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## SPEECH

### BRENNAN, MADISON, AND FREEDOM OF RELIGION

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Justice Brennan has lent his name to your lecture series in state constitutional law. As an ambivalent admirer of Justice Brennan, I am honored to have been asked to deliver this lecture. But I do feel like something of an imposter—I am afraid I don't know enough about state constitutional law to fill ten minutes, much less an hour. But I nonetheless wish to do something in the spirit of Justice Brennan, so I will juxtapose him with the subject of the book I have just completed—that being James Madison, a man, like Justice Brennan, who had much to do with the Constitution.

Justice Brennan is well known to have taken a distinctive approach to First Amendment religion issues. His approach was not only distinctive, but controversial. The most perspicuous way to speak of the controversy is to say that he was frequently said to have promulgated a contradictory set of doctrines on the religious clauses. On the one hand, he took a very rigorous anti-establishment approach but coupled that with a very strong

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accommodationist approach to the Free Exercise Clause. On the one side, he seemed to be very friendly to religion, but on the other he seemed rather hostile to religion. While I do not intend to defend his approach to freedom of religion today, I do wish to examine whether the inconsistency he is said to have endorsed is not his but is built into the constitutional text. After all, the Free Exercise Clause is very friendly to the claims of religion, while the Establishment Clause seems to aim to contain and constrain the claims of religion.

So, in a sense, Justice Brennan sets my topic, but he is not actually the subject of my talk. That is James Madison, the alleged “Father of the Bill of Rights” and the author of the text that has frequently been called “the greatest statement on the subject ever produced in America.” The text to which I refer is Madison’s *Memorial and Remonstrance Against Religious Assessments*.<sup>1</sup> I am going to argue that Madison disagrees quite strongly with Justice Brennan, that he shows how to read the seemingly inconsistent religion clauses of the First Amendment, and most controversially, that his view is the correct view of the meaning of the right of religious freedom.

Madison’s *Memorial and Remonstrance* is a document prepared to counter Patrick Henry’s proposed bill to lay a tax for the support of the clergy of Virginia. It cannot be well understood without reference to Madison’s role in drafting Article 16 of the Virginia Bill of Rights, a provision designed to protect religion. Madison effected his entry into the ranks of constitution makers when, in 1776 as a member of the committee “to prepare a declaration of rights” for the Virginia Constitution, he offered two amendments to George Mason’s proposal of a provision securing the rights of religion. Mason’s proposal read as follows:

That as Religion, or the Duty which we owe to our divine and omnipotent 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 shou’d enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Colour of

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1. James Madison, “*Memorial and Remonstrance Against Religious Assessment, [CA. 20 June]*” 1785, FOUNDERS ONLINE (June 20, 1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163> [<https://perma.cc/V7UL-KUGL>].

Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals. And that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.<sup>2</sup>

Madison's amendments simplified some of Mason's language, but more importantly, he incorporated two substantive changes pregnant with future significance. His amendment read: "[t]hat religion or the duty which we owe to our Creator, and the manner of discharging it" "being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it accordg 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 . . . unless under [then what follows in Mason's original draft] . . ."<sup>3</sup>

Madison's first significant change substitutes "full and free exercise of [religion]" in place of Mason's "fullest [t]oleration in the [e]xercise of [r]eligion"; his second change adds to Mason's draft of the provision that none receive "peculiar emoluments or privileges" "on account of religion."<sup>4</sup> The first change recognizes a right to "free exercise of [religion]"; the second forbids special legal privileges or rewards based on or for the sake of religion, which was taken by his committee to call for the disestablishment of the Church of England in Virginia and, presumably, as a prohibition of church establishment altogether. Madison's substitution of free exercise for toleration was accepted, but his anti-establishmentarianism was rejected in the article ultimately adopted by the convention:

That 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; and

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2. George Mason, "George Mason's Proposed Declaration of Rights," [CA. 20–25 May 1776], FOUNDERS ONLINE (1776), <https://founders.archives.gov/documents/Madison/01-01-02-0054-0001> [https://perma.cc/F9SD-LJ7Y].

3. James Madison, "Madison's Amendments to the Declaration of Rights," [29 May–12 June 1776], FOUNDERS ONLINE (1776), <https://founders.archives.gov/documents/Madison/01-01-02-0054-0003> [https://perma.cc/P8EF-RD9Z].

4. Madison, *supra* note 3; Mason, *supra* note 2.

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 practise Christian forbearance, love, and charity toward each other.<sup>5</sup>

In the longer run, the more significant upshot of Madison's first foray into Constitution making is the way the twin innovations of his amendment later reappeared in the U.S. Constitution's First Amendment and its Free Exercise and Establishment Clauses. These have been among the most controversial parts of the Constitution. It would be helpful, if not dispositive of constitutional meaning, to know how Madison, the Father of the Bill of Rights, understood his handiwork, and it would be instructive to know his rationale for these central constitutional provisions regarding religion.

Madison's most significant political writing from the revolutionary period was his *Memorial and Remonstrance*,<sup>6</sup> a document that contains his most sustained thinking on the topic of the state's relation to religion. It would seem to contain the explanation for his proposed amendment to Mason's article and, thus, for his understanding of the First Amendment. This document was prepared at the behest of some of Virginia's political elite, including George Mason, to oppose a bill drafted by Patrick Henry providing for taxpayer-funded support for clergy in the various sects then extant in Virginia.<sup>7</sup> The *Memorial and Remonstrance* was, it must be emphasized, an emphatically public document, meant to be signed by members of the public and forwarded to the legislature as it considered Henry's bill.<sup>8</sup>

That bill mandated that "every person chargeable" shall pay a tax, the proceeds of which shall be paid to the religious denomination specified by the taxpayer.<sup>9</sup> Each individual will support his or her own church and no other. "[T]he money to be raised by virtue of this Act, shall be . . .

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5. VA. CONST. art. I, § 16.

6. Madison, *supra* note 3.

7. *Id.*

8. *Id.*

9. Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion* 1 (1784), <https://liberalarts.tamu.edu/pols/wp-content/uploads/sites/20/2020/09/Henry-Madison-Sundry-letters.pdf> [<https://perma.cc/696K-E8RN>].

appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship . . . .”<sup>10</sup>

Henry had been careful to justify his bill in terms of Article 16 of the Virginia Bill of Rights. The tax he was proposing would not, he insisted, “counteract[] the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies or communities of Christians.”<sup>11</sup> Henry understood the “liberal principle” of the religion article in the Virginia Bill of Rights to permit non-discriminatory aid to religion, which he clearly believed his proposal to provide.<sup>12</sup> He may have taken this to be the implication of the rejection of part of Madison’s amendment, which, it is recalled, provided that “no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges.”<sup>13</sup> Had Madison’s amendment been accepted, Henry’s tax would clearly have been in violation of it. Henry, therefore, had a more than plausible reason to believe that his proposal was constitutionally valid.

Madison, however, thought otherwise. Even under Article 16, as adopted and without the second part of his amendment, the *Memorial and Remonstrance* pronounced Henry’s bill (if passed) “a dangerous abuse of power,” which Madison and his fellow signers “are bound as faithful members of a free State” to resist.<sup>14</sup> Madison, then, must have believed either that, even without his amendment, the Mason draft had anti-establishment implications or, more likely, that the substitution of “free exercise” for “full[] toleration” carried with it strong anti-establishment implications.<sup>15</sup>

The *Memorial and Remonstrance* consists of fifteen numbered paragraphs, each giving a reason for the signers’ resistance to Henry’s Bill.<sup>16</sup> The reasons vary greatly in character. Some challenge the arguments Henry included in the bill that were intended to establish the public good to be achieved by it. For example, paragraph eight affirms that “the establishment in question is not necessary for the support of Civil Government,”<sup>17</sup> countering Henry’s claim that “the general diffusion of

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10. *Id.* at 1-2.

11. *Id.* at 1.

12. *Id.*

13. Madison, *supra* note 3.

14. Madison, *supra* note 1.

15. Madison, *supra* note 3.

16. Madison, *supra* note 1.

17. *Id.* para. 8.

Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society,” all of which is said to be furthered by a “competent provision for learned teachers” and thereby by Henry’s Bill.<sup>18</sup> Parallel to paragraph eight is paragraph six, asserting that the “establishment proposed by the Bill is not requisite for the support of the Christian Religion.”<sup>19</sup> Some of the items call attention to historically harmful effects of establishments which Henry was promoting: according to paragraph seven, “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”<sup>20</sup> Or, as paragraph eleven puts it, the bill “will destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects.”<sup>21</sup>

Most important, however, was the first paragraph, for here Madison both lays out the philosophic fundamentals of his position and identifies the legal doctrine that ought to govern the relations of civil society to religion. That doctrine is that religion is “wholly exempt from [civil society’s] cognizance,” sometimes called the doctrine of noncognizance.<sup>22</sup> This is not a doctrine that has prevailed historically in interpretations of the First Amendment. If, as suggested above, the *Memorial and Remonstrance* embodies the position contained in Madison’s proposed amendments to Mason’s draft and if both are embodied in the First Amendment to the U.S. Constitution, then these earlier materials provide us with invaluable insight into the original understanding of the First Amendment.

The *Memorial and Remonstrance*’s case for religious liberty is similar to earlier statements by John Locke and Thomas Jefferson. But First Amendment scholar Vincent Phillip Muñoz also finds Madison’s argument to be importantly unique in that he begins with the affirmation of a duty to God or of “what we owe to God.”<sup>23</sup> This, says Muñoz, is “the most distinctive element” of Madison’s argument.<sup>24</sup> Given this starting

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18. Henry, *supra* note 9.

19. Madison, *supra* note 1, para. 6.

20. *Id.* para. 7.

21. *Id.* para. 11.

22. *Id.* para 1.

23. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 76 (Univ. of Chi. Press) (2009) (emphasis omitted).

24. *Id.* at 75.

point he denominates Madison's argument as theological, but he resists the claim often raised that Madison's position assumes a Protestant account of religious belief. Rather, he claims that Madison's argument is based on "natural theology" and therefore is compatible with his intent to affirm and defend a natural right to religious liberty.<sup>25</sup>

A more immediate explanation for Madison's beginning with the affirmation of a religious duty is that it is a quotation from Mason's draft and the final version of Article 16 of the Virginia Bill of Rights. To emphasize that, he presents the duty as follows: "we hold it for a fundamental and undeniable truth, 'that 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.'"<sup>26</sup> He begins with the affirmation of the duty of religion because that is the doctrine "we hold," with the "we" being the signers of the *Memorial and Remonstrance* but more broadly the people of Virginia.<sup>27</sup> This duty is, in effect, the official or established doctrine of Virginia, for it is part of one of its constitutive documents.

When we read further down the first paragraph of the *Memorial and Remonstrance* we discover the doctrine of noncognizance affirmed there. Is there not some large irony in beginning with the Virginia official doctrine regarding religion when the chief implication of that doctrine appears to be the prohibition of what is being done in that beginning point? To have an official constitutional doctrine about religious duty is to take cognizance of it. Was Madison or any of his co-signers aware of this irony, this self-contradiction? We must see. Nonetheless, we ought to grant Madison that the Bill of Rights was a natural place to begin, because Patrick Henry had referred to and attempted to justify his bill in terms of that same article of the Virginia Bill of Rights. That article thus provides a shared starting point and authority for the two contestants. It would be a very effective form of argument if Madison could begin with the same premise to which Henry had appealed, but show that it did not lead to Henry's conclusion. Were Madison writing solely on his own behalf to present his theory of religious liberty, there is no reason to believe he would begin as he did here.

The duty as expressed in Article 16 holds that the manner of discharging it "can be directed only by reason and conviction," but it does

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25. *Id.* at 75-77.

26. Madison, *supra* note 1, para. 1.

27. *Id.*

not say whether the very existence of the duty, as opposed to its manner of discharge, is a matter of reason and conviction.<sup>28</sup> The language of Madison's text seems open to being understood as grounded in Christian or Protestant doctrine or, alternately, in the legal authority of the Bill of Rights. This is problematical for the subsequent development of the argument because Madison proceeds to derive a right from the specified duty, which is then said to be a natural right. A natural right necessarily differs from a right based on mere human law or on religious doctrine.

The puzzles about the *Memorial and Remonstrance* multiply. Let us proceed in a way that recognizes but does not force a solution to the puzzles. Madison begins by inquiring: if there is such a duty as is affirmed in Article 16, what follows from it? From the duty, he concludes to a right: "[t]he Religion then of every man must be left to the conviction and conscience of every man," a conclusion that merely restates the way the duty is specified in Article 16.<sup>29</sup> He then restates this conclusion as a "right of every man to exercise [religion] as [conviction and conscience] may dictate."<sup>30</sup> Given the difference in character between a duty (something obligatory) and a right (something permissive) this may seem a further puzzle, but it is a solid inference. If we have a duty, a moral obligation, to do X, we must have a right, a moral permission, to do X. "Ought" implies "may."

Madison further concludes that this right is inalienable. This conclusion too is an inference from the premised duty. Each man has a duty to God with no expiration date attached to it; it is an inalienable duty, in effect. An inalienable right, one that cannot be taken away or given up, follows by the same reasoning as the right itself. Madison indicates that the inalienability of the right or the precedent duty follows more particularly from the nature of human opinion formation. "It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . . ."<sup>31</sup> Madison here borrows from Locke and Jefferson, both of whom had made the same point. Human beings form convictions on the basis of what they personally find convincing, not what another tells them or commands them to believe. We *believe* what we believe.

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28. VA. CONST. art. I, § 16.

29. Madison, *supra* note 1, para. 1.

30. *Id.*

31. *Id.*

But Madison, Locke, and Jefferson seem mistaken in making this claim, for people often or even usually believe what they believe on the basis of what others tell them. So, in the sphere of religious belief, we regularly see that people believe what others tell them to believe, be it the Pope or one's parish priest or local rabbi, or one's parent, or society at large. Madison's rejoinder would be that we believe those who we believe there is some reason to believe. Authorities are only authorities for those who accept their authority based on some conviction or opinion of their own. It is conviction all the way down. Since this is the way in which opinion formation occurs, the right to form an opinion according to conviction is inalienable. What must be, must be, and must be both permissible and unseizable. If the right is inalienable it cannot be given up to society in the society-forming social contract. In paragraph two Madison draws the relevant political conclusion: "if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former."<sup>32</sup>

Madison has a second reason for decreeing the right to be inalienable; this is the more significant of the two. He refers back to the precedent duty from which the right was deduced: "[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."<sup>33</sup> The decisive idea Madison introduces here is religion as homage. Religion is a form of homage to, that is, honoring of, God. Much depends on Madison's grasp of religion as homage. Is it accurate and adequate? It seems narrow because there are many different forms of religion and many different apparent motives to its practice. Some forms of religion are attempts to appease angry or demanding gods. Some are to express gratitude for the gift of life and the blessings of existence. Some are to express love to a loving God. Some are to achieve divine or superhuman aid in human endeavors like war or athletic contests. Is it possible to capture this kind of variety in one formula?

Madison's idea seems to be this: all forms of religion, no matter what the motive, are attempts to win favor, by showing proper honor or subordination to God, to recognize divine power, or win divine beneficence, in a word, to render homage to God as Supreme. Worshipers of different religions express their worship in a myriad of different ways, but they all share one thing if they are engaged in genuine worship and not

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32. *Id.* para 2.

33. *Id.* para 1.

merely going through the motions that custom or coercion have imposed: the belief that their mode of worship is acceptable to God. Humans disagree greatly about what the one true religion and the one true religious worship are, but they agree that the true worship depends on the worshippers' conviction that his or her form of worship is a form favored by God.

In identifying religion as a rendering of homage Madison invites us to consider the nature of homage or honoring. Let us say that the political authorities in your country require a form of religion that you do not consider the true religion, that is, the correct manner of honoring God. Let us say that you believe God mandates worship with one's head uncovered so as to express one's openness and transparency to God. Yet the community requires worship with one's head covered, which you take as an effort or sign of closing oneself to God. If you worship as the authorities mandate, are you actually honoring God, rendering homage in the way you believe God considers acceptable? At most, you may be said to be honoring the authorities and their coercive power, but this is far different from honoring God. True homage or practice of religion must stem from actual or sincere belief or conviction. Therefore, coerced religion can never be true religion. Religion as a form of homage differs from other kinds of homage in that the honoree, God, is presumed to know souls, to reach the inner person in a way that human kings can never do. There is no just going through the motions for a true believer, that is, one who recognizes the duty with which Madison begins.

Several remarkable conclusions follow from the nature of homage. First, a necessary condition for religion in the proper sense is that it be the result of personal conviction. That implies that it cannot be directed by force or violence. This in turn implies that so far as there is a duty of religion it must have the character specified in the Virginia Bill of Rights: it can be directed only by reason and conviction, or perhaps more accurately by conviction. The character of the premised duty with which Madison begins is not at all arbitrary: it states the necessary character of any such duty. Moreover, so far as the duty has that character, we can see that the affirmation of a duty is at best tentative. If one does not have a sincere conviction of the existence of a god who cares about human homage, then by its own terms we cannot have the duty as specified. These conclusions guarantee that the right to free exercise affirmed in Article 16 extends to atheists and non-Christians, even if the language of the article seems to suggest otherwise. The beginning point for Madison's argument

is only apparently the duty affirmed in Article 16 as formulated. It is rather the nature of free exercise of religion added to Article 16 by Madison himself.

Madison, as we have noted earlier, pronounces the proper relation between religion and the state to be one of noncognizance. According to the thorough research of Philip Muñoz, this was not a widespread view at the time of the founding. It was, Muñoz concludes, “idiosyncratic.”<sup>34</sup> The noncognizance doctrine, recall, holds that “[r]eligion is wholly exempt from [government’s] cognizance.”<sup>35</sup> Governmental action must be “religion blind.”

The right applies to the religious assessment in a quite direct way: to support a particular clergy member or any clergy member at the behest of the state is to coerce homage in the form of a tax contrary to the right to render only sincere homage according to conviction. But, does the broader doctrine of noncognizance follow from the inalienable right Madison has articulated? Disappointingly, he supplies little by way of a fleshed-out argument to make his case. Noncognizance does appear to go beyond what the Virginia Bill of Rights or what Madison to this point calls for. Coerced religious belief or practice is clearly covered and forbidden by the argument from the nature of homage. But what about aids and benefits to religion? What about other establishment issues?

Madison invites us to think along the following lines. Suppose the government pays each worshiper a stipend to worship at the church favored by the president. This is a complex case for it involves the use of both a stick, in the form of taxation to support the payment, and a carrot, in the form of the payment itself. Let us focus only on the carrot. On consideration, this seems as much a violation of the duty and perhaps surprisingly of the right to practice religion only according to sincere personal conviction. A special inducement to religious worship is just as much contrary to the nature of religion as honoring God.

Of course, not all government benefits to religion are of this sort. For instance, there are benefits that readily meet the noncognizance criterion. Churches certainly benefit from the provision of public roads, but these are, or can be, provided in a completely noncognizing manner. What about tax exemptions for religious organizations? As is normally recognized these also can be provided in a noncognizing manner. These sorts of benefits accrue to religion, along with all sorts of non-religious activities,

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34. Muñoz, *supra* note 23, at 82.

35. Madison, *supra* note 1, para. 1.

and do not require even mentioning religion in providing them. They would seem to meet with Madison's approval.

However, let us consider another sort of benefit. Let us say that adherents of certain religions are afforded a privilege, the use of peyote, denied to others in the community. Does this not violate the rule that the state should not reward one for one's religious practice or belief and should not act so as to induce one to one or another or any form of homage to the divine? In other words, the nature of religion as true homage rules out state-supplied benefits to religion as such just as much as state-imposed coercion or punishment. Madison's noncognizance principle then follows as the universally valid moral or natural standard governing the relation of state to religion.

Given the nature of religion, it is always and necessarily right that we practice it according to personal conviction, for anything else is only apparent religion. We can also better understand how Madison's two reasons go together to support his claim of an unalienable right to worship or not only according to conviction. The first reason, let us call it the Lockean reason based on the law of opinion formation, tells us that it is inevitable that opinion formation is an internal process of the agent that cannot be otherwise. We or others can command that we act in given ways, but neither we nor others can command us to believe a given thing. Convictions rest on conviction. If the process of opinion formation is necessarily of this kind, then it cannot be otherwise and it must be right, or at least not wrong, that it happens that way.

Madison's second reason, the reason from the nature of homage or honoring, decrees that worship or lack of worship follows or rests on conviction as formed according to the process identified in the first reason. It is not right only in the above sense that it cannot be otherwise, but it is necessarily morally or religiously right as well. We are always in the right formally (though not necessarily substantively) when we so believe. If we are always in the right, morally, to so act and believe, then we have a right to do so. Thus, we can see, Madison has developed the ground for the right to full religious freedom from the nature of conviction formation and the nature of religion, not from a pre-existing duty, as the language of his first paragraph at first suggests. That there is such a duty, properly understood, is not false, but the duty follows from the right and not vice versa.

We can now conclude that this moral right is also a natural right resting on the natural and rationally discernible process of opinion formation and on the naturally discernible nature of religion. As natural, it

is universally true, applying not merely to Protestants, or Christians, or Judeo-Christians, but to all forms of religion. It should be understood that this natural right of free exercise is not a warrant for any and every action we might take because of conscientious conviction. As Madison says, civil government and its laws are not violative of the religious rights. “[I]n matters of Religion, no man’s right is abridged by the institution of Civil Society . . . .”<sup>36</sup> Religious conviction does not trump otherwise valid civil law. To make exceptions for conscientious action is to cognize and privilege religion and thus to violate free exercise requirements. Madison clearly disagrees with Justice Brennan.

I believe I have shown the following:

- (1) The adopted version of the religion provision in the Virginia Bill of Rights was actually equivalent to Madison’s first proposed amendment, for the full meaning of free exercise of religion has in itself anti-establishment implications.
- (2) Central to Madison’s understanding of religion is homage and the far-reaching implications of appreciating what homage is and entails.
- (3) The substitution of Madison’s “free exercise” for Mason’s “full Toleration” renders Article 16 of the Bill of Rights fully equivalent of what Madison aimed at in the first version of his amendment, for the proper stance of the state is noncognizance, just as Madison said. This is not only implied by the nature of religion but best fits the standard of equality that Madison expresses in the fourth paragraph of *Memorial and Remonstrance*. “[T]he [Henry] Bill violates that equality which ought to be the basis of every law[] . . . . If ‘all men are by nature equally free and independent,’ 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.”<sup>37</sup>

In that same paragraph, Madison speaks of peculiar privileges and peculiar advantages as being as much a violation of free exercise as subjection to coercion, echoing the language of his first amendment to Mason’s draft.<sup>38</sup>

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36. *Id.*

37. *Id.* para 4.

38. *Id.*

The *Memorial and Remonstrance* was not Madison's last or even his most significant constitutional level contribution to the American ordering of church-state relations. That honor must belong to the religion clauses of the First Amendment to the U.S. Constitution. As mentioned above, the meaning of these provisions has been a subject of controversy and uncertainty since they became part of the Constitution. Now that we are familiar with Madison's earlier thinking, it seems clear that the First Amendment was meant by him to embody the very noncognizance doctrine he identified in the *Memorial and Remonstrance*. Muñoz's careful review of Madison's subsequent actions as an interpreter of the amendment for the most part confirms the identification of his understanding of the First Amendment with the doctrine announced in the *Memorial and Remonstrance*.

However, as Muñoz also pointed out, Madison's noncognizance was an outlier in his time. Few Americans of the founding era sought as clear and clean a distinction between matters governmental and matters religious as did Madison. What authority, if any, does Madison's understanding of the text of the First Amendment have? Present orthodoxy in the field of constitutional interpretation would seem to say he has no authority; his understanding, if indeed an outlier, is hardly more than a private opinion. The interpretation with authority is "original public meaning" as held by those who adopted the amendment. However, it seems to me not so easy as all that. Madison claims, I believe successfully, that noncognizance is the true doctrine following from the commitment to free exercise of religion, following from the very nature of religion. That is to say, the truth about religion and the state is noncognizance. Does that truth, both of the meaning, the full meaning, of the text in the Constitution and as embodied in the phenomenon itself have no claims on us? And if it has such a claim, what are its limits?