause prohibited only the penalization of belief, but left government free to dictate action: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[69] If free exercise shielded action from governance, the Court suggested, it might protect abhorrent practices like human sacrifice or sati.[70]

Later jurisprudence, however, accorded broader protection to rights more generally, and religious free exercise was no exception. In *Board of Education v. Barnette*, the Court asserted that religious liberty, like other First Amendment rights, could be imposed upon, even indirectly, only to promote the most important state interests. Denying the government's right to demand recitation of the pledge of allegiance by dissenting Jehovah's

[67]Drakeman, "Religion and the Republic," 434. A reader asks whether Madison's relevance is negated by the fact that the religious framework for his thought about religious liberty is controversial. While an objection to Madison's argument for religious liberty based on alleged problems with his religious foundations is philosophically interesting, it is irrelevant to the questions raised here. Madison's views and their significance to an originalist analysis of the Constitution's meaning remain unchanged regardless of whether they are satisfactorily grounded philosophically.

[68]Reynolds v. United States, 98 U.S. 145, 162 (1878).

[69]Ibid., 164.

[70]Ibid., 166.

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Witness school children, the Court stated that "freedoms of speech and of press, of assembly and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[71] Even as it held against a particular free exercise claim, *Braunfeld v. Brown* also retreated from *Reynolds*, holding that a law could not constitutionally have either the purpose or effect of burdening religious belief unless it could not accomplish its purpose in a more narrowly tailored fashion. "If the purpose or effect of a law is to impede the observance of one or all religions, that law is constitutionally invalid . . . [if] the state may accomplish its purpose by means which do not impose such a burden."[72] And *Wisconsin v. Yoder* continued to find a constitutional exemption from generally applicable laws where religious free exercise was at stake. For Wisconsin's law burdening the Amish religion by requiring universal high school to stand, the Court held, "it must appear . . . that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[73]

More recently, however, the Court has retreated to a standard much closer to that of *Reynolds*. *Employment Division v. Smith* held that "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)" is a legitimate use of governmental power that does not violate religious liberty.[74] Henceforth, state and federal governments would have no constitutional obligation to take individuals' religious scruples into account. So long as a generally applicable law that violates religious mandates serves a mere rational purpose, the courts will uphold its application without acknowledging a constitutional requirement for exemptions, accommodation, or tailoring. The Court's decision in *Smith* was alleged to depend upon precedent. This is tendentious at best. The Court chose its words with extreme care in stating the doctrine allegedly so derived: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[75] This can be portrayed as an accurate representation of the Court's precedent only by dismissing the standards enunciated in all the post-*Reynolds* cases discussed above as mere dicta and distinguishing *Yoder* as involving a law that required rather than prohibited conduct—a distinction of dubious relevance.

Other precedents the Court cited in *Smith* similarly contradicted its holding. *Prince v. Massachusetts* and *Gillette v. United States* may have failed to create the particular exemptions for which the Court was asked, but they

[71]Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

[72]Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[73]Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). See also Sherbert v. Verner, 374 U.S. 398, 406 (1962).

[74]Employment Division v. Smith, 494 U.S. 872, 878 (1990).

[75]Ibid., 878–79.

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did so by *balancing* state regulatory interests against religious free exercise rights.[76] And touching on *United States v. Lee*, the *Smith* Court actually cited a concurrence rather than the majority opinion because *Smith* deviated from the latter.[77] It seems, then, that the *Smith* standard, stamping as constitutional any burden on religious free exercise that results from the neutral application of a generally applicable law, cannot be justified on the basis of precedent. *Smith* was, in fact, a radical departure from the body of the Court's free exercise jurisprudence, demoting the Free Exercise Clause from its position as a standard First Amendment right and making it instead an anomaly defined by the lack of protection accorded to it as compared with its fellows.

Smith is no more supported by Madison's understanding of free exercise rights than it is by precedent. Muñoz is correct that Madison must be interpreted through the framework of his social contract theory. Rather than disputing that, this article seeks to read Madison as a social contract theorist even more consistently than Muñoz has done. Madison's thought about religious free exercise is a direct outgrowth of his thought about the distribution of authority to govern more generally. When he endorsed the view that government should remain noncognizant of religion, Madison meant precisely that it could not infringe upon the independent sphere of authority represented by reserved rights of religious conscience that were not and could not be delegated in the social contract. He did not mean that government could never be aware of its citizens' religious persuasions. It follows that the *Smith* standard is untenable for Madison, for inadvertence is no excuse for the usurpation of reserved rights—the fact that civil government does not intend to govern areas of citizens' lives over which it possesses no authority is no excuse for it to so govern. Instead, in various phases of his career, Madison made clear that government actions infringing on the free exercise of religion should only be undertaken if vital governmental ends were at stake, and even then the law must be narrowly drawn to respect religious liberty as much as reasonably possible. The fire of Madison's passion for religious freedom, tempered by the cool reasonableness of his belief in governmental impartiality, led him to advocate reasonable accommodation for those whose religious scruples prohibited them from complying with a measure.

It appears that the Supreme Court has already begun to move away from *Smith* and back toward a more Madisonian standard. In the 2012 case *Hosanna-Tabor v. EEOC*, for the first time since *Smith*, the Court granted an exemption to neutral and generally applicable laws under the Free Exercise Clause. The Court unanimously ratified the existence of a "ministerial exception" to employment laws (specifically, the ADA) for religious organizations

[76]Prince v. Massachusetts, 321 U.S. 158, 164 (1943); Gillette v. United States, 401 U.S. 437, 462 (1971).

[77]United States v. Lee, 455 U.S. 252, 257–58 (1982).

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hiring and firing individuals charged with furthering the organization's religious purpose.[78] The decision was confirmed and expanded in 2020. In *Our Lady of Guadalupe School v. Morrissey-Berru*, a nearly unanimous Court extended the "ministerial exception" to all employees whose tenure is vital "to preserve a Church's independent authority" to teach the tenets of its faith and lead its congregation in that faith's practices.[79]

The *Smith* decision set forth a problematic view of the Free Exercise Clause's requirements—problematic in its reading of precedent and also from the perspective of original intent. From a Madisonian perspective, a decision to rethink *Smith* in favor of a more generous standard would be a victory for the reserved duty to obey God, which may be traduced by civil government but can never be surrendered to it. Drakeman is right that Madison's views are not dispositive, but they constitute weighty evidence in determining what meaning the Framers attached to the free exercise of religion. Thus, his reasonable accommodation standard is worthy of our—and the Court's—attention. In *Fulton v. Philadelphia* the Court passed over an opportunity to overturn *Smith*, but a majority of the justices joined opinions indicating that the *Smith* standard is flawed beyond repair.[80] Should the justices decide to make that conclusion more than dicta in the coming years, they can be confident that the First Amendment's chief architect would approve.

[78]Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188 (2012).

[79]Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. __, 11 (2020).

[80]Fulton v. Philadelphia (2021), 593 U.S. __, 1 (Barrett, J., concurring), 77 (Alito, J., concurring).

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