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Response to Jonathan Ashbach

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It is satisfying to have one's work taken seriously by the next generation of scholars. I was pleased to learn in Jonathan Ashbach's article that I advance "both the most persuasive and the dominant articulation of Madison's beliefs about religious free exercise in the literature" (329). I was less pleased to read that my interpretation is "mistaken," "in need of revision," and "fail[s] to appreciate the implications of social contract theory" (330). Upon review, however, I think my work survives his criticism. I believe that Ashbach makes two errors, which leads him to both misinterpret my scholarship and misunderstand Madison. The issue between us is the proper understanding of Madison's principle of religious freedom. We focus on the same evidence—primarily, Madison's "Memorial and Remonstrance"—and read Madison in the same way, as a natural rights, social compact political thinker. We disagree, however, about what Madison's fundamental principle is.

Starting with a 2003 article,[1] further developed in my first book[2] and a subsequent article,[3] I have advanced a "noncognizance" interpretation, contending that Madison held that the state must remain "blind" to religion and thus cannot classify individuals on account of their religious affiliation for purposes of privilege or penalty.[4] Ashbach finds this mistaken because, he

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[1]Vincent Phillip Muñoz, "James Madison's Principle of Religious Liberty," *American Political Science Review* 97, no. 1 (2003): 17–32.

[2]Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (New York: Cambridge University Press, 2009).

[3]Vincent Phillip Muñoz, "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion," *American Political Science Review* 110, no. 2 (2016): 369–81.

[4]Though it goes beyond the scope of the disagreement at issue here, I have developed my interpretation of Madison by focusing on his political science of religious liberty (Vincent Phillip Muñoz, "James Madison's Political Science of

claims, Madison's principle actually pertains to jurisdiction. "Madison's point," he writes to distinguish his interpretation from mine, "is that the state may classify individuals on the basis of religion so long as it does not assume jurisdiction over religious matters" (337).

So is Madison's principle noncognizance or does it pertain to jurisdiction? Actually, it is both. Ashbach has misframed the issue, setting forth a false opposition. Noncognizance and jurisdiction are not rival interpretations; rather, noncognizance follows from Madison's account of the state's lack of jurisdiction over religion. Ashbach fails to apprehend this relationship.

Madison says the state must remain noncognizant of religion because it lacks jurisdiction over religion. Jurisdiction pertains to the state's authority; noncognizance pertains to the state's principle of action given its lack of authority over religion.

I believe I make this relationship clear in my published writings. In my first article on Madison, for example, I summarize his position as follows: "No free people can approve legislation that classifies citizens and grants them benefits on account of their religious affiliation, because religion lies outside the jurisdiction of any social compact that respects and secures natural rights."[5] I make the point repeatedly in this article, writing on the same page that "a state noncognizant of religion lacks jurisdiction over religion. It may not take authoritative notice of or perceive religion or the religious affiliation of its citizens."[6] On the following page I say that "the 'Memorial and Remonstrance' offers Madison's most comprehensive philosophical statement on the fundamental principles excluding religion as such from civil jurisdiction."[7] I also make this claim in the later article, observing that "Madison means that authority over religious exercise as such does not become part of the original compact. Religious obligations remain outside of the social compact and, therefore, beyond the jurisdiction of any constitutional authority created to govern it."[8]

Ashbach's failure to recognize how noncognizance follows from the state's lack of jurisdiction is connected to his misunderstanding of the concept of jurisdiction. As I explain in an article which it seems Ashbach did not consult, Madison's social compact theory holds that some natural rights are "unalienable," meaning that individuals do not—indeed, could not—grant

Religious Liberty," *American Political Thought* 10, no. 4 [2021]: 552–76), and the underlying natural theology that guides his political philosophy (Vincent Phillip Muñoz, *Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses* [Chicago: University of Chicago Press, 2022], 74–82).

[5]Muñoz, "Madison's Principle of Religious Liberty," 23.

[6]Ibid.

[7]Ibid., 24.

[8]Vincent Phillip Muñoz, "Two Concepts of Religious Liberty," 372–73.

authority to the political community over specific areas of their natural liberty.[9] For Madison, this means that the state's authority is limited, that is, that it lacks authority to make law regarding those nonalienated areas. When the state lacks jurisdiction over subject matter X, it cannot legislate directly on subject matter X. Ashbach offers a different understanding of jurisdiction. He holds that the state's absence of jurisdiction over subject matter X means the state cannot pass laws that adversely impact X. Jurisdiction for Ashbach pertains not to the state's authority to act, but rather to the substance or impact of the state's actions. So, for Ashbach, the state's lack of jurisdiction over religion means that it can pass laws directly on the subject matter of religion, as long as religious individuals and institutions do not experience adverse effects from those laws. But that is not what Madison understood by jurisdiction.[10]

For the reasons stated above, I do not find reason to revise my interpretation of Madison. I do, however, encourage Ashbach to continue to think through Madison's principle of noncognizance and assess its adequacy. Ashbach repeats a point that I myself make, that Madison as a political actor did not always follow his own stated principle.[11] If explored, this tension might reveal not that I have misinterpreted Madison, but rather that Madison's principle may not necessarily dictate the results that Madison himself says they command. I suggest as much in the conclusion of *God and the Founders* and my distinction between religious rights and religious interests, but I have not sufficiently developed the argument.[12] Exploring this potential deficiency in Madison's thought deserves the attention of a young, talented, and ambitious scholar like Ashbach.

[9]Ibid.

[10]As I think I explain clearly in my 2016 article, it is also a misunderstanding of the founders' natural rights social compact theory of inalienable rights more generally. "Two Concepts of Religious Liberty," 371–74.

[11]Muñoz, "Madison's Principle of Religious Liberty," 28; Muñoz, *God and the Founders*, 38.

[12]Muñoz, *God and the Founders*, 216–21; Muñoz, "Two Concepts of Religious Liberty," 374.