

BYU Law Review

Volume 2003 | Issue 3


Article 3

9-1-2003

James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants

Rodney K. Smith

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Christianity Commons](#), [First Amendment Commons](#), and the [Legal History Commons](#)

Recommended Citation

Rodney K. Smith, *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants*, 2003 BYU L. Rev. 891 (2003).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2003/iss3/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants

*Rodney K. Smith**

A number of years ago, as I completed an article regarding the history of the framing and ratification of the First Amendment's religion provision, I noted similarities between the written thought of James Madison and that of the 134th section of the *Doctrine & Covenants*, which section was largely drafted by Oliver Cowdery.¹ At

* Herff Chair of Excellence in Law, Cecil C. Humphreys School of Law, The University of Memphis. J.D., J. Reuben Clark Law School, Brigham Young University; L.L.M., S.J.D. University of Pennsylvania. I am grateful to Galen L. Fletcher and Val Ricks for helpful comments regarding an early draft of this Article. Research assistance was provided by Leanne Austin and Muriel Malone, and Karol Usmani provided able secretarial assistance.

This article is based on a paper presented on October 17, 1997, at the annual meeting of the American Society for Legal History in Minneapolis, and on a public lecture delivered at Brigham Young University on January 31, 2002, in conjunction with the Library of Congress exhibition entitled Religion and the Founding of the American Republic. The views expressed herein do not necessarily reflect the views of the Church of Jesus Christ of Latter-day Saints, the J. Reuben Clark Law School, or the Brigham Young University Law Review.

1. While I attribute the writing of the 134th section of the *Doctrine & Covenants* to Oliver Cowdery, section 134 is accepted by the Church of Jesus Christ of Latter-day Saints ("Church") as a part of its sacred canon based on its inclusion in the *Doctrine & Covenants*.

Gordon B. Hinckley, who currently serves as President of the Church and is considered to be a latter-day prophet by members of the Church, stressed the importance of section 134 in a talk given on May 1, 1995, at the Howard W. Hunter Law Library groundbreaking luncheon at Brigham Young University:

Now, in conclusion, I [am] going to do something that maybe I should and maybe I shouldn't do. If I shouldn't, I can repent. If I did not do it, I might regret it. I don't know whether there hangs in the Law School . . . a statement of the 134th section of the Doctrine and Covenants. I think I read last night and I read again this morning, this statement and if it's not in the Law School itself, I hope there will be some small tabature at least in which will appear these great words which I regard as a charter of the Doctrine of the Church concerning law and government. These are tremendously great words and I'm going to take the liberty of reading them. These words were placed in the back of the Book of Commandments when the Book of Commandments was first organized in 1835 and subsequently became section 134 of the Doctrine and Covenants. I think these are the only words found in sacred literature anywhere concerning law and government.

Gordon B. Hinckley, Address at the Howard W. Hunter Law Library Groundbreaking Luncheon (May 1, 1995) (unpublished transcript on file with author). In those remarks, Hinckley added, "Now [verse 12 of the 134th section, which dealt with slavery] was pertinent

the time, I hoped I would one day be able to do more research on this topic and compare the views of Madison and Cowdery in greater depth. I am grateful to the organizers of this conference for giving me the opportunity to do so.

This essay is divided into three parts. Part I provides some biographical information regarding Madison and John Witherspoon, including a discussion of the influence of Witherspoon on Madison's thinking regarding the right of religious conscience and an examination of Madison's efforts to secure the right of religious conscience in the founding era. Part II includes pertinent biographical information regarding Cowdery, followed by an examination of those verses of the 134th section of the *Doctrine & Covenants* that deal with government and the right of religious conscience. Part III compares the views of Madison and Cowdery and offers some concluding commentary.

I. JAMES MADISON AND THE RIGHT OF RELIGIOUS CONSCIENCE

James Madison was born on March 16, 1751, at the home of his maternal grandparents in Port Conway, Virginia, and returned shortly after his birth with his mother to the family home, the largest estate in Orange County, Virginia, which consisted of 5,000 acres.² It has been said that: "Madison was destined for a life of privilege and responsibility. The triad of land, slaves, and tobacco supported him throughout his long life, allowing him to concentrate on politics and the intellectual pursuits he loved."³ This biographical sketch focuses largely on Madison's intellectual development and related political activities.

Madison's parents thought that it was important for him to learn to read at an early age, so he could study the Bible and be guided by its teachings throughout his lifetime.⁴ From 1762 to 1767, he was

to times in which [the section] was written." *Id.* I join in the sentiments expressed by Gordon B. Hinckley and agree with Professor Stan A. Taylor who believes section 134 "to be the most inspired and accurate statement about government ever written." Stan A. Taylor, *Accountable Citizenship, Devotional Address at Brigham Young University* (May 5, 1998), <http://speeches.byu.edu/devo/97-98/TaylorSp98.html>.

2. Ralph Ketcham, *James Madison*, in *ENCYCLOPEDIA AMERICANA*, <http://gi.grolier.com/presidents/ea/bios/04pmadi.html> (last visited Jan. 10, 2003).

3. David Mattern, *James Madison (1751-1836)*, in *2 THE AMERICAN REVOLUTION 1775-1783: AN ENCYCLOPEDIA 1002* (Richard L. Blanco & Paul J. Sanborn eds., 1993), <http://www.virginia.edu/pjm/biog.html> (last visited Oct. 17, 2002).

4. See MARY-ELAINE SWANSON, *THE EDUCATION OF JAMES MADISON* 5 (1992).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

also exposed to some of the basic concepts of the Scottish Enlightenment⁵ by his teacher, Donald Robertson, who had been educated in Edinburgh and was a licensed preacher.⁶ This early introduction to the thought of the Scottish Enlightenment laid the groundwork for Madison's further training, as a young man of sixteen, under the tutelage of Reverend Thomas Martin.⁷ Martin had relocated from New Jersey to serve as rector of the parish church at the request of Madison's father and also served as Madison's teacher.⁸ Martin was an Anglican but had attended school at the College of New Jersey, a hotbed of Scottish Enlightenment thought under the leadership of John Witherspoon.⁹ It is believed that Martin may have helped persuade Madison to attend the College of New Jersey¹⁰ rather than William & Mary, an Anglican institution.¹¹

5. See John Robertson, *The Scottish Contribution to the Enlightenment*, Address Presented to the History of Political Thought Seminar Group (June 24, 1997), <http://www.ihrinfo.ac.uk/projects/elec/sem12.html> (last visited Jan. 10, 2003), for a discussion of the historical development of and intellectual tensions within the Scottish Enlightenment. The importance of Frances Hutcheson's role in the Scottish Enlightenment is highlighted in Part III of that document. *Id.*

6. *James Madison, His Legacy: Brief Biography—Youth and Education*, at www.jmu.edu/madison/biography/youth.htm (last visited Oct. 17, 2002) [hereinafter *Youth and Education*]; see also Willis J. Smith, *Conscience and Human Nature: James Madison's Moral and Philosophical Training Under the Tutelage of John Witherspoon 20–21* (2002) (unpublished thesis, Brigham Young University) (on file with author).

7. See Smith, *supra* note 6, at 21.

8. *Id.* at 21–22.

9. *Id.*

10. *Youth and Education*, *supra* note 6. As to Madison's choice to attend the College of New Jersey, it is noted that “[Madison] may have been influenced by Martin; he may have feared the unhealthy environment of Williamsburg; and he may have been repelled by William and Mary's reputation for dissolution.” *Id.*

11. It has been noted that

[w]hile the College of New Jersey was under the direction of the Presbyterian Church and not the Anglican Church, which church Madison's family attended, its curriculum provided for fervent bible study and religious development. Along with some problems Madison's father had with the College of William and Mary, the Reverend Martin's experience at the College of New Jersey and his suggestion that Madison attend school there proved pivotal in Madison's parents deciding to send him far from home to New Jersey. Probably following his conscience, Madison's father decided that it would be in the best interest of his son to attend the College of New Jersey. It is likely James' father never understood how this decision would eventually be in the best interest of the future United States, its constitutional foundation, and the welfare of citizens for generations to come.

Smith, *supra* note 6, at 21–22.

Madison began his studies at the College of New Jersey in 1769.¹² He entered as a sophomore, having passed an advanced placement examination.¹³ Madison attended the College of New Jersey for two years and graduated with his bachelor of arts degree in 1771.¹⁴ He received “a thorough classical education in Latin and Greek studies, and he also learned Christian thought and precepts from his clergymen teachers.”¹⁵ It has been observed that “Madison was introduced to the College’s theology, which drew deeply from the English dissenting tradition and stressed the importance of ‘free enquiry’ and ‘private judgment’ in arriving at religious truth.”¹⁶ In a letter to his father, written while he was a student, Madison indicated his satisfaction with the education he was receiving at the College of New Jersey: “The Rules by which the Students & Scholars are directed, are, in my Opinion, exceedingly well formed to check & restrain the vicious, & assist the studious, & to countenance & encourage the virtuous.”¹⁷ It is not surprising, therefore, that “[f]ollowing graduation, in the fall of 1771, Madison stayed on at [the College of New Jersey] some months more, studying the Hebrew language [and philosophy¹⁸] with John Witherspoon, president of the College and a preeminent Christian thinker.”¹⁹

Witherspoon’s influence on Madison and his other students should not be underestimated. One scholar relates that Witherspoon has been referred to as “the most influential professor in American history.”²⁰ Indeed, it has been noted that:

[Witherspoon’s] students included, in addition to a president and vice-president of the United States, nine cabinet members, twenty-one senators, thirty-nine congressmen, three justices of the Supreme Court, and twelve state governors. Five of the nine Princeton graduates among the fifty-five members of the

12. *Id.* at 22.

13. *Id.*

14. Ketcham, *supra* note 2, at 2.

15. *Id.*

16. Charles J. Reid, Jr., *The Fundamental Freedom: Judge John J. Noonan Jr.’s Historiography of Religious Liberty*, 83 MARQ. L. REV. 367, 406 (1999) (footnotes omitted).

17. *Youth and Education*, *supra* note 6.

18. POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 532 (Ellis Sandoz ed., 1991) [hereinafter SERMONS].

19. Reid, *supra* note 16, at 406–07.

20. SERMONS, *supra* note 18, at 530.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

Constitutional Convention of 1787 were students of Witherspoon.²¹

Witherspoon was more than a teacher and college president. He also served two terms in the New Jersey legislature,²² served in the Continental Congress intermittently from 1776 through 1782,²³ and was the only clergyman to sign the *Declaration of Independence*.²⁴ Given his sacrifice and service during the founding of our nation, it is not surprising that John Adams declared Witherspoon to be “as high a Son of Liberty, as any Man in America.”²⁵

With his profound impact on the founding of our nation, it is interesting to note that he did not leave his native Scotland until 1768, when he accepted the presidency at the College of New Jersey.²⁶ During Witherspoon’s first year as president of the college,

21. W. Frank Craven, *Witherspoon, John*, in A PRINCETON COMPANION (Alexander Leitch ed., 1993), http://etc.princeton.edu/CampusWWW/Companion/witherspoon_john.html (last visited Jan. 10, 2003).

22. *Id.* While serving in the legislature, Witherspoon was a member of New Jersey’s “ratifying convention for the Constitution in 1787.” SERMONS, *supra* note 18, at 530.

23. SERMONS, *supra* note 18, at 530. In this capacity, Witherspoon “was a member of over a hundred legislative committees, including two vital standing committees, the Board of War and the Committee on Foreign Affairs.” *Id.* Witherspoon “resigned from Congress in November 1782, when a war that had cost him the life of his son James (who graduated from the College [of New Jersey] in 1770 and was killed in Germantown) was ended, and peace, with American independence, seemed assured.” Craven, *supra* note 21.

24. SERMONS, *supra* note 18, at 530. Largely in recognition of Witherspoon’s role in signing the DECLARATION OF INDEPENDENCE, Wilford Woodruff, then an apostle of the Church and the President of the St. George Temple, was baptized in behalf of John Witherspoon by Brother McAllister on August 21, 1877. Wilford Woodruff, JOURNAL, VOLUME 7, 1871–1880, at 368 (1985). Of this occasion Elder Woodruff wrote:

It was a very interesting day. I felt thankful that we had the privilege and power to administer for the worthy dead especially for the signers of the declaration of Independence, that inasmuch as they had laid the foundation of our Government that we Could do as much for them as they had done for us.

Id. at 369 (text copied as written by Elder Woodruff).

25. Craven, *supra* note 21.

26. Witherspoon’s coming to America was hardly assured:

A graduate of the University of Edinburgh, who received an honorary doctorate from St. Andrews in 1764, Witherspoon had become widely known as a leader of the evangelical or “Popular Party” in the established Church of Scotland, of which he was an ordained minister. The trustees of the College [of New Jersey] first elected him president in 1766, after Samuel Finley’s death; but Mrs. Witherspoon was reluctant to leave Scotland, and he declined. Thanks very largely to the efforts of Benjamin Rush 1760, then a medical student at Edinburgh, she was persuaded to

only eleven students graduated, with the number increasing to twenty-nine in 1773.²⁷ As president, it was anticipated that Witherspoon would help produce graduates who would be “ornaments of the State, as well as the Church.”²⁸ Witherspoon was extremely successful in meeting this charge. As previously noted, despite the meager number of annual graduates from the college, his students included a President and Vice-president, nine cabinet members, numerous senators and congressmen, Justices of the Supreme Court, governors, and influential members of the Constitutional Convention of 1787.²⁹ In little over a decade, Witherspoon had influenced many of the young leaders of the new republic.

Surely, Madison, who served in prominent roles at the Constitutional Convention, in the First Congress, and as President, can be counted among Witherspoon’s most earnest and prominent students. Madison’s formative thinking clearly began to take shape under the tutelage of Witherspoon. It has been observed:

While . . . Madison learned some of the basic philosophies of the Scottish Enlightenment as a young man, it would not be until his second year at college that he would be intensely immersed in moral philosophies of enlightened Scotland. His first intense and highly focused exposure to the philosophies of the Scottish Enlightenment occurred under the tutelage of John Witherspoon, a man who participated actively in its initial formation. In Witherspoon’s class entitled “Moral Philosophy,” Madison learned of Scotland’s “broad and diverse tradition, a tradition that included natural rights theorists, civic humanists, and a strong dose of Calvinism.” Conscience was heavily discussed in this class, and Madison would one day note that he saw “each subject he studied throughout life in relation to the moral and religious principles which had undergirded his education.”³⁰

Given Madison’s statement regarding the influence of his early education and the emphasis on “conscience,” which apparently

reconsider. Informed that Witherspoon would now accept the call if renewed, the trustees again elected him to the presidency in December of 1767.

Id.

27. *See id.*

28. *Id.*

29. *See Craven, supra* note 21, and accompanying text.

30. Smith, *supra* note 6, at 22.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

permeated that education, this portion of this essay focuses on the teachings of Witherspoon that deal with public morality and conscience.

In his moral philosophy course, Witherspoon emphasized the role of “common sense” in moral philosophy:

The man who possesses “common sense” is the man gifted by nature with sound judgment; he is judicious in thought and prudent in conduct. He is the man who achieves his goals, best serves society, and is worthy of the highest respect . . . “Common sense” also referred to the time-tested customs, traditions, and values of society—the social virtues which promote settled, orderly human relationships.³¹

Professor Kathleen Brady recently observed: “In his Lectures on Moral Philosophy, Witherspoon told his students that some Scottish thinkers were advancing the argument that the belief in God was one of these universal ‘dictates of common sense,’ and Madison clearly adopted this position.”³² Early in his lectures, Witherspoon also specifically emphasized moral duty and obligation: “[I]t seems a point agreed upon that the principles of duty and obligation must be drawn from the nature of man. That is to say, if we can discover how his Maker formed him, or for what he intended him, that certainly is what he ought to be.”³³ In a later lecture,³⁴ Witherspoon added:

31. *Id.* at 24 (citing DOUGLAS SLOAN, *THE SCOTTISH ENLIGHTENMENT AND THE AMERICAN COLLEGE IDEAL* 119 (1971)). Smith adds:

Relying most heavily on both the teachings and lecture model established by Francis Hutcheson, the founder of Scottish common sense philosophy, Witherspoon created a learning environment which was conducive to independent thought. Following Hutcheson’s model, Witherspoon explained to his students that the study of moral philosophy was not destructive to the interests of religion. Instead he maintained that all empirical thought would be supported by religious principles and that by reconciling the apparent differences between empiricism and spiritual Christianity, man can come to understand more fully both the encompassing power of the divine creator and his own natural rights, abilities and responsibilities.

Id. at 24–25.

32. Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 *NOTRE DAME L. REV.* 433, 458 (1999) (footnote omitted).

33. *THE SELECTED WRITINGS OF JOHN WITHERSPOON* 154 (Thomas Miller ed., 1990) [hereinafter *WRITINGS OF WITHERSPOON*]; see also Smith, *supra* note 6, at 30 (citing *WRITINGS OF WITHERSPOON*, *supra*, at 154). For Witherspoon, therefore, nature, or natural law in this sense, could best be understood by exploring how we are formed by our Maker and the purposes for which we are intended.

The moral sense implies also a sense of obligation, that such and such things are right and others wrong, that we are bound in duty to do the one, and that our conduct is hateful, blameable, and deserving of punishment if we do the contrary; and there is also in the moral sense or conscience an apprehension or belief that reward and punishment will follow according as we shall act in the one way or the other.³⁵

For Witherspoon, “This moral sense is precisely the same thing [that] in scripture and common language we call conscience. It is the law which our Maker has written upon our hearts, and both intimates and enforces duty previous to all reasoning.”³⁶ In the teaching of President Witherspoon, duty or moral obligation derives from such conscience and is prior and superior to choices made solely through reasoning, unaided by inspiration.

Witherspoon also discussed those instances in which conscience might come into conflict with the general good:

True virtue certainly promotes the general good, and this may be made use of as an argument in doubtful cases to determine whether a particular principle is right or wrong, but *to make the good of the whole our immediate principle of action is putting ourselves in God’s place and actually superseding the necessity and the use of the*

34. For a more detailed discussion of the substantive content of Witherspoon’s lectures, see Smith, *supra* note 6, at 30–48. Smith summarizes those early teachings:

Early in the semester, Witherspoon would defend the importance of revelation in the face of reason by establishing three premises. The first claimed that there is nothing about reason and intellect that should pit it against revelation. Claiming *both reason and revelation originated with God*, Witherspoon established that the inquiring mind, which recognized the power of the Creator and sought for his guiding truth, could discover through reason, revelation, or both the universal truths . . . Secondly, Witherspoon “attempted to demonstrate the strong positive grounds for accepting revelation without sacrificing rationality.” . . . Witherspoon showed his students that the truths of Christian doctrine are in full agreement with reason and the state of human nature as was popularly discussed and debated during the European Enlightenment. Finally, Witherspoon attempted to outline how reason without revelation is inadequate, claiming that “revelation is necessary to correct the distortions of unaided reason.” According to Witherspoon, reason would remain corrupted by the often self-directed philosophies of man without the steady, refining presence of revelation.

Id. at 26–27 (emphasis added).

35. WRITINGS OF WITHERSPOON, *supra* note 33, at 163.

36. *Id.* at 161.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

*particular principles of duty which he hath impressed upon the conscience.*³⁷

In his fourth lecture, President Witherspoon summarized his thinking in this regard:

The result of the whole is that we ought to take the rule of duty from conscience enlightened by reason, experience, and every way by which we can be supposed to learn the will of our Maker and his intention in creating us such as we are. And we ought to believe that it is as deeply founded as the nature of God himself, being a transcript of his moral excellence, and that it is productive of the greatest good.³⁸

For Witherspoon, our moral sense or duty, as derived from religious conscience, is prior to but may be enlightened by reason and experience. Conscience of this sort is the source of moral excellence and is that which is most productive of the greatest good in society. It is clear that Witherspoon taught Madison and his other students that religious conscience should not be trumped by other senses of the general good; rather, the protection and furtherance of religious conscience is critical to the achievement of the greatest good.³⁹ Witherspoon's teaching in this regard has been summarized:

37. *Id.* at 167–68 (emphasis added).

38. *Id.* at 168. Neal A. Maxwell taught in a related sense that “faith and knowledge ‘are not hostile but sequential.’” BRUCE C. HAFEN, *A DISCIPLE’S LIFE* 496 (2002).

39. This theme recurred in Witherspoon's sermons and public discourses as well. On the first occasion of Witherspoon's “introducing any political subject into the pulpit,” he stressed the connection between liberty generally and religious liberty:

I willingly embrace the opportunity of declaring my opinion without any hesitation, that the cause in which America is now in arms, is the cause of justice, of liberty, and of human nature. So far as we have hitherto proceeded, I am satisfied that the confederacy of the colonies, has not been the effect of pride, resentment, or sedition, but of deep and general conviction, that our civil and religious liberties, and consequently in great measure the temporal and eternal happiness of us and our posterity, depended on the issue. The knowledge of God and his truths have from the beginning of the world been chiefly, if not entirely, confined to those parts of the earth, where some degree of liberty and political justice were to be seen, and great were the difficulties with which they had to struggle from the imperfection of human society, and the unjust decisions of usurped authority. There is not a single instance in history in which civil liberty was lost, and religious liberty preserved entire.

John Witherspoon, *The Dominion of Providence Over the Passions of Men*, Sermon Preached at Princeton University (May 17, 1776), in *SERMONS*, *supra* note 18, at 549. Later in that same sermon, Witherspoon added that religious liberty undergirds all other liberty:

“Even government itself ha[s] no right to infringe upon a man’s conscience, which to Witherspoon was man’s most sacred and precious property.”⁴⁰

During his studies at the College of New Jersey, under the tutelage of Witherspoon, it is, therefore, likely that Madison was taught:

1. the principles of moral duty and obligation are drawn from the nature of man (how and for what purposes he was formed by his Maker) and his relationship to God;
2. this sense of moral duty is what may be termed “conscience,” and is written upon our hearts by our Maker;
3. duty to God is prior or precedent to reason, although conscience may be enlightened by reason, which also may originate with God;
4. following one’s God-given or inspired or religious conscience results in true virtue, which in turn is the source of public good;
5. conscience, as such, is a foundational right; and

A good form of government may hold the rotten material together for some time, but beyond a certain pitch, even the best constitution will be ineffectual, and slavery must ensue. On the other hand, when the manners of a nation are pure, when true religion and internal principles maintain their vigour, the attempts of the most powerful enemies to oppress them are commonly baffled and disappointed.

. . . That he is the best friend to American liberty, who is most sincere and active in promoting true and undefiled religion, and who sets himself with the greatest firmness to bear down profanity and immorality of every kind. Whoever is an avowed enemy of God, I scruple not to call him an enemy to his country. Do not suppose, my brethren, that I mean to recommend a furious or angry zeal for the circumstantial of religion, or the contentions of one sect with another about their peculiar distinctions. I do not wish you to oppose any body’s religion, but every body’s wickedness. Perhaps there are few surer marks of the reality of religion, than when a man feels himself more joined in spirit to a true holy person of a different denomination, than to an irregular liver of his own.

Id. at 553–54.

40. Smith, *supra* note 6, at 48. Smith adds, “this idea became extremely important to Madison’s understanding of ‘conscience’ and the importance of protecting it from those forces, whether government or organized religion, which might seek to undermine its purpose.” *Id.*

6. given that conscience is a foundational right and the source of public good, it should not be trumped or limited by general conceptions of the public good derived from other sources.

Although his views regarding what we now have come to term the nonestablishment value were not well developed in his teachings regarding the right of religious exercise or conscience, Witherspoon was apprehensive about the capacity of any individual sect or group of religious sects to wrest the power of the state and use it for their own partisan ends. Witherspoon's teachings concerning the nature of the right of religious conscience significantly influenced Madison's thinking and impacted his political activities.

After returning to Virginia, Madison was elected to his first public office on December 22, 1774, the Orange County Committee of Safety.⁴¹ However, it was not until his election to the Virginia Constitutional Convention in April of 1776 that Madison truly entered into a life of public service.⁴² Madison's entry into public service came at a critical time in Virginia history. In fact, on May 15, 1776, the Virginia Constitutional Convention unanimously directed its delegates for the Continental Congress to propose a declaration of independence for Virginia and formulated an important document, the Virginia Declaration of Rights, which was primarily authored by George Mason. Madison, though young, offered a significant amendment to Mason's section of the Declaration of Rights dealing with religious liberty. In doing so, Madison began to establish himself as an intellectual force in Virginia politics.⁴³

Mason's original proposed provision regarding religious liberty provided:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, that all men

41. *Youth and Education*, *supra* note 6.

42. *James Madison, His Legacy: Brief Biography—Early Public Service*, at <http://www.jmu.edu/madison/biography/earlyservice.htm> (last visited Jan. 10, 2003) [hereinafter *Early Public Service*].

43. *Id.*

should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society, and that it is the mutual duty of all to practice Christian forbearance, love and charity toward each other.⁴⁴

Given Witherspoon's influence on Madison, it is not surprising that Madison took umbrage at some of the language in Mason's proposal. Madison countered with his own proposed amendment:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, *being under the direction of reason and conviction only, not of violence, or compulsion, all men are entitled to the full and free exercise of it* according to the dictates of conscience; *and therefore no man or class of men ought on account of religion to be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.*⁴⁵

Madison's amendment differed substantially from the proposal offered by Mason and evidences a commitment to a vibrant form of religious liberty.

Madison went further than Mason in protecting this right, which both Madison and Mason believed originated in one's duty to God. Madison also saw it as a right that may not be limited by violence or *compulsion*. This notion of duty, and the right that it spawns, is reminiscent of Witherspoon's teaching and indicates that the right of religious conscience is beyond the reach of government, except in very limited circumstances. For Madison, men are entitled to the "*full and free exercise*" of the duties or obligations owed their Creator, according to the "dictates of conscience." Indeed, Madison recognizes only two limits on the "full and free exercise" of religious conscience: (1) "no man or class of men ought on account of religion [may] be invested with particular emoluments or privileges";

44. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21 (1978) (citing G. Hunt, *Madison and Religious Liberty*, in HISTORICAL ASSOCIATION ANNUAL REPORT 163, 166 (1901)) (emphasis added). For further discussion regarding this proposal see RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 38-39 (1987).

45. MALBIN, *supra* note 44, at 21-22 (emphasis added to indicate Madison's proposed changes to Mason's provision).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

and (2) no man or class of men may be “subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.”⁴⁶

The first limit does not permit any man or class of men to be invested with particular emoluments or privileges on account of their religion. This limitation on receiving salaries or fees paid from public funds or other public emoluments or privileges conferred on the basis of religion may well have been a precursor to our establishment clause. It was designed to limit the receipt of special public benefits by religious individuals or sects.

The second limit provides that no man or class of men may be penalized or disabled in the exercise of religious conscience unless the “equal liberty” of another is infringed *and* the existence of the state is “manifestly endangered.” With this language, Madison abandoned Mason’s weaker terminology, which permitted religious conscience to be limited in the interests of preserving public peace, happiness or safety. Madison’s proposal called for much stronger protection for the exercise of religious conscience and was consistent with Witherspoon’s teaching that the general public good may not limit the exercise of religious conscience. In short:

[Madison] proposed the then (and, unfortunately, even now) extraordinary concept that government could only intervene in matters impinging upon the free exercise of one’s conscience or religious conviction when “under the color of religion the preservation of equal liberty, and the existence of the state be manifestly endangered.” Apparently, only something of the magnitude of sedition, or the denial by one religious group of the equal liberty of another would justify governmental action regarding religious matters.⁴⁷

Madison proved to be a loyal student to President Witherspoon in advocating limited government power to regulate the right of religious conscience.

In October of 1776, Madison became a member of the Virginia House of Delegates, which had been established by the new state constitution.⁴⁸ Madison’s early role was limited when compared to that of Thomas Jefferson: “Thomas Jefferson, also a delegate, led the

46. *Id.*

47. SMITH, *supra* note 44, at 42.

48. *Early Public Service*, *supra* note 42.

effort to disestablish (withdraw state aid from) religion. Madison supported these efforts but was too young and diffident to play more than a minor role.”⁴⁹ Madison’s early role may have been less influential than that of Thomas Jefferson, but Madison’s efforts to support a vibrant right of religious conscience gained increasing prominence with time.

Madison suffered a political set back in 1777 when he was not reelected to the House of Delegates, “a defeat he attributed to his refusal to provide ‘spiritous liquors’ to the electorate.”⁵⁰ He was nevertheless soon elected by the House of Delegates to serve on the Virginia Council of State.⁵¹ In 1779, his political fortunes turned in a favorable manner when he was selected as a delegate to serve in the Continental Congress in Philadelphia.⁵² He continued to serve in the Continental Congress until 1783, when he left to serve in the Virginia House of Delegates.⁵³

In December of 1784,

[f]resh from their victory on the incorporation issue [which favored the Episcopal establishment, to the exclusion of other religious groups in Virginia] and under the able leadership of Patrick Henry, those [in the Virginia House of Delegates] who were dismayed by the weakened status of the Episcopal establishment [as a result of the Revolutionary War] turned their efforts toward enactment of the General Assessment Bill of 1784.⁵⁴

The bill was formally entitled a “Bill establishing a Provision for Teachers of the Christian Religion.”⁵⁵

It is not surprising that Madison opposed this Assessment Bill, given his belief in equal treatment for matters of religious conscience and his opposition to investing religions with “particular emoluments or privileges,” as stated in his draft of a religious liberty provision for the Virginia Declaration of Rights. Despite Madison’s strong opposition to the Assessment Bill, the House passed, by a vote of 47–32, a resolution providing, “the people of the

49. *Id.*

50. *Id.*

51. *See id.*

52. *See* Mattern, *supra* note 3.

53. *Id.*

54. SMITH, *supra* note 44, at 46.

55. MALBIN, *supra* note 44, at 23.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

Commonwealth, according to their respective abilities, ought to pay a moderate tax or contribution [to] the support of *the Christian religion*, or of some *Christian* church, denomination, or communion of *Christians*, or of some form of worship.”⁵⁶

William Rives, Madison’s friend and early biographer, reproduced the outline of Madison’s argument against the Bill and summarized Madison’s remarks: “We learn from it that Mr. Madison contended, first, that the regulation of religion was not within the province of civil power, and that every attempt of the kind tended necessarily to ultimate projects of compulsory uniformity.”⁵⁷ Rives added:

[Madison] then showed that, as the benefits of the proposed provision were to be limited to *Christian* societies and churches, it would devolve upon the courts of law to determine what constitutes Christianity, and thus, amid the great diversity of creeds and sects, to set up by their *fiat* a standard of orthodoxy on the one hand and of heresy on the other, which would be destructive of the rights of private conscience. He argued, finally that the proposition dishonored Christianity by resting it upon a basis of mercenary support, and concluded with vindicating its holy character from such a reproach, contending that its true and best support was in the principles of universal and perfect liberty established by the [Virginia Declaration of Rights], and which was alone in consonance with its own pure and elevated precepts.⁵⁸

Interestingly, Madison believed that providing benefits to Christian religions would be “destructive of the rights of private conscience” because courts would “set up by their *fiat* a standard of orthodoxy.” For Madison, the primary reason for limiting assessments was that they violated the inalienable right of religious conscience.

Despite Madison’s efforts, the Assessment Bill passed on second reading by a 44–42 margin, a significant reduction of the 47–32 margin originally supporting the assessment resolution.⁵⁹ With this shifting momentum, opponents were able to postpone final reading and action on the bill until the next session of the House of

56. SMITH, *supra* note 44, at 46–47 (quoting 1 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 600 (1859)) (internal quotation marks omitted).

57. *See id.* at 48 (quoting 1 RIVES, *supra* note 56, at 603).

58. *Id.* (quoting 1 RIVES, *supra* note 56, at 604–05) (alteration in original).

59. *Id.*

Delegates. During the period of time between the postponement and reconsideration of the bill, petitions were circulated opposing the Assessment Bill. This petition effort ultimately undercut public support for the assessment and helped prevent its passage. Madison drafted one such petition, which he referred to as a *Memorial and Remonstrance*, against the assessment. Rives describes Madison's role in this regard as "the crowning victory in a momentous contest."⁶⁰

Madison opened his *Memorial and Remonstrance* with strong rights language:

The religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is, in its nature, an inalienable right. It is inalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men; it is inalienable also, because what is here a right towards men is a duty towards the Creator.⁶¹

This opening salvo mirrors closely both the teachings of Witherspoon regarding the inalienable nature of the right of conscience and the language of the Virginia Declaration of Rights. It also picked up on the theme that Madison had used initially in arguing against the assessment resolution in December of 1784.

Madison next made it clear that this duty to honor the Creator "is *precedent both in order of time and in degree of obligation, to the claims of Civil Society.*"⁶² He added, "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.*"⁶³

Madison then turned to an "equal liberty" argument:

Who does not see that the authority *which can establish Christianity, in exclusion of all other Religions* may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That same authority which can *force* a citizen to contribute threepence only of his property for the support of any

60. *Id.* at 50.

61. *Id.* at 51 (quoting 1 RIVES, *supra* note 56, at 635 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE (1785))).

62. *Id.* (quoting 1 RIVES, *supra* note 56, at 635) (emphasis added) (internal quotation marks omitted).

63. *Id.* (quoting 1 RIVES, *supra* note 56, at 635).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

one establishment, may force him to conform to any other establishment in all cases whatsoever.⁶⁴

In the following paragraph, Madison further developed this equality argument:

Because the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. . . . Above all are men to be considered as retaining an “*equal* title to the free exercise of Religion according to the dictates of conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.⁶⁵

64. *Id.* at 52 (quoting 1 RIVES, *supra* note 56, at 636 (quoting MADISON, *supra* note 61)). Madison’s concern that preferring “Christianity” would require determining which religions were in fact Christian was insightful and perhaps even prophetic. Today, for example, some Christian groups and theologians seek to declare that the Church of Jesus Christ of Latter-day Saints, which clearly professes to be Christian, is not in fact Christian. *See, e.g.*, Richard John Neuhaus, *The Public Square: Is Mormonism Christian?*, FIRST THINGS 101, Mar. 2000, at 97, available at www.firstthings.com/ftissues/ft0003/public.html. If we had a regime that could prefer Christian beliefs, then public battles would necessarily ensue among sects as to which religious groups are in fact Christian for the purpose of the conferral of such benefits.

65. SMITH, *supra* note 44, at 52–53 (quoting 1 RIVES, *supra* note 56, at 636). Professor Steven D. Smith has argued that Madison’s equality argument in the *Memorial and Remonstrance* “at best offers a tempting way of begging the real question.” Steven D. Smith, *Blooming Confusion: Madison’s Mixed Legacy*, 75 IND. L.J. 61, 65 (2000). Professor Smith asserts:

[T]he sort of ‘equality’ that Madison wanted to build into law was compatible with some religious beliefs and incompatible with others. It would be a bit severe, but not inaccurate, to say that under the heading of ‘equality,’ Madison was in effect seeking to have some central tenets of a particular and controversial version of Christianity adopted as the official position of government.

Smith, *supra*, at 66. In clarifying this point, Smith notes, “Under Madison’s religious views, someone like John Cotton (or perhaps Patrick Henry, or any religiously motivated proponent of religious establishment) would be deemed in error and legally sanctioned—by being constitutionally prohibited from implementing his more establishmentarian religion.” *Id.* at 69.

Professor Smith is correct in arguing that Madison’s notion of equality or non-preference among religious sects was contrary to the establishmentarian views held by some religious sects. Even today there are religious groups that believe that their religion should receive benefits from government that should be denied other less favored religious groups. In that sense, it might be said that Madison’s view of equality prefers the substance of some religious groups (those groups that believe in equal treatment for all religious groups and

Madison elaborated further on his equality argument⁶⁶ and then made an argument designed to appeal to those of the Christian faith. He observed that “the first wish of those who enjoy this precious gift [of Christianity] ought to be that it may be imparted to the whole race of mankind.”⁶⁷ Madison then argued that the Assessment Bill “at once discourages those who are strangers to the light of [Christian] revelation from coming into the region of it [Christianity], and countenances by example the nations who

individuals in the public square) over other religious groups (those that believe they should receive exclusive public benefits not necessarily conferred on other religious groups). This preference may carry some substantive weight, in a theological sense, because it prefers a theology that believes government should treat all religions equally. Professor Smith’s point is significant in at least two senses: (1) it indicates that equality arguments in the religious liberty context may be question begging and may require a closer examination into the substantive nature of the equality claimed; and (2) it may simply be a futile task to declare a principle of equality as to matters of religion or theology, in the public sector, because religions differ as to the proper role of religion in the public square and choosing one view will necessarily disfavor another, in that limited sense.

Madison’s notion of equality may, in fact, carry some theological baggage. Indeed, it is evident that Madison’s views closely track the teachings of John Witherspoon and have evident theological undertones. In this sense, however, there may be few views regarding the exercise of government power that can be said to be devoid of theological implications (e.g., governmental decisions regarding issues such as the death penalty, abortion, the war against terrorism, and internet pornography). But decisions must be made on major issues, and in the area of the conferral of governmental benefits, Madison’s view of equality, replete as it may be with theological implications, may be defensible if it is combined with a sensitivity to its inherent question-begging character. In this regard, whenever equality is invoked, care should be taken to try to delineate and even empathize with those groups and individuals that may be disfavored and to treat them as fairly as possible. This requires a level of goodness and sensitivity in those who have power to make equality decisions in this context. Perhaps this is what Professor Smith is alluding to when he cautions:

The risk is that this [equality] discourse will fall into the hands of people who combine a sort of over earnestness with either of two quite opposite qualities: either a kind of innocence that would lead someone to suppose that equality or neutrality just automatically has a particular meaning, period, or conversely a kind of shrewdness that understands equality or neutrality as rhetorical resources to be manipulated to secure the ends favored by the rhetorician. In either case, the risk is that equality will become the banner for an aggressive campaign—naively aggressive or shrewdly aggressive—to bring the diverse and wayward practices of the nation’s multitude of communities into line with the requirements of “equality.” Such a campaign would turn equality from being pluralism’s ally—admittedly a somewhat unsteady ally—into pluralism’s nemesis.

Id. at 74–75 (footnote omitted).

66. See SMITH, *supra* note 44, at 53–54.

67. *Id.* at 54 (quoting 1 RIVES, *supra* note 56, at 639) (alteration in original).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

continue in darkness [nonbelief in Christianity], in shutting out those who might convey it [the Christian faith] to them.”⁶⁸

Madison’s arguments in his *Memorial and Remonstrance* clarify his views regarding the scope of the inalienable right of religious conscience and the need for equal liberty as to matters of religious conscience. He also made an argument as to why Christians should have opposed the Assessment Bill on prudential as well as principled grounds (i.e., the argument that Christianity benefits most from a world in which the equal liberty of conscience is recognized and there is free and open dialogue among all religious groups). In the *Memorial and Remonstrance*, Madison continued themes raised in his education at the College of New Jersey and in his amendment to the Virginia Declaration of Rights. He had no need to discuss the “manifestly endangered” standard that he set forth in the Virginia Declaration of Rights because proponents of the Assessment Bill did not raise a plausible argument to the effect that failure to pass the bill would manifestly endanger the state. It is clear, at this time in Virginia’s history, that Madison’s views were in ascendancy.

In 1786, Madison served as a delegate to a convention regarding interstate commerce and trade to be held in Annapolis, Maryland.⁶⁹ At the close of that convention, Alexander Hamilton led an effort to convene a general convention to meet in the summer of 1787 in Philadelphia to revise the Articles of Confederation in a manner that would make “the Federal Government adequate to the exigencies of the Union”; Madison was again elected to serve as a delegate to that convention.⁷⁰ That convention, of course, became known as the Constitutional Convention because it gave birth to the Constitution of the United States of America.

Madison played a significant role both prior to and at the Constitutional Convention. In the spring preceding the Convention, Madison participated in the preparation of a comprehensive plan for a more powerful national government to be considered at the upcoming convention.⁷¹ Madison is perhaps best known, in an historical sense, however, for the comprehensive notes that he took

68. *Id.* (quoting 1 RIVES, *supra* note 56, at 639) (second, third, and fourth alterations in original).

69. Mattern, *supra* note 3.

70. *Id.*

71. *Id.*

at the convention and that were published on his death.⁷² A respected jurist recently concluded that: “Mr. Madison was the prime mover in the drafting and adopting of the Constitution. He was the quintessential Founder, known for generations by the title ‘Father of the Constitution.’”⁷³

I have previously summarized the limited treatment given to issues of religious liberty at the Constitutional Convention:

[R]eligious matters were considered on a number of occasions by the delegates at the Constitutional Convention, but . . . only one provision, the prohibition of a religious test as a requirement for national office, was included in the Constitution. There are a number of possible reasons for the refusal of the delegates to include a provision for religious liberty in the Constitution, ranging from Alexander Hamilton’s assertion that the delegates merely forgot to do so in their efforts to deal with weightier matters, to the Madisonian position that such rights would be protected by the pluralistic nature of the union and by virtue of the fact that such rights were inalienable and were, therefore, beyond the reach of government. For Madison, the silence of the Constitution would indicate that religious rights were reserved to the people. Between these somewhat polar positions stands another prominent position which may well have been held by a majority of the delegates: they may have believed that since the Constitution was silent as to the issue of national power regarding such matters, governmental power, if any, to regulate religious matters remained with the states.⁷⁴

While the inclusion of a prohibition of a religious test in the Constitution as a requirement for holding national office offers little additional insight into the thinking of Madison regarding the issue of the right of religious conscience, it certainly does further such a right

72. Madison, however, downplayed the use of his notes as a guide to interpreting the Constitution. See Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 280–83 (1997). Judge Arnold adds that Madison believed THE FEDERALIST to be a better interpretive tool. *Id.* at 283. Judge Arnold also includes a thoughtful analysis as to why Madison may have waited until after his death to have his notes published, including the possibility that the papers might provide a much needed inheritance to his beloved wife Dolly. *Id.* at 281–82.

73. *Id.* at 270.

74. SMITH, *supra* note 44, at 70–71 (footnote omitted). See *id.* at 67–71 for a more detailed discussion of religious matters raised during the course of the Constitutional Convention.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

in that it limits the power of the national government to create religious tests for office.

Strong opposition to the ratification of the Constitution, however, was voiced in state ratifying conventions. Much of the opposition centered on the issue of whether the Constitution was deficient because it failed to include a bill of rights.⁷⁵ In Madison's home state of Virginia, for example, delegates to the ratifying convention added a lengthy list of proposed amendments to the Constitution to the *Virginia Ordinance of Ratification*.⁷⁶ One of the proposed amendments dealt with religious conscience and was modeled somewhat after the religious liberty provision of the Virginia Declaration of Rights:

That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.⁷⁷

During this critical period in our nation's history, Madison and Thomas Jefferson, who was then serving the newly organized national government in France, communicated through a series of letters in which they discussed issues related to the Constitution, including the need for a Bill of Rights. In that context, a scholarly biographer of Jefferson's constitutional thought summarized Madison's views as expressed in that correspondence:

When Madison finally responded in October 1788 to Jefferson's letters calling for a bill of rights, he was candid about his position. Summarizing the debate in America, he observed that some sought "further guards to public liberty and individual rights . . . from the most honorable and patriotic motives," but many others continued to think the addition of a bill of rights "unnecessary . . . and misplaced in such a Constitution." Although Madison now disassociated himself from the latter view—writing, "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the

75. *Id.* at 73.

76. *Id.*

77. *Id.* at 74 (quoting MALBIN, *supra* note 44, at 3–4).

enumeration”—he admitted that he still did not regard “the omission a material defect.” He said he supported a bill of rights, supposing it might be “of some use, and if properly executed could not be of disservice,” but he had not “viewed it in a very important light” for four reasons. First, he agreed somewhat, “though not in the extent argued by Mr. [James] Wilson,” that rights were reserved by the manner in which federal powers are granted. Second, he feared that some essential rights, especially religious freedom, might somehow be limited by the language used to state them. Third, he suggested that the limited powers of the federal government and the “jealousy” of the state governments would uniquely “afford a security” against infringements by federal authority. Fourth, and finally, he argued that “experience proves the inefficacy of a bill of rights on those occasions when its controul [sic] is most needed.”⁷⁸

It is interesting that one of Madison’s primary qualms regarding the addition of a bill of rights had to do with his fear that religious freedom might be limited by the language used to delineate that freedom⁷⁹ because the existence of such a provision would imply that government has some power to act to limit the right contained therein, when no such power had been given to the national government by the Constitution. This conclusion is not surprising, given the experiences that Madison had relative to the drafting of a provision protecting the inalienable right of religious conscience in the Virginia Declaration of Rights and the battle he waged against the Assessment Bill.

I have previously noted that Madison was ultimately persuaded that a bill of rights should be added to the Constitution and agreed

78. DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 151 (1994). See *id.* at 148–55 for a further discussion of the correspondence between Madison and Jefferson regarding the need for a bill of rights in the Federal Constitution.

79. This fear is reflective of the concerns raised by Alexander Hamilton in *THE FEDERALIST* NO. 84:

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

THE FEDERALIST No. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

to sponsor such amendments if elected to the United States House of Representatives:

Whether persuaded or coerced [into supporting the addition of a Bill of Rights], Madison eventually assured his fellow Virginians that he would personally introduce a Bill of Rights in the First Congress if elected. It has been speculated that Madison primarily relented due to his realization that he might not be elected to Congress, if he did not support a Bill of Rights, and by his fear that the Constitution itself might be subjected to profound revision in a new constitutional convention. It is likely that these factors were indeed a strong motivation to Madison, but it is also conceivable that he changed his mind, coming to believe sincerely that such amendments, as a practical matter, should be included in the Constitution. Despite this possible change of mind, he continued to believe that such an enumeration of rights was nothing more than a reiteration of rights that could not be limited legitimately under any circumstances by the national government and that any enumeration of a Bill of Rights would almost of necessity be incomplete.⁸⁰

Given Madison's somewhat reluctant yielding on the issue of the need for a bill of rights and his continuing concerns regarding the difficulties that necessarily attend drafting language that could sufficiently protect the exercise of those rights against governmental infringement, without implying power the government does not have, Madison would no doubt have exercised great care in drafting the provisions of a Bill of Rights. It is likely that he intended to ensure that the language used would be read as providing very broad protection for rights he considered to be inalienable.

After being elected to the House of Representatives, Madison kept his promise to his constituents and introduced a proposed Bill of Rights to the United States Constitution on June 8, 1789. Madison's first proposal regarding religious liberty would have added the following language to Article I, Section 9, between Clauses 3 and 4 of the existing Constitution: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."⁸¹ He also

80. SMITH, *supra* note 44, at 75.

81. NEIL H. COGAN, *CONTEXTS OF THE CONSTITUTION* 813 (1999).

added the following provision limiting the power of states to violate the right of conscience to Article I, Section 10, between Clauses 1 and 2: “No state shall violate the equal rights of conscience”⁸² These provisions should be read in light of Madison’s evident desire to draft a broad protection for the right of religious conscience.

Madison begins by indicating that the civil rights of *none* shall be abridged on account of religious belief or worship. This protection mirrored similar provisions in various state declarations of rights and makes it clear that all should be protected in their worship and belief. Madison then adds that no “national religion shall be established,” carrying his opposition to the establishment of religion in Virginia to the national stage. It is interesting, however, that he did not expressly limit state establishments with this provision, which is clearly directed to the national government. This may have been done for prudential reasons, given legitimate fears that proponents of various existing state establishments might withdraw their support for the provision. It may be, as well, that Madison was dealing only with national establishments and left his concern for state establishments to be covered under his second provision that dealt directly with the states—“No state shall violate the equal rights of conscience”⁸³

Madison’s language specifically protecting the religious right of conscience provides that “the full and equal rights of conscience [shall not] be in any manner, nor on any pretext infringed.” His use of the terms “full” and “equal” is reminiscent of his prior efforts in Virginia to secure a vibrant right of conscience. The term “full” certainly is designed to make it clear that the right protected is very extensive and subject to little, if any, limitation. The term “equal” indicates that the right belongs to all in equal measure and that the only legitimate limitation on the exercise of the right of conscience is the “equal right” of another.⁸⁴ Finally, Madison’s use of “conscience,” instead of “religion,” although in all likelihood used in

82. *Id.* at 814.

83. *Id.* In this sense, it might be argued that “equal” treatment required that no religion be preferred over another. If so, it might fulfill an anti-establishment function, as well as promoting a vibrant right of conscience.

84. I have previously argued that this provision may be “even broader than Madison’s proposed addition to the Virginia Declaration of Rights, which would [also] have permitted the state government to act in matters affecting religious exercise only when the interests of the state would be manifestly endangered.” SMITH, *supra* note 44, at 76.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

the sense of religious conscience envisioned by Witherspoon, may evidence the concerns he raised in his *Memorial and Remonstrance* regarding the potential for illegitimate limitation of the right of religious conscience if the government is permitted to decide whether some act or doctrine is acceptable as a religious or theological matter. The use of the term “conscience” also implies that it is protecting a relationship of duty between an individual and God, not merely an institutionalized religion.

The provision protecting against the violation of “equal rights of conscience” by the states evidences Madison’s desire to provide protection for the right of religious conscience against state infringement. Obviously, he was not content to leave this protection unstated, even though he had expressed some belief in the past that rights not granted or recognized were not necessarily limited.

Madison pressed for consideration of his Bill of Rights and eventually prevailed and his colleagues agreed to consider the proposed amendments.⁸⁵ When those amendments were finally considered, discussion interestingly dealt primarily with the religious liberty provision and not with other rights contained in Madison’s proposed Bill of Rights.⁸⁶ The House and Senate passed the version that is now contained in the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁸⁷ This provision, as adopted, was the first right recognized in the First Amendment and differed from the wording offered by Madison. Nevertheless, one scholar has indicated:

As the head of the House’s delegation to the conference committee, Madison undoubtedly influenced the final choice of language, although the paucity of records prohibits us from discovering the extent of Madison’s influence. In light of Madison’s interest in such issues, however, it is reasonable to assume that Madison was an important member of the conference committee. It is unlikely that the committee would have agreed

85. *Id.* at 78.

86. For a more complete discussion of the debates, see *id.* at 81–87.

87. U.S. CONST. amend. I.

upon an amendment that was not acceptable to Madison without Madison voicing strong opposition in Congress.⁸⁸

Whether Madison was fully satisfied with the final version of the religious liberty provision of our First Amendment is not critical for our purposes. Still, Professor Drakeman's argument that Madison surely played a major role in the drafting of that provision does seem to carry some force. It is likely, therefore, that the general language of the religious liberty provision was influenced to some degree by the more libertarian views of Madison and his teacher, Witherspoon.

In his proposed amendment to the Virginia Declaration of Rights, his *Memorial and Remonstrance*, and his proposed religious liberty amendment to the Constitution, Madison remained true to a number of themes that had their genesis in the teachings of Witherspoon. Madison believed:

1. religious conscience, the duty owed one's Creator, is an inalienable right "precedent both in order of time and in degree of obligation, to the claims of Civil Society";
2. that, as such, the right of religious conscience may only be limited in the interests of equal liberty and in the event that the interests of the state are manifestly endangered; and
3. in the interests of equal liberty, to provide any religion or group of religions with any particular emoluments or privileges (i.e., to prefer any religion or group of religions over another in the receipt of governmental benefits).would violate the right of religious conscience.

In short, Madison believed in a vibrant right of free exercise, which likely included exemptions from laws of general applicability for matters of religious conscience, and had an establishment view that called for nonpreference or equal treatment as to matters of religious conscience.⁸⁹ Witherspoon does seem to be more inclined

88. Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 431-32 (1983) (footnote omitted).

89. One scholar has asserted that Madison's view differed from that of Witherspoon regarding governmental involvement with religion:

Witherspoon's view that religious communities have an important function in inculcating and forming faith also leads to a critical disagreement with Madison on the role of the state in supporting religion. Like the sponsors of Virginia's general assessment bill, Witherspoon argues that there "is a good deal of reason" for such

than Madison to support a greater role for religion in public matters, although the differences may not be significant. They both seem to prefer equal treatment (even-handedness, to use Professor Brady's term, or equality among religious sects), and they are each skeptical of permitting any religious sect to gain primacy over others in public matters. While there is some lack of clarity as to possible subtle differences between their views, it may be an overstatement to make too much of those differences. Even Madison's nonestablishment or nonpreference views seem to be based upon his abiding concern for maintaining a vibrant right of religious conscience. Professor Michael McConnell has referred to "the radical foundations of Madison's views on religious liberty."⁹⁰ Even if Madison's views were not "radical" in their foundation, it is clear that his views were not adhered to by all major figures at the time of the founding of our republic.⁹¹ I have also previously argued at length that Madison's equality or nonpreference establishment views differed substantially from both Jefferson, who held to a more separationist position, and Joseph Story and others, who held to a view that would have permitted government to show some preference to Christian religions, so long as non-Christian sects were tolerated.⁹² Madison's views, like Witherspoon's before him and Cowdery's after him, were not espoused by all political leaders. Indeed, they were refreshing for the manner in which they demonstrated respect for the primacy of religious conscience (in matters of free exercise) tempered only by

even-handed support for religious education "so instruction may be provided for the bulk of common people, who would many of them neither support nor employ teachers unless they were obliged."

Brady, *supra* note 32, at 460.

90. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990).

91. For example, Professor McConnell has drawn attention to the differences between Thomas Jefferson and James Madison:

No other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison. To a large extent, Jefferson reflected the rationalist premises of Locke, and it is these premises that the modern courts and commentators have relied upon in arguing for a no-exemption interpretation of the free exercise clause. The evidence indicates, however, that Madison, with his more generous vision of religious liberty, more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights.

Id. at 1455.

92. See SMITH, *supra* note 44, at 107–20.

establishment limitations designed to preclude the commandeering of government by any single religious sect or group of sects.

II. OLIVER COWDERY AND THE RIGHT OF RELIGIOUS CONSCIENCE

Part II of this essay is divided into two subparts: (A) Oliver Cowdery and the Church of Jesus Christ of Latter-day Saints (“Church”); and (B) Oliver Cowdery and section 134 of the *Doctrine & Covenants*. Subpart A provides basic biographical information about Cowdery’s life, including his affiliation and disaffection with and return to the Church of Jesus Christ of Latter-day Saints. While this subpart offers some background that may be helpful in understanding Oliver’s role in drafting the 134th section, it is anticipated that some readers, whose primary interest is in comparing the works of Cowdery and Madison in the area of religious liberty, may want to skip subpart A and move directly to subpart B, which deals specifically with the content of the 134th section.

A. Oliver Cowdery and the Church of Jesus Christ of Latter-day Saints: A Brief Biographical Sketch

Oliver Cowdery was born on October 3, 1806, in Wells, Vermont, to parents who were farmers.⁹³ Unlike Madison, Cowdery was not born into a wealthy family. Cowdery’s family moved to Poultney, Vermont, in 1809, where he grew up.⁹⁴ In Poultney, he received a common school education and worked on the family farm until 1825, when the family moved to the western part of New York, where Cowdery was employed as a clerk in a store.⁹⁵

In the winter of 1828–29, Cowdery accepted a teaching position in Manchester, New York, at a small rural school.⁹⁶ While serving in this capacity, Cowdery became acquainted and ultimately lived with the Joseph Smith, Sr. family.⁹⁷ From the Smith family, Oliver “heard

93. *Oliver Cowdery: His Life, Character and Testimony*, at www.boap.org/LDS/Early-Saints/OCowd-his.html (containing excerpts from multiple sources) (last visited Oct. 17, 2002) [hereinafter *Life, Character & Testimony*].

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* Actually, Joseph Smith, Jr., and Cowdery were related:

The fourth son of William and Hannah Emmons Cowdery was William Jr. born September 5, 1765 in East Haddam, Connecticut. He was married to Rebecca

891] *James Madison, John Witherspoon, and Oliver Cowdery*

the wonderful story of the visit of the angel Moroni to their son Joseph; the story of the finding of the sacred record, and of the efforts of the young Prophet to translate the same so that it might be given to the world.”⁹⁸

Cowdery was clearly intrigued by the story and received a vision that made him desire to assist Joseph Smith, Jr., who was then living with his wife, Emma, in Harmony, Pennsylvania.⁹⁹ Oliver arrived in Harmony on April 5, 1829, having traveled with Joseph Smith Jr.’s brother Samuel.¹⁰⁰ During the course of serving as a scribe to Joseph Smith, Jr.,¹⁰¹ Cowdery had many spiritual experiences, the describing of which is beyond the scope of this essay.¹⁰²

Fuller who was born January 2, 1768. This couple, William and Rebecca, became parents to Oliver Cowdery in 1806. Rebecca Fuller was the great-granddaughter of John Fuller and Mehitabel Rowley, who were also the second-great-grandparents of Lucy Mack, mother of Joseph Smith.

STANLEY R. GUNN, *OLIVER COWDERY: SECOND ELDER AND SCRIBE 14* (1962).

98. *Life, Character & Testimony*, *supra* note 93.

99. Richard Lloyd Anderson, *Cowdery, Oliver*, in 1 *ENCYCLOPEDIA OF MORMONISM* 335 (Daniel H. Ludlow ed., 1992).

100. *Life, Character & Testimony*, *supra* note 93.

101. The circumstances under which Oliver became a scribe to the Prophet Joseph are related by Robert D. Hales. He notes:

Joseph had matured and married, and he was now ready to begin the translation of the gold plates [that contained the *Book of Mormon*]. He had made attempts to do so with Martin Harris as his scribe, but a combination of circumstances had frustrated the work. Joseph’s wife, Emma, and his brother Samuel had also tried to help by acting as scribe, but problems persisted. Joseph found himself in desperate circumstances. By this time he not only was left without a scribe but also lacked the financial means to provide for himself and his wife. In this condition, Joseph said, “I cried unto the Lord that he would provide for me to accomplish the work whereunto he had commanded me.”

Robert D. Hales, *Oliver Cowdery*, in *HEROES OF THE RESTORATION* 11 (1997). Hales describes Oliver’s experience, as well: “Oliver became so preoccupied about gold plates and all the other things that had happened to Joseph that he remarked [while living with the Smith family but prior to his meeting Joseph Smith], “the subject . . . seems working in my very bones, and I cannot, for a moment, get it out of my mind.” *Id.* He concludes by observing:

One of the central themes of the Restoration is the sequence of fervent, sincere, prayerful petitions that were answered by revelations to guide the participants to do the Lord’s bidding. Oliver received his desired witness “one night after he had retired to be, [when] he called upon the Lord to know if these things were so.” “[The] Lord appeared unto . . . Oliver Cowdery and shewed unto him the plates in a vision and . . . what the Lord was about to do through [Joseph] . . . therefore he was desirous to come and write for [Joseph] and translate.”

It was at this perilous point that virtually simultaneous prayers, seeking divine guidance from the Lord by both Joseph Smith, in search of a scribe, and Oliver Cowdery, in petition for a confirmation of the truth were answered by God to

Joseph Smith, Jr. soon completed the translation of the *Book of Mormon*, with Cowdery faithfully serving as his scribe. The *Book of Mormon* was published in March of 1830, and the Church of Jesus Christ of Latter-day Saints was organized on April 6, 1830. Shortly thereafter, on April 11, 1830, Cowdery preached the first public discourse following the organization of the Church.¹⁰³ These were surely heady and happy times for Cowdery, and he wanted to share them with close family members.¹⁰⁴

Cowdery's early work in the Church led one noted scholar to conclude, "As a witness of significant events in the rise of the Church of Jesus Christ of Latter-day Saints, Cowdery's importance is

provide the second witness that was needed for the required revelations that would advance the restoration of the Church of Jesus Christ in these latter days.

Id. at 11–12.

102. In a letter, Oliver relates the impact one such experience had on him:

The Lord, who is rich in mercy, and ever willing to answer the consistent prayer of the humble, after [Joseph Smith and I] had called upon Him in a fervent manner, aside from the abodes of men, condescended to manifest to us His will. On a sudden, as from the midst of eternity, the voice of the Redeemer spake peace to us, while the veil was parted and the angel of God came down clothed with glory, and delivered the anxiously looked for message, and the keys of the Gospel of repentance. What joy! What wonder! What amazement! While the world was racked and distracted—while millions were groping as the blind for the wall, and while all men were resting upon uncertainty, as a general mass, our eyes beheld, our ears heard, as in the 'blaze of day'; yes, more—above the glitter of the May sunbeam, which then shed its brilliancy over the faces of nature! Then his voice, though mild, pierced to the center and his words, "I am thy fellow-servant," dispelled every fear. We listened, we gazed, we admitted! 'Twas the voice of an angel from glory, 'twas a message from the Most High! And as we heard we rejoiced, while His love enkindled upon our souls, and we were wrapped in the vision of the Almighty! Where was room for doubt? Nowhere; uncertainty had fled, doubt had sunk no more to rise, while fiction and deception had fled forever!

Letter written by Oliver Cowdery, Sept. 7, 1834, in Ikuver /ciwdert (1806-1850): Selected Writings in Messenger and Advocate, at <http://www.boap.org/LDS/Early-Saints/Cowdery-hist.html>

103. JOSEPH SMITH, 1 HISTORY OF THE CHURCH 81 (2d ed., rev. 1971) [hereinafter HISTORY OF THE CHURCH].

104. In October of 1833, for example, Oliver wrote his brother Warren:

Perhaps I should not do justice to the cause of religion, were I to let this opportunity pass without saying a few words on that subject, as it is my dependence for happiness hereafter. . . . You must know, Brother Warren, that as a conscientious man before God having been so favored highly in the sight of him, (though by me unmerited) that peculiar anxieties press upon my mind for the welfare of my relatives

Letter from Oliver Cowdery to Warren Cowdery (Oct. 30, 1833), in Oliver Cowdery Letters, at <http://www.boap.org/LDS/Early-Saints/Letters-cowdery.html> (last visited Oct. 17, 2002) [hereinafter Oliver Cowdery Letters].

891] *James Madison, John Witherspoon, and Oliver Cowdery*

superseded only by that of the Prophet Joseph Smith.”¹⁰⁵ Indeed, Cowdery’s role was formally recognized when Joseph ordained him as “assistant president of the high and Holy Priesthood, in the Church”¹⁰⁶

Even though Cowdery had many wonderful experiences in the early Church, darker times followed.¹⁰⁷ As the Church grew, persecution followed. The Saints, as members of the Church referred to themselves, were driven from Kirtland, Ohio, as well as from the state of Missouri. In the process, the Saints experienced loss of worldly possessions and sometimes even the loss of life. In all this, Cowdery was not immune.

In 1837–38, while living in Kirtland, Ohio, Cowdery’s faith in the Church and its leaders began to falter. One commentator notes that “[d]espite his great privileges and experiences, Cowdery practically rejected the leadership of the Prophet . . . oppos[ing] several important measures which Joseph Smith advocated.”¹⁰⁸ His opposition resulted in his excommunication from the Church on April 12, 1838.¹⁰⁹ In his letter responding to the charges raised against him by Elder Seymour Brunson, Cowdery stated that he

could have wished that those [proffering charges against him] might have deferred until after my interview with President [Joseph] Smith; but as they are not, I must waive the anticipated pleasure with which I had flattered myself of an understanding on

105. Leonard J. Arrington, *Oliver Cowdery’s Kirtland, Ohio, “Sketch Book,”* in *BYU STUD.*, Summer 1972, at 410. Elder Hales agrees:

Once joined with Joseph in the work of the Restoration, Oliver’s essential role in the marvelous work was to stand next to Joseph as a witness—a second witness—to the restoration of fundamental gospel truths and powers. His was the responsibility, along with Joseph, to experience firsthand the literal restoration and then testify boldly of it so that all mankind could be blessed and benefit thereby.

Hales, *supra* note 101, at 15.

106. GUNN, *supra* note 97, at 124.

107. In the words of Elder Hales:

Oliver Cowdery was provided as a witness to Joseph Smith and the Restoration in the same manner as the Lord appointed Aaron to serve by the side of Moses. . . . Unfortunately, both Aaron and Oliver eventually forgot their roles as witnesses and aspired to equality with the prophets they were sent to sustain.

Hales, *supra* note 101, at 13–14.

108. *Life, Character & Testimony*, *supra* note 93.

109. *Id.* When Oliver was excommunicated, Hyrum Smith, brother of Joseph Smith, was called to serve as Assistant President of the Church. Hales, *supra* note 101, at 18–19.

those points which are grounds of different opinions on some Church regulations, and others which personally interest myself.¹¹⁰

Cowdery did not respond in that letter to a number of the charges leveled against him, but he did emphasize his concern regarding what he considered to be his “right of private property.”¹¹¹ Since he believed he was being controlled in his temporal interests and was being deprived of his “Constitutional privileges and inherent right,” he “respectfully, ask[ed] leave . . . to withdraw from a society assuming they have such right.”¹¹²

In testifying during the Church disciplinary proceedings against Cowdery, Joseph Smith, Jr. is reported to have referred to Cowdery as “his bosom friend” and added that he had “intrusted [sic] him with many things.”¹¹³ Cowdery’s comment in his letter to the effect that he wished that he could have had an interview with Joseph prior to the hearing on the charges against him also intimates that he retained a fondness for and confidence in Joseph Smith. Indeed,

110. Letter from Oliver Cowdery (Apr. 12, 1838), in *Life, Character & Testimony*, *supra* note 93.

111. *Id.*

112. *Id.* Oliver may have misconstrued or misstated the reasons for the Church’s action, because the charges dealing with property ownership and management were rejected or withdrawn by the Council hearing his case:

[I]t is to be noted that the two principal points covered in [Oliver’s] letter, numbers four and five of Elder Brunson’s charges, were rejected by the Council as not being proper to be considered, and the sixth charge also is withdrawn, so that Oliver Cowdery was not disfellowshipped from the Church on the points raised in his letter at all, but on the first, second, third, seventh, eighth and ninth charges in Elder Brunson’s formal accusation [dealing with other actions on Oliver’s part].

Letter from Seymour Brunson to the High Council at Farr West (April 11, 1938), in *Life, Character & Testimony*, *supra* note 93.

113. Remarks delivered at a Meeting of the Farr West Missouri High Council, Kirkland Council Minute Book, LDS Archives (Apr. 12, 1838) (on file with author). Later, Joseph Smith would encourage members of the Quorum of Twelve Apostles to “reach out to [Joseph’s] friend.” SUSAN EASTON BLACK, WHO’S WHO IN THE DOCTRINE AND COVENANTS 75 (1997). Elder Hales also quotes a letter written by Joseph Smith about Oliver:

We are assembled together for the purpose of taking steps, for the upbuilding of Zion . . . Among other things that came before us, was that of the situation of Oliver Cowdery[.] We reflected upon the time when we had met together, when we were brethren, when we were one, & took sweet counsel together.

We thought perhaps our old, long esteemed friend might by this time have felt his lonely solitary situation; might feel that he was a stranger in a strange land, & had wandered long enough from his Father’s house, & that he might have a disposition to return. If this is the case, all that we have got to say, is, your *brethren* are ready to receive you, we are not your enemies, but your . . . brethren.

Hales, *supra* note 101, at 20.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

Samuel W. Richards recounts a later conversation he had with Cowdery:

Upon carefully inquiring as to his long absence from the body of the Church, [Cowdery] stated that he had never met the Prophet Joseph, after his expulsion from the Church, while he lived, apparently feeling that the Prophet could, with equal propriety, enquire after him, as for him to visit the Prophet, and as his pride would seemingly not allow him to become a suppliant without that, it was never made; while he felt quite sure that had he ever met the Prophet there would have been no difficulty in affecting a reconciliation¹¹⁴

Thomas Gregg, a lawyer who practiced with Cowdery and who was not a member of the Church, related the following experience he had with Cowdery after Cowdery's separation from the Church:

[Joseph] Smith was killed while C [sic] [Oliver Cowdery] lived here. I well remember the effect upon his countenance when he read the news in my presence. He immediately took the paper over to his house to read to his wife. On his return to the office we had a long conversation on the subject, and I was surprised to hear him speak with so much kindness of a man that had so wronged him as Smith had. It elevated him greatly in my already high esteem, and proved to me the nobility of his nature. Cowdery never gave me a full history of the troubles of the Mormons in Missouri and Illinois.¹¹⁵

Gregg may have incorrectly implied that Cowdery believed that he had been wronged by Joseph. In fact, in that same letter, Gregg acknowledged: "Now as to whether Cowdery ever openly denounced Mormonism let me say this to you: no man ever knew better than he how to keep one's own counsel. He would never allow any man to drag him into a conversation on the subject."¹¹⁶ In a similar vein, Judge William Henry Gibson wrote:

I think it is absolutely certain that Mr. Cowdery, after his separation from the Mormons, never conversed on the subject with his most intimate friends, and never by word or act, disclosed

114. Samuel W. Richards, *One of the Last Testimonies of Oliver Cowdery*, in *Life, Character & Testimony*, *supra* note 93.

115. Letter from William Lang to Thomas Gregg (Nov. 5, 1881), in *Life, Character & Testimony*, *supra* note 93 (alterations in original).

116. *Id.*

anything relating to the conception, development or progress of the “Church of Jesus Christ of Latter-day Saints.” He was an able lawyer, a fine orator, a ready debater and led a blameless life, while residing in this city.¹¹⁷

Cowdery personally provided some insight on this issue in a letter written to Phineas Young on August 19, 1842:

My [legal] business is steadily increasing[;] nothing operates against me, except the fact that I have been formerly connected with what is now an important church. Were it not for this I believe that I could rise to the heights of my ambition. But shame on man, or men, who are so beneath themselves as to make this a business. My God has sustained me, and is able to sustain me, and through his own mysterious providence, lift me above all my foes. With his dealings I will be content.¹¹⁸

With this statement, Cowdery seems to be saying that, despite what he considered to be major limitations on achieving his temporal ambitions, he was not willing to speak ill of Joseph Smith or the Church. Indeed, it appears that Cowdery was acting out of a sense of conscience or duty to God in refusing to do so, and that he retained substantial confidence in the Prophet Joseph Smith.

Cowdery practiced law from 1838 to 1848, with a measure of success and respectability, in Ohio and Wisconsin.¹¹⁹ It is clear, however, from correspondence between Cowdery and Phineas Young and others,¹²⁰ that Cowdery was not at peace and was seeking some reconciliation with the Church. By his letter of March 23, 1846 to Phineas Young, Cowdery stated:

117. Letter from W.H. Gibson to Thomas Gregg (Aug. 3, 1882), in *Life, Character & Testimony*, *supra* note 93.

118. Letter from Oliver Cowdery to Phineas Young (Aug. 19, 1842), in Oliver Cowdery Letters, *supra* note 104. In his HISTORY OF SENECA COUNTY: FROM THE CLOSE OF THE REVOLUTIONARY WAR TO JULY, 1880, at 4 (1880), William Lang, took a more secular perspective, in referring to Oliver's legal career:

[Oliver] came to Ohio when he was a young man and entered the law office of Judge Bissel, a very distinguished lawyer in Painesville, Lake County, as a student, and was admitted to practice having read the requisite length of time and passed an examination. His unfortunate association with the Mormons blasted the high hopes and bright prospects of an otherwise promising career, and planted a thousand thorns along the wayside of a life that was as pure and undefiled as the best of men.

119. *Life, Character & Testimony*, *supra* note 93.

120. Oliver Cowdery Letters, *supra* note 104.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

[Y]our last [letter] was perused with deepest satisfaction, and that one received from Brother Orson Hyde, about the same time, was either misunderstood, or in the spirit misconceived by me. But from your last I am fully satisfied that no unjust imputation will be suffered to remain upon my character. And that I may not be misunderstood, let me here say, that I have only sought, and only asked, that my character might be exonerated from those charges imputed to me the crimes of theft, forgery, etc. Those which all my former associates know to be false. I do not, I have never asked, to be excused, or exempted from an acknowledgment of any actual fault or wrong—for of these there are many, which it always was my pleasure to confess—I have cherished a hope, and that one of my fondest, that I might leave such a character as those who might believe in my testimony, after I should be called hence, might do so, not only for the sake of the truth, but might not blush for the private character of the man who bore that testimony.¹²¹

In that letter, he added:

You say you are having a meeting on the 6th of April. Brother Phineas, I could be with you, and tell you about April 6, 1830, when but six men belonged to the Church, and how we looked forward to a future. I should gladly, but I cannot only in spirit—but in spirit I shall be with you. And then in assembled kneel with those who are yet alive of that six.¹²²

In April of 1848, Cowdery wrote Phineas Young again and stated, “From hence forward I shall double my efforts in effecting a harmonious, righteous, reconciliation”¹²³ Thereafter, in October of 1848, Cowdery and his wife and daughter were finally able to meet with the Saints. Cowdery sought out Elder Orson Hyde, who was presiding at the branch of the Church in Council Bluffs, Iowa, and expressed his desire for reconciliation and the privilege of being baptized into the Church. The members present supported his petition and Cowdery was re-baptized.¹²⁴

Cowdery found great joy in his reunion with the Church and was preparing to move west with the Saints while visiting with his wife’s

121. Letter from Oliver Cowdery to Phineas Young (March 23, 1846), in Oliver Cowdery Letters, *supra* note 104.

122. *Id.*

123. Letter from Oliver Cowdery to Phineas Young (Apr. 1848), in Oliver Cowdery Letters, *supra* note 104.

124. *Life, Character & Testimony*, *supra* note 93.

family in Richmond, Missouri; at that time he, however, became seriously ill.¹²⁵ Elder Phineas Young, who was present at Cowdery's death on March 3, 1850, relates, "His last moments were spent in bearing testimony of the truth of the Gospel revealed through Joseph Smith, and the power of the holy priesthood which he had received through his administrations."¹²⁶ David Whitmer, Cowdery's brother-in-law and friend, added: "Oliver died the happiest man I ever saw. After shaking hands with the family and kissing his wife and daughter, he said, 'Now I lay me down for the last time: I am going to my Savior.'"¹²⁷ Cowdery had reconciled himself to the Church and died with a peace of conscience, a sense that he had at last, in his mind, fulfilled his duty to God.¹²⁸

*B. Oliver Cowdery and the 134th Section of the
Doctrine & Covenants*

During the time when he was active in the Church and prior to his disaffection in 1838, Cowdery regularly sought to promote the right of religious conscience. On January 1, 1834, for example, Cowdery wrote John Whitmer indicating:

The law is sufficient, the Constitution was established according to the will of heaven, and all they lack is for those whose duty it is to see that they are kept inviolable do their duty; pray that this may be

125. *Id.*

126. Oliver's Last Testimony, *in Life, Character & Testimony*, *supra* note 93.

127. *Id.* Lucy P. Young, wife of Phineas Young, related that just prior to his passing, Oliver asked those present to raise him up so that he could speak with his family and friends. *Id.* He then reportedly bore witness of the importance of living by the teachings of the *Book of Mormon*, cautioning his family that "if they would do this that they would meet him in heaven," and then said, "Lay me down and let me fall asleep." *Id.* Moments later, he died peacefully.

128. Thirty-seven years later, Elizabeth Whitmer Cowdery, wife of Oliver, recounted that:

From the hour when the glorious vision of the Holy Messenger revealed to mortal eyes the hidden prophecies which God had promised his faithful followers should come forth in due time, until the moment when he passed away from earth, [Oliver] always without one doubt or shadow of turning affirmed the divinity and truth of the Book of Mormon.

Richard Lloyd Anderson, *The Scribe as a Witness, Part 4: New Evidence from Modern Witnesses*, THE IMPROVEMENT ERA, Jan. 1969, at 58.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

the case; for God is able to turn the hearts of all men sufficiently to bring his purposes to pass.¹²⁹

Less than two weeks later, on January 13, 1834, he wrote his brother Lyman:

[A]s to the pure republicanism which was the basis of my political creed while with you, I have not changed from the same, for the Magna Carta, of equal rights, equal privileges, is that which shall never be dishonored by me

. . . [S]o long as we all are bound to support the constitution and are held amenable to the laws, it is but just, that we should entertain our own opinions, and exercise our own privileges in every matter in which we all are so deeply interested; consequently then, I consider it not only my privilege, but my duty, to myself and to the name, to ever entertain uncontrolled and unshackled principle as to the matters of our government¹³⁰

In the same letter, he raised the question of “whether a government of Church and State would be preferable to ours,” and offered his opinion that:

[T]he moment on any one religious sect . . . , gains the ascendancy sufficient to hold the administration of our government, the human heart is so easily corrupted that a spirit of intolerance would immediately transcend that of justice and equality and we should be compelled to immediately bid an everlasting adieu to our hard bought liberty.¹³¹

Finally, he asserted:

I have equal claim upon the laws for protection in my manner of faith and worship, is a fact also, that no scholar of the constitution will, for the moment deny; and to seek the destruction of a man because of his religion, is a step too low for any citizens of our Republic to take.¹³²

129. Letter from Oliver Cowdery to John Whitmer (Jan. 1, 1834), *in* Oliver Cowdery Letters, *supra* note 104.

130. Letter from Oliver Cowdery to Lyman Cowdery (Jan. 13, 1834), *in* Oliver Cowdery Letters, *supra* note 104.

131. *Id.*

132. *Id.*

Believing that men owe a higher duty to God, Cowdery clearly feared a government that could compel individuals as to matters of religious conscience or deprive them of equal liberty in that regard.¹³³

In October of 1834, Cowdery articulated his thoughts on the subject of the right of religious conscience in the first issue of the *Latter-day Saints Messenger and Advocate*, which he edited:

We believe that all men are born free and equal; that no man, combination of men, or government of men, have power or authority to compel or force others to embrace any system of religion, . . . so long as they do not molest or disturb others in theirs, in a manner to deprive them of their privilege as free citizens—or of worshipping God as they choose.¹³⁴

John Welch and David Whittaker noted that this expression by Cowdery was part of what was “[p]robably the earliest formulation of the beliefs [or *Articles of Faith*] of the Church.”¹³⁵ This belief, which was attributed to the Church, emphasized that government is lacking in power to force others to embrace any system of religion. The only limit stated by Cowdery on the right of religious freedom inherent in the people is that they may not “molest or disturb others [in their religious exercise], in a manner to deprive them of their privilege as free citizens.”¹³⁶

Cowdery’s major contribution in declaring the Church’s basic initial belief regarding religious liberty, however, came at a “meeting of Church leaders, brought together to consider the proposed contents of the first edition of the Doctrine & Covenants,” on August 17, 1835.¹³⁷ This addition to the *Doctrine & Covenants*, found today in section 134, was penned by Cowdery.¹³⁸ In discussing

133. In a letter to his brother William, Cowdery stated, “Men are justified when they live to what light they have, but when a greater is presented, God requires an obedience.” Letter from Oliver Cowdery to William Cowdery (Apr. 29, 1834), in Oliver Cowdery Letters, *supra* note 104.

134. John W. Welch & David J. Whittaker, “We Believe . . .”: *Development of the Articles of Faith*, ENSIGN, Sept. 1979, at 51.

135. *Id.* Today, the 11th Article of Faith reads, “We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may.” *Articles of Faith* 11 (Pearl of Great Price).

136. Welch & Whittaker, *supra* note 134.

137. See *Doctrine & Covenants* 134.

138. Surely, Cowdery’s work was influenced by conversations with others involved in the development of the Church and by prayerful reflection on his part.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

section 134 in the following pages, I often refer to it as “Cowdery’s view.” Section 134, however, is clearly more than a mere expression of Cowdery’s heartfelt beliefs—it was an effort to declare the position of the Church in matters relating to government and laws. When it was included in the *Doctrine & Covenants*, it became part of the canon of the Church of Jesus Christ of Latter-day Saints.

At a session of general conference held in 1935, J. Reuben Clark, Jr., a member of the First Presidency and the Quorum of Twelve Apostles of the Church and a respected lawyer, declared:

At a general assembly held in Kirtland on August 17, 1835, the Saints adopted a series of statements regarding human government [section 134]. They are wise and as far-reaching as the Articles of Faith themselves, They were given after the mobbings, plunderings, the assassinations of and part of our experiences in Missouri. They were uttered by a people, who, judged by human standards, had every reason to feel that their government had failed, and that they might not hopefully and successfully look thereto for their protection.¹³⁹

The Prophet Joseph Smith, who was not in attendance at the assembly, later accepted the decision of the assembly to include these statements in the *Doctrine & Covenants*.¹⁴⁰

Cowdery opened this declaration of belief regarding “governments and laws in general” by stating, “We believe that governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them, both in

139. J. Reuben Clark, Jr., Address at the 105th Annual Conference of the Church of Jesus Christ of Latter-day Saints (Apr. 5–7 1935), in 105th ANNUAL CONFERENCE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Apr. 1935, at 90. Joseph Fielding Smith is reported to have observed:

The reason for the article on “Government and Laws in General,” is explained in the fact that the Latter-day Saints had been accused by their bitter enemies, both in Missouri and in other places, as being opposed to law and order. They had been portrayed as setting up laws in conflict with the laws of the country. This bitterness went so far that an accusation was brought against them, on one occasion in a Missouri court, of disloyalty because they believed that at some future time the Lord would set up his own kingdom which would supersede the government of the United States, and so believing that the time would come when such a kingdom would be established, they were disloyal to the United States. Every pretext that could be imagined against the Saints to try to show them disloyal and rebellious against established government, was brought into use.

JOSEPH FIELDING SMITH, 2 CHURCH HISTORY AND MODERN REVELATION 30–31 (1953).

140. SMITH, *supra* note 139, at 30–31.

making laws and administering them, for the good and safety of society.”¹⁴¹ In this verse, Cowdery makes it clear that government is instituted of God and that men are accountable to God for their actions in relation to government. It is clear, therefore, that one’s obligations to God are superior and prior to one’s duty to government.

In the following verse, Cowdery notes that no government may legitimately have peace unless “such laws are framed and held inviolate as will secure to each individual the free exercise of conscience.”¹⁴² Cowdery later adds, “We believe that religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it . . . ; we do not believe that human law has a right to interfere in prescribing rules of worship to bind the consciences of men”¹⁴³ Finally, in this regard, Cowdery states:

We believe that all men are bound to sustain and uphold the respective governments in which they reside, while protected in their inherent and inalienable rights by the laws of such governments . . . and that all governments have a right to enact such laws as in their own judgments are best calculated to secure the public interest; at the same time, however, holding sacred the freedom of conscience.¹⁴⁴

These verses evidence a commitment to the belief that the right of religious conscience is an inalienable right, given of God, and must be upheld or kept sacred, as a matter between an individual and God, if a government is to abide legitimately in peace.

Section 134 also sets forth limits on the right of religious conscience:

[W]e do not believe that human law has a right to interfere in prescribing rules of worship to bind the consciences of men, nor

141. *Doctrine & Covenants* 134:1.

142. *Id.* at 134:2. Oliver seems to use “conscience” and “religion” interchangeably throughout section 134, much in the sense that John Witherspoon used the terms. In referring to Oliver’s views, I simply combine the terms and refer to them as the right of religious conscience. It is important to note, however, that use of the broader term “conscience” should, at a minimum, indicate that the definition of religion should not be unduly limited (see, for example, *supra* note 83 and accompanying text for a discussion of Madison’s use of the term “conscience” in such a sense) and that it implies a right to act—conscience is more of an action term than is religion, which may be limited in meaning by some to liturgy and ritual.

143. *Doctrine & Covenants* 134:4.

144. *Id.* at 134:5.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

dictate forms for public or private devotion; that the civil magistrate should restrain crime, but never control conscience; should punish guilt, but never suppress the freedom of the soul.¹⁴⁵

This verse makes it clear that Cowdery was most concerned with the potential for human law to interfere in religious exercise in a manner that might “bind the consciences of men.” He acknowledges the power of government to “restrain crime,” but he asserts that government should “never control conscience.” It is not clear why Cowdery included the term “worship,” which one might argue limits the right of conscience to matters of worship alone and not to acts outside the realm of worship. It might be argued that “worship” is being used in the sense of merely expressing veneration of God in a ritualistic or devotional sense; but given the emphasis on limiting the power of government to bind the conscience, it is far more likely that the term “worship” is being used in a broader sense to include venerating God through exercise of one’s belief.¹⁴⁶

This interpretation is strengthened by other statements included in section 134. Verse 5 states that we should sustain and uphold our government:

145. *Id.* at 134:4.

146. This broader sense of “worship” to include actions or exercise was used by Wilford Woodruff, who was then serving as president of the Church, in a discourse given in the midst of the Church’s efforts to secure the right of Church members to exercise polygamy as a part of their worship of God, despite significant persecution at the hands of the government. Wilford Woodruff declared:

There is one principle which has been universally acknowledged by the Latter-day Saints, by Joseph Smith, Brigham Young, John Taylor, the Apostles and all the leading men of the Church. I have heard Joseph Smith and Brigham Young say that if they had the power over the whole world, over every human being who breathes the breath of life, they would give every inhabitant of the earth the right to worship God according to the dictates of their own conscience. This is a principle which we believe in as Latter-day Saints, we ever have believed in it, and it is a principle which even the laws of our country, the constitution of our government holds out to all of its citizens. . . . Because the God of heaven gives all his children this right and privilege, it belongs to the whole human family, every man, woman and child under heaven has the right to worship God according to his desires, according to his own views, and according to the light which he has. The Lord gives all the children of men this right and privilege. He gives them their agency and holds them responsible for their actions, and while the Lord does this, why should the children of men interfere.

Wilford Woodruff, *Liberty of Conscience—The Unrighteousness of Religious Persecution—Eternal Truths Revealed—Indestructibility of the Principles of the Gospel, etc.*, Address in the Salt Lake City Mormon Tabernacle (Oct. 23, 1881), in 22 *JOURNAL OF DISCOURSES* 341–42 (Geo. F. Gibbs et al. eds., 1882).

while protected in [our] inherent and inalienable rights [including the right of religious conscience] by the laws of such governments; and that sedition and rebellion are unbecoming every citizen thus protected, and should be punished accordingly; and that all governments have a right to enact such laws as in their own judgments are best calculated to secure the public interest; at the same time, however, holding sacred the freedom of conscience.

This language indicates that sedition and rebellion are limitations on the right of religious exercise and “should be punished accordingly.” It also implies that the public interest may be pursued, so long as the government “hold[s] sacred the freedom of conscience.”

Finally, verse 7 deals directly with the issue of governmental limitations on the exercise of religious conscience and provides:

We believe that rulers, states, and governments have a right, and are bound to enact laws for the protection of all citizens in the free exercise of their religious belief; but we do not believe that they have a right in justice to deprive citizens of this privilege, or prescribe them in their opinions, so long as a regard and reverence are shown to the laws and such religious opinions do not justify sedition nor conspiracy.¹⁴⁷

Once again, Cowdery states that the right of the free exercise of belief can only be limited if the religious exercise constitutes a lack of regard for the law or is used to justify sedition or conspiracy.¹⁴⁸

There is an additional sense in which Cowdery would recognize the legitimacy of an exercise of governmental power that limits the right of religious conscience. Verse 4 declares: “We believe that religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it, unless their religious opinions

147. *Doctrine & Covenants* 134:7.

148. His fear of “anarchy and terror” and his recognition that spiritual matters are to be “answered by man to his Maker,” as voiced in verse 6, seems to support this reading of sedition as being an appropriate limitation on the exercise of religious conscience, as well:

We believe that every man should be honored in his station, rulers and magistrates as such, being placed for the protection of the innocent and the punishment of the guilty; and that to the laws all men show respect and deference, as without them peace and harmony would be supplanted by anarchy and terror; human laws being instituted for the express purpose of regulating our interests as individuals and nations, between man and man; and divine laws given of heaven, prescribing rules on spiritual concerns, for faith and worship, both to be answered by man to his Maker.

Id. at 134:6.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

prompt them to infringe upon the rights and liberties of others”¹⁴⁹ Thus, section 134 permits government limitation of one person’s right of religious exercise in order to avoid “infringe[ment] on the rights and liberties of others.” This limitation would include the protection of another’s rights of conscience, property, or life.

In addition to recognizing the duty to God and the inalienable nature of the right of conscience, with minimal room for regulation by the government, section 134 states: “We do not believe it just to mingle religious influence with civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges, and the individual rights of its members as citizens, denied.”¹⁵⁰ Interestingly, Cowdery characterizes this “establishment” value, as we would refer to it today, as being necessary to protect the “spiritual privileges” and “individual rights” of members of society. It is, as such, a subpart of the more extensive right of religious conscience. He adds that the mingling of such religious influence with civil power should be regulated when such mingling results in “one religious society [being] fostered and another proscribed.” This statement implies an equality or non-preference principle¹⁵¹ that would permit religion some space in the civil sphere, except when such religious activity might result in fostering one religious sect and prescribing another.

Based on the preceding examination of section 134, Cowdery’s views regarding the right of religious conscience can be summarized in five points:

1. we are all children of God and owe our primary obligation (duty) to God and not the government;
2. governments were instituted of God for the benefit of his children;
3. God instituted religion and wants his children to be afforded the right of religious conscience, which right is precedent to

149. *Id.* at 134:4

150. *Id.* at 134:9.

151. For a discussion of various equality, non-preference, or neutrality views, see Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN’S L. REV. 245 (1991). As previously noted, however, Professor Steven Smith offers a strong critique of such equality theories. *See supra* note 65.

the existence of government (i.e., it is acknowledged to be a right given of God and not a mere privilege bestowed by government);

4. government may regulate or limit the right of religious conscience in two circumstances: (1) when religious conscience is used to justify sedition or rebellion; or (2) when the exercise of religious conscience by one person would infringe on the rights and liberties of others; and
5. the mingling of religious influence with civil government should be avoided in instances in which one religious society is fostered and another is proscribed.

III. COMPARISON AND CONCLUDING COMMENTARY

Cowdery's views are quite similar to those of Madison.¹⁵² Madison and Cowdery shared the views that:

1. religious conscience is the duty or obligation owed one's creator and is an inalienable right;
2. the right of conscience is precedent to the organization and generally superior to the power of government;
3. the right of conscience may be restricted only when the exercise of religious conscience by one person would result in sedition (manifestly endanger the state) or infringe on the equal liberty of another; and
4. the mingling of religious influence and civil government, would violate the equal liberty secured by the right of religious conscience.

Cowdery, perhaps like Witherspoon, takes an approach that is more overtly theological in its genesis than that of Madison. Madison and Cowdery each individually acknowledge that there is a religious duty, the exercise of which should be protected as an inalienable right of religious conscience. Cowdery goes into more depth, however, in noting that both government and the right of

152. Such resemblance may be mere coincidence, but it may also be explained in a way that acknowledges the hand of the Lord in enlightening the understanding of John Witherspoon, James Madison, and Oliver Cowdery.

891] *James Madison, John Witherspoon, and Oliver Cowdery*

religious liberty are instituted by God for the benefit of his children. Madison focuses more on the right itself. This is not surprising, given that Madison was writing in a political context while Cowdery was writing in an ecclesiastical context.

Madison and Cowdery may also differ as to what constitutes “equal” liberty for the purpose of legitimate regulation by government. Madison, at times, seems to imply that religious conscience is the equal liberty referred to (i.e., in exercising one’s religious conscience, a person may not infringe another’s right of religious conscience) while Cowdery seems to include the right to property and life in that category (i.e., in exercising one’s religious conscience, a person may not infringe on another’s right of religious conscience, property, or life). My use of the qualifier “seems” is intentional. The views of Madison and Cowdery were not fully elaborated in their writings, and what constitutes an equal countervailing right remains a somewhat open question. In terms of a least common denominator, however, they both would seem to permit government regulation of the right of religious conscience on this ground only when equal rights of religious conscience (and possibly property or life of another) would be infringed by the exercise of one’s religious conscience. Cowdery would also limit free exercise of religious conscience when it is used to justify sedition or conspiracy. Madison, on the other hand, once again takes what appears to be an even more aggressive stance in protecting religious exercise, by permitting government to limit religious exercise only when the existence of the state is *manifestly endangered*. Other minor differences between Madison and Cowdery might be deduced from their writings. The similarities, however, are much more striking than the differences.

A brief examination of some of the implications of the agreement between Cowdery and Madison is in order. Before exploring those implications, however, it is important to note that one implication is not being explored—the ramifications of their views for the purposes of constitutional interpretation. It would be a stretch for multiple reasons to try to draw any such conclusions. Cowdery was born after the ratification of the First Amendment and had no role in its adoption or ratification. And, even though Madison was a major player in framing the religious liberty portion of the First Amendment, evidence that his views prevailed in the adoption or the ratification process is scanty at best, and it is not clear that he

intended for them to be used in that manner.¹⁵³ With this caveat in mind, however, some interesting substantive observations can be drawn.

Madison and Cowdery place significant weight on the fact that the right of religious conscience is based on a “duty” owed to God. This duty is more than a mere preference or choice. This notion of duty may differentiate the right of religious conscience from other rights that may be based on more personal choices.¹⁵⁴ Michael Sandel has noted the difference between religious duty and moral choice.¹⁵⁵ There is a conceptual distinction between choices which are preference-based—a matter of personal belief or preference—and choices that are duty-based (i.e., based on a covenant with God). Of course, it must be acknowledged that there are no doubt times when moral choices are as stark and compelling as are religious ones. Nevertheless, the conceptual difference remains.

153. In analyzing Madison’s theory of constitutional interpretation, Judge Richard Arnold concludes:

What can we learn from Madison that is of any use in present-day constitutional decisionmaking? Maybe the answer is nothing. Perhaps the kinds of issues with which Madison dealt are so different that his interpretive criteria cannot easily be transported into the present generation.

Arnold, *supra* note 72, at 291. However, Judge Arnold adds:

What would Madison think about the modern debate over “original intent”? He certainly was an advocate for originalism, but in the sense of the original meaning of the document, when viewed against the times in which it was adopted. The kinds of arguments that this approach makes relevant are quite general. They involve broad inferences from the essential structure of the Constitution, from the evils of the 1780s and from the nature of a federal government in general.

Id. at 292.

154. See Rodney K. Smith, *The Role of Religion in Progressive Constitutionalism*, 4 WIDENER L. SYMP. J. 51, 83–84 (1999).

155. Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597. Professor Michael Paulsen has also noted that there is a difference of kind between matters of religious conscience—derived from a duty owed God—and moral conscience in other contexts:

For the [religious] believer, the nature of the obligation is stronger. At the risk of being reductionist: the personal ethical individual who objects to war but is forced to bear arms has not been true to his own principles; the religious believer who has been forbidden by God to bear arms against his fellow man, but does so anyway, risks eternal damnation and the fires of hell. That is a big difference.

Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1622 (1997) (book review).

891] *James Madison, John Witherspoon, and Oliver Cowdery*

This difference between duty and preference is given some life by a concrete example recently used by Gordon B. Hinckley, president of the Church of Jesus Christ of Latter-day Saints:

I think of a friend whom I knew when I was a missionary in London many years ago. He came to our door through the rain one night. I answered his knock and invited him in.

He said, as I remember, "I have to talk to someone. I'm all alone."

I asked what the problem was.

He said, "When I joined the Church, my father told me to get out of his house and never come back. A few months later my athletic club dropped me from membership. Last month my boss fired me because I am a member of this Church. And last night the girl I love said she would never marry me because I'm a Mormon."

I said, "If this has cost you so much, why don't you leave the Church and go back to your father's home, to your club, to the job that meant so much to you, and marry the girl you think you love?"

He said nothing for what seemed a long time. Then, putting his head in his hands, he sobbed as if his heart would break. Finally he looked up through tears and said, "I couldn't do that. I know this is true, and if it were to cost me my life, I could not give it up."¹⁵⁶

Had it been merely a matter of personal preference, as opposed to a duty believed to be owed to God, the individual in this story might have chosen to keep his club membership, his job, and the girl

156. Gordon B. Hinckley, *Living with Our Convictions*, ENSIGN, Sept. 2001, at 4. I personally had a related experience that illustrates the nature of duty in matters of religious conviction. As a young man, I was encouraged by a friend to read the *Book of Mormon* and ask God whether it was true. I took that challenge seriously. I read the book daily and inquired of the Lord as to its truthfulness. Then, one day, while reading it, as I started a verse, I did not know it was true. But when I finished that verse I received a spiritual witness of its truthfulness, which filled my being with what I can best term "pure knowledge." I confess, however, that in the very next instant I said, in my mind, "Oh, no! Now I am a Mormon, bring on the sackcloth and ashes." I was initially converted, as a matter of duty, not as a matter of personal preference or choice. It was an obligation arising out of faith—I knew God wanted me to do it—not a choice made for other reasons. Since that time, I have also chosen my faith, finding in it a source of happiness and joy that I could not have imagined at the instant when I was first called by duty and not choice.

he loved; but he could not do so because he felt duty bound to act on the spiritual promptings given him of God. This sense of duty or obligation to God is a central aspect of the right of religious conscience and differentiates it from choice or preference-based rights, including even a more generalized right of conscience. The notion that one owes a duty to God is, therefore, different from preference-based rights and may warrant peculiar solicitude on the part of government, both in terms of protecting the right from governmental restriction and limiting the ways in which religionists may mingle their religious duty with government, as Madison and Cowdery both recognized.

Both Madison and Cowdery, like Witherspoon before them, use the term “conscience” rather than religion on numerous occasions, although it appears evident that they mean religious conscience. The use of the term “conscience” may be significant for a number of reasons. For example, “conscience” implies action (acting or refusing to act upon some moral duty or obligation) and not merely observance of ritual, although the observance of ritual may be a form of conscience. As such, using terms like the “full and free exercise of conscience” rather than “religion” helps clarify that more than belief or a mere worship service are included. Additionally, the term “religious conscience” implies the protection of individual religious acts and does not permit or require the government to pick and choose among religious actors. Both Cowdery and Madison also appear concerned about the possibility of government defining religion in a restrictive manner and may have used the seemingly broader term “conscience” to ensure that all religious exercise is protected. Finally, they may be distinguishing religious acts that are a matter of conscience—a matter of duty between the actor and God—and those that are a matter of religious culture or preference. A person, for example, may want to meet at a given time to worship. That time may even be strongly preferred and a matter of culture—they have met at that time for years, but it is not a matter of conscience (i.e., a matter of duty between the person and God). Rather, it would seem to be a matter of preference, albeit one that has become quite significant for the individual.

Madison and Cowdery also believed that the right of religious conscience should be afforded broad protection against government infringement or regulation. Their standard is quite high, permitting government to regulate matters of religious conscience only if: (1)

891] *James Madison, John Witherspoon, and Oliver Cowdery*

the exercise of religious conscience by one person infringed on the rights and liberties of another; or (2) the exercise of religious conscience constituted an actual threat of sedition or rebellion (i.e., in Madison's words, "manifestly endangered the state"). This standard is at least as high as the strict scrutiny test sometimes applied by the Supreme Court in fundamental rights cases, which calls for government to have a compelling state interest applied in the least restrictive manner.¹⁵⁷ It also demonstrates the great latitude that both Madison and Cowdery believed religious conscience should be afforded. Indeed, this standard, coupled with their recognition that the inalienable right of religious conscience is based on a duty between a person and God, may indicate that the full and free exercise of that right is preeminent among all rights in terms of the level of protection offered to it.

There is symmetry in their views. On the one hand, they would afford religious conscience very broad protection against government infringement, protection as great or greater than that afforded any other fundamental right. On the other hand, however, they would also limit the mingling of religious influence with civil government, something they would not do with other rights. They would not permit religious influence on the civil government to extend to areas in which one religious society or group of sects is fostered and another is prescribed. This equality or nonpreference limitation, which requires that religions be treated equally by civil government, limits the capacity of religious sects to commandeer the democratic process to achieve their religious ends and does so in ways that would not apply to efforts by ideological or other non-religious groups seeking to achieve their secular objectives through the democratic process.

Even though their backgrounds were dissimilar, and they used their talents in differing contexts, Madison and Cowdery both envisioned broad protection for the right of religious conscience. They understood the importance of religion. They also were students of history and recognized the need to ensure that no religious individual, sect, or group of sects should be permitted to gain control of the political process to achieve their religious ends and

157. See, for example, ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 75-77 (2d ed. 2001) for a discussion of the strict scrutiny model of analysis generally applied in fundamental rights cases.

thereby limit the religious conscience of others. They wanted to protect the encumbered self, the individual seeking to fulfill the duty one owes God, but they did not want a political process that could be dominated by a single religious sect or group of sects. Their efforts merit further study and continue to be relevant as we wrestle with issues of religious conscience in the pluralistic world of the twenty-first century.