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Reply to Muñoz

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I am grateful to Vincent Muñoz for his analysis and critique of my argument. It seems to me, however, that the two criticisms offered here fail to connect with the position I advance.

Begin with the second and more fundamental point. Muñoz claims my argument is predicated upon redefining the term "jurisdiction" such that "the state's absence of jurisdiction over subject matter X means the state cannot pass laws that adversely impact X" (351). I am not sure where this definition is coming from, but it is certainly not coming from me. Undoubtedly, governments may pass all manner of laws that negatively impact religion, on Madison's terms. Madison's own advocacy of secular state universities,[1] for example, might well have some negative impact on religion by diverting promising candidates from religious institutions. Neither here nor anywhere else in his corpus, to my knowledge, does Madison make adverse impact a test of jurisdiction.

What I did say was that government may not rule religious areas of life, either intentionally or unintentionally: "Something stronger than a duty merely to abstain from targeting religion flows naturally from Madison's claims. Because reserved rights have not been granted to government, for Madison, the more natural implication is not that government may only infringe upon them if it does so unintentionally, but that government may not infringe upon them at all" (339). Government may not require individuals to take or abstain from actions in violation of their right of religious conscience merely out of oversight or because everyone else is required to do the same thing. Yet the legitimacy of such governmental requirements is the acknowledged upshot of Muñoz's understanding of noncognizance and the *Smith* decision it supports. Instead, I present evidence that Madison believed government must actively respect the inalienable rights of conscience to the extent feasible.

In short, the difference between Muñoz and myself is not that I am unfamiliar with his treatment of inalienable rights, as he suggests. As indicated in the passage just quoted, I agree with it and use it to advance my own case. Nor is the issue that we disagree on the meaning of jurisdiction. Muñoz characterizes the true definition well enough: it means that the state "lacks authority

[1]See, e.g., Jeff Broadwater, *James Madison: A Son of Virginia and a Founder of the Nation* (Chapel Hill: University of North Carolina Press, 2012), 184–87.

to make law regarding those nonalienated areas" (351). The issue is that Muñoz's theory of noncognizance does in fact allow the state to "make law regarding those nonalienated areas," and even to do so at will, so long as it does so without intentionally targeting religion. This, I have suggested, clashes both with Madison's theory and with his practice.

Second, Muñoz says I have set up a false dichotomy by which Madison's fundamental principle is either that the state must be noncognizant of religion or that the state lacks jurisdiction over religion. He goes on to argue that both are true—the state must be noncognizant of religion because it lacks jurisdiction over it. Here too I suggest that the critique fails to connect with my argument. I did not set up the opposition Muñoz suggests. Instead, I noted that Madison does believe in governmental noncognizance of religion, but that there are two possible interpretations of that term. Muñoz assumes—without evidence, so far as I can tell—that to have cognizance of religion means to have awareness of it. But I provide substantial evidence that Madison uses having cognizance as a synonym for having jurisdiction. Here too the issue is not that I misunderstand Muñoz's theory, but that that theory seems to me to lack a solid basis in Madison's own thought. Once one realizes that government's lack of cognizance of religion just means its lack of jurisdiction over religion, it becomes clear that the state may be aware of religion so long as it does not seek to govern it—with eminently practical applications, as the example of militia substitutes illustrates. It also seems to me that the interpretation I offer here has greater explanatory power than Muñoz's own. Where Muñoz's understanding of cognizance as awareness leads him to conclude that Madison was at odds with his own principles in key moments of his career, taking cognizance as a synonym for jurisdiction leads to the conclusion that Madison's actions were consistent with, indeed flowed from, what Muñoz and I agree were some of his most deeply cherished beliefs—and surely the latter position is the more plausible.

Muñoz is a massively accomplished scholar who has advanced our understanding of Madison a great deal and will no doubt continue to do so. It appears to me that he will do so even more splendidly, however, if he rethinks this key element of Madison's thought.