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## Religious Liberty: Natural Rights or the Politics of Conscience

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Honors Thesis

Religious Liberty: Natural Rights or the Politics of Conscience

By  
Madeline Jo Nielsen

Submitted to Brigham Young University in partial fulfillment of graduation requirements  
for University Honors

Political Science Department  
Brigham Young University  
August 2024

Advisor: Ralph Hancock  
Reader: Bradley Rebeiro  
Honors Coordinator: Darin Self

## **Abstract**

Religious Liberty: Natural Rights or the Politics of Conscience

Madeline Jo Nielsen

Political Science Department

Bachelor of Arts

Religion Clause jurisprudence in the United States has long been a subject of debate. Vincent Phillip Muñoz and Steven D. Smith, two prominent scholars in the field, offer distinct perspectives on the interpretation and application of the Religion Clauses. Muñoz advocates for a natural rights construction, grounding religious liberty in the Founders' understanding of inalienable rights. In contrast, Smith analyzes the principle of religious liberty through reflecting upon how the Founders', particularly James Madison, were influenced by the historical, philosophical, and theological development of the principle. This thesis conducts a comparative analysis of their viewpoints, focusing on their interpretations of the First Amendment, the nature of religious freedom, and their legal implications, using James Madison's Memorial and Remonstrance as a benchmark. By examining their contrasting perspectives, this research aims to contribute to a nuanced understanding of religious freedom discourse and provide insights into the evolving landscape of religious freedom jurisprudence.

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## I. Introduction

Religious liberty, once heralded as one of the foremost blessings and rights of the American people, has now become a subject of intense debate regarding whether it merits special protection.<sup>1</sup> Some scholars argue against singling out religion for preferential treatment in law and public discourse, suggesting that there are no principled reasons for viewing religious freedom as a special constitutional commitment.<sup>2</sup> This argument has gained traction as other ‘fundamental rights’ emerged, often fundamentally at odds with religious liberty. For example, the expansion of LGBTQ+ rights have led to a tension between the rights of LGBTQ+ individuals to express their sexuality and the rights of individuals to exercise their religious beliefs, which are not compatible with LGBTQ+ expressions. This tension between anti-discrimination law and religious liberty raises the question: What is the character of religious liberty, and should it amount to a special constitutional commitment?

Given the paradigmatic shift in how religious liberty was once understood to how it is now, there must be something missing from our modern-day conception of religious liberty. To evaluate this missing piece, further analysis of the Founder’s intentions and the original meaning of the Religion Clauses is necessary. With this further analysis, it can be determined why this shift occurred and why it was warranted. However, this is difficult considering that all informed and careful commentators understand that an original meaning of the Religion Clauses is difficult to ascertain.

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<sup>1</sup> The liberty enjoyed by the People of these States, of worshiping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their rights.” George Washington to the Society of Quakers, October 1789, in *The Papers of George Washington: Presidential Series, September 1789-January 1790*, ed. Dorothy Twohig (Charlottesville: University Press of Virginia, 1993), 4:266.

<sup>2</sup> See generally Brian Leiter, Why Tolerate Religion, 25 CONST. COMMENT. 1 (2008); James W. Nickel, Who Needs Freedom of Religion, 76 U. COLO. L. REV. 941 (2005).

Religion Clause scholarship and jurisprudence have been complicated by the fact that justices and scholars have interpreted the same historical facts differently, thus creating various interpretations. This lack of consensus complicates how the character of religious liberty should be understood. It is further complicated by the lack of specificity the text of the First Amendment provides. The text of the First Amendment simply states, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” The text does not provide a definitive answer as to the principle of religious liberty that the nation adopted. The lack of coherence in religious liberty jurisprudence necessitates further research to understand the commitment to religious liberty and the grounds for its classification as a fundamental right. Two prominent religious liberty scholars, Vincent Phillip Muñoz, and Steven D. Smith, recognize that the character of religious liberty has been misunderstood or inadequately recognized. In response, they have crafted arguments and analyses to enrich the understanding of how the Founders conceived religious liberty and how it should be understood and adjudicated in modern society.

Vincent Phillip Muñoz is the Tocqueville Associate Professor of Religion & Public Life in the Department of Political Science at the University of Notre Dame and has written extensively about religious liberty and natural rights philosophy. Muñoz's work, notably his most recent book, *Religious Liberty and the American Founding*, proposes a natural rights construction of the First Amendment Religion Clauses. Such a construction, he argues, provides the most faithful interpretation of the Founders’ understanding of religious liberty.<sup>3</sup> Muñoz contends “that we have neither grasped the

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<sup>3</sup> Vincent Phillip Muñoz, *Religious Liberty and the American Founding* (2022).



Founders' natural rights understanding of religious liberty nor accurately appreciated how it would inform First Amendment church-state jurisprudence.”<sup>4</sup> He conducts a philosophical, historical, and legal analysis to support the crafting of what he deems to be a natural rights construction of the Religion Clauses.

Steven D. Smith is the Warren Distinguished Professor of Law at the University of San Diego School of Law. He has published several works providing critical analyses of the philosophy of law and religious freedom. His books *The Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*<sup>5</sup> and *The Rise and Decline of American Religious Freedom*<sup>6</sup> provide insight into the original meaning of the Religion Clauses and the current state of religious liberty. In the former, he argues that the original meaning of the Religion Clauses did not adopt a substantive principle of religious liberty but rather a jurisdictional arrangement whereby the states were to determine the principle they would adopt. In the latter, he explains how Religion Clause jurisprudence and discourse have adopted a narrative of religious liberty inconsistent with what Smith deems as the reality of religious liberty. He conveys this reality by providing a revised account that focuses on how philosophical, theological, and historical developments influenced the Founders' understanding of commitments to freedom of conscience and separation of church and state. The book analyzes how the current emphasis on secularity embedded in jurisprudence places religious liberty in danger. Without a religious rationale, religious liberty is not strong enough to stand against conflicting rights, or even to assert itself as a right of special protection. Smith

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<sup>4</sup> Id at 6.

<sup>5</sup> Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

<sup>6</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom* (2014).

further elucidates the importance of religious rationales in religious liberty in a more recent book, *The Disintegrating Conscience and the Decline of Modernity*, where he analyzes the evolution of the conception of conscience and how this evolution has affected our understanding of religious liberty.<sup>7</sup>

Smith and Muñoz both provide distinctive commentary on religious liberty which separates them from the mainstream of religion clause jurisprudence. They also differ fundamentally from each other in their analyses of the original intentions and meaning of the Religion Clause and their practical application of it in adjudication. Their main disagreement centers on evaluating the efficacy of natural rights philosophy in constructing a comprehensive theory of religious freedom that aligns with the Founders' intentions. Muñoz formulates such a theory, while Smith, acknowledging certain aspects of natural rights philosophy as valid, contends that this lens restricts analysis of religious liberty. He insists that examining the historical, theological, and philosophical developments can reveal important considerations and context essential to understanding the American conception of religious liberty. Muñoz and Smith share the goal of providing insight into the Founders' intentions, the original meaning of the Religion Clauses, and the state of religious liberty in modern society. However, their arguments fundamentally differ in the lens they use to analyze the Founders' intentions, leading to differing considerations on how religious liberty should be conceived in modern society. Given that Vincent Phillip Muñoz and Steven D. Smith analyze the Founders' conception of religious liberty through different lenses, this thesis endeavors to conduct a comparative analysis of Muñoz and Smith's varying perspectives to

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<sup>7</sup> Steven D. Smith, *The Disintegrating Conscience and the Decline of Modernity* (2023).

evaluate which perspective provides a more comprehensive understanding of the character, original meaning, and current predicament of religious liberty.

To compare Muñoz and Smith's viewpoints, this thesis will analyze their interpretations in light of James Madison's *Memorial and Remonstrance*.<sup>8</sup> Madison wrote *Memorial and Remonstrance* to further the causes of disestablishment in Virginia. He framed his argument by asserting that the rights of conscience are fundamental and that religious establishments offend these rights. Given the rare and unprecedented nature of disestablishment, the Memorial and Remonstrance conveys the unique character of American religious freedom, and thus equips it to be a useful lens by which to analyze and determine whether Steven D. Smith's or Vincent Phillip Muñoz's interpretations of the original intentions and meaning of the Religion Clauses more effectively encapsulate how the Founders' understood religious liberty.

Ultimately this thesis concludes that to further understand the character, original meaning, and current predicament of religious liberty, Smith provides a stronger frame of analysis through a historical, philosophical, and theological context, emphasizing the evolution of conscience and its relationship to government authority. Muñoz's natural rights construction restricts the analysis of religious liberty to social contract theory and, by doing so, neglects to adequately address the current predicament of religious liberty, as it is placed in direct tension with other 'fundamental rights,' and to define the character of religious liberty. While Muñoz may not provide the best lens of analysis, his scholarship provides a resourceful historical record of the drafting of the Religion

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<sup>8</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, 1785.

Clauses, which enriches analysis of their original meaning. However, Smith more adequately captures the character of religious liberty, its original meaning, and the current predicament of religious liberty.

To properly compare Muñoz and Smith's arguments, Section II will begin by providing a summary and analysis of Religion Clause jurisprudence to set up the questions in Religion Clause jurisprudence and scholarship that are necessary to consider given the current predicament of religious liberty. Then, in Sections III and IV, Muñoz and Smith's work will be summarized and analyzed respectively to understand the lens they use and the arguments they have crafted given the questions in Religion Clause jurisprudence and scholarship. Section V will present Madison's *Memorial and Remonstrance* as a mechanism of comparison of Muñoz and Smith's interpretations and analysis. This section will analyze whether Muñoz or Smith's interpretation of James Madison's conception of religious liberty is the most compatible with the text and context of the Memorial and Remonstrance. Finally, the thesis will conclude by analyzing how Smith provides a more comprehensive view for understanding the principle of religious liberty and addressing the pertinent challenges religious liberty faces today.

## **II. Religion Clause Jurisprudence**

Religion Clause jurisprudence is complicated by the difficulty of ascertaining the original meaning or intent of the Religion Clauses. Understanding the original meaning or intent of the Religion Clauses is crucial because it provides a stable and historical foundation for legal interpretation, ensuring that modern rulings are consistent with the principles upon which the nation was founded. This originalist approach helps maintain

the integrity of the Constitution by preventing contemporary biases and perspectives from distorting the original framework of rights and liberties. However, both Religion Clause jurisprudence and scholarship reflect an inconsistency in what is to be understood as the original meaning or intentions of the Founders. This inconsistency arises from the varied interpretations of the same historical texts and the production of differing conclusions based on the same historical texts drawn by scholars and judges. The jurisprudence of the Establishment and Free Exercise Clauses will be considered respectively for how this challenge to determine original meaning or intention led to a distorted jurisprudence.

### **A. Establishment Clause Jurisprudence**

Across Establishment Clause jurisprudence, three key interpretations invoking original meaning developed and oscillated in recognition and application.<sup>9</sup> The first approach, termed “strict-separationism,” advocates for a completely separate and distinct relationship between church and state, originating from *Everson v. Board of Education*.<sup>10</sup> Separationism still influences current jurisprudence to some extent; however, it has been challenged by another approach termed “nonpreferentialism,” developed in *Wallace v. Jaffree*, which contends that religious liberty does not necessitate a completely separate relationship between church and state but rather requires the government to avoid providing legal privileges to or discriminating against a particular sect.<sup>11</sup> Justice Thomas, previously an advocate of the nonpreferentialist

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<sup>9</sup> Vincent Phillip Munoz, James Madison’s Principle of Religious Liberty, 97 The American Political Science Review 17 (2003).

<sup>10</sup> *Everson v. Board of Education* 330 U.S. 1 (1947).

<sup>11</sup> See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

approach, shifted to a jurisdictional interpretation in *Elk Grove Unified School District v. Newdow*, which is not necessarily mutually exclusive of the nonpreferentialist position but expands upon it.<sup>12</sup> The jurisdictional interpretation argues that the Establishment Clause was solely meant to apply to the Federal Government, leaving states to determine their church-state relationships. The jurisdictional approach has been heavily supported by several legal scholars as the truest interpretation of the original meaning; however, this approach faces enforcement challenges due to the incorporation of the Religion Clauses.<sup>13</sup> This section will further elucidate on these three interpretations and their role in jurisprudence.

In *Everson v. Board of Education*, the issue before the Court was whether a New Jersey law reimbursing parents for the costs of transportation to parochial schools violated the Establishment Clause.<sup>14</sup> Justice Black, writing for the majority, stated, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”<sup>15</sup> This metaphor, coined by Thomas Jefferson in an 1802 letter to the Danbury Baptist Association, emphasized the government’s non-interference in religious matters.<sup>16</sup> Justice Rutledge, in his dissent, contended that the wall had been breached, arguing that the original intention of the Establishment Clause was “to create

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<sup>12</sup> See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 45 (2004).

<sup>13</sup> The Establishment Clause was incorporated against the states through the Fourteenth Amendment in *Everson v. Board of Education*, 330 U.S. 1, 8 (1947) and the Free Exercise Clause was incorporated against the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The incorporation of the Religion Clauses challenges the jurisdictional approach because by applying the Religion Clauses to the states it adds those prohibitions to the states when they were otherwise meant to solely apply to the national government.

<sup>14</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>15</sup> *Id.* at 18.

<sup>16</sup> Thomas Jefferson, Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 8 *The Writings of Thomas Jefferson* 113 (H.A. Washington ed., 1854).

a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”<sup>17</sup> He relied on Madison’s *Memorial and Remonstrance*, describing Madison’s view that “religion was a wholly private matter beyond the scope of civil power either to restrain or to support.”<sup>18</sup> Justice Rutledge concluded that the Establishment Clause delineates a distinct and separate relationship between church and state whereby the nation is prohibited from providing any aid or support to religious exercise, even if it may be interpreted as a public benefit.<sup>19</sup> The majority and dissenting opinions in *Everson* both relied on Jefferson’s wall metaphor, yet they reached different outcomes based on varying interpretations of the boundaries of this “wall.” This variance foreshadows the pervasive problem in Religion Clause jurisprudence: the difficulty to ascertain the original meaning or intent of the Religion Clauses. *Everson* did not elicit a strong public reaction; however, the strict separationist approach, as applied in the cases *Engel v. Vitale* and *Abington v. Schempp*, which found school-facilitated prayer or scripture reading in schools to be unconstitutional, provoked one of the strongest public outcries against a Supreme Court decision.<sup>20</sup> *Everson*’s principle of strict separation between church and state essentially constitutionalized a principle of neutrality or, to the logical extreme, secularity. In *Schempp*, the constitutional test of neutrality, otherwise referred to as the secular purposes and effects test, described that governments must act only for secular purposes and must not act in ways that have a primary effect of

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<sup>17</sup> *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

<sup>18</sup> *Id.* at 39.

<sup>19</sup> *Id.* at 41.

<sup>20</sup> Bruce C. Dierenfield, *The Battle over School Prayer* 72 (2007) Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 120 note 55.

advancing or inhibiting religion.<sup>21</sup> Arguably, these cases have effectively established “political secularism as an official constitutional orthodoxy.”<sup>22</sup> Ironically, the Supreme Court’s emphasis on neutrality relegated religious beliefs and exercises to the private sphere and placed secularity in the public sphere. Justice Stewart, in his dissent in *Schempp*, recognized the goals of neutrality to be illusory, stating, “We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways.”<sup>23</sup>

The rhetoric of the wall, which had pervaded Establishment Clause jurisprudence, was challenged as inherently inconsistent with the original intent in Justice Rehnquist’s dissent in *Wallace v. Jaffree*.<sup>24</sup> Justice Rehnquist argues that the Establishment Clause had been characterized by Jefferson’s metaphor, concluding that the original intention was to prevent the government from ecclesiastical establishment and from giving preferential aid to or showing hostility toward any religious sect.<sup>25</sup> He argued that Justice Black and Rutledge’s opinions in *Everson* incorrectly attributed the original meaning of the Establishment Clause primarily through the writings and opinions of Thomas Jefferson and James Madison. Rehnquist argued that solely emphasizing these Virginians’ conception of religious liberty mischaracterizes the Framers’ conception, as Jefferson was not involved in the

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<sup>21</sup> *Abington School District v. Schempp*, 374 U.S. 203 222 (1963).

<sup>22</sup> Steven D. Smith, *Constitutional Divide: the Transformative Significance of the School Prayer Decisions*, 38 *Pepperdine Law Review* 945 (2011).

<sup>23</sup> *Abington School District v. Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting).

<sup>24</sup> *Wallace v. Jaffree* 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

<sup>25</sup> *Jaffree*, 472 U.S. at 104 (Rehnquist, J., dissenting). Analysis of Rutledge is connected to the work of Robert Cord in *Separation of Church and State: Historical Fact and Current and Fiction* (1982).



drafting or adoption of the First Amendment, and Madison's influence should be considered as advocating for legislative compromise, not as incorporating the Virginia Statute of Religious Liberty into the Constitution.<sup>26</sup> Rehnquist succinctly described the nonpreferentialist position, stating that "[n]othing in the Establishment Clause...requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."<sup>27</sup>

Justice Thomas in *Elk Grove Unified School District v. Newdow* suggested that "the Establishment Clause is best understood as a federalism provision—it protects state establishment from federal interference but does not protect any individual right."<sup>28</sup> This interpretation of a jurisdictional establishment clause fits with the history and tradition of the nation, whereby states were permitted to have state establishments of religion.<sup>29</sup> Justice Thomas's interpretation is also recognized by many other scholars.<sup>30</sup> However, this interpretation is complicated by the incorporation of the Religion Clauses.<sup>31</sup>

Establishment Clause jurisprudence generally embraced the strict separationist narrative, but at times expressed a nonpreferentialist view. This preference for the strict separationist narrative is reflected in the additional prong of analysis added to the

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<sup>26</sup> Jaffree, 472 U.S. 38, 98 (Rehnquist, J., dissenting) (1985).

<sup>27</sup> Jaffree, 472 U.S. 38, 113 (Rehnquist, J., dissenting) (1985).

<sup>28</sup> *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (Thomas, J., concurring) (2004).

<sup>29</sup> State establishments of Congregationalism existed in New Hampshire until 1817, in Connecticut until 1818, and Massachusetts until 1833. Colin Kidd, *Civil Theology and Church Establishments in Revolutionary America* 42 *The Historical Journal* 1019 (1999).

<sup>30</sup> Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373. Akhil Reed Amar, *The Bill of Rights* 32-42 (1998). Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 62 (2002); Philip Hamburger, *Separation of Church and State* 101-07 (2002); Steven D. Smith, *The Jurisdiction Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

<sup>31</sup> *Supra* note 14.

secular purposes and effects test in *Lemon v. Kurtzman*.<sup>32</sup> This test suggests that the government can assist religion only if (1) the primary purpose of the assistance is secular, (2) the assistance neither promotes nor inhibits religion, and (3) there is no excessive entanglement between church and state.<sup>33</sup> Given that the prongs of the Lemon test are extremely broad, analyses of Establishment Clause violations were applied incoherently and intermittently. In Justice Scalia's dissent in *Lamb's Chapel v. Center Moriches Union Free School District*, he described the Lemon test, stating, "[L]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again."<sup>34</sup>

The Lemon Test's demise came to fruition in the case *Kennedy v. Bremerton*.<sup>35</sup> Although primarily a free exercise and free speech case, *Kennedy v. Bremerton* struck down the Lemon test.<sup>36</sup> The case involved the Bremerton School District's action against Coach Kennedy for praying at midfield after high school football games, fearing it would be viewed as an endorsement of religion. Considering how the school-initiated threats based on fears of establishment clause violation, the Supreme Court struck down the Lemon test and argued that a test of history and tradition be used instead. The case "abandoned Lemon and its endorsement test offshoot" in favor of "an analysis focused on original meaning and history."<sup>37</sup> This change abandoned the strict separationist

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<sup>32</sup> *Lemon v. Kurtzman* 403 U.S. 602 (1971).

<sup>33</sup> *Lemon v. Kurtzman* 403 U.S. 602, 612-13 (1971). The test was borrowed from *Board of Education v. Allen*, 392

U.S. 236, 243 (1968); *Walz* at 397 U.S. 674.

<sup>34</sup> *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (Scalia, J., dissenting) (1993).

<sup>35</sup> *Kennedy v. Bremerton*, 597 U.S. \_\_\_\_\_ (2022).

<sup>36</sup> *Lemon v. Kurtzman* 403 U.S. 602 (1971).

<sup>37</sup> *Kennedy v. Bremerton*, 597 U.S. \_\_\_\_\_ 22,24 (2022).

narrative and deemed it as contrary to an originalist interpretation of the Religion Clauses. The court's recent shift to analyzing these cases based on original meaning and history demonstrates the necessity of religion clause scholarship to further analyze the context and history of religious liberty to inform adjudication.

## **B. Free Exercise Clause Jurisprudence**

Free Exercise Clause jurisprudence has been shaped by contrasting approaches: the accommodationist approach, which asserts that the Free Exercise Clause requires the government to generally provide exemptions for religious exercise when it conflicts with the law, and the non-accommodationist approach, which does not recognize the Free Exercise Clause as providing exemptions to generally applicable and neutral laws. Initially, the belief-action doctrine allowed some accommodation but also permitted restrictions based on societal norms, as seen in *Reynolds v. United States*. Subsequent cases like *Cantwell v. Connecticut* and *Sherbert v. Verner* favored accommodation, scrutinizing laws infringing on religious exercise. However, *Employment Division v. Smith* introduced the non-accommodationist Smith test, limiting religious exemptions. While the Religious Freedom Restoration Act (RFRA) aimed to restore accommodationist principles, its scope remains limited. Recent cases like *The Church of the Lukumi Babalu Aye v. Hialeah* show exceptions to the Smith test, but tensions persist. *Fulton v. City of Philadelphia* and *Tandon v. Newsom* suggests a nuanced shift towards greater accommodations, signaling a potential evolution in the Court's approach.

Free Exercise Clause jurisprudence was initially characterized by the belief-action doctrine. This originated with *Reynolds v. United States*, where the Supreme

Court described, “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”<sup>38</sup> In this case, no accommodation for religion was made on the grounds that Congress found the worship to be repulsive to good society and moral order. The belief/action doctrine was further distinguished in *Cantwell v. Connecticut* and *Sherbert v. Verner*, where the Court provided an accommodationist approach. In *Cantwell v. Connecticut*, the Court applied what can be characterized as ‘strict scrutiny’ to laws infringing upon religious exercise. The Connecticut law prohibiting the solicitation of money from the public without a “certificate of approval” had to prove it was based on a compelling state interest and was narrowly tailored to achieve that interest without unnecessarily restricting religious freedom. The Court found that while the law had a legitimate government interest, it was invalid because it targeted religious solicitation by requiring a “certificate of approval” specifically for religious activities. This demonstrated that the law was not the least restrictive means of achieving the state's interest. In *Sherbert v. Verner*, the Supreme Court distinguished greater accommodations to religious freedom by formally applying strict scrutiny standards for violations of free exercise.<sup>39</sup> The government had to demonstrate that the law inhibiting free exercise had a compelling government interest that was narrowly tailored and was the least restrictive means of imposing that interest. This case solidified the use of strict scrutiny in assessing laws that burden religious practices, ensuring a high level of protection for religious freedom.

However, almost 30 years later, in *Employment Division v. Smith*, the Supreme Court applied a new standard called the Smith test, which significantly shifted the

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<sup>38</sup> Reynolds v. United States 98 U.S. 145, 166 (1879).

<sup>39</sup> Sherbert v. Verner 374 U.S. 398 (1963).

accommodationist approach provided by strict scrutiny.<sup>40</sup> The Court in *Smith*, rather than utilizing the balancing test and holding that the state of Oregon had a compelling interest to control drug use that overrode the free exercise rights of the claimants, instead adopted the *Smith* test. This test asserts that if the law infringing free exercise is generally applicable and neutral, then it is a valid law, leaving no recourse for the individual whose free exercise has been infringed.<sup>41</sup> This shift from an accommodationist approach to a non-accommodationist approach held that providing greater accommodations to religious exercise would be “courting anarchy” by allowing an individual’s conscience to become “a law unto itself.”<sup>42</sup> This decision shocked the nation and led Congress to pass the Religious Freedom Restoration Act (RFRA) in 1993, which essentially applied the strict scrutiny standard to free-exercise cases regardless of whether the law was generally applicable and neutral.<sup>43</sup> However, the Court held in *Boerne v. Flores* that RFRA applied only to federal government action and did not apply to the states, leading to efforts within the states to pass their own RFRA.<sup>44</sup>

Since *Smith*, the Supreme Court has maintained some distinctions or exceptions that reflect an accommodationist interpretation of the Free Exercise Clause. An exception to the *Smith* test was established in *The Church of the Lukumi Babalu Aye v. City of Hialeah*, where laws targeting religion are subject to strict scrutiny.<sup>45</sup> While this exception was helpful in expanding protections of free exercise, it is not often the case

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<sup>40</sup> *Employment Division v. Smith* 494 U.S. 872 (1990).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 875.

<sup>43</sup> Religious Freedom Restoration Act Pub. L. No. 103-141, 107 Stat. 1488 (1993).

<sup>44</sup> *Boerne v. Flores* 521 U.S. 507 (1997). 28 of the 50 states have state RFRA, leaving 32 states without such protection.

<sup>45</sup> *The Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

that laws discriminate against religious exercise deliberately or explicitly. Religious exemptions were once subject to a balancing test, giving religious exercise greater deference through strict scrutiny. The Court's decision to reject the use of strict scrutiny analysis in free-exercise cases in *Smith* essentially rejected the religious justification of religious liberty. Religious exemption cases essentially claim that an individual should be excused from complying with a certain law because of their religious beliefs or in the language of Madison, their duty to God. *Smith* placed religious freedom jurisprudence in a difficult place, where its status as a fundamental right has been placed in jeopardy and can easily be infringed by generally applicable and valid laws.

The cases *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and 303 *Creative LLC v. Elenis* demonstrate how religious liberty, long regarded as a fundamental right, faces challenges from anti-discrimination law. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court ruled in favor of a baker who refused to make a wedding cake for a same-sex couple, emphasizing that the Colorado Civil Rights Commission showed hostility towards the baker's religious beliefs.<sup>46</sup> This case placed the question of balancing free exercise rights with the valid anti-discrimination law before the court; however, the Court avoided the question based on the hostility shown towards the baker's religious beliefs in the oral argument. Similarly, in 303 *Creative LLC v. Elenis*, the Court held that a website designer could not be compelled to create websites for same-sex weddings, ruling that compelling such speech would violate the designer's right to refrain from messaging that conflicts with her religious beliefs.<sup>47</sup> This case was won primarily on the basis of free speech rights in

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<sup>46</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_ (2018).

<sup>47</sup> 303 *Creative LLC v. Elenis*, 600 U.S. \_\_ (2023).

conjunction with free exercise rights, thus begging the question of the strength of free exercise claims when placed in conflict with valid laws pursuing civil rights, such as LGBTQ+ anti-discrimination laws.

*Smith*'s non-accommodationist position has pervaded Free Exercise Clause jurisprudence; however, recent cases have demonstrated a shift towards a more accommodationist position. In *Fulton v. City of Philadelphia*, the Court held that if exemptions are granted for other reasons but not for religious groups, the *Smith test* does not apply, and strict scrutiny is applied.<sup>48</sup> In *Tandon v. Newsom*, the Court similarly held that religious exercise must be treated the same as or better than “any comparable secular activity.”<sup>49</sup> These cases demonstrate a shift in the Court’s jurisprudence towards restoring strict scrutiny analysis to religious exemption claims and overturning *Smith*.

### **C. Distorted Religion Clause Jurisprudence**

The challenge of determining the original meaning of the Religion Clauses has complicated adjudication, resulting in a fragmented and often inconsistent body of law, suggesting that a purely originalist approach does not satisfy interpretation of the Religion Clauses. Both Muñoz and Smith argue that the original meaning and intentions of the Founders fall short in interpretation. Muñoz crafts a natural rights construction that uses the lens of natural rights philosophy and, more specifically, social contract theory to supplement interpretation. In contrast, Smith does not provide a specific construction or principle whereby religious liberty should be adjudicated. Instead, Smith

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<sup>48</sup> *Fulton v. City of Philadelphia* 593 U.S. 522 (2021).

<sup>49</sup> *Tandon v. Newsom* 593 U.S. \_\_\_\_ (2021) (per curiam).

provides his own analysis of the original meaning, which follows the jurisdictional approach, and critically analyzes the current problems of Religion Clause Jurisprudence and how it conflicts with the character of religious liberty. Muñoz's analysis provides a restrictive lens, while Smith provides a comprehensive lens to frame Religion Clause jurisprudence. The distorted nature of Religion Clause jurisprudence highlights the necessity of grounding Religion Clause jurisprudence in the historical and philosophical context provided by the Founders. Smith provides this more comprehensive picture. The following two sections will further elaborate on Smith and Muñoz's respective analysis concerning the character of religious liberty, the original meaning, and the current predicament of religious liberty.

### **III. Muñoz and the Natural Rights Construction**

Vincent Phillip Muñoz's recent book *Religious Liberty and the American Founding* provides a profound historical, philosophical, and legal analysis of the principle of religious liberty through the lens of natural rights philosophy.<sup>50</sup> His book aims to elucidate the Founders' perception of religious liberty as an inalienable natural right, determine the extent of our knowledge regarding the original meaning of the Religion Clauses, and adjudicate Religion Clause cases based on the principles derived from this natural rights interpretation. In pursuit of these ends, the book crafts a natural rights construction.

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<sup>50</sup> Vincent Phillip Munoz, *Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses* (2022).



### **A. Religious Liberty is a Natural and Inalienable Right**

Muñoz argues that, despite differing views among the Founders on church-state relations, they unanimously recognized religious liberty as a natural and inalienable right. He asserts that “the Founders’ most authoritative understanding of religious liberty was that it is an inalienable natural right.”<sup>51</sup> Thus, Muñoz concludes that the best way to craft a comprehensive and cohesive theory of religious authority amidst disagreement is to frame the analysis upon what the Founders agreed upon- that religious liberty is a natural and unalienable right. To support his claim, he relies upon the natural rights language in State Constitutions and the Declaration of Rights within the context of social contract theory to demonstrate the relationship between natural rights philosophy and religious liberty. He additionally draws upon writings from Thomas Jefferson, James Madison, and Issac Backus to highlight how the rhetoric of natural rights and social contract theory influenced the Founding Generation's philosophical and theological understanding of religious liberty.

The Framers were heavily influenced by natural rights philosophy and social contract theory, as evidenced by the language of the Declaration of Independence. The Declaration asserts the fundamental truth “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness” and further asserts a doctrine of political legitimacy whereby “governments are instituted among Men, deriving their just powers from the consent of the governed.” Social Contract theory reflected this doctrine of political legitimacy, providing a hypothetical model to understand the relationship

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<sup>51</sup> Id. at 9.

between governmental authority and citizens, thereby providing a framework for legitimate government authority. The theory began by reflecting upon the state of nature, the human condition without political order. However, there came a point when individuals would consent to give up some of their freedoms to better ensure their rights. As articulated in John Locke's *Two Treatises of Government*, the obligation to obey government authority, established under the social contract by the authority of the people, was contingent upon the government's commitment to safeguarding the natural rights of individuals.<sup>52</sup>

Muñoz relies on the natural rights and social contract language found in State Constitutions and Declarations of Rights to explore how the Founders perceived natural rights and understood religious liberty within the context of social contract theory. Citing scholar Thomas G. West, Muñoz argues that State Constitutions “represent the most authoritative expression of the consensus of the Founding generation.”<sup>53</sup> For instance, Rhode Island's official ratification of the Constitution includes a declaration of natural rights principles, affirming that “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity.”<sup>54</sup> Article IV of that Declaration asserts that “all men have a natural, equal, and unalienable right to the exercise of religion.”<sup>55</sup> Among the eight states that drafted Declarations of Rights from 1776-1786, five explicitly recognized religious liberty as a natural right, while the

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<sup>52</sup> John Locke, *Two Treatises of Government* (1690).

<sup>53</sup> Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Condition of Freedom*, 175 (2017). Cited in Vincent Phillip Muñoz, *Religious Liberty and the American Founding* at 28 (2022).

<sup>54</sup> Cited in Vincent Phillip Muñoz, *Religious Liberty and the American Founding*, 39, (2022).

<sup>55</sup> *Id.*

remaining three incorporated natural rights language encompassing religious liberty within their frameworks.<sup>56</sup>

Relying upon natural rights philosophy, Thomas Jefferson, James Madison, and Isaac Backus crafted epistemological, philosophical, and theological arguments to further assert the natural and unalienable character of religious liberty. Jefferson's *Virginia Statute for Religious Liberty* argued that religious liberty is an unalienable right because it is both irrational and illegitimate for the government to infringe upon the rights of conscience. He further maintained that "the opinions and belief of men depend not on their own will but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint."<sup>57</sup> His claim rested upon the premises that the mind is insusceptible of coercion and involuntarily subjects itself to persuasive evidence. These claims were inspired by John Locke's assertion in *An Essay Concerning Human Understanding* that "knowledge is no more arbitrary than perception."<sup>58</sup> Thus conveying that attempts by other actors to coerce an individual's opinion are irrational. Jefferson also contended that such coercion is illegitimate within the context of social contract theory, writing in the *Notes on the State of Virginia* that "rulers can have authority over such natural rights only as we have submitted to them...the rights of conscience we never submitted...we could not

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<sup>56</sup> Vincent Phillip Munoz, *Religious Liberty and the American Founding*, 32-33, (2022).

<sup>57</sup> Thomas Jefferson, *Virginia Statute for Religious Liberty* (1786).

<sup>58</sup> John Locke, *An Essay Concerning Human Understanding* (New York: Dover Publications, 1959 [orig. Pub. 1689]), book 4, chapter 13, section 2, 358. Cited in Vincent Phillip Munoz, *Religious Liberty and the American Founding* at 71 (2022).

submit.”<sup>59</sup> Here, Jefferson explains the unalienable nature of religious liberty. Within the logic of the social contract, unalienable rights are unable to cede to government authority; individuals are unable to submit this right due in part to epistemological considerations previously described. Yet, Thomas Jefferson contended that while individuals are unable to submit their beliefs, they can submit their actions. He further distinguished this position by describing that “the legitimate powers of government extend to such acts only as are injurious to others,” thus implicating the natural rights logic that natural rights have natural limits.<sup>60</sup> Muñoz recognizes that Jefferson’s argument regarding the unalienable character of religious liberty is centered upon epistemological considerations that are enriched by a religious premise that “Almighty God hath made the mind free.”

James Madison relied on epistemological and theological foundations similar to Thomas Jefferson’s; however, his analysis differed on account of his regard for the exercise of conscience as a duty. Jefferson’s consideration that “Almighty God hath made the mind free” further indicated, for Madison, that a God that created the faculties of the mind free and capable of both reason and revelation deserves the cultivation of that free will in coordination with worship to Him. Further, this obligation to worship our Creator “is precedent both in order of time and degree of obligation, to the claims of Civil Society.”<sup>61</sup> Muñoz characterizes Madison’s argument of the precedential nature of our obligation to God as both “pre-political,” since these obligations existed prior to the

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<sup>59</sup> Thomas Jefferson, Notes on the State of Virginia (1786). Cited in Vincent Phillip Munoz, Religious Liberty and the American Founding at 72 (2022).

<sup>60</sup> Id.

<sup>61</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785). Cited in Vincent Phillip Munoz, Religious Liberty and the American Founding at 80 (2022).

creation of political authority, and “transpolitical,” since the obligation is rendered to a higher power, God. Following the logic of social contract theory, the duty owed to God existed before the initiation of political authority by social contract. Thus, it is an obligation which the contract cannot infringe. Such obligations also transcend the bonds of political authority due to their religious character. Here, Madison’s argument relies upon theological grounds, suggesting the nature of God and his relationship to man. From these assertions, he philosophically deduced that the only manner by which man can fulfill his religious duties is by conviction and conscience; therefore, men have an inalienable right to religious liberty.

Muñoz recognizes that, beyond Jefferson’s epistemological argument and Madison’s natural theological approach, many Americans ground their reverence of religious freedom upon a Christian account of the natural right of religious liberty. Muñoz specifically cites Issac Backus, Elisha Williams, and Samuel Stillman as prominent preachers at the time who argued that religious liberty is a natural and unalienable right through a religious lens using social contract language. Backus characterized “true religion [as] voluntary obedience unto God.”<sup>62</sup> His analysis was echoed by Elisha Williams, who argued that it is a “self-evident maxim...that a Christian is to receive his Christianity from Christ alone.”<sup>63</sup> He further argued, based on the Reformation’s interpretation of sacred scripture, that individuals must engage in a more personal manner with God rather than relying on the Church to receive salvation.

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<sup>62</sup> Issac Backus on Church, State, and Calvinism 351 (1778). Cited in Vincent Phillip Munoz, *Religious Liberty and the American Founding* at 83 (2022).

<sup>63</sup> Elisha Williams, *The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion*, (1744). Cited in Vincent Phillip Munoz, *Religious Liberty and the American Founding* at 86 (2022).

Thus, he concluded that “every Christian has a right of judging for himself what he is to believe and practice in religion according to that rule.”<sup>64</sup> Elisha Williams weaved his analysis within the context of social contract theory by arguing that “the members of a civil state do retain their natural liberty or right of judging for themselves in matters of religion.”<sup>65</sup> Dr. Samuel Stillman, a contemporary of Backus, further distinguished this connection by invoking his purpose as “to draw a line between the things that belong to Caesar and those that belong to God.”<sup>66</sup> He did so by invoking principles from John Locke, asserting that the agreement of individuals to enter a social contract is conditional upon the protection of their natural rights. Then Stillman echoed Locke’s principle in his *Letter Concerning Toleration* that the political authority “is wholly confined to the things of the world.” The scope of authority is limited to that which is Caesars, and therefore, this limitation “secures[s] to every man the inestimable right of private judgment.”<sup>67</sup> Muñoz argues that the right of private judgment derived from Christian theology “connected moral theology to natural rights social compact constitutionalism.”<sup>68</sup> Though the Founding Generation understood the right to religious liberty in different frameworks, theological or philosophical, they reached the same conclusion: religious liberty is a natural and inalienable right.

This evidence indicates a clear agreement among the Founders and the American people regarding the existence of a natural and unalienable right to religious worship.

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<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Samuel Stillman, A Sermon preached Before the Honorable Council, and the Honorable House of Representatives of the State of Massachusetts-Bay in New England Boston (1779). Cited in Vincent Phillip Munoz, *Religious Liberty and the American Founding* at 86 (2022).

<sup>67</sup> Id.

<sup>68</sup> Vincent Phillip Munoz, *Religious Liberty and the American Founding* 87 (2022)

However, the Founders disagreed about the nature of the relationship between church and state that is implicated by this natural and inalienable right. Muñoz characterizes two positions regarding this disagreement: “expansive liberalism” and “narrow republicanism.” He characterizes the “Narrow Republicanism” position as recognizing an inalienable natural right to religious liberty and therefore holding that the state may not exercise jurisdiction over religious worship ‘as such.’ The state, accordingly, may not penalize, prohibit, or mandate religious worship ‘as such’, and it may not pursue the end of saving citizens’ souls. The implications of this position on the politics of church and state are as follows: “The state may employ religion to accomplish otherwise legitimate civic ends. Since morality is essential to republican citizenship, and religion is essential to morality, the government should promote the religious character of the citizenry.”<sup>69</sup> While the “Expansive Liberalism” approach understands the natural and inalienable character of religious liberty, it differs in its understanding of the implication of the principle: “the state may not impose religious taxes for the exclusive support of religion, or affect an individual’s civil rights on account of his or her religious beliefs or affiliation. The state may not employ religion to accomplish otherwise legitimate civic ends. Even if morality is essential to republican citizenship and religion is essential to morality, religion does not need governmental support and therefore the government ought not directly support religion.”<sup>70</sup> Given the warring positions of the implication of the principle of religious liberty on the relationship between church and state, the original meaning of the Religion Clauses is difficult to ascertain. The text does not

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<sup>69</sup> Id. at 104.

<sup>70</sup> Id. at 105.

provide much indication, and furthermore, the original intentions of the clause could be attributed to either position.

### **B. The Original Meaning of the Religion Clauses**

To give meaning to the Religion Clauses, Muñoz employs what he terms “text and design” originalism. This form of originalism draws upon the distinction in originalist literature between constitutional interpretation and construction. The former is “the recovery of the communicative content of the constitutional text.”<sup>71</sup> This refers to analyzing the original meaning of the text and what the text would have been understood to have meant at the time of adoption. However, this method can fall short at times. Therefore, constructions “elucidate the text in the interstices of discoverable, interpretative meaning, where the text is so broad or so undetermined as to be incapable of faithful but exhaustive reduction to legal rules.”<sup>72</sup> Muñoz further employs another element to his analysis of the original meaning of the Religion Clauses, drawing upon Jack Balkin’s analysis, which proposes that there are three types of constitutional language: rules, standards, and principles. Muñoz applies Balkin’s analysis to the distinction between construction and interpretation to hold that when a constitutional provision is a rule, it is understood through constitutional interpretation; however, when the provision sets a standard or principle, it requires constitutional construction. Muñoz concludes in his analysis that the Establishment Clause contains two rules that the Framers left undetermined and that the Free Exercise Clause communicates a principle that requires construction.

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<sup>71</sup> Id. at 121.

<sup>72</sup> Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 5 (1999). Cited in Vincent Phillip Munoz, *Religious Liberty and the American Founding* at 121 (2022).



Following a “text and design” approach, Munoz argues that the Framers adopted the Establishment Clause to recognize the national government's lack of authority to establish a religion and that church-state affairs would remain primarily at the state level. The Founders accomplished this by crafting the Establishment Clause, which set forth the constitutional rules that Congress shall make no law to erect a religious establishment and that Congress shall make no law concerning state-level establishments. However, what constitutes “an establishment of religion” is unclear, thus requiring a construction. On the other hand, the Free Exercise Clause communicates a principle that the rights of conscience shall not be infringed. However, the scope of this principle is not made clear by the text or drafting records. Thus, the constitutional language must be constructed.

The impetus for the Bill of Rights was rooted in the Anti-Federalists' concern that the Constitution would impede fundamental rights. Federalists argued that the Constitution was written within the framework of enumerated powers, and therefore, the government had no authority beyond what was explicitly enumerated. However, the Anti-Federalists argued that some provisions of the Constitution were so broad, such as the Necessary and Proper Clause, that they could be used to impede individual rights. Anti-Federalists also specifically mentioned their discontent that there was no specific protection of religious liberty, among other rights, enumerated in the Constitution. The Federalists did not share these fears; however, it became evident that, for the sake of ratification of the Constitution, a Bill of Rights would need to be adopted. Therefore, the historical context of the drafting of the Bill of Rights was complicated by the Anti-Federalists, who were more preoccupied with enumerating rights rather than developing

intricate principles, rules, or standards, and the Federalists, who believed the Bill of Rights had no legal force, but to serve as an instrument of ratification. This historical context provides an important perspective for analyzing the drafting debates for implications of Religion Clause interpretation. While a few key considerations from the drafting debates can provide key insights into interpretation, a great deal of information is difficult to ascertain or understand, given the historical context.

Through an intricate analysis of the drafting debates pertaining to the Establishment Clause, Muñoz concludes that its original meaning pertains to federalism but is not a purely federalist provision. He also concludes that the original meaning of the Establishment Clause was to limit the power of the National Government regarding Religious Establishments, not Religion in general. He shows that New Hampshire proposed language that would have placed a categorical prohibition of federal laws “touching” the subject of religion. It was rejected and the current language prohibits laws “respecting an establishment of religion,” thus denoting the intention that Congress’s limitation on religious establishments is emphasized; however, there is no categorical prohibition of laws touching religion. Muñoz further concludes that the Establishment Clause imposed two constitutional rules that Congress shall make no law erecting a religious establishment, federally and at the state level.<sup>73</sup> He specifically notes the use of the word “Congress” to denote that the provision would only apply to the national government, and as previously mentioned, the phrase “respecting an establishment of religion,” was used to narrow the prohibition to “establishments.” While the drafting records provide some insight, Muñoz contends that they do not

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<sup>73</sup> The meaning has since been extended to state-level establishments due to the incorporation of the Establishment Clause in *Everson v. Board of Education* 330 U.S. 1 (1947).

provide a clear meaning. Muñoz specifically argues that the drafting records do not define an “establishment of religion.” Even within the framework of original public meaning, an establishment of religion is not clearly defined because there is variance across states’ conceptions of an “establishment.”

While the drafting records do not provide a clear understanding of what constitutes “free exercise,” Muñoz concludes that it was likely not understood to include a right for the religious to receive exemptions from burdensome laws. Muñoz relies heavily upon an analysis of the drafting records of the 2nd Amendment to further inform his analysis of the Free Exercise Clause. During the debates of the 2nd Amendment, several states recognized the burden of compelling military service upon individuals whose religious principles conflicted with bearing arms. Some State Constitutions or Declarations of Rights recognized this exemption, and some states proposed an amendment extending such religious exemptions. During debate, a connection was never made between the right to religious exemptions regarding bearing arms and the language of the Free Exercise Clause. Muñoz concludes that the absence of this connection suggests that religious exemptions were not intended. Muñoz further substantiates his conclusion by citing several representatives who state that “they are not part of the natural right of religious liberty” and that they should be considered a “legislative right.” Muñoz also recognizes the comments made by Representative Elias Boudinot, who asserted the importance of religious exemptions by asking, “What justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”<sup>74</sup> Several scholars rely on Boudinot’s

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<sup>74</sup> Id.

positive statements regarding the right to religious exemptions to assert an accommodationist approach to the Free Exercise Clause.<sup>75</sup> However, Muñoz concludes that the debates of the 2nd Amendment's failure to connect it to the 1st Amendment while invoking the principle of religious liberty shows that the First Amendment did not contain protections for religious liberty.

### **C. Construction and Adjudication of the Religion Clauses**

Muñoz's analysis of the drafting debates presents an intricate historical account, yet it yields no clear interpretation of the Religion Clauses. Therefore, Muñoz insists that the clauses be constructed. Muñoz argues that, once a constitutional provision enters the "construction zone," an authoritative understanding of the abstract principle must be chosen to guide construction. The guiding understanding of the principle is then used either to uncover the principle as it was best understood at adoption or tailored to what one would determine as the best understanding of the principle.

Beginning with the Free Exercise Clause, Muñoz's analysis of the "text" suggests that it conveys the principle that Congress shall not violate the right of religious liberty. However, neither the text nor the drafting debates provide further insight into what this provision means. Thus, Muñoz employs "design originalism" to construct the meaning of this principle. Reflecting on his analysis of the Founding Generation's understanding of religious liberty, Muñoz suggests that religious liberty was unanimously understood in the light of natural right philosophy. He asserts that the inalienable natural right of religious liberty is a jurisdictional concept, as reflected in the language of state

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<sup>75</sup> See generally, Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 Harvard Law Review 1409 (1989).

Declarations of Rights. Muñoz concludes that “because authority over religious exercise cannot be delegated, the state lacks jurisdiction over religious exercises as such.”<sup>76</sup> Thus constructed, the Free Exercise Clause prohibits “the government from punishing, prohibiting, mandating, or regulating religious beliefs or exercises as such”<sup>77</sup> Muñoz’s use of the language “as such” refers to the jurisdictional line that the government is prohibited from infringing upon religious beliefs or exercises on account of religious character or religious reasons. Muñoz insists that given the social contract, individuals consent to abide by the law. If laws are crafted reasonably, then an individual’s inalienable right to religious liberty is not implicated. Muñoz constructs the Establishment Clause similarly by recognizing the individual natural right to religious liberty as a jurisdictional concept. Muñoz concludes that the Establishment Clause prohibited “government itself exercising the functions of an institutional church, including the regulation of internal church matters, such as the content of doctrine and the selection of ministers” and “delegation of governmental coercive authority to churches, especially in matters of taxation and financial contribution.”<sup>78</sup> The natural rights construction would allow the state to fund religion as a means to foster legitimate state ends, but the state cannot manufacture ends to legitimize funding religion. It would not categorically forbid religious individuals and groups from participating in state funding programs.

Muñoz’s work offers a profound historical and philosophical insight into the Founders’ conception of religious freedom. He provides a fair and precise historical

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<sup>76</sup> Vincent Phillip Munoz, *Religious Liberty and the American Founding* 230 (2022).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 247.

analysis that surveys the ratification debates for an original meaning or legal rule, to which no clear answer is found. While his philosophical and historical construction of the free exercise clause follows logically, it seems restrictive to solely rely on a natural rights framework for constructing the Religion Clauses. Labeling religious liberty as an inalienable right implies that if a law incidentally burdens religion and hinders an individual's worship, for which they are accountable to God, it interferes with an inalienable natural right. An individual is placed in a position where their "freedom of conscience," their obligation to God, conflicts with the obligations of the state. While recognizing that natural rights have natural limits, it appears that government action can easily impede religious liberty through otherwise valid laws, according to the natural rights construction. It is evident that the Founders perceived religious liberty as a right of elevated importance, yet Muñoz's construction allows government intervention in the name of preserving or protecting other perceived 'fundamental rights' or government interests to prevail over religious liberty. The next section will evaluate Smith's analysis of religious liberty and will provide further insight for this thesis's comparative analysis.

#### **IV. Smith and the Revised Version of Religious Freedom**

Smith somewhat differs from Muñoz on account of his natural rights construction and his understanding of the principle of religious liberty. Smith argues that the original meaning of the Religion Clauses does not provide a substantive principle of religious liberty, because the clauses were meant to reaffirm a jurisdictional relationship where the federal government is categorically prohibited from making laws respecting an establishment of religion and laws that prohibit the free exercise of religion, thus allowing the states to determine the church-state relationship they would like to

implement. However, considering the incorporation of the Establishment and Free Exercise Clauses, the original meaning has been frustrated.<sup>79</sup> Therefore, Smith argues, Religion Clause scholarship is misguided in its attempts to ascertain the original meaning. Rather than seeking an original meaning, scholarship should further analyze the foundations of religious liberty and its two-fold commitment to freedom of conscience and separation of church and state to enhance our understanding of the historical, philosophical, and theological origins of the American conception of religious liberty.

In Steven D. Smith's, *The Rise and Decline of American Religious Freedom*, he argues that the story of Religious Freedom in the United States is misrepresented by partial truths and some flagrant fictions. He conveys the standard story in five parts, each expressing themes and ideas regarding the development of religious freedom in America as an unfolding story. With each part of the standard story expressed, Smith provides his revised version which criticizes the content of the standard story and corrects the partial truths through moderation or by providing a critical view that entirely disproves some claims. In simple summary, Smith argues that the standard story of religious freedom regards it as the product of Reason, while the revised story regards it as a product of Religion.<sup>80</sup>

#### **A. American Religious Freedom as Christian-Pagan Retrieval**

The standard story begins by characterizing the American achievement of religious freedom as a uniquely developed product of reason from the Enlightenment which symbolized "a radical break with the past."<sup>81</sup> While this insight carries truth, it

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<sup>79</sup> Supra note 14.

<sup>80</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 9 (2015).

<sup>81</sup> Id. at 46.

neglects how the distinctive American achievement of religious liberty was not a radical break but rather a retrieval of Christian themes. The Enlightenment did not itself inspire a more principled religious liberty but rather served as a carrier of Christian commitments and Pagan influences that evolved into an American approach to religious liberty- one that could thrive in a pluralistic democracy. The Pagan influence on American religious freedom particularly addresses the predicament of how, without a religious establishment, varying churches and religious opinions can coexist. This influence is reflected in the following phrase from Jefferson: “It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”<sup>82</sup> Paganism embraces a diverse manner and direction of worship within its own tradition. This type of tolerance, reflected by paganism and the quote from Jefferson, is one of indifference rather than a principled commitment to religious toleration. This paganistic influenced tolerance of indifference is further reflected in John Stuart Mill’s harm principle, which states that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is to prevent harm to others.”<sup>83</sup> The standard story of religious liberty attributes its basis to the Paganistic influences of the Enlightenment and neglects the importance of Christian commitments to religious liberty. Solely understanding religious freedom through a Paganistic lens ignores the religious character of the commitments to the separation of church and state and the freedom of conscience which are reflected in the text of the First Amendment and

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<sup>82</sup> Thomas Jefferson, Notes on the State of Virginia. Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 42 (2015).

<sup>83</sup> John Stuart Mill, *On Liberty*, 13, Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 42 (2015).



the writings of the Founding era. These commitments were inspired by Christian theology.

The separation of church and state is hardly a Jeffersonian idea but a reflection of the Christian recognition of dual jurisdictions. This is primarily and initially reflected in Jesus Christ's teaching to "Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's."<sup>84</sup> This reflects the existence of dual jurisdictions of independent authority ruling over the temporal and spiritual concerns. The conception struggled to be fully realized until the Protestant Reformation when the commitment of the "inner church," or in other words, an individual's conscience, was realized, leading to the proliferation of religious sects and thus severely decreasing the authority of the church. This development began to sever the relationship between the established church and the state.

The second commitment of the freedom of conscience is primarily reflected in the teachings of Jesus Christ in the Sermon on the Mount describing the importance of faith as necessary to eternal salvation; this teaching was again further realized by Protestant Christianity. It was a long-held belief and tradition that salvation came through the church. However, the Protestant Reformation, inspired by the teachings of Jesus Christ, recognized the importance of the "inner conscience" and one's own faith as a means towards salvation. This led to a shift in emphasis from the church as a means of salvation to the self or "inner conscience." The convergence of the dual jurisdiction and freedom of inner conscience themes developed the principle that the domain of conscience is outside the government's jurisdiction. The convergence of

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<sup>84</sup> Luke 20:25.

these themes is best described by Locke, who argued that “the care of souls is not committed to the civil magistrate,” thus conveying the theme of the dual jurisdictions, separation of church and state, and their separate roles in the temporal and the spiritual matters of the soul. Locke provided further reasoning for this dual jurisdiction in his argument that “true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable before God. And such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force.”<sup>85</sup> The enhanced understanding of the freedom of conscience further defined the Christian commitment to dual jurisdictions to recognize that the state must not coerce the church, just as the church cannot coerce or compel belief from an individual’s soul.

The American retrieval of Christian and Pagan influences within the context of the Enlightenment provided the necessary elements to developing a principle of religious liberty that would foster a liberal democracy. The Christian commitments of separation of church and state and the freedom of conscience recognized the uniquely religious justification for religious liberty. At the same time, pagan influences provided a way to navigate religious liberty in a pluralistic environment where one sect was not given orthodoxy status.

## **B. The Accidental First Amendment**

The second theme described in the standard story characterizes the commitments to the separation of church and state and freedom of conscience embedded in the First Amendment as providing substantial and comprehensive principles of religious liberty.

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<sup>85</sup> John Locke, Letter Concerning Toleration, 118-19. Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 40 (2015).

Smith criticizes this account as misleading because, while these commitments are embraced in the Religion Clauses, they do not provide a clear and comprehensive principle of religious liberty. Rather, they impose a jurisdictional status quo whereby the states were to develop their own applications of the principle of religious liberty. Smith, in his book, *Foreordained Failure*, frames his analysis of the original meaning of the Religion Clauses by proposing the following questions that faced the new nation: the religion question and the jurisdictional question.<sup>86</sup> The former refers to the relationship between the church and state and the latter refers to who should enforce that relationship, the federal or state government. The religion question was subject to disagreement among those who held the providentialist position, championed by George Washington and John Adams, and the secularist position, favored by Thomas Jefferson and James Madison. Smith characterizes the providentialist position as committed to the following two claims: religion is essential to a stable social and political order, and government support is necessary for maintaining a religious foundation. While the secularist position agreed with the first premise it disagreed with the second, on the grounds that government support could potentially be harmful to religion. Neither argument prevailed in the adoption of the Religion Clauses. Rather than answer both the religion and jurisdiction question the First Amendment solely answered the jurisdiction question and left the religion question open to the competing positions.

Smith draws further upon the history and remarks of the Founders' discussion of religious liberty in the drafting of the Bill of Rights to further substantiate his claim that they did not recognize the adoption of the First Amendment as adopting any substantial

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<sup>86</sup> Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 19-34 (1995).

principle of religious liberty. His conclusion on this matter comes from recognizing the context of the constitutional convention and the doctrine of enumerated powers. James Madison in the Virginia ratifying convention assured that “there is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.”<sup>87</sup> This suggests that no affirmative protection of religious liberty, or any fundamental rights, was necessary. Despite the doctrine of enumerated powers and assurances given by the Federalists, the Anti-Federalists feared that implied powers recognized in the necessary and proper clause might allow for the government to encroach upon fundamental rights. The commitments to separation of church and state and freedom of conscience were only embedded insofar as they specified the substance of what the national government was being denied jurisdiction over. This left the door open to contestation regarding the content of these commitments and allowed the competing conceptions of the relationship between the religion and the state to coexist.

### **C. The Religion Question and the American Settlement**

The third theme in the standard story argues that the principles embodied in the First Amendment were not realized initially. Rather the revised version of the story recognizes the first century and a half as embracing the unique American commitment to religious liberty, which Smith characterizes as “the American Settlement.”<sup>88</sup> Rather than focusing on neutrality or secularity, this approach embraces open contestation of the

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<sup>87</sup> 3 Elliot Debates, at 330. Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 52 (2015).

<sup>88</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 77 (2015).

contrasting positions of the providentialists and secularists.<sup>89</sup> Despite the differences between the competing positions, the American Settlement provides an avenue that respects the competing conceptions and furthermore reflects the distinctive achievement of the American democratic republic.

Smith further distinguishes the “American Settlement” through arguments from legal scholar Larry Kramer regarding how constitutional interpretation relies upon the interplay between “hard constitutionalism” and “soft constitutionalism.” “Hard constitutionalism” refers to the formal and legalistic understanding of the Constitution, while “Soft constitutionalism” refers to “a set of understandings and conventions about rights and liberty that ... yielded a framework for an argument rather than a fixed program of identifiable outcomes.”<sup>90</sup> Courts during the 19th century predominantly handled religion questions through the lens of soft constitutionalism; the providentialist and secularist conceptions were able to coexist. This led to contradictory decisions in courts but was recognized as legitimate on account of the questions arising as a matter of state law rather than through constitutional principle. Even in the case of *Church of the Holy Trinity v. United States*, when the Supreme Court declared that “this is a Christian nation,” this was not a “hard” Constitutional declaration but rather a “soft” constitutional declaration.

Soft constitutionalism allowed varying states to treat religious questions such as whether prayer should be permitted in schools differently. The contradictory decisions demonstrated how the secularist and providentialist conceptions could coexist without

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<sup>89</sup> Id. at 76-110.

<sup>90</sup> Larry Kramer, *The People Themselves* 30-31 (2004). Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 96 (2015).

acknowledging one as a substantial hard constitutional commitment. Smith describes the American Settlement as functioning in the following way:

In the first place, by embracing what nearly all Americans agreed on (namely, exactly what religious freedom in this country meant or entailed), the arrangement was well calculated both to unite citizens around a shared commitment and to bring them together in debating or contesting what was controversial. People of various faiths might find themselves in the minority in different times and places, of course. But by offering assurance that even minorities were still full participants in the constitutional contest, American disestablishment avoided the sort of entrenched sense of alienation or dispossession that might naturally result from having one's view officially ruled a constitutional hearsay."<sup>91</sup>

However, the American Settlement approach was replaced by the modern Supreme Court's embracement of secular neutrality. The original meaning has since become frustrated by the Supreme Court's incorporation of the clauses, effectively repealing the original meaning, and unknowingly adopting a substantial principle of religious liberty.<sup>92</sup> Thus, Smith argues that attempts to determine the original meaning are fruitless. Unbeknownst to the Supreme Court, they craft meaning into the Religion Clauses under the guise of following an original meaning methodology.

#### **D. Dissolution and Denial**

The fourth theme in the standard story views the Supreme Court's adoption of the principle of secular neutrality as the fulfillment of the unique conception of religious liberty derived from reason. However, Smith flips this theme on its head and argues that the adoption of secular neutrality abandoned the "American Settlement" and elevated the principle of neutrality, most closely associated with the secularist position, to a hard constitutional commitment.

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<sup>91</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 104 (2015).

<sup>92</sup> *Supra* note 14.

The American Settlement was initially dismembered by the pronouncement of the themes of neutrality and government secularism as exemplified in the school prayer case *Abington v. Schempp*.<sup>93</sup> In the concurring opinion, Justice Brennan argued that the Establishment Clause requires “strict adherence to the principle of neutrality” in matters of religion.<sup>94</sup> Justice Clark, in the majority opinion, agreed that the Establishment Clause requires “wholesome neutrality.”<sup>95</sup>

Neutrality implies that the government must remain in the domain of the secular. This led to the development of the “no endorsement test” by Justice O’Connor.<sup>96</sup> This test was not well defined and was applied sporadically. However, its existence suggests how:

by elevating the secularist interpretation to the status of hard constitutional orthodoxy, the Court placed the Constitution itself squarely on the side of political secularism and relegated the providentialist interpretation to the status of constitutional heresy. And the Court thereby tacitly but effectively repudiated the principle of open contestation under which over the decades Americans had negotiated their religious and secular differences.<sup>97</sup>

The problem with the principle of neutrality is that it is an illusion. Justice Stewart in his dissenting opinion in *Schempp* described how the decision contradicted the principle of neutrality; the ruling “is seen not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least, as the government support of the beliefs of those who think that religious exercises should be conducted

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<sup>93</sup> *Abington School District v. Schempp*, 374 U.S. 203 (1963).

<sup>94</sup> *Id.* at 233 (J. Stewart concurring opinion).

<sup>95</sup> *Id.* at 222.

<sup>96</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984) (J. O’Connor concurring opinion).

<sup>97</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 123 (2015).

only in private.”<sup>98</sup> Thus, religious liberty faces a “fundamental conundrum.”<sup>99</sup> It is impossible to develop a completely neutral theory, because it is inevitable that any theory of religion will favor the religious beliefs or moral worldview of one particular sect more than another. The Supreme Court, under the illusion of neutrality, believed to be doing so, but it adopted a “constitutional orthodoxy of secularity.”<sup>100</sup>

### **E. The Last Chapter?**

The fifth theme of the standard story conveys the current state of religious liberty and characterizes the conservative movement as endangering the constitutional principle of government neutrality. In contrast, the revised version frames the current state of religious liberty as endangered due to how the principle of secular neutrality has essentially divorced the religious rationales for upholding religious liberty as a right of special protection from its content, leaving religious liberty defenseless.

When religious liberty is analyzed within the context of the principles of equality, neutrality, and secular government, it reveals a paradox. Smith describes the paradox in the following manner: “If religion is wholly outside the state’s cognizance, wouldn’t it follow that the state is precluded from acting on religious rationales? So, did religious freedom mean that governments could no longer rely on the historic rationales for religious freedom? Would religious freedom cancel itself out by vetoing its own supporting premises?”<sup>101</sup> The

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<sup>98</sup> Schempp, 374 U.S. at 313 (J. Stewart dissenting). Cited in Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 131 (2015).

<sup>99</sup> Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religion*, 63 (1995).

<sup>100</sup> Steven D. Smith, “Constitutional Divide: the Transformative Significance of the School Prayer Decisions,” *Pepperdine Law Review* 38, no. 4 (2011): 945-1020.

<sup>101</sup> Steven D. Smith, *The Rise and Decline of American Religious Freedom*, 143 (2015).



religious rationales provided the basis for the commitments to the separation of church and state and the freedom of conscience. Without these commitments, religious freedom is susceptible to self-negation. Thus, the embrace of the principles of equality, neutrality, and secular government in Religion Clause jurisprudence has left religious liberty susceptible to negating its own supporting rationale. The calls for neutrality, secularity, and equality subvert the commitment to religious liberty by identifying religious rationales as forms of “establishments” leaving religious liberty without its strongest defense and ironically sidestepped for a secular constitutional orthodoxy.

#### **F. Muñoz & Smith Compared**

Muñoz and Smith recognize how the classical and religious rationales of religious liberty have been neglected in both Religion Clause scholarship and jurisprudence, thus leading to a distorted conception of religious liberty. Their interpretations and commentary seek to counter the narrative that religious liberty is not a fundamental right worthy of special constitutional protection. Muñoz relies heavily upon social contract theory, while Smith relies heavily upon the historical, philosophical, and theological developments of conscience and how that informed the Founder’s understanding of religious liberty. Through analyzing their respective interpretations of Madison’s *Memorial and Remonstrance*, this thesis seeks to evaluate the efficacy of these lenses to determine the principle of religious liberty that is most consistent with the Founding generation’s conception of the principle.

## V. Madison's Memorial and Remonstrance

James Madison's *Memorial and Remonstrance Against Religious Assessments* offers a historical and philosophical analysis of religious liberty, providing insight into the Founder's intentions and the original meaning of religious liberty and church-state relations. It has been widely cited across Supreme Court precedent to ascertain the original meaning of the Religion Clauses.<sup>102</sup> Scholars and justices have invoked the *Memorial and Remonstrance* to defend various and competing approaches to defining a principle of religious liberty to guide adjudication, including strict-separationism, nonpreferentialism, jurisdictional interpretation, accommodationist, and non-accommodationist approaches. This contrary application further demonstrates the confused nature of Religion Clause jurisprudence.

Madison's *Memorial and Remonstrance* is representative of the Founder's philosophical and theological rationales for religious freedom. As Smith and Muñoz's historical analysis indicates, the Founders disagreed about church-state relations but relatively agreed that religious liberty is a natural and inalienable right. While Madison's *Memorial and Remonstrance* conveys the Virginian depiction of religious liberty on the relationship between church and state, it serves also as a representative source of how the Founders understood the rationales for religious freedom. Furthermore, Madison's *Memorial and Remonstrance* provides a source to further compare Muñoz and Smith's analysis regarding how religious liberty was predominantly understood. Smith and Muñoz interpret Madison's conception of

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<sup>102</sup> Refer to Section II.

religious liberty and its rationales differently and thus construct different approaches to understanding the principle of religious liberty.

Vincent Phillip Muñoz argues that a strict-separationist, non-preferential, and accommodationist interpretation of Madison's Memorial and Remonstrance incorrectly represents Madison's argument.<sup>103</sup> Rather, Muñoz asserts that Madison heavily relied on social contract and natural rights logic to establish that the exercise of religion is an inalienable natural right. This interpretation implicates a principle of religious liberty that requires state authority to be blind to religion because, as consistent with the definition of an inalienable right, it has no authority over religious exercise "as such." This means that the state can neither punish nor privilege citizens on account of religion; however, if the state acts by means of legitimate political authority in a way that infringes religion, it would be a valid infringement considering the inalienable logic of the right. Steven D. Smith argues that Madison's *Memorial and Remonstrance* provides further insight into how religious rationales influenced the Founder's conception of religious liberty. Recognizing the context of the religious justification of religious liberty provides insight to the current predicament of religious liberty, where the religious rationale to religious liberty has been neglected and endangered.

#### **A. Muñoz and Madison's Principle of Non-Cognizance**

Madison is often invoked as an advocate of varying and competing interpretations of religious liberty. Muñoz argues that these interpretations misunderstand Madison and neglect to recognize the principle of non-cognizance, which the Virginian articulates

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<sup>103</sup> Vincent Phillip Munoz, James Madison's Principle of Religious Liberty, 17-32 (2003).

clearly in the *Memorial and Remonstrance*.<sup>104</sup> Muñoz claims that Madison's arguments in the *Memorial and Remonstrance* are often misunderstood because they are not contextualized within the framework of social contract theory, which heavily influenced the Founders' understanding of natural rights.<sup>105</sup>

Through the lens of social contract theory, Muñoz characterizes Madison's main argument as asserting that the state must remain non-cognizant of religion- or that the state must be blind to religion. Religion is a natural and unalienable right and, therefore, is not surrendered in the formation of the social contract; its unalienable status as a natural right implies that the government has no power over establishing religion or infringing religious exercise "as such." Muñoz relies upon Madison's usage of social contract language as well as his reasoning regarding the inalienability of religious rights to support his interpretation of the *Memorial and Remonstrance* and his natural rights construction of the Religion Clauses.

Madison's argument in the *Memorial Remonstrance* begins with his characterization of religion as an unalienable right and what this implies about the relationship this right has to the state. Madison begins by stating the "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>106</sup> This statement implies that religion is tantamount to a duty that individuals are obliged to render to their Creator, and that religious exercise may only be executed by the agency and volition of the individual. Madison further expounds and relies upon

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<sup>104</sup> Id.

<sup>105</sup> Id. at 17.

<sup>106</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785).

these claims to distinguish religion as “in its nature is an unalienable right.”<sup>107</sup> Given the character of religion as an inalienable natural right, Madison concludes that “in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”<sup>108</sup> Muñoz argues that Madison’s arguments follow the logic of social contract theory by distinguishing the inalienability of religious liberty and then upon recognizing how an inalienable right lies outside the confines of the social contract; the logic of the philosophy concludes that government must not infringe upon religious liberty as such and it must be non-cognizant of religion. To further understand the relationship between social contract theory and Madison’s argument, the premises that religious liberty is unalienable must be considered respectively, as well as their connection to social contract reasoning.

One of the reasons Madison provides for the inalienable character of religious liberty is dependent upon an epistemological framework. Madison argues that religious liberty is “unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.” This statement implies that religion fundamentally consists of one’s personal opinions or conception of their duties to God and how they should fulfill them.<sup>109</sup> These opinions are solely developed by the evidence presented to one's mind, “directed only by reason and conviction,” which cannot be influenced by other men nor by “force or violence.”<sup>110</sup> This sentiment reflects Locke’s view that “knowledge is no more arbitrary

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<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Vincent Phillip Munoz, *James Madison’s Principle of Religious Liberty*, 22 (2003).

<sup>110</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785).

than perception.”<sup>111</sup> Just as the eye perceives an object, the mind forms beliefs based on encountered evidence or reasoned reflection. Given the nature of man’s mind, external actors, such as individuals or the state, lack the capacity to coerce individual opinions. This premise underscores the inherent inalienability of religious beliefs. Madison and even Jefferson’s reasoning on this point echoes Locke’s points on the freedom of mind from coercion.<sup>112</sup> Thus, efforts to coerce man’s religious convictions fail because they cannot produce the necessary conviction that salvation requires. Men cannot govern their bodies as they do their minds; they do not have the power to change their religious convictions. Therefore, efforts to coerce man’s beliefs are futile and, therefore, religious beliefs are inalienable.

Man’s inherent capacity for reason and free will suggests the potential man has to carry out his religious worship through such means. The human mind is structured in such a way, by divine design, that it relies upon the evidence presented to the mind to construct belief and conviction rather than influence from external forces. This ability implies that man is a “self-directed moral agent,” capable of worshiping God through conviction and conscience.<sup>113</sup> Muñoz argues that from these possibilities, one can infer the type of worship that God would find favorable. Muñoz concludes that considering a Creator who endowed mankind with freedom and reason, “[a] God that creates us with the ability to freely worship deserves free worship in return.”<sup>114</sup> This further implies that

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<sup>111</sup> Supra note 61.

<sup>112</sup> Vincent Phillip Munoz, James Madison’s Principle of Religious Liberty, 24 (2003).

<sup>113</sup> Id. at 25.

<sup>114</sup> Vincent Phillip Munoz, Religious Liberty and the American Founding 79 (2022).

from the first premise the second premise follows logically, that is, that religion is a duty owed to the Creator, given mankind's endowed abilities, through God-given reason and free will, which demonstrate the possible religious exercise man is capable of performing.

Given the premise that religion is a duty to the Creator implies an obligation that is prior to and that transcends political obligation. Madison argues, "This duty is precedent, both in order of time and in degree of obligation to the claims of Civil Society."<sup>115</sup> This statement reflects social contract thinking, as it underscores how Madison views one's identity as a "subject of the Governour of the Universe " as taking prior consideration to one's identity "as a member of Civil Society."<sup>116</sup> The religious obligations and prior identity as a "subject of the Governour of the Universe" existed within the state of nature and therefore cannot be relinquished or undermined by adopting the identity and terms of the social contract. Furthermore, it would be unwise for an individual to relinquish their obligation to God in favor of greater allegiance to political authority, due to God's greater authority in comparison to political authority. The stakes of God's authority cover salvation and eternity, while the stakes of political authority only cover our mortal existence, thus implicating the higher priority that must be given to one's obligations to God rather than the obligations of the state.

Following Madison's analysis of the inalienability of religious liberty, Muñoz concludes that "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance." Muñoz defines the word cognizance, citing the definition in the Oxford

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<sup>115</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785).

<sup>116</sup> Id.

English Dictionary that it is “the action of taking judicial or authoritative notice” or “jurisdiction” and, in a more general sense, “knowledge” or “perception,” or the “state of being aware of.”<sup>117</sup> Applying these definitions within the context of Madison’s principle of non-cognizance, Muñoz concludes that “[a] government non-cognizant of religion, in other words must be blind to religion.”<sup>118</sup> Muñoz articulates this conclusion as the “doctrinal teaching of the Memorial and Remonstrance.”<sup>119</sup> The state must remain non-cognizant of religion because it is not a part of the social compact; it is an inalienable right.

Article 1 of the Memorial and Remonstrance framed Madison’s key argument well and provides a framework whereby Madison criticized Patrick Henry’s bill for being cognizant of religion and thus incongruent with the principle of religious liberty. The continuing articles of the *Memorial and Remonstrance* rely upon the primary argument embedded in Article 1 and applied it to Henry’s Bill as well as reiterated social contract language, thus further supporting Muñoz’s interpretation. In article 2 Madison argues that “The preservation of a free Government requires not merely that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people.”<sup>120</sup> He further explains those who encroach upon their authority as tyrants and those who are subject to such illegitimate power as slaves. This argument is a further reiteration of the social compact framework. The “great barrier” referred to the social contract whereby the legitimate confines of

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<sup>117</sup> Vincent Phillip Muñoz, *James Madison’s Principle of Religious Liberty*, 26 (2003).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785).



power and authority are defined and agreed upon. Further, if a ruler exceeds their given commission as agreed upon by the terms of the social contract, they are acting illegitimately and, as Madison characterizes, “tyrannical.” Because religion lies outside the jurisdiction of the social compact, the Religious Assessments Bill is an example of tyranny. In Section 4 Madison explains the relationship between the principle of non-cognizance and equality:

All men are to be considered as entering 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.<sup>121</sup>

While Henry’s Bill may seemingly provide a legitimate accommodation to Quakers and Mennonites, Madison argues that treating others differently on account of their religion essentially takes religion into the state’s cognizance. Thus, any sort of exemption or exception regarding religious exercise violates the principle of religious liberty. Muñoz suggests that the *Memorial and Remonstrance* is Madison’s “most comprehensive philosophical statement on the fundamental political principles excluding religion as such from civil jurisdiction.”<sup>122</sup> As such Muñoz claims that the *Memorial and Remonstrance* serves as an important reference to Madison’s consistent commitment to the principle of non-cognizance. Muñoz largely uses this principle to guide his natural rights construction of the Religion Clauses.

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<sup>121</sup> Vincent Phillip Munoz, James Madison’s Principle of Religious Liberty, 29 (2003).

<sup>122</sup> Id.

## **B. Smith and Madison's Gospel of Conscience**

Steven D. Smith does not provide a clear construction of religious liberty based on Madison's *Memorial and Remonstrance* as Muñoz does. Rather Smith provides further considerations and context to the Founders' insights through the lens of historical and philosophical developments of religious liberty. As previously mentioned in section IV, Smith argues that religious liberty faces a "fundamental conundrum."<sup>123</sup> Smith analyzes this conundrum on a deeper level in his recent book, *The Disintegrating Conscience and the Decline of Modernity*, where he discusses how the conception of conscience over time has played a pivotal role in how religious liberty has been understood.<sup>124</sup> Smith argues that the current Religion Clause jurisprudence has adopted a principle of secularity to guide jurisprudence, which has essentially divorced the religious rationale from religious liberty. This divorce leaves religious liberty defenseless. Furthermore, in this book, Smith explains how the conception of conscience has evolved from Thomas More to James Madison to William Brennan. By analyzing the conception of conscience in three distinct chapters, Smith demonstrates how conscience was conceived prior to the emergence of the American Republic. Furthermore, he explores how Madison was inspired and how he conceived of a conception of conscience that could endure in a liberal pluralistic democracy without a national establishment of religion. In the third chapter, Smith analyzes the present predicament concerning religious liberty through the lens of both More and Madison to recognize how conscience has evolved and what aspects have been lost, misconstrued, or ignored. The additional context provided by Thomas More and Justice Brennan's conception of conscience

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<sup>123</sup> Supra note 105.

<sup>124</sup> Steven D. Smith, *The Disintegrating Conscience and the Decline of Modernity* (2023).

provides further insight for understanding Madison's *Memorial and Remonstrance* and how Madison's conception of conscience was a distinct achievement, one that has been misunderstood at the detriment of religious liberty.

In *The Disintegrating Conscience and the Decline of Modernity* Smith begins to analyze the conception of conscience at the precipice between the Old World and the New World. Thomas More and Martin Luther are analyzed as foils of one another sharing a general understanding of conscience yet diverging based on whether the character of conscience was primarily individualistic or communal. More and Luther agreed upon the following two premises describing the importance of conscience: first, doing what is right is equivalent to saying that you should follow God's will, and second, an individual has a fundamental duty to act with integrity.<sup>125</sup> Luther's and More's conceptions of conscience recognize how these two propositions converge: "To obey God is to be true to yourself" and, conversely, "to depart from conscience, and thus from God, would be to betray and renounce the very ground of one's being."<sup>126</sup> Where Luther and More disagree is on the question of whether the character of conscience is primarily individualistic or communal. More's and medieval conceptions of conscience believe that "man did not form his judgments of conscience 'upon his mind alone'." More believed that one's conscience was formed or anchored by the "common faith and belief of Christ's church."

However, Martin Luther recognizes that individuals, by their "private judgment," may interpret the scriptures differently and craft their conscience respective to that

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<sup>125</sup> Id. at 30.

<sup>126</sup> Id at 31.

interpretation, which may conflict with the practices and traditions of the church.<sup>127</sup>

Martin Luther and the Protestant Reformation influenced a shift in conscience that Smith describes in the following way:

“Conscience, which in medieval thought was mostly a sort of realistic concession to human finitude (ideally, people should do what is right, but the most that can actually be expected of them is that they do what they believe to be right), was becoming an instrument for justifying and even consecrating controversial beliefs and choices, and for dealing with the challenges and uncertainties of a fragmenting Christendom.”<sup>128</sup>

The communal strand of conscience, embraced by Thomas More, was waning in influence as the individualist strand, embraced by Martin Luther, gained more prominence. The Protestant Reformation and the American Revolution paved the way for the individualist strand of conscience to further develop and become the reigning conception.

The historical development of a pluralistic democratic republic along with the philosophical development of the individuality strand of conscience led to the creation of what Smith characterizes as Madison’s “Gospel of Conscience.” In Madison’s *Memorial and Remonstrance*, he provides a philosophical defense of religious liberty that addresses the contextual question at the time of whether establishments of religion are necessary to support civil society. He answers this question primarily through the theme of conscience, focusing on the individuality strand of conscience.

The reigning understanding of religious liberty during the American Revolution was based upon a principle of toleration, whereby an ecclesiastical endorsement existed; however, it was no longer heretical for other religious denominations to exist- they were

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<sup>127</sup> “Here I stand! I can do no other!” Unless you can convince me that my judgment or my interpretation of the scriptures is incorrect, I must stand by my opinion.” Id. at 33.

<sup>128</sup> Id.

tolerated. This understanding of religious liberty was reflected in one of the drafts of Article 16 in the Virginia Declaration of Rights, written in 1776. In this draft written by George Mason, Article 16 stated: “All men should enjoy the fullest toleration in the exercise of religion.” James Madison revised the language of the article to state that, “all men are equally entitled to the free exercise of religion.”<sup>129</sup> While this seemingly appears to be a simple semantic change, it conveys a monumental change. Biographer Richard Brookhiser remarks that “Madison’s language...lifted the Declaration of Rights from an event in Virginia history to a landmark of world intellectual history.”<sup>130</sup> Madison’s revision signified a larger movement towards determining whether disestablishment would be possible. It wasn’t until 1784 that Madison addressed that very question: “Is an ecclesiastical Establishment absolutely necessary to hold civil society together?”<sup>131</sup> Madison concludes in the *Memorial and Remonstrance* that “a church establishment is not necessary to support the social order, and indeed is subversive of that order.”<sup>132</sup>

Madison frames his primary argument in the first Article by stating the following premise: “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 concludes that “therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.” Smith argues that the logical connection between the premise and conclusion in this argument is weak. Madison

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<sup>129</sup> Id at 62-63.

<sup>130</sup> Id. at 65.

<sup>131</sup> Id. at 76.

<sup>132</sup> Id. at 77.

attempts to elaborate further; however, rather than bridge the logical connection, these statements simply rephrase the premise.<sup>133</sup>

The gap in Madison's argument is best understood through what Smith describes as the "theologically grounded practical tautology at the core of conscience." It begins with an indisputable fact about morality, that "if something is the right thing to do, then you ought to do it."<sup>134</sup> Given the human condition, it can be difficult for an individual to judge what is "right." Given these conditions a qualifier is necessary to include in the initial phrase. "You should do what (you believe) is right."<sup>135</sup> The qualifier is conscience. Given our nature as rational and self-directed moral agents, our conscience is what provides us with "beliefs and convictions about what is right or wrong to do."<sup>136</sup> This qualifier introduces the paradox that what may be derived as "right" by one's conscience may be wrong. However, by virtue of one acting upon what their conscience believes to be right, paradoxically they may be right by doing wrong.<sup>137</sup> Madison's argument seems to ignore the necessary implications a complete and unalienable right to conscience would have on actors in

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<sup>133</sup> Madison writes: "because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men", however this is a simple repetition of the premise that religious opinions can only be directed by reason and conviction and therefore cannot be coerced. Madison further argues elsewhere that, "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 statement is again just a restatement of the premise that equates religion as a duty rendered to God.

<sup>134</sup> Conscience had been conceived by canon and Thomas Aquinas that it was a mortal sin to violate one's conscience – even if conscience was in error, and even if one's conscience contradicted a teaching or directive of a church authority. *Id.* at 27

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Smith provides the following example to further understand this distinction "Suppose I am convicted of having acted improperly in some respect – even wickedly, or criminally. It is still open to me to say, "Alright, maybe I did the wrong thing, but in a more basic sense I did the right thing. Because although what I did was wrong (as I now understand), I believed it was right. And so, I was obligated to do what I did. In that sense, I did was wrong (as I now understand), I believed it was right. And so, I was obligated to do what I did. In that sense, I did what was right (even if it was also wrong). And I merit praise and approval for doing the right thing, not condemnation for doing the wrong thing." *Id.* at 28.

society that regulate conduct, namely government. No further analysis is provided to explain why the government must recognize conscience as an unalienable right. Madison neglects to provide a necessary analysis of the relationship between government and conscience.

Given the practical tautology of conscience, medieval conceptions of conscience have regarded ecclesiastical establishments as necessary towards mitigating the essential paradox that by acting on one's conscience an individual may be lending themselves to error. Smith describes these rationales for establishment as the pedagogical and contagion rationale. The pedagogical rationale regards establishment as a pedagogical function that guides individuals to the truth, or salvation. The contagion rationale similarly regards establishments as essential on the basis that they would prevent heretical beliefs or practices from corrupting individuals or the state. While the medieval conceptions of conscience agreed with the premise of Madison's argument describing the character of conscience, they relied upon an understanding of a communal character of conscience, which served as a guide for individuals to develop their conscience through the common faith and understandings of the established church. In this way, Christianity served as a tool of social cohesion amidst the tautology of conscience. Madison challenges how conscience had been understood by embracing the individual strand of conscience.

Smith argues that Madison's reconstruction of the practical tautology of conscience bridges the logical gap in the *Memorial and Remonstrance's* primary argument. The paradox of conscience is that given human nature, an individual may mistake what they believe God wants of them and therefore act as they believe God

would want them to; however, in reality, their actions could be wrong. Madison reconstructs the paradox by supposing that “God does in fact want us to do what we believe He wants us to do – even if that is contrary to God’s will.”<sup>138</sup> In this way, Madison emphasizes the conscience over the truth of the actions or beliefs an individual’s conscience may inspire. Thus, it is conscience that consecrates religious belief, while More’s conception would argue that it is Christianity that consecrates conscience.<sup>139</sup> This sentiment is reflected in how Madison equates religion as a duty rendered to God and that the character of this duty is determined by conscience. This consideration then becomes a key to characterizing the relationship of conscience to government. Smith characterizes this relationship in the following manner, “Our first obligation, and an obligation that precedes and takes priority over any obligation to government or society, is to render homage to God as our conscience dictates. That is what we should do; that is what God demands of us. Anyone, and any government, that prevents us from doing this will be acting in opposition to what God requires.”<sup>140</sup> With Madison’s Gospel of Conscience, a plural society, despite their differences, can unite as a community based upon their common belief that their fellow citizens are doing God’s will and living as God would like them to live according to the dictates of their conscience.

The key to the Gospel of Conscience is the principle of the existence of a benevolent God who would not condemn children who worship Him sincerely yet in error. Without an implicit or generally accepted belief in God, the Gospel of Conscience

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<sup>138</sup> Id. at 30.

<sup>139</sup> Id.

<sup>140</sup> Id at 120.



does not stand. Without a belief in God or a higher power, this error is not an expression of sincere conviction consecrated by one's conscience but simply an error. It ultimately depends upon "our duties to our Creator" and the power of conscience to consecrate error. This key has become ejected as modern jurisprudence has shifted the conception of conscience upon the self. Smith describes this changing conception beginning with how Madison conceived conscience and then showing how Justice Brennan and modern jurisprudence now conceive conscience: "I must do what (I believe) God wants me to do. But the emphasis is subtly shifting, from an accent on 'God' to an accent on the 'I'. 'I must do what (I believe) *God* wants me to do is becoming I must do what *I believe* (God wants me to do)."<sup>141</sup> Smith's analysis of the evolution of conscience through the lens of Madison's *Memorial and Remonstrance* provides further analysis to understand the grounds for religious liberty and the relationship of that right to government. Also, by recognizing how the right has evolved over time, it becomes clearer what the present conception of conscience is missing and what is at stake considering that loss.

### **C. Principle of Non-Cognizance v. Gospel of Conscience**

The *Memorial and Remonstrance* defines the character of the right of religious liberty and proposes a limitation on government authority to protect that right. *The Memorial and Remonstrance* states that conclusion as such: "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance." Muñoz and Smith interpret this conclusion differently by applying different lenses of interpreting Madison's argument. Muñoz characterizes Madison's conclusion as the principle of non-cognizance, using

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<sup>141</sup> Id. at 122.

social contract theory as a lens of interpretation. Muñoz concludes that this means that religion is beyond the jurisdiction of the government because the rights of conscience are unalienable. Their unalienable nature, according to social contract theory, places the right beyond the jurisdiction of government action. Smith characterizes Madison's conclusion as the "Gospel of Conscience," He frames his analysis through the lens of historical, philosophical, and theological developments regarding the evolution of conscience. Madison's conception of conscience implies that instead of the church serving as an establishment, conscience would serve as a unifying factor. Despite individuals' stark differences in faith, they would be united by recognizing that citizens are following God by the dictates of their own conscience and that God accepts such even if it may be objectively wrong. Muñoz's principle of non-cognizance relies primarily on social contract theory to connect the character of the right of religious liberty to an implication on government authority, while Smith relies on the historical, philosophical, and theological context of the rights of conscience and how Madison crafted the Gospel of Conscience from this context.

One of the key problems with Muñoz's analysis is that he analyzes Madison solely through the lens of social contract theory, while Madison did not confine himself to this analysis. By doing so, Muñoz neglects important comprehensive truths about religious liberty, which are articulated by Madison. This neglected understanding also misses how the American conception of religious liberty, while not a complete departure from how religious liberty had been previously conceived, marked a significant change in how conscience was understood with respect to the pluralism and liberty that America sought to embrace. While social contract language is embedded

within the *Memorial and Remonstrance*, this does not imply that it was the sole understanding of rights utilized by Madison. Social contract theory is a tool of the “Enlightenment Project,” which seeks to reject and dissolve conceptions of what morality is and apply a naturalistic and scientific approach to understanding humanity and reality at the expense of the teleological understanding of the cosmos and human beings.<sup>142</sup> This neglect of the past tradition, which tied discussions about reality, the law, and justice to teleological thinking or to a providential design, has led to the existence of “enormous gulfs” within law and philosophy.<sup>143</sup>

Social Contract theory is a helpful rhetorical device that informs citizens of their relationship to the government and how their rights must be recognized. It recognizes God-given rights, but it fails to provide a substantive argument as to why such rights exist and why all men must be treated equally before the law. This is better reflected in the classical legal tradition with a conception of law that recognizes that all men and women are created in the image of God. Thus, we see how social contract theory can create “gulfs” within law and philosophy. It simplifies grand questions such as the basis of equality, political authority, and the relationship of an individual to their government through the logic of inalienable and alienable rights at the expense of the comprehensive picture. While the social contract does convey true principles, when used substantially to analyze questions of law and philosophy, it can create “enormous gulfs” as it ignores the derivation of this tool and rather provides a formulaic answer through a fictional contract. Madison’s efforts towards disestablishment cannot be understood by simply

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<sup>142</sup> Alasdair MacIntyre, *After Virtue* (1984) in Steven D. Smith, Presently Absent, or Absently Present? The Curious Condition of Natural Law, 67 AM. J. JURIS. 119, 129 (2022).

<sup>143</sup> Michael Smith, *The Moral Problem* 3, (1994) in Steven D. Smith, Presently Absent, or Absently Present? The Curious Condition of Natural Law, 67 AM. J. JURIS. 119, 129 (2022).

arguing that, because religious convictions cannot be coerced and an establishment of religion would be coercive, it should thus not be allowed given the character of conscience. The social contract provides no connection as to why the character of the right, while true, implies a limitation upon government. Smith's analysis, on the other hand, provides a historical, philosophical, and theological analysis of religious liberty that bridges that gap.

The impetus of Madison's *Memorial and Remonstrance* was primarily to further the cause of disestablishment. To further this cause, Madison needed to provide a replacement for the adhesive that the ecclesiastical establishment served between religion and government. Within this context, Smith identifies Madison's argument as providing a new adhesive to religion and government that would allow individuals to enjoy the right to conscience without an ecclesiastical establishment. This new adhesive was the Gospel of Conscience which drew upon the practical tautology of conscience to argue that, despite an individual acting in error based upon the belief they are acting according to God's will, the action is justified because God wants individuals to act according to what they believe to be His will. This accounts for the diversity in religious opinion in a pluralistic democracy and further defines religion, or the Gospel of Conscience, as the adhesive to civil society. The principle of non-cognizance is ultimately derived in a formulaic fashion using social contract theory, while the Gospel of Conscience addresses how Madison developed the uniquely American conception of religious liberty through a historical, philosophical, and theological context, thus better reflecting the principle of religious liberty.

Ultimately, Muñoz's restrictive use of the formulaic social contract theory ignores the nuanced character of religious liberty as articulated by Madison. His analysis and construction do not provide sufficient support or insight into the current predicament of religious liberty. While Muñoz acknowledges the premises describing religious liberty as a natural and inalienable right, the power of these premises and their profound meaning are ultimately undermined when placed within the rigid confines of social contract theory. Muñoz's natural rights construction of the Religion Clauses takes Madison's argument that the government is non-cognizant of religion to an extreme, concluding that the Religion Clauses do not include a right to religious exemptions. This detachment from the substantive core of religious liberty leads to an interpretation that permits legitimate state laws to override religious exercise, as long as the laws do not directly target religion.

In contrast, Smith's analysis provides a richer framework that recognizes the religious, historical, philosophical, and theological rationales underpinning religious liberty. By emphasizing Madison's characterization of religion as a duty rendered to God, determined by individual conscience, Smith highlights how the Gospel of Conscience serves as a unifying factor in a pluralistic society. This perspective allows for the acknowledgment of diverse religious beliefs and practices, recognizing that even if individuals hold differing or incorrect beliefs, their conscientious actions are validated by their intent to follow God's will. Smith's approach bridges the gap, connecting religious liberty to its deeper, more comprehensive roots in American constitutional thought.

Madison's efforts toward disestablishment cannot be fully understood through the lens of social contract theory alone. Smith's historical and philosophical approach reveals

how the American conception of religious liberty evolved to accommodate pluralism and protect the freedom of conscience in a way that aligns with the foundational values of the nation. By recognizing the integral role of the Gospel of Conscience, Smith's analysis more accurately reflects the true intent and scope of Madison's argument in the *Memorial and Remonstrance*. This comprehensive understanding is crucial for addressing the complex challenges of religious liberty in contemporary society.

Smith's interpretation demonstrates that Madison's argument was not merely about limiting government authority but about fostering a society where religious diversity is respected, and individuals are free to act according to their conscience. This holistic view provides a more robust and enduring foundation for religious liberty, one that acknowledges the interwoven historical, philosophical, and theological dimensions of the right. By situating religious liberty within this broader context, Smith's analysis offers a clearer and more effective framework for preserving the fundamental freedoms that underpin American democracy.

## **VI. Conclusion**

The comparative analysis of Vincent Phillip Muñoz and Steven D. Smith's interpretations of the Religion Clauses demonstrate that Smith provides a more comprehensive analysis of the character of religious liberty, its original meaning, and the current predicament it faces. While Muñoz offers a strong historical account, he often overlooks deeper influences that extend beyond the natural rights framework. Smith, on the other hand, delves into the complexities of religious liberty, offering crucial insights into the challenges posed by the prevailing rhetoric of neutrality and secularity.

Smith's analysis highlights a significant predicament: the neglect of religious rationale has left religious liberty defenseless, resulting in other 'fundamental' rights being prioritized. This shift has led to a principle of religious liberty that embraces secular neutrality, rendering it devoid of meaning and contributing to arguments against its special constitutional protection. Smith's work, particularly in *The Disintegrating Conscience and Decline of Modernity*, illustrates how Madison's "Gospel of Conscience" may have inadvertently opened the door for conscience to be conceived primarily by the individual's conception of morality, thus detaching it from divine authority.

Smith traces the evolution of conscience from Thomas More to James Madison and Justice Brennan, showing how Madison's embracement of the individual strand of conscience, inspired by medieval conceptions, has left religious liberty without the religious rationale. Madison's "Gospel of Conscience" relied upon the religious premise that religion is a duty that must be rendered to the Creator, and if the government were to intrude upon that duty, they would be placing themselves in opposition to God. Given this recognition of God's transcendent authority over government and an individual's relationship to God, this concluded a principle of religious liberty which is a natural and inalienable right. Considering the historical context of the Reformation and the proliferation of religious sects and beliefs, this conception of religious liberty is challenged by the reality that individuals may be acting in accordance with their duty to God. However, they may be objectively wrong. Madison's Gospel of Conscience answers this consideration by relying upon the assertion that God still accepts such offerings regardless of whether they are objectively right or wrong, but rather because they were rendered under the assumption that such religious exercise is correct. The Gospel of

Conscience ultimately embraces the individuality strand of conscience; however, this is reined in by the belief that individuals would be acting upon their perceived duty to God. By liberating the individual strand of conscience, Madison inadvertently opened the door for individuals to develop their own conceptions of how to order their lives, untethered to God or divine authority. By opening the door and allowing individuals to develop their own conceptions of their relationship to God, he also opened the door for them to allow themselves to become their own God or to allow secular beliefs or ideologies to serve as their “God.” Consequently, the religious rationales of religious liberty are neglected, turning the focus to individual conceptions of self.

Western civilization has long intertwined religion and government, with authority often understood through a religious lens. Severing this relationship raises critical questions about the basis of equality and authority in a secular state. Without a shared religious foundation, individualism reigns supreme, leading to a fragmented and unstable notion of equality. Smith’s analysis underscores the need to reevaluate the role of God and religion in public life. However, this is further complicated by the reality that Smith suggests as “the fundamental conundrum of religious liberty” which conveys that any principle of religious liberty will inevitably rely on specific conceptions of God, which may not be compatible with other religious beliefs.<sup>144</sup>

In conclusion, Smith’s comprehensive analysis offers a crucial perspective on the evolution and current state of religious liberty. By understanding the historical context and the shift towards individualism, we can better address the complexities of religious

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<sup>144</sup> Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).



freedom today. Addressing this fundamental conundrum necessitates acknowledging the role of religion in shaping our legal and moral frameworks, ensuring that religious liberty remains a cornerstone of our rights and freedoms.