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James Madison, American Liberalism, and the Problem of the "Gordian Knot"

Nicholas Marr
University of Notre Dame

On April 2, 1792, in the *National Gazette*, James Madison offered the following: the "real friends of the Union [are] not those who study, by arbitrary interpretations and insidious precedents, to pervert the limited government of the Union, into a government of *unlimited discretion*, contrary to the will and *subversive to the authority* of the people" (Madison 1999, 518; emphasis added). Madison's judgment offers a glimpse into the complexities of American liberalism. Although, as Madison knew, it's not upon a theory of liberalism that the health of this natural rights republic rests, but upon practice and the public opinion which dictates it: "All power has been traced to opinion. The stability of all government and security of all rights may be traced to the same source" (Madison 1999, 503). I'll consider two pathologies of contemporary public opinion—it accepts unlimited federal authority and it demonstrates hostility to the presence of religious faith in the public square and public office. Among the more potent examples of this hostility is Senator Dianne Feinstein's 'accusation' to Judge Amy Coney Barrett that "the dogma lives loudly within you" (Ahmari 2017). These pathologies are, I will show, quite connected. More significantly, they are particularly destructive to a republic intended to secure Creator-endowed natural rights. How, then, was the general mind formed in this way?

Patrick Deneen's *Why Liberalism Failed* has sparked a debate over the nature and sustainability of American liberalism. Deneen has a compelling answer to the question—in displaying these pathologies, the general mind has become more fully itself (Deneen 2018). He, along with other postliberal thinkers, present Madison's thinking as deeply flawed, while liberal constitutionalists tend to present Madison's thinking without attending to its flaws—even those Madison himself saw (Deneen 2018, 101, 142, 163-175; Vermeule 2019). I argue that Madison sought to *avoid* the pathologies mentioned, but that his own thinking indicates their significant latency at the founding. I hope this balanced view of Madison's thinking might provide additional insight into and something of a common ground in the debate over the sustainability of American liberalism.

Madison put tremendous faith in his theory of the extended republic. We might think of this as hope in the efficacy of liberalism's potential to make peace among people who fundamentally disagree about life. A republic, Madison insists, could be large and still be political but still requires some kind of local politics to develop the political knowledge and experience needed for all to be good citizens. Madison's answer for this is to separate the national and the local authorities by jurisdiction, that they both might remain active and relevant. To encourage good public opinion on this matter, he advises in a newspaper column: "Those who love their country . . . will therefore study to avoid the alternative, by elucidating and guarding the limits which define the two governments by inculcating moderation in the exercise of the powers of both, and particularly a mutual abstinence from such as might nurse present jealousies, or endanger greater" (Madison 1999, 509).

While the first half of the quote explains the contours of what Madison would consider a proper federal-state relationship, the second half sounds like a reliance on virtue - political virtue, at least - for this relationship to succeed. In explaining the constitutional basis for this complementary knowledge and virtue, he emphasizes in Federalist No. 39 that local authorities "form distinct and independent portions of the supremacy [of government]" and *are not* subject to the authority of the national government within their distinct sphere (Madison 1999, 216). As for his hopes for future developments, Madison explains in Federalist No. 46, "…even in that

case [of better administration by national government], the state governments could have little to apprehend, because it is only within a certain sphere that the federal power can, *in the nature of things,* be advantageously administered" (Madison 1999, 267). Here, Deneen and Madison might agree: It's not good for the federal power to have a million employees making a million regulations which touch daily life in a million more ways. The chartered central power was neither authorized nor advised to involve itself in properly local matters (Madison 1999, 490).

But it's quite obvious that the conflict has played out to the great detriment of local politics and of that equilibrium between the powers Madison sought. This is one of the big problems in the liberalism debate. How to develop the good, participatory politics that both sides of the debate support? Can American politics even *do* that? The first and obvious problem is that it's simply not clear what properly local and properly national matters are. Madison's thinking here is revealing. He identifies in an 1821 letter the "problem of collision between the federal & State powers" as the "Gordian Knot of the Constitution" (Madison 1999, 777; Hughes 1932, 854, 857). The story of the Gordian Knot is about Alexander the Great and a wagon with a yoke where several knots were "all so tightly entangled that it was impossible to see how they were fastened" (Andrews 2016). Anyone who could untie the knot, an oracle said, would rule Asia. So, Alexander decided it didn't matter how the deed was done, and relying on his strength and cunning, cut the knot. This decision explains why Madison, later in the same letter, counsels, "If the knot cannot be untied by the text of the Constitution it ought not, certainly, to be cut by any Political Alexander" (Madison 1999, 777).

This reference provides new insights into the liberalism debate. National government didn't have to expand and consolidate political power the way it did. But this result, I would suggest from Madison's reference, was the most likely one. The extended republic excites those pathologies of liberalism, in government and in designing men, that tend to consolidate power at the highest level. So how are we to combat the easy way out – the cutting of power from local authority? Madison's point in the letter is that we're to look to the written text rather than to the extent of our capacities (and whatever selfish ambitions we might use them for) to see what the local and national matters are. We can see at first glance that some of these properly national objects are defense and the facilitation of interstate commerce (Constitution Preamble, I.8, II.2). But what about the protection of rights? In particular, the protection of the natural right to religion? An important concern in this contemporary debate over liberalism is, after all, its relationship with religious faith. So, is reliance on the federal Bill of Rights and the courts, as we practice it today, the best way to protect this natural right?

I argue that it is not, and that in presuming so, we've lost something very valuable and distinctive to our founding's liberalism. Indeed, one of Madison's most unique contributions to American political thought - his religious liberty principle of no cognizance - once held great promise for preserving peace *and* liberty in a society of diverse Christian sects. But it has been eviscerated by federal intervention into the natural right to religion. Madison's principle, explained most clearly in his "Memorial and Remonstrance Against Religious Assessments," holds that the state cannot discriminate on the basis of religion because it has no jurisdiction over religion as such (Madison 1999, 29-36). That jurisdiction belongs to churches alone. Madison's principle holds the state's duty of non-discrimination to be higher than both fearing establishment or preventing incidental burdens that might befall religious believers from general law. To the extent that

Madison's principle is written into the First Amendment,[i][1] we can see from the above explanation that the Supreme Court has it *precisely* backwards. For the Court, establishment is the gravest evil and exemptions are a presumption (See Muñoz 2006, 585, 625). For the Court, government must discriminate on the basis of religion, either to help or to hurt, depending on the whims of officials.

The Court has decisively cut the "Gordian Knot" of the First Amendment, and in so doing, has severed any salutary equilibrium to be had between national and state authority on the matter. The knot, from Madison's "Memorial," is: each citizen has a right to the free exercise of religion, defined as worship according to conscience, and the federal Congress has no jurisdiction over establishments - either to establish a national religion or to touch state religious establishments. There's a lot to untie here. I will attempt to do so briefly, with an emphasis on the fact that this principle distinguishes American liberalism and our founders' natural rights philosophy from French liberalism, Lockean liberalism, or any other kind of liberalism.

Madison's understanding of religious liberty wasn't liberal in the sense its critics use, as a kind of freedom from unchosen obligation. Religious liberty was for Madison the freedom to worship according to conscience. The formation of this conscience is rooted *not* in a unfettered right to self-express, but in a "duty towards the Creator" (Madison 1999, 30). *This* understanding cannot, of course, authorize the kind of separation and secularization that French liberalism does. And while John Locke emphasizes the importance of material property, Madison is concerned with property as a way of describing the most important *non-economic* human goods (*Second Treatise*, Chapter 5). Madison holds that man "has a property of peculiar value in his religious opinions, and in the profession and practice dedicated by them" (Madison 1999, 515). This peculiar value is both consistent with the best of the American tradition - in that it understands religious worship as a natural right, derived from the natural duty to the *Creator* - and has simple yet quite striking implications for civil law.

From the duty to worship, Madison derives a "right towards men" to let them alone in their worship, and to take no account of their religious beliefs in making *or applying* law. This is we might call a religion-blind approach to law. That's in part a freedom from coercion, which postliberals criticize, but should consider more seriously given our cultural moment. Its political implications give us a principle: religion as such can be neither helped nor hurt by the state. No *presumption* to exemptions. To untie this knot means to make good, neutral, and equal law rather than self-interested, sectarian law. One of the particularly challenging implications is that laws which incidentally burden religious believers aren't bad law and don't need exemptions simply because they burden citizens. There might be other reasons why the law is bad. Recall the "limited government of the Union." The *scope* of the laws is to be limited. Indeed, the freedom of religion is Madison's most powerful reason to defend limits.

To return to the more concerning pathology I mentioned at the beginning - our culture's outright hostility to people of faith - Madison's principle also means no excluding religious people, institutions, speech, or anything else from the public square on account of their religious character. This kind of principle might be best practiced, we can recall from the oft-forgotten historical context of Madison's "Memorial," in the local, political context. The virtuous treatment of fellow citizens Madison's principle requires might best be preserved through

personal and political engagement rather than impersonal legal rulings. To argue that manifestations of faith in public are *not* permitted because our government must oppose such things, per a mistaken and often ill-intentioned understanding of James Madison and the Establishment Clause, is undoubtedly the easy way out. But it also infects the general mind and excites bad tendencies. It is to take up Alexander's mantle, cut the knot of religious liberty, and begin to craft with the severed pieces of rope a noose for the neck of the republic. We might instead consider how to remake what has been cut to set our sails true.

References

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[i] The Free Exercise guarantee is consistent with noncogizance. But while Madison opposed establishment in Virginia, he did not see other state establishments as within the jurisdictional scope of the national power. See Vincent Phillip Muñoz, "The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation," 8 *University of Pennsylvania Journal of Constitutional Law* 585, 625 (2006).