

James Madison's Principle of Religious Liberty

VINCENT PHILLIP MUÑOZ *North Carolina State University*

Although James Madison has been invoked by justices and judicial scholars for over 100 years, Madison's principle of religious liberty has never been fully grasped or adopted by the Supreme Court. Judges and scholars have failed to understand Madison's radical but simple teaching that religion is not part of the social compact and, therefore, that the state may not take religion within its cognizance. In this article I set forth Madison's principle of "noncognizance" in light of the social compact theory he articulates in the "Memorial and Remonstrance." I then attempt to show how it consistently explains Madison's political actions and writings on religious liberty. I conclude by explaining how a "Madisonian" approach, properly understood, would adjudicate the First Amendment's religion clauses.

No man is more responsible for the U.S. Constitution than James Madison. Leading delegate at the Philadelphia Convention, advocate and expositor as Publius, author and sponsor of the Bill of Rights, Madison rightfully earned his title "Father of the Constitution." Madison also played the leading role in Virginia's battle for religious freedom, which was won, in no small part, because of his "Memorial and Remonstrance." It should come as no surprise, then, that, along with Thomas Jefferson, he has been considered an authoritative guide to the meaning of the First Amendment's religion clauses. Yet Madison's understanding of the proper relationship between church and state continues to be debated vigorously. For Establishment Clause jurisprudence, "strict-separationist" judges and scholars claim that Madison sought to erect a wall separating state from church, thereby prohibiting all governmental support for religion. "Nonpreferentialists" challenge this interpretation, contending that Madison meant only to prevent the state from favoring one religious sect over others. The state may support religion, they claim, so long as it supports all religions equally. In recent Free Exercise cases, Madison has been invoked as defending the right to religious exemptions from facially neutral but burdensome laws. Justice Scalia, the Court's most articulate defender of "originalism," has authored the Court's rejection of this position, but his Court opinions have failed to respond to his opponents' Madisonian arguments. Thus, although Madison's authority for First Amendment religion jurisprudence has been nearly universally accepted, what he says on these matters remains sharply contested. Did Madison think any and all state aid to religion violates constitutional principles? If so, did he also intend to protect the free exercise of religion by granting religious citizens exemptions from oppressive laws?

This article attempts to answer these questions by articulating Madison's principle of religious liberty. It begins by reviewing the leading interpretations and constitutional applications of Madison's thought on re-

ligious liberty, all of which, I suggest, have failed to grasp Madison's position. I then offer my alternative interpretation, focusing on the social compact framework of Madison's "Memorial and Remonstrance." I argue that Madison champions a "religion-blind" constitution, a constitution that prohibits the state from taking cognizance of religion. The state, in Madison's view, may not classify citizens on the basis of religious beliefs or religious affiliation, which means that the state may neither privilege nor penalize religious institutions, religious citizens, or religiously motivated conduct as such. I defend my interpretation by showing how the principle of a "religion-blind" constitution explains Madison's political actions, statements, and writings made as a state legislator, congressman, president, and elder statesman. I conclude by explaining the implications that a correct understanding of Madison's principle of religious liberty has for First Amendment religion jurisprudence.

THE USE AND ABUSE OF MADISON

About 100 federal and state court decisions have highlighted Madison's role in crafting the religion clauses of the First Amendment (Drakeman 2000, 219). In judicial decisions and scholarship on the Establishment Clause, Madison has been identified both as a "strict separationist" who stands against any and all public support of religion and as a "nonpreferentialist" who proscribes only aid that favors some religions over others. For the Free Exercise Clause, Madison has been invoked as a defender of the right to religious exemptions from laws that burden religious exercise. All three of these interpretations, I argue, are incorrect.

Madison and the Establishment Clause

The "strict-separationist" interpretation of Madison began in the Supreme Court's landmark incorporation decision *Everson v. Board of Education* (1947). *Everson* was decided five to four, but all nine justices agreed that the meaning of the Establishment Clause was to be found in Jefferson's and Madison's writings establishing religious freedom in Virginia, and that these writings indicated that the founders intended "to erect a wall of separation between church and state"

Vincent Phillip Muñoz is Assistant Professor of Political Science, Department of Political Science & Public Administration, North Carolina State University, Campus Box 8102, Raleigh, NC 27695-8102 (vpmunoz@ncsu.edu).

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(p. 16).¹ Justice Wiley Rutledge, writing in dissent, paid particular attention to Madison. His historical research led him to conclude that “Madison opposed every form and degree of official relation between religion and civil authority” (p. 39) and, therefore, that the Establishment Clause “forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises” (p. 41).

This “strict-separationist” interpretation of Madison received authoritative confirmation four years later by Irving Brant, the distinguished biographer of the fourth president. According to Brant (1951, 3), freedom of religion was for Madison “the fundamental item upon which all other forms of civil liberty depended,” and the fundamental requirement for religious freedom “was the total separation between government and religion.” Brant canvassed all of Madison’s major writings on religious liberty, but he employed most forcefully the then newly rediscovered “Essays on Monopolies.”² In that essay, Madison calls the appointment of taxpayer-funded legislative chaplains by the First Congress a “palpable violation” of constitutional principles. Religious proclamations by the president are “shoots from the same root.” Madison goes so far as to identify a prohibition on taxpayer-funded chaplains for navy crewmen insulated at sea as “the consequence of a right principle” (Brant 1951, 21–24; Fleet 1946, 558–62). Brant (1951, 11) took the date and the dispassionate, retrospective tone of the “Essay on Monopolies” as conclusive proof that Madison “regarded any compulsory contribution to religion, through taxes, as a violation of the individual taxpayer’s religious liberty.”

As the Supreme Court continued to hear Establishment Clause cases in the 1950s and 1960s, the prolific and influential Leo Pfeffer (1958) augmented Brant’s interpretation with a “strict-separationist” reading of Madison’s “Memorial and Remonstrance.”³ Pfeffer focused on the “Memorial’s” political context, pointing out that Madison wrote it with a specific legislative intention, to defeat Patrick Henry’s pending “Bill Establishing a Provision for Teachers of the Christian Religion.” Henry’s measure, according to Pfeffer,

represents the closest approximation in American history to absolutely non-preferential government aid to religion. It is difficult to conceive of any measure which adheres

more closely to the requirements of non-discrimination and equality among sects. (p. 66)

Pfeffer thus concluded that Madison could not be understood as opposing only preferential aid to religion. His opposition to Henry’s nonpreferential measure demonstrated that he opposed every form of aid to religion.

Attention to Madison waned in the 1970s as the Supreme Court eschewed the philosophy of “original intent.” In 1984, however, then Associate Justice William Rehnquist’s “originalist” dissent in the public school-moment-of-silence case *Wallace v. Jaffree* (1985) marked a resurgence of interest in Madison. Building on the scholarship of Robert Cord (1982), Justice Rehnquist denied that the founders in general or Madison in particular intended to erect a wall separating church and state or to require state neutrality between religion and irreligion. The founders, Justice Rehnquist claimed, intended to prohibit only sectarian government support to religion. The Establishment Clause, accordingly, should be read only to prohibit preferential aid to some religions over others.

To make his case, Justice Rehnquist turned to the drafting of the Establishment Clause in the First Federal Congress. There he found, contrary to the Court’s *Everson* ruling, that Madison was not trying to introduce Jefferson’s “Virginia Statute for Religious Liberty.” Madison, rather, was “an advocate for sensible legislative compromise” (*Wallace* 1985, 97). Justice Rehnquist zeroed in on Madison’s original draft amendment, “nor shall any national religion be established,” and on his subsequent explanation on the House floor that it meant “that congress should not establish a religion, and enforce the legal observation of it by law” (p. 98). These statements indicated to Justice Rehnquist that Madison

saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He [Madison] did not see it as requiring neutrality on the part of government between religion and irreligion. (p. 98)⁴

Everson and the “strict-separationist” jurisprudence built on it, Justice Rehnquist concluded, were constructed on a “mistaken understanding of constitutional history” (p. 92). “Nonpreferentialism,” not a “wall of separation,” best reflects Madison’s and the founding fathers’ original intentions.⁵

¹ The Justices disagreed only on where the wall stood in the case at hand. The majority ruled that the New Jersey program in question, which reimbursed the transportation costs incurred by parents sending their children to Catholic schools, did not breach the wall.

² Madison’s “Essay on Monopolies” had been published in *Harper’s Magazine* in 1914 but was lost and forgotten until rediscovered and republished by Elizabeth Fleet (1946). The exact date of its composition is unknown but it is thought that Madison drafted it between 1817 and 1832.

³ According to Gregg Ivers (1995, 222) it is “impossible to overestimate the impact that Leo Pfeffer, as an individual and as a public interest lawyer, had on the constitutional development of church-state law during the latter half of this [twentieth] century. . . . [F]or no lawyer has exercised such complete intellectual dominance over a chosen area of law for so extensive a period. . . .” Cushing Strout (1988, 225) reports that of some 50 adversarial cases between 1951 and 1971 involving the Establishment Clause, Pfeffer was active in 20 of them at the trial stage and in 14 at the appellate stage.

⁴ In his dissent in the released-time for religious instruction case *McCullum v. Board of Education* (1948, 244), Justice Stanley Reed also cited Madison’s explanatory statement on the House floor as evidence that the Establishment Clause aimed only to proscribe an official state church.

⁵ Both Cord and Rehnquist also introduce as evidence numerous instances in which the founding fathers endorsed and supported religion, including the reenactment of the Northwest Ordinance by the First Congress, which proclaimed, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, school and the means of education shall forever be encouraged”; calls for national days of prayer and thanksgiving by Presidents Washington, Adams, and Madison; and Jefferson’s authorization of direct payments by the federal government to a Catholic

Justice Rehnquist's reinterpretation brought forth a wave of "strict-separationist" scholarship, the influence of which now can be seen most pronouncedly in Justice David Souter's opinions.⁶ In two nonmajority opinions in the 1990s, Justice Souter established himself as the leading "originalist," "strict separationist" on the Court. In *Lee v. Weisman* (1992), the prayer-at-public school-graduation case, Justice Souter poured over the same historical materials that Justice Rehnquist did in his *Wallace* dissent. Like Justice Rehnquist, Justice Souter focused on Madison's original draft amendment. But Justice Souter pointed out that Madison's initial draft was not adopted. A comparison of rejected drafts of the Establishment Clause with the actual adopted text, he argued, reveals that the farmers considered but ultimately rejected prohibiting only nonpreferential aid to religion (*Lee* 1992, 615).⁷ When the Court ruled three years later that a University of Virginia Christian student newspaper could receive student activity funds, in *Rosenberger v. University of Virginia* (1995), Justice Souter further developed his position with a "strict-separationist" reading of Madison's "Memorial and Remonstrance." His dissenting opinion in that case emphasized article 3 of the "Memorial," where Madison states, "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (*Rosenberger* 1995, 868). This statement, in addition to the fact that the "Memorial" was written against a general assessment, demonstrated to Justice Souter that Madison objected to any government subsidization of religion.

Justice Souter wrote his *Rosenberger* dissent in response to Justice Clarence Thomas's "nonpreferentialist" concurring opinion in the same case. Justice Thomas picked up Chief Justice Rehnquist's argument that the entire edifice of Establishment Clause jurisprudence has been built on a mistaken understanding of history. In addition to focusing on the records of the First Federal Congress, Justice Thomas also returned to the "Memorial and Remonstrance," specifically article 4, which argues that Henry's proposed assessment "violates that equality which ought to be the basis of every law." According to Justice Thomas, Madison opposed Henry's assessment bill "not because it allowed religious groups to participate in generally available benefits, but because the bill singled out religious entities for special benefits" (*Rosenberger* 1995, 854–55). A proper interpretation of the "Memorial," and thus

the Establishment Clause, prohibits government only from favoring some religious faiths over others.

Although Justice Thomas employed the "Memorial" to defend "nonpreferentialism," his opinion betrays a leery suspicion of Madison. Justice Thomas concedes that others have interpreted the "Memorial" differently than he does (*Rosenberger* 1995, 854–55; citing Laycock 1986), and perhaps because the "strict-separationist" interpretation of Madison looks so strong, he suggests that "the views of one man do not establish the original understanding of the First Amendment" (p. 856). Is Madison, then, a "strict separationist?" Did he think that any and all aid to religion violates constitutional principles? If so, why did he not say so clearly in either his initial proposed constitutional amendment or his later clarifying remarks made during the Constitutional Convention? And if Madison did intend strictly to separate religion and politics through the Establishment Clause, did he also, as some claim, intend vigorously to protect religion from politics with the Free Exercise Clause?

Madison and the Free Exercise Clause

Until the 1990s, Madison was not invoked for Free Exercise jurisprudence nearly to the extent that he was for Establishment Clause cases. This was partially because when the Supreme Court first addressed the meaning of free exercise in the Mormon polygamy case *Reynolds v. United States* (1879), it turned to Jefferson.⁸ When the Court later incorporated the Free Exercise Clause in *Cantwell v. Connecticut* (1940), and then expanded its reach to grant religious exemptions from generally applicable regulations and laws in the 1960s and 1970s,⁹ it did so again without invoking Madison. The Court overlooked Madison one more time in its controversial 1990 *Smith* decision,¹⁰ which denied a constitutional right to religious exemptions from generally applicable laws. A conservative reaction to this decision, however, has led to a vigorous application of Madison's thought to the free exercise controversies.

The leading scholar to apply Madison to the Free Exercise Clause is Michael McConnell. In a widely cited *Harvard Law Review* article, McConnell (1990) meticulously defends the case for religious exemptions from laws that burden religious exercise. At the center of his arguments stands Madison's "Memorial and Remonstrance." In article 1 of the "Memorial," Madison derives the right of religious liberty from "the duty of

priest ministering to Native Americans. The deficiency in Cord's "nonpreferentialist" interpretation of Madison is that he cannot square it with Madison's seemingly "strict-separationist" "Detached Memoranda." As such, Cord (1982, 35–36, 1987, 79–85) is forced to say that Madison was inconsistent or that he changed his mind as "an old man" in his "declining years," both highly dubious propositions.

⁶ The scholarship cited by Justice Souter includes Leonard Levy 1986 and Douglas Laycock 1986.

⁷ Souter also trumpeted Madison's "Detached Memoranda," employing the same evidence and reaching the same conclusion that Irving Brant did nearly 50 years prior (*Lee* 1992, 622–26).

⁸ *The Court* ruled that the Free Exercise Clause protects beliefs, not actions, and therefore that Reynolds was not exempt from federal laws banning polygamy.

⁹ See, in particular, *Sherbert v. Verner* (1963), ruling that Sherbert, a Seventh-Day Adventist, was entitled to unemployment compensation despite being fired with cause (refusing to work assigned hours on Saturday), and *Wisconsin v. Yoder* (1972), ruling Amish parents exempt from state laws requiring parents to send their children to school past the eighth grade.

¹⁰ *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) ruled that Smith's and other Native American Church members' sacramental use of peyote was not constitutionally protected.

every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.” “This duty,” Madison continues, “is precedent both in order of time and degree of obligation, to the claims of Civil Society.” McConnell (1990, 1453) reasons,

If the scope of religious liberty is defined by religious duty (man must render to God “such . . . homage as he believes acceptable to him”), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable. This is the central point on which Madison differs from Locke, Jefferson, and other Enlightenment advocates of religious freedom.

If religious duties conflict with civic regulations, civic regulations must give way. Although McConnell admits that the “Memorial” does not call for judicial exemptions explicitly, he claims that it “suggests an approach toward religious liberty consonant with them” (p. 1453; see also McConnell 2000).

To support this reading of the “Memorial,” McConnell also introduces into evidence Madison’s proposed revisions of the “free exercise provision” of the Virginia Declaration of Rights. He reports that, as drafted by George Mason, Article XVI proposed

that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness or safety of society. (McConnell 1990, 1462)

Madison, McConnell claims, objected on two grounds. First, Madison criticized the use of the word “toleration,” because religious liberty is a right derived from duties more sovereign than civic obligations. He moved, accordingly, to strike Mason’s language of toleration and substitute instead, “All men are equally entitled to the full and free exercise of religion according to the dictates of conscience.” Second, Mason and Madison clearly anticipated exemptions from generally applicable laws, which is why they included balancing test standards at the ends of their drafts. Mason would have extended exemptions only to religious actions that did not disturb the “peace, happiness, or safety of society,” a standard, McConnell suggests, “that would encompass virtually all legitimate forms of legislation” (p. 1463). Madison, according to McConnell, aimed to create a test much more favorable to religious citizens. He proposed to narrow the compelling state interest in denying religious exemptions only to cases manifestly endangering “the preservation of equal liberty and the existences of the state.” This standard, McConnell concludes, “only the most critical acts of government can satisfy” (pp. 1462–63).¹¹

McConnell’s arguments have found a voice on the Supreme Court in Justice Sandra Day O’Connor. In her

dissenting opinion in *City of Boerne v. P.F. Flores* (1997, 549), Justice O’Connor calls for a reversal of *Smith* and a restoration of the *Sherbert* balancing test because “the historical evidence casts doubt on the Court’s current [nonexemption granting] interpretation of the Free Exercise Clause.” For her historical evidence, she relies heavily on McConnell’s Madison.

McConnell’s and O’Connor’s arguments have been criticized sharply both on and off the bench by those who deny that the First Amendment secures a right to religious exemptions from generally applicable laws. These critics have failed, however, to address adequately the McConnell/O’Connor interpretation of Madison. Philip Hamburger (1992), the most thorough and persuasive critic of religious exemptions on historical grounds, has countered McConnell’s historical research point by point. When it comes to McConnell’s reading of Madison’s “Memorial and Remonstrance,” however, Hamburger is noticeably silent (see especially pp. 926–29, which discuss McConnell’s use of Madison). The same omission also can be attributed to Justice Antonin Scalia, the Court’s leading critic of exemptions. In both his *Smith* majority opinion, in which he originally overturned the Court’s exemption-granting balancing test, and then his defense of *Smith* in response to O’Connor in *City of Boerne v. P.F. Flores*, Justice Scalia fails to address McConnell’s and O’Connor’s strongest argument: that James Madison, architect of the First Amendment, grounds the right to religious liberty on the premise that religious obligations are precedent in time and obligation to civil obligations. Those who defend a constitutional right to religious exemptions from burdensome laws seem to have Madison on their side.

As is true of the “strict-separationist” and “nonpreferentialist” interpretations of Madison, so too is the “proexemption” interpretation incorrect. Madison is misinterpreted for both Establishment Clause and Free Exercise jurisprudence because scholars and judges have failed to see the social compact framework of the “Memorial and Remonstrance.” Prior interpreters thus fail to see Madison’s clearly stated doctrine about the meaning of religious liberty in a constitutional republic limited by and dedicated to the protection of natural rights—namely, that the state must remain noncognizant of religion.

MADISON’S PRINCIPLE OF “NONCOGNIZANCE”

The Historical and Political Context of the “Memorial”

Madison’s most mature and most philosophical defense of religious liberty is his “Memorial and

¹¹ McConnell’s history on this point suffers from his reliance on Sanford Cobb’s (1902, 491–92) incomplete account of Madison’s proposed revisions to Mason’s text. What McConnell presents as Mason’s original proposal is actually a slightly amended committee version of Mason’s initial draft. Madison then offered two different sets of revisions on two different dates. What McConnell reports as Madison’s proposed revisions is actually the second set of revisions

he offered—Madison’s initial revisions were rejected. McConnell appears to be unaware of Madison’s first proposed revisions and thus fails to consider them. Unfortunately for McConnell, it is these revisions that reveal most clearly Madison’s intentions (see discussion below, under The “Memorial’s” Argument). For a complete account of the drafting of Article XVI of the Virginia Declaration of Rights, see Dreisbach 2000, 9–18.

Remonstrance.” He drafted the “Memorial and Remonstrance” in the spring of 1785, in the midst of a fierce debate over Patrick Henry’s proposed bill “Establishing a Provision for Teachers of the Christian Religion.”

Before discussing the “Memorial’s” argument, it is important to note what exactly Madison was arguing against. According to Leo Pfeffer (1958, 66), as noted above, Henry’s proposed assessment bill

represents the closest approximation in American history to absolutely non-preferential government aid to religion. It is difficult to conceive of any measure which adheres more closely to the requirements of non-discrimination and equality among sects.

Pfeffer is simply wrong. Though more accommodating than the prerevolutionary establishment or the proposed establishment of 1779, it is incorrect to claim that Henry’s bill was nondiscriminatory or established equality among all religious sects. The title alone, “A Bill Establishing a Provision for Teachers of the Christian Religion,” belies Pfeffer’s interpretation. Only ministers of recognized Christian sects were eligible for state funding. In December 1784, an amendment was passed to drop the word “Christian,” in order to open up the assessment to any religious society, but Benjamin Harrison, the former governor, managed to have the change reversed (Buckley 1977, 108). Instead, in the final text appeared a statement of the bill’s liberality, which more clearly reveals its limits:

[I]t is judged that such a provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies or communities of Christians.¹²

Henry’s bill may have erased distinctions among Protestants, but it was not nonsectarian.

What it was a property tax. Under the bill’s provisions, each property owner was to specify the Christian denomination to which he wished his tax directed. The sheriffs of the several counties would then distribute the taxes accordingly, minus 5% for administration. If a taxpayer failed or refused to specify a Christian society, his tax would go to the public treasury “to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning . . . and to no other use or purpose whatsoever.” Similarly, the taxes received by the various denominations were to be “appropriated to a provision for a Minister or Teacher of the Gospel, or the providing of places of divine worship, and to none other use whatsoever.” An exception to this rule was made for Quakers and Mennonites, who were allowed to place their distribution in their general funds because they lacked the requisite clergy.

The restrictions on how funds were to be distributed, with the noted exceptions, were due to the bill’s stated educational purpose. The bill began,

WHEREAS the general diffusion of Christian knowledge hath a tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers

This educational facade was not present in the bill’s original version, which was designed to support Christian ministers, churches, and worship. A drafting committee added it, probably to increase the bill’s appeal (Buckley 1977, 105; cf. Braun 1997, 210). Even with these changes, however, all knew that the purpose of the bill was to keep the Christian ministry, particularly Episcopalian clergy, active and solvent (Buckley 1977, 109). And even with the educational preamble, ministers who received appropriations were not required to use them for educational purposes. In its effect, the bill granted a direct subsidy to Christian clergymen.

Madison revealed his perception of the measure and what he thought was at stake in a letter to Thomas Jefferson on 9 January 1785. “Should the bill ever pass into law in its present form,” he wrote, “it may and will be easily eluded.” Madison probably had in mind the assessment’s provision that allowed citizens not to name their denomination and thereby steer their taxes to a state general education fund. “It is chiefly obnoxious,” he continued, “on account of its dishonorable principle and dangerous tendency” (Madison 1884, 1:131). For Madison, defeating Henry’s assessment was primarily a matter of principle. This understanding is reflected in the nature of the “Memorial’s” argument. It addresses specifics of Henry’s bill and its immediate political consequences, but its true force is its theoretical argumentation. While not ignoring immediate politics—indeed, while intending directly to influence them—the “Memorial” offers a philosophical understanding of the proper relationship between church and state.

The “Memorial’s” Argument

The “Memorial and Remonstrance” consists of 15 articles. Each article is written as if to stand alone, but there is an obvious sequence. Articles 1 through 4 argue from principle articles 5 through 14 offer pragmatic reasons for defeating Henry’s proposed assessment. Article 15 returns to the principle articulated in article 1. Madison sets forth his doctrine of religious liberty in the first article. Although almost all commentators focus on it, its exact meaning has been missed.

The structure of article 1’s argument follows Locke’s social compact theory. In the *Second Treatise* ([1689a] 1960), Locke teaches that men are originally born into the state of nature, a condition in which every man possesses the rights to life, liberty, and property and the right to execute the law of nature. But because of the tendency of each man to execute the law of nature to his own advantage, no effective common law exists among men. The state of nature tends to break down into a state of war. To escape this situation of war and poverty that ill secures man’s rights to life, liberty, and property, men enter into a social compact with one another. They consent equally to give up their full

¹² The text of Henry’s assessment bill can be found in Buckley 1977, 188–89.

natural right to execute the law of nature in exchange for governance under the rule of law as expressed by the majority. Rights such as property, which in the state of nature are left to each individual to secure for himself, are protected by common civil law executed by a government whose ultimate authority derives from the unanimous consent of the governed.

Following Locke, the "Memorial" begins with a statement of natural rights: Men have a natural right to exercise religion according to conviction and conscience. Madison derives this right from the "fundamental and undeniable truth" that had been set forth previously in Article XVI of the Virginia Declaration of Rights:

Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence. (article 1)

The "Memorial" presupposes this truth as its fundamental starting point. It does not attempt to demonstrate how or why religion can be directly only by reason and conviction; it takes this as given.¹³

Because the exercise of religion must follow one's own conscience and conviction, it is a particular kind of natural right, an inalienable natural right. Madison gives two reasons why. The first is

because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men. . . . (article 1)

Since religion is a matter of conviction and conscience, the essence of religion is opinions—namely, opinions about the duties man owes to the Creator and how those duties ought to be discharged. And opinions, Madison says, depend only on the evidence contemplated by the mind. He follows here the argument of Locke's ([1689b] 1983) *A Letter Concerning Toleration*. Every man, Locke claims, comes to his opinions and beliefs individually by virtue of the evidence he sees and finds persuasive. Since opinions and beliefs can be shaped by evidence alone, no man can impose his opinions on any other man: all that can be proffered is persuasive evidence and argument. Similarly, no man can simply accept the opinions of another, even if he wishes to, if he is not truly persuaded (Locke [1689b] 1983, 27). Opinions, then, are very different from other types of property such as land and money. Whereas a man can freely give away his money or have it stolen from him, no man can cede or lose his opinions unless he loses his mind. The right to one's opinions, accordingly, is different from one's right to other forms of property.

¹³ Gary Rosen (1999, 23) identifies this starting point as "the obvious Protestant subtext" of the "Memorial and Remonstrance." Rosen then draws out the following theological implications: "Religious truth becomes a particular sort of experience rather than a doctrine. In this view, sincerity takes the place of right-thinking and -acting." Rosen is correct that the starting point of Madison's argument is compatible with certain strains of Protestantism, but this does not make Madison's argument necessarily Protestant or even theological. Madison leaves it unclear whether the "Memorial's" argument is theological, strictly rational, or both.

Whereas men transform their natural right to one's possessions into a civil right to property upon entering into the social compact, men do not similarly transform the right to their opinions. Opinions by their nature cannot be alienated, and therefore religion, which is essentially opinion, is an inalienable natural right.¹⁴

The second reason Madison gives for the inalienable character of man's natural religious right is that

what is here a right towards men, is a duty towards the Creator. 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. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. (article 1)

Here, again, Madison relies on a distinction made by Locke in *A Letter Concerning Toleration*. Civil society, Locke maintains, arises in order to overcome war and poverty. At the most basic level, the social compact aims at the protection of life and to secure the conditions that allow for material comfort (Locke [1689b] 1983, 26). Religion, in contrast, is concerned with the good of the soul, which means, ultimately, either eternal salvation or damnation (Locke [1689b] 1983, 28). Madison assumes Locke's separation of religion from civic obligations and, from this, concludes that religious duties take precedence over the claims of civil society. Religious duties are precedent in time because a man's relationship with God exists prior to his citizenship. More importantly, religious duties are precedent in degree of authority because man's eternal soul is of higher status than his temporal body. Just as no rational man would ever sacrifice his eternal soul for the temporary good of his body, a man could never rationally forsake his duties to God in order to fulfill his duties as a citizen. Duties of citizenship—that is, the obligations one agrees to upon entering the social compact—cannot trespass upon duties to God. It would be irrational and contrary to the gravity and nature of man's religious obligations for men to agree to a social compact that includes religious obligations or precepts. Religion, thus, is an inalienable natural right.

Having established the inalienable nature of man's natural religious right, Madison's argument reaches its pinnacle:

We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society,

¹⁴ Madison also makes the distinction between alienable (e.g., money) and inalienable (e.g., opinions) types of property in his essay on property, which appeared in the *National Gazette* in 1792:

In its larger and juster meaning, it [property] embraces everything to which a man may attach a value and have a right, and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or money, is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . . . In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . Conscience is the most sacred of all property; other property depending in part on the positive law, the exercise of that being a natural and unalienable right. (1981, 186–87; Madison's emphasis)

and that Religion is wholly exempt from its cognizance. (article 1)

The inalienable character of man's natural right to religion has a precise meaning and implication.¹⁵ 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. The status of man's religious right, then, is different from property rights such as land and money within the social compact. Whereas the right to land or money is limited equally within civil society (and thereby better secured), religion, Madison says, "is wholly exempt from its [civil society's] cognizance."

Used in a legal sense, the word "cognizance," then as now, means "the action of taking judicial or authoritative notice," or "jurisdiction." More generally, it means "knowledge," "perception," or "the state of being aware of" (*Oxford English Dictionary*, 2nd ed., s.v. "cognizance"; see also the entries under "cognition" and "cognizance" in Johnson 1755 and Ash 1775). A state noncognizant of religion lacks jurisdiction over religion. It may not take authoritative notice of or perceive religion or the religious affiliation of its citizens. A government noncognizant of religion, in other words, must be blind to religion. It cannot use religion or religious preference as a basis for classifying citizens. This is the doctrinal teaching of the "Memorial and Remonstrance." The state, which is a product of the social compact between men originally born in the state of nature, must remain noncognizant of religion because religion is not a part of the social compact. Religion cannot be part of the social compact because of the inalienable character of man's right to direct his religion according to conviction and conscience.¹⁶

Insofar as Henry's bill is cognizant of religion, then, it usurps power. It violates the fundamental principles of the social compact. This is why Madison uses the language of tyranny and slavery in article 2 of the

¹⁵ For a discussion of the founders' understanding of the difference and relationship between natural rights and civil rights, see Hamburger 1993.

¹⁶ Although the "Memorial and Remonstrance" adopts Locke's basic social contract framework, Madison's derivation of the principle of "noncognizance" represents a significant break from Locke. In *A Letter Concerning Toleration*, Locke does not speak of religion as an "inalienable" right, nor does he claim that the state must remain noncognizant of religion. He explicitly says that civil magistrates are not obliged to tolerate "opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society" (Locke [1689b] 1983, 49). In this context, Locke famously teaches that civil magistrates need not tolerate atheists or "that church [whose members] . . . *ipso facto* deliver themselves up to the protection and service of another prince" (p. 50), i.e., Catholics. Locke clearly allows the state to be cognizant of a citizen's religious belief or lack thereof. Madison breaks from Locke on this point; his principle of "noncognizance" is uniquely his own. In this context, one should also note that other leading American founders adopted an approach more Lockean than Madisonian. George Washington, for example, did not share Madison's conclusion that the state must remain noncognizant of religion. For a discussion of Washington's differences from Madison on matters of church and state, see Muñoz 2003.

"Memorial." The preservation of free government, he says, requires, first, the separation of powers, but also, and more importantly, that no branch of government "overleap the great Barrier which defends the rights of people." This great barrier is the social compact through which the people grant legitimate authority to those who govern. Rulers guilty of an encroachment on the social compact "exceed the commission from which they derive their authority, and are Tyrants." It may seem hyperbolic and demagogic to characterize the Virginia House of Delegates as tyrannical if they pass a bill favored by a majority of the voting citizens, but Madison's point is that every encroachment of the social compact, even a popular one, usurps power. It is to rule without legitimate consent, which is tyranny. "The People who submit to it," Madison continues, "are governed by laws made neither by themselves, nor by an authority derived from them. . . ." (article 2). No free people can approve legislation that classifies citizens and grants them benefits on account of their religious affiliation, because religion lies outside the jurisdiction of any social compact that respects and secures natural rights.

In the "Memorial's" fourth article, Madison derives the implications of "noncognizance" with regard to equality. "If all men are by nature equally free and independent," Madison reasons,

all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all they are to be considered as retaining an *equal* title to the free exercise of Religion according to the dictates of conscience. . . . As the [Henry's] Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. (article 4; Madison's emphasis)

Madison does not identify whom the law burdens but presumably he means non-Christians. Like everyone else, they had to pay the tax, but their religions alone were not eligible for funding under the bill. The "extraordinary" privilege Madison rails against is that Quakers and Mennonites (or "Menonists," as both the bill and Madison called them) would receive their appropriations with no restrictions attached. On its face, this exception does not seem like a distinct privilege but rather a realistic accommodation for denominations that lacked ministers of the gospel—in order to use the funds appropriated to them for Christian education, Quakers and Mennonites would have to fall under a different set of rules. A corollary to the doctrine of "noncognizance," however, is equality. Members of different religions may not be treated differently on account of their religion, because any legal exemption or exception based on religious affiliation by definition takes religion into the state's cognizance. To grant exemptions or exceptions on the basis of religious affiliation requires the recognition of religion. All exemptions and exceptions, therefore, no matter how miniscule or convenient, violate the principle of

religious liberty.¹⁷ The principle of equality follows from the principle of "nongovernmental."¹⁸

Articles 5 through 14 of the "Memorial" offer pragmatic arguments. The assessment should be rejected, Madison contends, because it implies either that the civil magistrate is a competent judge of religious truth or that he may employ religion as an engine of civil policy (article 5), is not needed for the support of the Christian religion (article 6), will corrupt the purity and efficacy of religion (article 7), is unnecessary for the support of civil government (article 8), is a signal of persecution and thus will discourage immigration (article 9) and encourage emigration (article 10), will

¹⁷ I disagree with Steven D. Smith's criticism of the "Memorial" regarding its treatment of Quakers and Mennonites. Smith (2000, 66–68) writes, "The fudginess in Madison's treatment of Quakers and Mennonites points to a larger problem that afflicted Madison's 'Memorial and Remonstrance' at all levels"; namely, that Madison begged the question of the meaning of religious liberty by appealing to "equality." Smith fails to recognize that Madison's use of "equality" in article 4 derives from his social compact argument in article 1. Smith thus does not see the solid grounds from which Madison derives his principle.

¹⁸ Although I agree with most of Weber's (1982) interpretation, I disagree with his contention that equality is the fundamental teaching of the "Memorial and Remonstrance." The "Memorial's" argument from equality, Weber correctly points out, clearly reveals Madison's understanding that a proper church–state relationship requires the state to treat all religions and religious citizens equally to one another and equally to nonreligious citizens. Equality does not exhaust the principle of "nongovernmental," however. The demand for equal treatment could be met while still using religion as a basis for classification (the 1790 census, discussed below, is an example of such a case). To say the same thing differently, equality relates only to the application of a law to different classes of citizens; it says nothing about the authority of the state to make those classifications in the first place. In the assessment case, equality demands that all citizens be treated equally regardless of religion. But equality alone does not consider whether the state has the authority to pass an assessment for religion. The "Memorial's" fundamental teaching, with which it both begins and ends, is jurisdictional—namely, that states lack jurisdiction to enact a law that takes cognizance of religion. This is why Madison concludes in article 15 by calling Henry's bill a dangerous "usurpation" by the legislature, violating "the trust committed to them." While the assessment does violate the equality "which ought to be the basis of every law," its most egregious offense is its "dangerous abuse of power," which will allow the legislature to act tyrannically, thus enslaving the people.

The shortcoming in Weber's interpretation is that he overemphasizes article 4 of the "Memorial" at the expense of recognizing Madison's social compact argument in article 1. This leads him to misinterpret article 15 of the "Memorial," which begins "Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." Weber takes this statement to mean that individuals' religious rights are protected just like other natural rights. For Madison, Weber contends, "religion is an inalienable right on a par with other natural rights such as life and property" (p. 185). Madison's point in article 15 is actually that religious rights, like other rights, are secure only if the legislature respects the terms of the social compact. Both inalienable natural rights (religion) and natural rights limited and protected as equal civil rights (property) are secured by the maintenance of the social compact. Madison's point is not that they have the same status under that compact, but that they are both protected by respecting the limits of the compact. Nonetheless, I agree with Weber's conclusion that "Madison's principle [of religious liberty] was that religious individuals had the same rights and privileges—and no other—as any other individuals and associations" (p. 185). It is precisely because religion is an inalienable natural right, different from other natural rights, that this conclusion is true.

encourage rivalry between sects to control the government (article 11), is adverse to the diffusion of the light of Christianity (article 12), and is obnoxious to a great proportion of the citizens, who will not follow the law, thus enervating the authority of the law in general (article 13), and because a matter of such importance should not be imposed without the clearest evidence of a support of the majority, which is not secured (article 14).¹⁹ Article 15, as mentioned, concludes the "Memorial" by returning to its social compact foundations. The principal and principled argument of the "Memorial," to repeat, is that the exercise of religion is an inalienable natural right and therefore that religion is not part of the social compact. The state, accordingly, must remain nongovernmental of religion, which means that it can neither privilege nor punish citizens on account of religion or religious affiliation.

The "Memorial and Remonstrance" offers Madison's most comprehensive philosophical statement on the fundamental political principles excluding religion as such from civil jurisdiction. It stands as the pinnacle of his theoretical reflections on the subject of church and state. We must not overlook, though, that Madison was a man of political practice as well as political philosophy. He labored for the cause of religious liberty throughout his entire political career, from his first year in the Virginia House of Delegates to his final station as the nation's foremost retired statesman. These efforts offer ample material to test any hypothesized interpretation of Madison's principle of religious liberty. A careful consideration of these events demonstrates that the principle of "nongovernmental" consistently explains Madison's actions. Madison maintained an unwavering commitment to the maxim that the state may neither privilege nor penalize citizens on account of their religion.

MADISON'S POLITICAL EFFORTS TO ESTABLISH RELIGIOUS LIBERTY

Madison's Revision of the Virginia Declaration of Rights

Madison's first political contribution to the cause of religious liberty took the form of a proposed amendment to the religion article of the Virginia Declaration of Rights. In the late spring of 1776, Virginia's Revolutionary Convention moved to adopt a declaration of rights. George Mason's slightly revised initial draft stated,

That religion or the duty which we owe to our CREATOR, and the manner of discharging it, can be governed only by reason and conviction, not by force or violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpublished and unrestrained by the magistrate, unless, under colour of religion, any many disturb the peace the happiness, or safety of society. And that it is the

¹⁹ For a helpful restatement of the bare bones on the "Memorial's" argument, see Braun 1997, 245.

mutual duty of all to practice Christian forbearance, love and charity, towards each other. (Madison 1962–91, 1:173)

Dissatisfied with Mason's text, Madison initially proposed the following revision:

That Religion or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not violence or compulsion, all men are equally entitled to the full and free exercise of it accord[ing] to the dictates of Conscience; and therefore that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities unless under &c. (Madison 1962–91, 1:174)

Most commentators highlight Madison's replacement of Mason's language of toleration with the language of rights (see, e.g., Buckley 1977, 18; Dreisbach 2000, 14; and Hunt 1902, 1:166)²⁰ More important, however, is Madison's clarification of what the right of free exercise means. Men are equally entitled to the full and free exercise of religion according to conscience; therefore, Madison explains, no man or class of men is to be invested with particular privileges or subject to particular penalties on account of religion. The full and free exercise of religion and freedom of conscience means no privileges or penalties on account of religion (cf. Soifer 2000).²¹ Madison says here exactly the same thing he would declare a decade later in the "Memorial and Remonstrance." 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.

The Virginia convention quickly rejected Madison's proposed amendment because his language seemed incompatible with the existing Anglican establishment (Buckley 1977, 19). If no class of men was eligible for peculiar emoluments on account of their religion, then Anglican clergy could not be employed by the state. Instead, Virginia adopted an amendment that declared that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ."²² The exact parameters of "free exercise of religion" were left unstated, and debate over the Anglican establishment was left for another day. Madison, however,

²⁰ For a discussion of the difference between religious "toleration" and religious "liberty," see Palm 1997.

²¹ Michael McConnell (1990) fails to address the meaning of Madison's proposed language "therefore that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities." Because of his use of Sanford Cobb's incomplete historical account of Madison's proposed revisions (see footnote 11), McConnell appears to be unaware that Madison offered such language.

²² The following was adopted as Article XVI of the Virginia Declaration of Rights:

That religion, or the duty to which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

had already arrived at his understanding of the principle of religious liberty. A decade later, when political circumstances had changed, he would bring Virginia's law of religious freedom more in accordance with his understanding of the right to religious freedom.

Madison and the Drafting of the Bill of Rights

By 1789 Madison had left the Virginia House of Delegates to represent Virginia in the U.S. House of Representatives. One of his first legislative aims was to secure the adoption of a bill of rights. The drafting of the First Amendment, however, offers little guidance in understanding Madison's principle of religious liberty. Along with nearly every member of the Constitutional Convention, Madison did not think a bill of rights essential to the protection of liberty.²³ Republican liberty required a carefully designed system of representation, the separation of powers, and the cultivation of republican character in an extended, diverse, commercial republic—elements that were provided by the unamended Constitution. Bills of rights were no more than parchment barriers and, therefore, not to be relied on.²⁴

Madison's view of the necessity of adopting a bill of rights would change, but not his appreciation of its utility for protecting liberty. Robert Goldwin (1997, especially chaps. 4, 5) has demonstrated persuasively that Madison's leadership in securing amendments to the Constitution was primarily defensive. Madison's intention was to keep the promise made to those states that had ratified the Constitution expecting amendments. At the same time, he sought to silence the Constitution's critics and to prevent a second meddlesome and damaging constitutional convention.²⁵ Last in his priorities was to procure amendments that might do some good in further protecting the essential liberties of the people.²⁶ For Madison, the adoption of the Bill of Rights was more pragmatic than principled. This is why later in his life he identified the battle for disestablishment in Virginia and the Virginia Statute, and not the debates in First Congress and the First Amendment, as "where religious liberty is placed on its true foundation and is defined in its full latitude" (Fleet 1946, 554). It is naïve and mistaken to turn to the drafting of the First Amendment to find Madison's deepest reflections on religious liberty.

Compounding this difficulty is also the fact that the final text of the First Amendment was the product of

²³ The Constitutional Convention spent almost no time considering whether to include a bill of rights in the Constitution. When adopting a bill of rights was proposed on September 12, no state delegation voted in favor of the motion (Farrand 1966, 2:588). See also James Wilson's recollection during the Pennsylvania Ratifying Convention of the Constitutional Convention's near-unanimous opinion of the lack of necessity of a bill of rights (Farrand 1966, 3:143–44).

²⁴ For Publius' (Hamilton) classic Federalist statement against a bill of rights. See *Federalist* 84 (Madison, Hamilton, and Jay [1788] 1961).

²⁵ For Madison's (1884, 1:386) view of the possible danger of a second constitutional convention, see his letter to Edmund Randolph, 10 April 1788.

²⁶ See Madison's (1884, 1:446–48) letter to George Eve, 2 January 1789.

debate and compromise within and among legislative committees. The religion clauses, in particular, went through several changes offered by numerous congressmen. Although Madison certainly had his influence, he was not the sole author and, hence, not simply responsible for the adopted text.²⁷

What we know for certain is that Madison drafted the initial text proposed and that he made a few comments on subsequent proposals on the House floor. His initial proposal consisted of two amendments. For the national government he suggested,

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or in any pretext, infringed. (1962–91, 12:201)

He also proposed an amendment to apply against the states,

No state shall violate the equal rights of conscience. (1962–91, 12:201)

If we are searching for what Madison hoped to secure, it is reasonable to assume that he expressed it in his initial drafts (Weber 1982, 174).

The one clear principle that emerges is that Madison sought to prevent the federal government from penalizing citizens because of their religious affiliation. This can be seen in his proposal that “the civil rights of none shall be abridged on account of religion or worship.” Madison also sought to prohibit a certain class of privileges toward religion—“nor shall any national religion be established”—and prevent infringements of the liberty of conscience by both the national and the state governments. What he meant by “an establishment of religion” and “the equal rights of conscience” is clarified by a statement he made on the House floor on 15 August 1789. At the time, the text under consideration was, “No religion shall be established by Law, nor shall the equal rights of conscience be infringed,” which was close to his initial proposal minus the first clause:

MR. MADISON said he apprehended the meaning of the words to be, that congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience; whether the words were necessary or not he did not mean to say, but that had been required by some of the state conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience or establish a national religion. To prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of language would admit. (*Annals of the Congress of the United States, 1789–1834*, 1789, 1:758)

Madison thought that the proposed text made clear that Congress lacked authority to legislate a traditional

establishment akin to the Anglican Church's privileged position in England. What is most revealing in his comment, however, is the indifference it reveals toward the precise language used. The real purpose of the amendment and the Bill of Rights as a whole, Madison says, is to satisfy those who ratified the Constitution with reservations. He is recorded here as saying that it is not necessary to say whether such an amendment is necessary, but all familiar with his politics knew that one year earlier he had vehemently argued that such an amendment was absolutely unnecessary. At the Virginia Ratifying Convention on 12 June 1788, Madison had argued that “there is not a shadow of a right in the general government to intermeddle with religion” and that the national government's “least interference with it [religion] would be a most flagrant usurpation” (Elliot 1836, 3:330). Because the national legislature's powers were enumerated, what was not granted was denied. With or without an amendment, Congress lacked all authority over religion, and thus, the exact language used to restrict Congress's power over religion did not matter. Any language aimed at restricting Congress would be redundant.

The only amendment imposing a new, substantive restriction on governmental power was Madison's proposal to prohibit state governments from violating the equal rights of conscience. This is why Madison called it “the most valuable amendment on the whole list” (*Annals of the Congress of the United States, 1789–1834*, 1789, 1:784). Unfortunately, during Congress's deliberations, Madison was never recorded clearly defining what he meant by the “equal rights of conscience.” His August 15 statement directed at the national amendment that prohibited Congress from infringing the “equal rights of conscience” would have prohibited states, in his recorded words, from “compel[ling] men to worship God in any manner contrary to their conscience.” This provides some insight into one type of state legislation that Madison intended to prohibit, but whether this is all that the “equal rights of conscience” covers is unclear. Also unclear is how Madison would have legally defined “compulsion” and “the worship of God.”

Given Madison's expressly stated political intention in securing a bill of rights and the paucity and unreliability of the congressional record, the drafting of the First Amendment is a relatively poor source of information for Madison's doctrine of religious liberty. From what can be determined, Madison's proposals in the First Congress approach the principle of “non-cognizance.” Madison's proposed clause preventing the national government from abridging the civil rights of citizens on account of their religion is the same as the no-penalty provision. His prohibition against the establishment of any national religion and his restrictions on infringements of the equal rights of conscience approach the no-privilege provision.²⁸ Thus regarding

²⁷ For a discussion of the degree to which Madison is responsible for the final text of the First Amendment's religion clauses, see Drakeman 1983.

²⁸ No privileges on account of religion may be what Madison meant by “the equal rights of conscience,” but he does not say so as explicitly as he did in the drafting of the Virginia Declaration of Rights. Madison may have limited what he was willing to state on the House

Madison's actions in the drafting of the religion clauses of the First Amendment, we can say that they are consistent with the doctrine of "nongovernmental," though they do not reaffirm it in its full latitude.

Madison on Government Classifications Based on Religious Affiliation

When Madison first had the opportunity to interpret the First Amendment a few months later, however, he returned to his strict "nongovernmental" doctrine. In early 1790, following Article I, Section 2, of the Constitution, the House of Representatives made preparations to conduct the first national census. Madison suggested that in addition to obtaining an enumeration of the population, the census include questions that might provide information useful to Congress, such as the relative proportions of citizens engaged in agriculture, manufacturing, and commerce (*Annals of the Congress of the United States, 1789–1834*, 1790, 1:1115). There was a limit, however, to what questions Congress could ask. The census, he said, should ascertain information "only so far as to be extremely useful, when we come to pass laws, affecting any particular description of people." It could not ask, therefore, whether a citizen was a religious minister:

As to those who are employed in teaching and inculcating the duties of religion, there may be some delicacy in singling them out, as the General Government is proscribed from interfering, in any manner whatever, in matters respecting religion; and it may be thought to do this, in ascertaining who, and who are not ministers of the Gospel. (*Annals of the Congress of the United States, 1789–1834*, 1790, 1:1146)

Madison's comments suggest two problems with asking citizens if they are religious ministers. First, knowing the relative number of ministers would in no way be useful to Congress. Ministers as such could never properly be the subject of legislation because the Constitution proscribes the federal government from intermeddling with religion. Second, the very act of ascertaining who is and who is not a minister itself violates constitutional principles. To identify ministers as ministers is to classify citizens on account of their religion. Even

floor on account of his experience in Virginia. Just as Virginia had a state establishment in 1776, six of the 13 states had official religious establishments in 1789. To deny explicitly the states' authority to privilege religion as such surely would have been rejected out of hand, just as it was in Virginia in 1776. One of the primary reasons Madison doubted the efficacy of adopting a bill of rights, in fact, was that any public attempt to define the rights of the people would fail to do so in the requisite latitude. "I am sure that the rights of conscience in particular," he wrote to Jefferson in 1788, "if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed [federal] power" (Madison 1884, 1:424). Madison may have hoped to secure whatever vague language he could and then to define it later when the opportunity presented itself. Regardless, Madison would have at least denied explicitly some forms of privilege to religion, which may or may not have included all privileges to religion as such.

in something as innocuous as a census, Madison stood firm on the principle of "nongovernmental."²⁹

Madison had taken exactly the same position on a different issue two years earlier. In 1788 he had received a letter from John Brown, a leading politician from Kentucky, asking his opinions about Thomas Jefferson's draft of a constitution. Jefferson had published his proposed constitution for Virginia as an appendix to *Notes on the State of Virginia*, and it was being read with attention because Kentucky was drafting its own constitution in preparation for statehood. Jefferson's constitution included a provision excluding "ministers of the gospel" from the legislative assembly, a practice that was common at the time, especially in the South.³⁰ In his response to Brown, Madison singled out this exclusion for particular disparagement:

EXCLUSIONS. Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting compensation for it? does it not in fine violate impartiality by shutting the door against the Ministers of Religion and leaving it open for those of every other. (1900–10, 5:288)³¹

To single out ministers for exclusion from political office penalizes them on account of religion. It is to act on the basis of religion, which is what the principle of religious liberty forbids. Here, again, Madison requires the law to be blind to the religious affiliation of citizens.

Madison on Government Support to Religion as Such

As president, Madison employed the principle of "nongovernmental" to veto two congressional statutes. In February 1811, Congress passed a bill incorporating the Protestant Episcopal Church of Alexandria, D.C. In addition to recognizing the church as a corporate

²⁹ Irving Brant (1951, 17–18) interprets Madison's remarks on the census to support his larger contention that Madison sought to prohibit all federal aid to religion. While it is true that Madison would prohibit aid to religion as such, Brant fails to recognize that this conclusion is derivative from Madison's principle of "nongovernmental." The principle of "nongovernmental" also forbids singling out religion for denial of aid. Madison would prevent the government from knowing the religious affiliation of its citizens, which means that government may not single out religion for either privilege or penalty. Because of privacy concerns (see Mr. Livermore's objections in *Annals of the Congress of the United States, 1789–1834*, 1790, 1:1145), the 1790 census asked only the names and number of persons in every household.

³⁰ About half the states belonging to the Union in the first half-century after independence, including Virginia, had constitutional provisions excluding clergymen and ministers of the gospel from serving in their state legislatures (Stokes 1950, 1:622–28).

³¹ Madison's reference "to another article of the plan" refers to text just three paragraphs below the provision excluding clergymen from public office, which stated, "The general assembly shall not have power to infringe this constitution, to abridge the civil rights of any person on account of his religious belief, to restrain him from professing and supporting that belief. . ." The relevant passages of Jefferson's draft of a constitution can be found in Jefferson 1904, 2:286–87.

body, the bill specified rules for electing and removing the church's ministers. This, Madison said, would make the church a religious establishment by law. It would subject sundry rules and proceedings pertaining purely to the church's internal organization to enforcement by the state. A government blind to religion cannot make or enforce laws for the internal governance of a church. Madison (1984-, 3:176) also objected to Section 8 of the bill, which stated, "That it shall and may be lawful for the said vestry to make such provisions for the support of the poor of the said church as shall by them be thought proper. . . ." This provision, Madison (1984-, 3:176) claimed, "would be a precedent for giving to religious Societies as such, a legal agency in carrying into effect a public and civil duty."³² The most important words of Madison's sentence are "as such." His objection is not that the bill would allow a religious society to participate in the carrying out of public duties, but that a specific legal sanction to help the poor in a bill of incorporation would suggest that the church had legal sanction to help the poor because it was a church. Madison objects to giving religious societies as such a legal agency in carrying into effect public duties, which means giving religious groups a special privilege because they are religious. It is the singling-out of religion, the treating of religious groups as religious groups as such, that violates the Constitution.³³

For the same reason, Madison vetoed a second bill concerning religion one week later. Congress passed a bill resolving the land claims of five individuals in the Mississippi territory.³⁴ The sixth section of the bill granted five acres to the Baptist church, which had erected a meeting house on the land. Madison (1984-, 3:193) vetoed the bill on the straightforward grounds that

reserving a certain parcel of land of the United States for the use of said Baptist Church, comprizes [*sic*] a principle and precedent for the appropriation of funds of the United States, for the use and support of Religious Societies. . . .³⁵

³² Congress first passed the bill on 8 February 1811. Following Madison's veto, the House of Representatives debated the constitutionality of the bill and the means of reconsidering it before voting against its passage on 23 February 1811. See *Annals of Congress*, 11th Congress, 3rd Session, 129, 453, 828, 983–85, 995–98.

³³ James Hutson (2001, 16–17) claims that the veto represents Madison's effort undertaken later in life to limit the political influence of ecclesiastical institutions, i.e., that Madison targeted religious institutions for unfavorable treatment. In his "Detached Memoranda," Madison does warn that "there is an evil which ought be guarded agst [*sic*] in the indefinite accumulation of property from the capacity of holding in perpetuity by ecclesiastical corporations." But Madison also says that "the power of *all corporations*, ought to be limited in this respect" (Fleet 1946, 556; emphasis added). Madison's concern about the accumulation and concentration of property was not exclusively about the property of religious institutions as Hutson seems to suggest.

³⁴ "An Act for the relief of Richard Tervin, William Coleman, Edwin Lewis, Samuel Mims, Joseph Wilson, and the Baptist church at Salem meeting house, in the Mississippi Territory," passed by Congress on 20 February 1811 (*American State Papers*: 10, *Miscellaneous* 2:154).

³⁵ On 2 March 1811, both houses of Congress reconsidered the bill. The House failed to override Madison's veto, then passed the bill after removing Section 6. The Senate concurred on 3 March 1811. See *Annals of Congress*, 11th Congress, 3rd Session, 125, 127, 150–

Both vetoes reflected Madison's (1984-, 1:17) understanding that the rights of conscience and the functions of religion are, as he stated in his first inaugural address, "wisely exempted from civil jurisdiction."

It would seem that Madison violated his principle of "noncognizance" in 1812 when he issued the first of his four presidential proclamations declaring national days of prayer and thanksgiving. The practice of issuing religious proclamations had been started by George Washington and continued by John Adams. Jefferson refused to issue them and Madison sought to follow Jefferson's example. During the War of 1812, however, Congress requested that President Madison revive the tradition. In his "Detached Memoranda," (Fleet 1946, 562) Madison says that he issued the proclamations because he thought "it was not proper to refuse a compliance [to Congress] all together."³⁶ Removed from the exigencies of war and politics, however, Madison forthrightly revealed that his true position was that religious proclamations by the president violated the Constitution.

This revelation has been interpreted as conclusive proof that Madison stood for the "strict-separationist" wall between church and state (Brant 1951, 23). Madison's own explanation is more nuanced, however. First, Madison explicitly permits public leaders to make religious proclamations as private individuals, a point that is often overlooked:

In their individual capacities, as distinct from their official station, they [government officials] might unite in recommendations of any sort whatever, in the same manner as any other individuals might do. But then their recommendations ought to express the true character from which they emanate. (Fleet 1946, 560)³⁷

What violates the Constitution are religious proclamations made by a government official acting in his official capacity. Even though proclamations alone are only advisory, "they imply a religious agency, making no part of the trust delegated to political rulers" (Fleet 1946, 560). For the president acting in his official capacity to advise citizens to pray and give thanksgiving to God suggests that prayer is a legitimate subject for government legislation. But prayer, like every other aspect of

51, 329, 508, 900, 1098, 1103, 1105, 1106. See also Madison's (1884, 2:511–12) letter, dated 3 June 1811, to the Baptist Churches on Neal's Creek and on Black Creek, North Carolina, discussing his veto.

³⁶ Madison's four proclamations requesting days of prayer and thanksgiving can be found in Richardson 1896, 1:513, 532–33, 558, 560–61. A perusal of the text of the proclamations reveals Madison's ambivalence in issuing them. Each one begins with a statement that Congress has requested that such a proclamation be issued. Madison's first proclamation, which is typical of all four, begins, "Whereas the Congress of the United States, by a joint resolution of the two Houses, have signified a request that a day may be recommended to be observed by the people. . . ." Madison never takes personal responsibility for initiating the proclamations. He is extremely careful, moreover, to emphasize their advisory character. He "recommends" "to all those who shall be piously disposed to" pray to do so. Madison is also extremely careful to use nonsectarian language. He recommends that citizens render homage to the "Sovereign of the Universe" and "the Benefactor of Mankind" and celebrate "the goodness of the Great Disposer of Events."

³⁷ Locke ([1689b] 1983, 27) makes this same point in *A Letter Concerning Toleration*.

religious worship, is not a part of the social compact. To issue an official religious proclamation implies that the state has authority over religion, which indicates a lack of understanding of the legitimate authority of the state and nature of man's inalienable religious right.

In his "Detached Memoranda," Madison also writes that congressional and military chaplains violate the First Amendment for the same reason. The purpose of chaplains is to facilitate religious worship, and although "it [may] be proper that public functionaries, as well as their Constituents shd [sic] discharge their religious duties," such is not a proper object for the law (Fleet 1946, 560). It would have been much better proof of their pious feelings, Madison (1900–1910, 9:100) later wrote to Edward Livingston, if individual congressmen would have maintained a chaplain with contributions from their own pockets. The same would go for the military.

Madison's discussion of legislative chaplains nicely summarizes his doctrine of "noncognizance" and how, in his judgment, that principle leads to better, safer politics. The selection of a legislative chaplain necessarily requires favoring one religion over others unless a chaplain of every denomination is employed. With such a selection before them, legislators are encouraged to think of themselves along sectarian lines. One sect's benefit is necessarily another sect's loss. "Noncognizance" moderates sectarian politics by preventing the government from either privileging or punishing religion as such. Sectarian political aspirations are limited because religious affiliation is not allowed as grounds for government action. Legislators and citizens are thus encouraged to see themselves not as sectarian partisans, but as fellow citizens who mutually respect one another's rights. The multiplicity of sects further encourages this by giving every religion an interest in mutual toleration and respect. The intractable problem of religious oppression that follows from religious diversity is thus submerged within a republic dedicated to respecting individuals' natural rights.

The ground for the principle of "noncognizance" is man's inalienable natural right to religious freedom. Because religion is not part of the social contract, government must remain blind to religion as such. It can neither privilege religion nor punish citizens on account of their religion. Madison held fast to this position throughout his entire political life, from his first year in the Virginia legislature, when he proposed amendments to the Virginia Declaration of Rights, to his last reflections as the "Father of the Constitution" in his "Detached Memoranda."

MADISON AND CONTEMPORARY FIRST AMENDMENT RELIGION JURISPRUDENCE

It is relatively easy to apply Madison's principle of religious liberty to contemporary constitutional controversies.³⁸ A Madisonian approach to the First Amendment would utilize the straightforward rule that

³⁸ It is important to note that one should not assume that Madison's principle of "noncognizance" represents the "original intentions" of

the state must remain noncognizant of religion. No state actor or government policy could classify, punish, distribute, or withhold benefits from individual citizens or organizations on account of religion or religious affiliation. To borrow from contemporary civil rights discourse, the Constitution must be "religion blind."³⁹

The Establishment Clause

A Madisonian interpretation of the Establishment Clause would prevent the state from singling out religious citizens or religious organizations for any reason. Government policies that require cognizance of religion or religious affiliation in order to benefit religion, then, violate the First Amendment. The Nebraska taxpayer-funded legislative chaplaincy upheld by the Supreme Court in *Marsh v. Chambers* (1983) exemplifies such a violation. Nebraska became cognizant of religion in two ways: It hired an employee on the basis of religious affiliation—a prerequisite for the chaplain position, no doubt, was that one be a religious minister—and it employed an individual specifically to conduct a religious exercise, to open the state legislative session with a prayer. A second example of an impermissible state recognition of religion is the New York tax exemption upheld in *Walz v. Tax Commissioners of New York City* (1970). New York exempted from taxation real property "owned by a corporation or association organized exclusively for . . . religious . . . purposes" and used "exclusively for carrying out" such purposes. New York became impermissibly cognizant of religion from a Madisonian perspective when it made religion a criterion for a government classification (nontaxpayer status). For the same reason, a Madisonian approach also would have struck down the tax exemption ruled unconstitutional by the Supreme Court in *Texas Monthly Inc. v. Bullock* (1989). The Texas statute in question exempted from sales and use taxes "[p]eriodicals . . . published or distributed by a religious faith . . . consist[ing] wholly or writings promulgating the teachings of the faith and books . . . consist[ing] wholly of writings sacred to a religious faith." Government must remain blind to religion, which means that it cannot benefit individuals or organizations on account of their religious character.

Walz offers a clear example of how "noncognizance" differs from "nonpreferentialism." Chief Justice Warren Burger's majority opinion upheld the New York exemption on the grounds that tax exemptions for religious organizations are "deeply embedded in

the framers and drafters of the First Amendment. Madison did not explicitly propose the principle of "noncognizance" in the First Federal Congress and his proposed amendment protecting the equal rights of conscience against state encroachments was not adopted. This article attempts only to offer a "Madisonian" approach to First Amendment religion jurisprudence, not a more general interpretation of the "original understanding" of the First Amendment's religion clauses.

³⁹ Philip B. Kurland (1961) advocated for the Court to adopt a test similar to Madison's position. Kurland did not, however, trace his position back to Madison, suggesting instead that a proper construction of the religion clauses "cannot now be confined to the application they might have received in 1789" (p. 5).

the fabric of our national life” and that such policies reflect “benevolent neutrality toward churches and religious exercise generally” without favoring one religion over others (Walz 1970, 676–77). His opinion invoked what has become standard “nonpreferentialist” reasoning: Government policies that aid religion meet constitutional muster if they support all religions equally. “Noncognizance” respects equality, but it does not make equality among religions the grounds for constitutional sanction. Under the principle of “noncognizance,” what matters is whether the government makes religion a criterion for governmental classification. As a result, all religions stand in formal equality with one another before the law. But this is not all. Madison’s principle also requires that religious individuals and organizations stand in formal equality with nonreligious citizens and organizations, a demand that “nonpreferentialism” does not make. In order for a tax exemption to pass Madisonian constitutional muster, it must base eligibility on a nonreligious classification, e.g., charitable nonprofit organizations. Religious organizations as well as nonreligious organizations then may apply for the exemption without needing to make reference to the religious or nonreligious character of their organization. An example of a permissible “religion-blind” tax exemption came before the Court in *Mueller v. Allen* (1983). The state of Minnesota allowed a state income tax deduction for tuition, textbook, and transportation expenses incurred for sending a child to any elementary or secondary school. Since the tax deduction did not inquire into the religious character of the child’s school, the state remained noncognizant of religion.

The principle of “noncognizance” also forbids the state from using religious affiliation to exclude individuals or organizations from generally available benefits. If, for example, New York extended tax exemptions to nonprofit organizations but excluded religious organizations as such from qualifying for them, this would violate the First Amendment. In *Rosenberger v. University of Virginia* (1995), the Court evaluated a University of Virginia policy that explicitly excluded groups that sponsored religious activities from receiving student activity funds. Following its own rules, the university denied funding to a student group that published a multicultural Christian newspaper, despite its general policy of funding student-sponsored newspapers. A majority of the Supreme Court struck down the university regulation on the grounds that it violated the free speech rights of students. A Madisonian interpretation of the First Amendment would have reached the same result on the grounds that to deny a student newspaper generally available newspaper funds because their paper contains religious content subjects religious students to a particular disability. The university became unconstitutionally cognizant of religion by singling out religious activities for exclusion from generally available funds. The state must remain blind to religion, which means that if a public university chooses to fund student-sponsored newspapers, it cannot exclude religious newspapers because they are religious.

Rosenberger reflects the distance between a Madisonian approach to the Establishment Clause and “strict separationism.” As discussed above, in *Rosenberger* Justice Souter (with whom Justices Stevens, Ginsburg, and Breyer agreed) offered a “strict-separationist” dissent that argued that to allow direct funding to core religious activities by an arm of the state violates the Establishment Clause. Justice Souter’s “strict-separationism” demands that no government benefit directly support religion or religiously motivated activities. If pushed to its logical conclusion, it requires state actors to identify and to monitor religious recipients of benefits to ensure that they do not use them in a manner that directly supports religion. To ensure compliance with prior “strict-separationist” rulings, the University of Virginia adopted the safest course of action—singling out religious groups in order to deny funding them so as to avoid a possible Establishment Clause violation. Madisonian “noncognizance” requires a different course of action and a different line of inquiry. It asks whether the policy in question takes religion into account for either privilege or penalty. If religion or religious affiliation is not made the basis for qualification or exclusion, the policy stands. “Noncognizance” does not require state actors or judges to ask about or to monitor the use of governmental benefits by religious recipients. Quite the opposite, it prevents the state from taking religion or religious affiliation into its view.

The simplicity of the principle of “noncognizance” offers perhaps its most important advantage in the vexing realm of religion in public schools and public money supporting private religious schools. Madison would have viewed prayer in public schools in the same way that he viewed government-funded military chaplains and religious proclamations made by the president. Religion is not part of the social compact, and therefore, the state has no authority over religious exercises as such. States and state actors acting in their official capacity lack authority to command or direct religious activities. A Madisonian interpretation of the Establishment Clause, then, would have supported the Court when it ruled that public school officials cannot compose and direct prayer (*Engel v. Vitale* 1962) or mandate daily Bible readings at the beginning of the school day (*Abington v. Schempp* 1963). By the same principle, however, voluntary prayer and Bible readings by students—or even school officials when not acting in their official capacity—on public school grounds or at public school events are constitutional. A public school may not require such activities, but it also may not single out religious activities to prohibit them.

Regarding the constitutionality of public money going to private religious schools, the Madisonian approach would adjudicate the issue like any other policy of governmental funding. The government may not use religious affiliation as a classification or criterion for either privilege or penalty. The government may not fund schools because they are religious, but it also may not fund schools only because they have a religious affiliation. If the government chooses to adopt a general policy to fund educational programs in public and private schools, it may not adopt standards that take

religion into account. Religiously affiliated schools cannot be disqualified automatically from federal or state funds that provide, for example, sign-language interpreters for deaf students (upheld in *Zobrest v. Catalina Foothills School District* 1993), school teachers for remedial education for disadvantaged children (initially ruled unconstitutional in *Aguilar v. Felton* 1985 but then ruled constitutional in *Agostini v. Felton* 1997), or library services and computer hardware for secular education (upheld in *Mitchell v. Helms* 2000). The First Amendment prohibits religion or religious affiliation from entering the government's consideration. A Madisonian interpretation of the Establishment Clause would allow a general program of school vouchers, including vouchers to private religious schools, so long as religious schools are in no way singled out for special privileges or particular penalties. Similarly, "charitable choice" legislation, which extends government funding to faith-based organizations, would pass a Madisonian test as long as funding decisions do not require cognizance of religious affiliation.

The Free Exercise Clause

The same standard for Establishment Clause jurisprudence would also apply to Free Exercise cases: Government must remain blind to religion and, hence, may not privilege or penalize religion as such. The dominant free exercise issue over the last decade has been whether the Free Exercise Clause grants to religious individuals and organizations exemptions from neutral, generally applicable laws that have the indirect effect of burdening religious exercise. As discussed above, Michael McConnell and Justice Sandra Day O'Connor invoke Madison as the founding father who champions religious exemptions. A proper understanding of Madison's principle of "noncognizance," however, leads to the conclusion that Madison would find religious exemptions from neutral, generally applicable laws to violate the principle of religious liberty. To classify citizens or organizations as "exemption eligible" on account of religion requires the government to take cognizance of religion. It grants religion as such special treatment, which violates the principle of a "religion-blind" constitution. Madison would have agreed with most of the Court's early Free Exercise jurisprudence, which denied to religion and religious groups exemptions from generally applicable laws (e.g., *Reynolds v. United States* 1879; denying a practicing Mormon an exemption from federal laws banning bigamy and polygamy). He would have objected to the modern Court's introduction of a compelling state interest test in *Sherbert v. Vener* (1963; granting a religious exemption to a Seventh-Day Adventist from unemployment insurance regulations requiring Saturday work) and its subsequent implementation in *Wisconsin v. Yoder* (1972; granting Amish parents exemptions for state laws requiring school attendance past the eighth grade). He would have cited with approval the Court's return to its pre-*Sherbert* position in *Employment Division v. Smith* (1990; ruling that the Free Exercise Clause does

not grant religious individuals and organizations a constitutional right to exemptions from generally applicable laws that do not target religion but have the effect of burdening religious exercise). A Madisonian interpretation of the Free Exercise Clause would prohibit the government from making laws that single out a religion or religion generally for unfavorable treatment. It would also deny the government the authority to make laws or exemptions singling out a religion or religion generally for favorable treatment under the law.

Although James Madison has been invoked by justices and judicial scholars for over 100 years, Madison's principle of religious liberty has never been fully recognized or adopted by the Supreme Court. Judges and scholars have failed to understand Madison's radical but simple teaching: Religion is not part of the social compact, and therefore, the state may not take religion within its cognizance. A Madisonian interpretation of the Establishment Clause would prevent the state from supporting religion as an end in itself, but it also would prevent the state from excluding religious individuals and organizations from generally available benefits supporting a secular purpose. A Madisonian interpretation of the Free Exercise Clause would prevent the state from prohibiting religious exercises directly, but it would not extend to religious individuals and organizations special exemptions from generally applicable laws that indirectly burden religious exercise.

REFERENCES

- Abington v. Schempp*. 1963. 374 U.S. 203.
Agostini v. Felton. 1997. 521 U.S. 203.
Aguilar v. Felton. 1985. 473 U.S. 402.
American State Papers 10. *Miscellaneous*. 1834, Vol. 2. Washington, DC: Gales and Seaton.
Annals of the Congress of the United States, 1789–1834. 1834–56. 42 vols. Washington, DC: Gales and Seaton.
Ash, John. 1775. *The New and Complete Dictionary of the English Language*. London. Printed for Edward and Charles Dilly in the Poultry and R. Baldwin in Pater-Noster Row.
Braun, Eva. 1997. "Madison's 'Memorial and Remonstrance.'" In *The Past Present: Selected Writings of Eva Braun*, ed. Pamela Kraus. Annapolis, MD: St. John's College Press.
Brant, Irving. 1951. "Madison: On the Separation of Church and State." *William and Mary Quarterly*, 3rd Series, 8 (January): 3–24.
Buckley, Thomas. 1977. *Church and State in Revolutionary Virginia*. Charlottesville: University of Virginia Press.
Cantwell v. Connecticut. 1940. 310 U.S. 296.
City of Boerne v. P.F. Flores. 1997. 521 U.S. 507.
Cobb, Sanford H. 1902. *The Rise of Religious Liberty in America*. New York: Macmillan.
Cord, Robert. 1982. *Separation of Church and State: Historical Fact and Current Fiction*. New York: Lambeth Press.
Cord, Robert. 1987. "Original Intent Jurisprudence and Madison's 'Detached Memoranda.'" *Benchmark* 3 (1–2): 79–85.
Drakeman, Donald L. 1983. "Religion and the Republic: James Madison and the First Amendment." *Journal of Church and State* 25 (Autumn): 427–45.
Drakeman, Donald L. 2000. "James Madison and the First Amendment Establishment of Religion Clause." In *Religion and Political Culture in Jefferson's Virginia*, ed. Garrett Ward Sheldon and Daniel L. Dreisbach. Lanham, MD: Rowman & Littlefield, 219–33.
Dreisbach, Daniel L. 2000. "George Mason's Pursuit of Religious Liberty in Revolutionary Virginia." *Virginia Magazine of History and Biography* 108: 5–44.
Elliott, Jonathan, ed. 1836. *Debates in the Several State Conventions on the Adoption of the Federal Constitution*. Washington, DC.

- Employment Division, Department of Human Resources of Oregon v. Smith*. 1990. 485 U.S. 660.
- Engel v. Vitale*. 1962. 370 U.S. 421.
- Everson v. Board of Education*. 1947. 330 U.S. 1.
- Farrand, Max, ed. 1966. *The Records of the Federal Convention of 1787*. Rev. ed. 4 vols. New Haven, CT: Yale University Press.
- Fleet, Elizabeth. 1946. "Madison's 'Detached Memoranda.'" *William and Mary Quarterly*, 3rd Series, 3 (October): 534–68.
- Goldwin, Robert A. 1997. *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution*. Washington, DC: AEI Press.
- Hamburger, Philip A. 1992. "A Constitutional Right of Religious Exemptions: An Historical Perspective." *George Washington Law Review* 60 (April): 915–48.
- Hamburger, Philip A. 1993. "Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights." In 1992 *The Supreme Court Review*, ed. Dennis J. Hutchinson, David A. Strauss, and Geoffrey R. Stone. Chicago: University of Chicago Press, 295–392.
- Hunt, Gaillard. 1902. "James Madison and Religious Liberty." In *Annual Report of the American Historical Association for the Year 1901*. Washington, DC: Government Printing Offices, 165–71.
- Hutson, James. 2001. "James Madison and the Social Utility of Religion: Risks vs. Rewards." Presented at the symposium, James Madison: Philosopher and Practitioner of Liberal Democracy, Library of Congress, Washington, DC.
- Ivers, Gregg. 1995. *To Build A Wall: American Jews and the Separation of Church and State*. Charlottesville: University of Virginia Press.
- Jefferson, Thomas. 1904. *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb. Washington, DC: Thomas Jefferson Memorial Association.
- Johnson, Samuel. 1755. *A Dictionary of the English Language*. London: W. Strahan.
- Kurland, Philip B. 1961. "Of Church and State and the Supreme Court." *University of Chicago Law Review* 29 (Autumn): 1–96.
- Laycock, Douglas. 1986. "'Nonpreferential' Aid to Religion: A False Claim about Original Intent." *William and Mary Law Review* 27 (Summer): 875–923.
- Lee v. Weisman*. 1992. 505 U.S. 577.
- Levy, Leonard. 1986. *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan.
- Locke, John. [1689a] 1960. *Two Treatises on Government*, ed. Peter Laslett. Cambridge: Cambridge University Press.
- Locke, John. [1689b] 1983. *A Letter Concerning Toleration*, ed. James H. Tully. Indianapolis: Hackett.
- Madison, James. 1884. *Letters and Other Writings of James Madison*. 4 vols. New York: R. Worthington.
- Madison, James. 1900–10. *The Writings of James Madison*, ed. Gaillard Hunt. 9 vols. New York: G.P. Putnam's Sons.
- Madison, James. 1962–91. *The Papers of James Madison*. Congressional Series, ed. William T. Hutchinson et al. 17 vols. Chicago: University of Chicago Press; Charlottesville: University of Virginia Press.
- Madison, James. 1981. *The Mind of the Founder: Sources of the Political Thought of James Madison*, ed. Marvin Meyers. Rev. ed. Hanover and London: Brandeis University Press.
- Madison, James. 1984–. *The Papers of James Madison*. Presidential Series, ed. J.C.A. Stagg et al. 4 vols. Charlottesville: University of Virginia Press.
- Madison, James, Alexander Hamilton, and John Jay. [1788] 1961. *The Federalist Papers*, ed. Clinton Rossiter. New York: Mentor.
- Marsh v. Chambers*. 1983. 463 U.S. 783.
- McCullum v. Board of Education*. 1948. 333 U.S. 203.
- McConnell, Michael W. 1990. "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Review* 103 (May): 1409–1517.
- McConnell, Michael W. 2000. "Believes as Equal Citizens." In *Obligations of Citizenship and Demands of Faith*, ed. Nancy L. Rosenblum. Princeton, NJ: Princeton University Press, 90–110.
- Mitchell v. Helms*. 2000. 530 U.S. 793.
- Mueller v. Allen*. 1983. 463 U.S. 388.
- Muñoz, Vincent Phillip. 2003. "George Washington and Religious Liberty." *Review of Politics* 65 (Winter).
- Palm, Daniel. 1997. "Religious Toleration and Religious Liberty at the Founding." In *On Faith and Free Government*, ed. Daniel Palm. Lanham, MD: Rowman & Littlefield, 29–42.
- Pfeffer, Leo. 1958. "The Case for Separation." In *Religion in America: Original Essays on Religion in a Free Society*, ed. John Cogley. New York: Meridian Book, 52–94.
- Reynolds v. United States*. 1879. 98 U.S. 145.
- Richardson, James D. 1896. *A Compilation of the Messages and the Papers of the Presidents 1798–1897*. 10 Vols. Washington, DC: Government Printing Office.
- Rosen, Gary. 1999. *American Compact: James Madison and the Problem of Founding*. Lawrence: University of Kansas Press.
- Rosenberger v. University of Virginia*. 1995. 515 U.S. 819.
- Sherbert v. Verner*. 1963. 374 U.S. 398.
- Smith, Steven D. 2000. "Blooming Confusion: Madison's Mixed Legacy." *Indiana Law Journal* 75 (Winter): 61–75.
- Soifer, Aviam. 2000. "The Fullness of Time." In *Obligations of Citizenship*, ed. Nancy Rosenblum. Princeton, NJ: Princeton University Press, 245–79.
- Stokes, Anson Phelps. 1950. *Church and State in the United States*. New York: Harper & Brothers.
- Strout, Cushing. 1988. "Jeffersonian Religious Liberty and American Pluralism." In *The Virginia Statute for Religious Freedom: Its Evolution and Consequence in American History*, ed. Merrill D. Peterson and Robert C. Vaughn. Cambridge: Cambridge University Press, 201–35.
- Texas Monthly Inc. v. Bullock*. 1989. 489 U.S. 1.
- Wallace v. Jaffree*. 1985. 472 U.S. 38.
- Waltz v. Tax Commissioners of New York City*. 1970. 397 U.S. 664.
- Weber, Paul. 1982. "James Madison and Religious Equality: The Perfect Separation." *Review of Politics* 44 (April): 163–86.
- Wisconsin v. Yoder*. 1972. 406 U.S. 205.
- Zobrest v. Catalina Foothills School District*. 1993. 509 U.S. 1.