

Blooming Confusion: Madison's Mixed Legacy

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"For those who like to speak of an 'Age of Constantine' that began in the fourth century," Martin Marty observes, "there is reason to regard [Jefferson's Virginia Bill for Religious Freedom] as the key moment of the end of that age and the beginning of a new one."¹ And even more than Jefferson, James Madison was the principal prophet of that new age. Madison authored perhaps the most powerful brief for religious disestablishment that has ever been written, he pushed Jefferson's bill through the Virginia legislature, and his common sponsorship of that measure and of the First Amendment provided the pretext on which the modern Supreme Court read the Virginia provision into the Constitution.² If the era before the 1780s was the "Age of Constantine," then the period since then can with even greater justification be called the "Age of Madison."

And what *is* the condition of religious freedom in the Age of Madison? Here we encounter a paradox. On the one hand, we often suppose that no society in history has afforded greater scope of protection for a diverse range of religious belief and conduct.³ On the other hand, there is something approaching unanimity on the proposition that the prevailing *discourse* of religious freedom—or the official framework and language within which issues of religious freedom are argued and judicially resolved—is deeply incoherent.⁴ Our situation is just the reverse, it might seem, of that of earlier periods in which apologists and theorists could argue about

* Robert and Marion Short Professor, Notre Dame Law School. Challenges at and after the conference, as well as later comments by Andy Koppleman and Michael Zuckert, made it clear that further elaboration of the argument would be in order at various places, but time and the "short essay" format have precluded much additional elaboration here. After the conference I did prepare a fairly lengthy section applying the criticisms of equality rhetoric to Michael Perry's conference paper. That addition produced some rewarding exchanges (for me, at least), but the addition also threatened to expand, risking a "tail wagging the dog" problem. So, for present purposes, I've shrunk the addition to a single footnote. I very much appreciate the comments and objections; though they haven't dissuaded me from the present thesis, they do point to the need for continuing reflection—beyond the conventional formulas and slogans—in this difficult area.

1. Martin E. Marty, *The Virginia Statute Two Hundred Years Later*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 1, 2 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

2. For a laudatory review of Madison's contributions to the establishment of religious freedom in this country, see JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 59-91 (1998).

3. Questions might be raised about this self-congratulatory supposition. See, e.g., KENNETH R. CRAYCRAFT, JR., *THE AMERICAN MYTH OF RELIGIOUS FREEDOM* (1999); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 *COLUM. L. REV.* 2255 (1997). But those questions are not the focus of this Essay.

4. William Marshall's contribution to this Symposium provides support for both aspects of this description. William P. Marshall, *What is the Matter with Equality?*, 75 *IND. L.J.* 193 (2000).

questions of church and state in forceful, cogent, substantive terms⁵ even while actual respect for and protection of religious freedom was comparatively feeble. As our practice has improved, it seems, our understanding and discursive facility have deteriorated.

How to explain this curious development? And for which part of our current paradoxical situation does Madison deserve the credit, or the blame? In this Essay I want to argue that Madison—as symbol and to an impressive extent as actor—is the source of both the happy and unhappy parts of our current situation. Moreover, this is not a case in which Madison's positive contributions were partially marred by unfortunate extraneous mistakes, or in which our inheritance includes both a valuable estate and some regrettable independent debts. On the contrary, the two aspects of our situation are interrelated; we likely could not have one without the other. So in both our virtues and our vices we are Madison's faithful heirs.

I. THE FIRST BEQUEST: THE PRINCIPLE OF RELIGIOUS EQUALITY

Probably the most visible part of Madison's legacy is the principle—by now regarded as a sort of central and self-evident truth—that all religions should be treated as equal before the law. For two and one-half centuries before Madison, from the time in which the Protestant Reformation had fractured Western Christendom, European states and their colonies had struggled to find a satisfactory principle for regulating the conflicts among competing faiths. The earliest principle had favored monolithic religious establishment. Thus, the Peace of Augsburg had decreed that the religion of the prince should be the religion of the realm—*cujus regio ejus religio*.⁶ That principle had been challenged—but only in part—by proponents of a different approach, which we might call the principle of *toleration*.⁷ But toleration was still offensive to some because it implied that some religions were favored over others.⁸ To borrow a modern expression, toleration meant that even if people were allowed to practice their religions, still some religions were “insiders” while others were “outsiders.”

So a few visionaries like Madison favored a more radical principle—a principle of religious equality—that aimed to eliminate the remaining invidious distinctions. The discourse of religious freedom as it has evolved in this country has come to regard the equality principle as axiomatic, and credit for perceiving and promoting that principle is often given to Madison. The honor is deserved. Madison was ahead of his time in emphasizing—again and again—that all religions should be treated equally. Thus, in 1776, when Virginia was adopting a bill of rights for itself as a state, George Mason offered a provision ensuring the “[t]oleration” of diverse

5. For a discussion of the more substantive character of discussions of religious freedom during the early colonial period, see Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 239-46 (1999) (book review). For an earlier period, see the various positions excerpted in BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050-1300* (1964).

6. See OWEN CHADWICK, *THE REFORMATION* 143 (1964).

7. See, for example, JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (Mario Montuori ed., Martin Nijhoff 1963) (1689), for perhaps the best-known expression of this position.

8. See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 309-11 (1990).

religions.⁹ Mason may have thought he was expressing the enlightened or progressive sentiment of his time, but Madison wanted—and got—more: the provision was amended to say that the free exercise of religion extended to all *equally*.¹⁰ William Lee Miller comments that “everything that was to come in the American arrangement of these matters [of religion and government] was already present in Williamsburg, Virginia, in June of 1776, in the proposals of young James Madison.”¹¹

Later, in his famous *Memorial and Remonstrance*, Madison argued eloquently on behalf of religious equality.¹² And in the First Congress, Madison proposed a constitutional amendment providing that “[n]o state shall violate the equal rights of conscience.”¹³ Nitpickers may point out that this “equality” proposal was defeated in the Senate, and so was never presented to the states for possible ratification. But Madison was posthumously vindicated when, using the notion of “incorporation,” the modern Supreme Court construed the Constitution *as if* it contained the provision that Madison had favored.¹⁴ Consequently, the equality principle (along with the corollary notion that government must be “neutral” in matters of religion) has provided the major premise under which modern religion clause controversies have been debated and decided.

So if there is cause to question Madison’s legacy in this respect, it is not because of any uncertainty about his zeal in championing the equality principle. Questions, if there are any, would have to concern the *value* of that principle.

A. Equality and Evasion

And in fact there *is* room to wonder whether the equality principle has been entirely beneficent in its influence. Suppose, for example, that we were to reflect on Madison’s favored principle immediately after reading Peter Westen’s well-known essay, *The Empty Idea of Equality*.¹⁵ The thrust of that subversive essay, you may recall, is that equality is a purely formal notion; it is entirely parasitic on

9. WILLIAM LEE MILLER, *THE FIRST LIBERTY* 3-7 (1986).

10. *See id.* at 5-7.

11. *Id.* at 7; *see* NOONAN, *supra* note 2, at 69-71.

12. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), *reprinted in* *THE SUPREME COURT ON CHURCH AND STATE* 18, 20 (Robert S. Alley ed., 1988). Madison wrote:

If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions Above all are they 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.

Id. at 20 (emphasis in original).

13. *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 13 (Helen E. Veit et al. eds., 1991).

14. *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947).

15. Peter Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537 (1982).

independent substantive criteria for its practical meaning and consequences, and it adds nothing to those criteria once they are identified. Equality simply means that like cases should be treated alike—a proposition with which no one really disagrees. What people *do* disagree about is whether some particular case really *is* like some other case in relevant respects. But the notion of equality does nothing to help resolve that sort of disagreement.

To put the point more generally, every person is in different ways both like and unlike every other person. Every situation is like every other situation in some respects but not in others. Political and legal controversies hinge on the substantive criteria that make particular similarities and differences relevant for a particular purpose; and the principle of equality in itself does nothing to supply those criteria. If we agree on the substantive criteria that should govern a matter then the addition of “equality” is not necessary, and if we don’t agree on the substantive criteria then the invocation of equality is not useful.

Westen’s argument generated extensive debate, leading to an intricate and technical literature and a few concessions by Westen himself.¹⁶ Fortunately, we need not pursue the debate into its remote provinces; our concern here is only with the core problem that Westen identified. It may be more helpful, for present purposes, to approach that problem by noting that equality typically serves as a device not so much for *importing* substantive criteria without full acknowledgment or justification, but rather for *excluding* particular substantive criteria from the decisionmaking processes. Thus, *racial* equality typically means that race should not be taken into account (in employment decisions, or voting privileges, or some other context). *Gender* equality means that gender should not be counted as a factor for some purpose or another. Neither sort of equality specifies what criteria *should* govern hiring or voting or other sorts of matters; equality is invoked to indicate that particular criteria *should not* be treated as relevant. This revised statement does not deprive Westen’s argument of significance. The *exclusion* of substantive criteria from decisionmaking reflects a substantive judgment just as the inclusion or acceptance of substantive criteria does, and neither sort of judgment can be defended by invoking the concept of equality.

Claims about equality are conclusions to be *argued for*, in other words, not premises to be *argued from*. So whenever the concept or principle of equality seems to be doing any significant intellectual work on a controversial question (as opposed to merely expressing a conclusion), on closer inspection it will likely become apparent that this is “illegitimate” work—illegitimate in the sense that the language of equality is being used to import or, more often, to exclude some more substantive values or criteria without any careful attempt to provide justification.¹⁷ If we see

16. See PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF “EQUALITY” IN MORAL AND LEGAL DISCOURSE at xx (1990) (“As a consequence of response to the article, and further reflection on my part, I have modified my original views in several respects.”).

17. Questions at and after the conference prompt me to emphasize that the problem with equality rhetoric is *not* that the notion of equality *remains* substantively “empty”—if it did, then the notion would play no part in an argument—but rather that a largely formal truism (“Treat like cases alike,” or “Don’t treat persons or situations differently on the basis of irrelevant distinctions”) is offered as if it provided justification for substantive conclusions

controversial issues being debated mainly in terms of equality, in short, we will have reason to suspect in advance that some kind of cheating—or deception, or self-deception—is going on.

B. Egalitarian Question-Begging in Madison's Memorial

Equipped with this suspicion inspired by Westen, let us revisit the principle of religious equality. Can we detect any of the problems described by Westen in Madison's use of the principle?

We might start with a small point. The Assessment Bill which Madison opposed in his *Memorial and Remonstrance* had provided that each taxpayer could designate which Christian denomination should receive his or her contribution, and it had then limited the churches' use of this money to the purposes of paying ministers or constructing and maintaining buildings for worship.¹⁸ But Quakers and Mennonites (or "Menonists," as both the bill and Madison called them) were exempted from these restrictions—presumably on the assumption that these faiths did not believe in or support a paid, professional ministry. The manifest purpose of this exception was to treat these religions "equally" by allowing them to use the money in a way consistent with their own religious beliefs and practices.¹⁹ Madison quarreled with the exemption, though; he argued that the bill *violated* the principle of religious equality by granting Quakers and Mennonites a legal privilege not enjoyed by other faiths.²⁰

We see here an early version of the "free exercise exemption" controversy, in which advocates all appeal to the same principle—equality (or "neutrality")—to argue, variously, that free exercise exemptions are constitutionally forbidden, or permitted, or required. Should religious pacifists such as Quakers be excused from military conscription, for example, if nonreligious objectors are drafted? That question hinges on whether there is some relevant substantive difference between a religious and a conscientious but nonreligious objection. Both today and in the past, some people have thought there is a relevant difference; others have disagreed.²¹ But the important point is that the formal principle of equality simply does not speak to that substantive question at all. So the language of equality at best offers a tempting way of begging the real question.

And that is just what Madison did in his *Memorial and Remonstrance*. If the Assessment Bill treated Quakers and Mennonites differently from other Christians, presumably it did so because its sponsors believed Quakers and Mennonites *were*

that need *substantive* justifications.

18. See A Bill Establishing a Provision for Teachers of the Christian Religion (1784), reprinted in *Walz v. Tax Comm'n*, 397 U.S. 664 app. at 717-18 (1970) (Douglas, J., dissenting).

19. Though still requiring Quakers and Mennonites to pay the tax, the bill provided that they might place the money "in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship." *Id.* at 718.

20. See MADISON, *supra* note 12, at 20.

21. For a lucid discussion of the question, see Michael W. McConnell, *Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1491-1503 (1990).

different than other Christians—and different in a way that warranted different legal treatment. Madison evidently disagreed. Perhaps he could have supported his contrary view with substantive arguments. But he didn't. Instead, he chose to beg the question by invoking the idea of equality.²²

The fudginess in Madison's treatment of Quakers and Mennonites points to a larger problem that afflicted Madison's *Memorial and Remonstrance* at all levels. Though he insisted that all religions should be treated equally, an inspection of the *Memorial and Remonstrance* reveals that in one sense Madison's argument pervasively depended on treating religions differently. His very argument discriminated among faiths by accepting and endorsing some religious views while rejecting other religious views. We might roughly describe the religious beliefs in which Madison's argument was grounded as theistic—and not merely theistic but Christian, and not merely Christian but Protestant, and not merely Protestant but reflective of a sort of nonstatist, voluntaristic Protestantism akin to that of the Baptists whom Madison had earlier defended against persecution and who later provided the votes to elect Madison to Congress.²³ Throughout the *Memorial and Remonstrance* Madison made arguments and drew conclusions with which not only atheists but also Catholics and Protestants in the mainstream Lutheran and Reformed and Anglican traditions would surely have taken issue—and on the basis of their own, different religious beliefs and commitments.²⁴

Both in its premises and in the conclusions to which those premises led, in short, the 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 the government.

Lest I be misunderstood, let me emphasize that although Madison's use of the equality principle was in some respects question-begging and perhaps a bit deceptive, it was *not* hypocritical or inconsistent in its practical consequences. All citizens *would* be treated equally under the substantive views and criteria favored by Madison, just as they would be treated equally—albeit equally in a very different

22. To reiterate a point made earlier, *see supra* note 17, but one that discussion shows to be elusive: the objection here is not that Madison's version of equality was "empty." It wasn't—not in the end, at least. Madison, like others who use the rhetoric of equality, filled the formal notion of equality with substantive content; more specifically, he used it in this instance to criticize religious exemptions. The problem is that the wrongfulness of exemptions cannot be inferred from the formal notion of equality, as Madison suggests; the opposite, pro-exemption position is just as compatible with "equality" as Madison's position is.

23. *See* NOONAN, *supra* note 2, at 67-68, 77-78.

24. A full explanation of the theology implicit—and sometimes explicit—in the *Memorial and Remonstrance* would require a longer treatment than is possible here. But the *fact* of theological content can hardly be in doubt. *See, e.g., id.*; McConnell, *supra* note 21, at 1453. And the controversial character of that content is apparent from the fact that many other differently minded religionists obviously disagreed with Madison's views. For a lengthier treatment of one aspect of the theology of the *Memorial and Remonstrance*, *see* STEVEN D. SMITH, IS TOLERATION IMPOSSIBLE? AMERICAN PLURALISM AND THE ULTRA-PROTESTANT TURN (work in progress).

way—under the substantive beliefs and criteria favored by Madison's opponents (or, for that matter, under the substantive beliefs and criteria that had guided the Massachusetts Puritans, or the Inquisition). Madison and the Puritans both believed that like cases should be treated alike, and they both made judgments on the basis of their overall understandings of the world—understandings that were in important part “religious”—about which cases were and were not alike. In that sense, they both worked to have their substantive views—views that were often religious in nature—embodied in the law.

Insofar as their substantive religious views differed, of course, the results of the equal application of these views would also differ. We might say that both the Madisonian and the Puritan positions rejected some religious beliefs as heretical, and both positions also imposed legal burdens on heretics; they differed in the specific content of their heresies and in the specific legal sanctions they would impose. Under the Puritans' religious views, someone like Roger Williams would be deemed heretical and legally sanctioned—perhaps, as in Williams's case, by being banished from the community. 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. But in both positions, like cases would be treated alike.

So in many respects, James Madison and the Massachusetts Puritans were similar. But there were two crucial differences. Most obviously, as I have just said, they differed in their substantive religious views. But they also differed in the discursive strategies they adopted to promote those views: the Puritans were in a sense up-front about their efforts to embody their religious beliefs in law, while Madison's more deliberate use of the language of equality tended to conceal the legal adoption of his own religious beliefs and the legal rejection of incompatible religious beliefs.

Since Madison was working in a transition period in which the new regime still had to be actively argued for, the concealment was less complete than it would later become: Madison's religious premises and his reliance on those premises in shaping the law were still readily visible. Indeed, the appeal to equality was not Madison's featured argument; it appeared in the *Memorial and Remonstrance* only after a more explicitly theological rationale had been presented.²⁵ We might say that Madison had only begun to glimpse the rhetorical possibilities opening up with the new nation's commitment to “equality.” In the ensuing two centuries these possibilities would be fully exploited.

C. Equality in the Modern Discourse of Religious Freedom

Rhetorical exploitation of the idea of equality, or of closely related concepts like neutrality, pervades the modern discourse of religious freedom. Consider (to take an example almost at random²⁶) Christopher Eisgruber's and Lawrence Sager's argument about the still controversial issue of free exercise exemptions. In addressing this and other issues of religious freedom, Eisgruber and Sager start from

25. See SMITH, *supra* note 24, for a more detailed presentation of that rationale.

26. It is purely a coincidence that I pick an example from a review criticizing my work.

a principle much like Madison's, which they call the principle of "equal regard." In general, "equal regard" means that "the interests and concerns of every member of the political community should be treated equally";²⁷ and in the context of religion this principle implies, they say, that "the government is obliged to treat the deep religious commitments of members of minority religious faiths with the same regard as it treats the deep commitments of other members of the society."²⁸

The basic notion of equal regard is one that no one could sensibly or perhaps even coherently reject, I think, but notice how the inevitable question-begging is already being introduced in the corollary. That corollary quietly smuggles in (without actually declaring or defending) substantive criteria under which "deep" commitments are relevantly like each other and unlike other commitments—shallow commitments, perhaps?—but in which "religious" commitments are *not* relevantly different than nonreligious commitments. What matters, in other words, is the "depth" of a commitment, not its religious character. Eisgruber and Sager have not yet come to the question of free exercise exemptions, but once the notion of "equal regard" has been tilted in this way, the answer is foreordained: the distinctiveness of religion *as religion* has already been tacitly denied as part of the very definition of equality. So we hardly need to read any further to know that Eisgruber and Sager will go on to conclude that specifically religious exemptions are constitutionally offensive: minority religious believers can be excused from general laws only to the extent that nonreligious citizens with "comparable commitments" are likewise excused.²⁹

One might have thought that whether religious and nonreligious objections *are* "comparable" for exemption purposes is precisely the question at issue. But that is a hard and controversial question. Rather than addressing the question, Eisgruber and Sager circumvent it by resorting to the obliging rhetoric of "equality."

This example is simple and stark. Often scholars and jurists (and, in other writings, Eisgruber and Sager themselves) offer more complicated and sophisticated treatments. Rather than invoking "equality" or "equal regard," scholars may use essentially equivalent notions, such as "antidiscrimination."³⁰ And advocates usually do not rely *solely* on the rhetoric of equality; they often mix appeals to equality with more substantive argumentation (as Madison himself did in his *Memorial and Remonstrance* as a whole). The challenge in all such cases is to extract the substantive claims from their packaging in the beguiling language of equality, and

27. Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 600-01 (1996) (reviewing JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* (1995), and STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995)).

28. *Id.* at 601.

29. *Id.* at 603.

30. Michael Perry's contribution to this conference adopts as its central theme the idea of "antidiscrimination." Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295 (2000).

then to examine the substantive positions on their own merits. Sometimes the positions will be able to stand on their own. But often a position will seem quite feeble when denuded of the trappings of equality or nondiscrimination.³¹

My assessment of these efforts by leading legal scholars may seem harsh, so let me quickly make some disclaimers. To begin with, I emphatically do not mean to suggest that the scholars I have mentioned are uniquely guilty of equivocation or question-begging. Their equality-based arguments reflect the predominant character of modern discourse about religious freedom, which routinely purports to deduce answers to difficult substantive questions from the notion of equality, or from its companion notion of neutrality. They are only doing what the Justices have been doing, and what virtually everyone in this field has been doing. Indeed, one might argue that the discourse of religious freedom is itself merely an example in miniature of the modern discourse of "liberal democracy," which a critic might view as a massive project in question-begging based on the empty notions of equality³² or, sometimes, neutrality.

Neither do I think that the practitioners of this rhetorical art are being insincere or consciously manipulative, any more than I think that Madison (as admirable a figure, probably, as any in our constitutional tradition, with the possible exception of Lincoln) was being insincere or manipulative. The magical rhetoric of equality, especially when employed in support of positions that "reasonable" or right-thinking

31. As an example, consider the nonestablishment component of Perry's antidiscrimination norm. Under this heading, Perry argues that government must not take any action based on the view that any particular religious tenet is "truer or more authentically American or otherwise better" than any competing religious or nonreligious tenet. *Id.* at 308. Packaged in the language of "nondiscrimination," this prohibition may seem appealing, even compelling. Unpacked, the prohibition appears to be substantively equivalent to a familiar and quite extreme position in the by now voluminous debate about whether citizens, or legislators, or other government officials may permissibly rely on religious convictions in making political decisions. More specifically, the prohibition that Perry attaches to an "antidiscrimination principle" appears to reduce to the position in that debate that seeks to exclude religious convictions as a basis for political decisions. To be sure, some scholars *have* taken that extreme exclusionary position in the "religious convictions" debate. But the exclusionary position has also been powerfully criticized—by, among many others, an earlier Perry. *See, e.g.,* KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); Michael J. Perry, *Comment on "The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment"*, 27 *WM. & MARY L. REV.* 1067 (1986); Philip L. Quinn, *Political Liberalism and Their Exclusions of the Religious*, in *RELIGION AND CONTEMPORARY LIBERALISM* 138, 156-59 (Paul J. Weithman ed., 1997); Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in *RELIGION AND CONTEMPORARY LIBERALISM, supra*, at 162, 172-76. However one comes out in this debate, it seems clear that the exclusionary position is highly controversial and in need of serious justification; it cannot be rendered acceptable merely by being piggybacked onto an "antidiscrimination principle."

32. Michael Zuckert has cogently argued, for example, that the whole edifice of Rawlsian political liberalism rests on just such equivocations about the meaning of equality. Michael P. Zuckert, *Is Modern Liberalism Compatible with Limited Government? The Case of Rawls*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 49, 75-78 (Robert P. George ed., 1996).

people regard as axiomatically correct, seems able to beguile the rhetoricians at least as effectively as it beguiles their audiences.

Finally, I do not even mean to suggest that the question-begging rhetoric of equality is a bad thing, or that it is something necessarily to be regretted or avoided. Whether or not such rhetoric is desirable presents a question that cannot be decided in the abstract. And so we need to return to that question after first considering the other major part of Madison's legacy.

II. THE SECOND BEQUEST: RELIGIOUS PLURALISM

Madison's less celebrated but perhaps more important contribution to religious freedom lay in his recognition, carefully and eloquently presented in *Federalist 10* and again in *Federalist 51*, that the best way to maintain a condition of religious freedom in a religiously pluralistic society is not to subject the pluralism to some legally enforceable substantive principle, but rather to permit the pluralism to flourish—and to maintain institutional structures (such as federalism) in which pluralism *can* flourish.³³ We might call this Madison's "positive pluralism" theme: unlike so many other people who saw pluralism only as a *problem*—as a source of civil strife possibly culminating in tyranny—Madison recognized that pluralism could also be a solution to an array of potential problems. To be sure, Madison proposed pluralism as an answer to the problem of faction in general, not just religious faction. But he explicitly included religion in his analysis.³⁴ "In a free government," he insisted, "the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."³⁵

It might be argued that Madison deserves less credit for the religious pluralism theme than he receives for the equality theme. After all, Madison obviously did nothing to originate religious pluralism in this country; it grew up on its own, perhaps with the aid of more providential nurturing. It may also be that, unlike the religious equality theme, which Madison articulated repeatedly and with conviction, this "positive pluralism" theme was something that Madison stumbled onto almost by accident as he tried to defend the Constitution against the argument, taken from Montesquieu, that republican governments must necessarily be small.³⁶ But regardless of how he came to the view, Madison did recognize and articulate the

33. THE FEDERALIST NOS. 10, 51, at 78, 321 (James Madison) (Clinton Rossiter ed., 1961).

34. See THE FEDERALIST NO. 10, *supra* note 33, at 84 ("A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.")

35. THE FEDERALIST NO. 51, *supra* note 33, at 324.

36. Robert Wiebe suggests that Federalists like Madison were not initially committed to a strongly federalist system at all, and indeed were opposed to it in the constitutional convention. They came to favor federalism only by necessity when their preferred arrangements were defeated. See ROBERT H. WIEBE, *THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION 24-25* (1984). "Unrepentant they simply lost the vote, and in the process they became federalists in spite of themselves." *Id.* at 25.

positive function of pluralism more clearly than anyone else seems to have done, and he worked energetically for a Constitution that would maintain it.

So pluralism was a direct and intended consequence of the federalism that was at least an original purpose—or, in my view, *the* original purpose³⁷—of the First Amendment religion clauses. And it seems clear that this pluralism deserves most of the credit for the elimination of religious establishments in this country and for the spectacular growth of a diversity of religious and faiths.³⁸ For example, within a half-century after the adoption of the Constitution, all states had eliminated their official religious establishments—wholly without prodding, we should note, from the Supreme Court. During this same period a large number of religious movements and experiments sprang up throughout the country.³⁹ Some of these, such as revivalism, were outgrowths of the more traditional faiths. Others were more exotic. Most of the new movements, such as the Kingdom of Matthias,⁴⁰ were short-lived; others, such as Mormonism, proved to be more enduring.

I don't mean to suggest, of course, that pluralism was an entirely happy, harmonious affair. Judged by conventional standards, many of the new movements (and some old ones, such as Catholicism) were heretical, or in bad taste—or downright immoral, or even traitorous. In the rough-and-tumble world of expanding America, consequently, unpopular faiths were forced to endure persecution, sometimes to migrate.⁴¹ The important point, though, is that the ferment that caused religious diversity to flourish—and that is largely responsible for the condition of religious freedom we enjoy today—was a product of pluralism;⁴² it owed little or nothing to judicial review, or to the legal elaboration and enforcement of any constitutional “principle of religious freedom.” And if anyone deserves credit for recognizing the function of this pluralism and for crafting a Constitution that would preserve it, Madison does.

37. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17-43 (1995).

38. The point is forcefully made in Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *CASE W. RES. L. REV.* 674 (1987).

39. For a colorful exposition of the variety of religious movements that flourished during this period, see ALICE FELT TYLER, *FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860*, at 23-195 (1944).

40. See PAUL E. JOHNSON & SEAN WILENTZ, *THE KINGDOM OF MATTHIAS* (1994).

41. The Mormon migrations from New York to Ohio to Missouri to Illinois and finally to the Great Basin were the most dramatic example.

42. Further reflection since the conference has led me to think that this assertion, though correct as far as it goes, is also incomplete. Under some circumstances, religious pluralism may be compatible with a relatively peaceful “religious freedom”; under other circumstances it will produce intolerance and civil strife. For further consideration, see SMITH, *supra* note 24.

III. PLURALISM AND THE LANGUAGE OF EQUALITY

My discussion so far has suggested that James Madison's religious legacy had two principal parts: his promotion of a legal principle of religious equality, and his recognition of the value of pluralism in promoting religious freedom. Though the first of these bequests is more often celebrated in the literature of religious freedom, I've also suggested that the second bequest has been more important in promoting actual religious freedom. If the argument thus far is persuasive, then it might almost seem that we could have dispensed altogether with the equality principle—which after all has mostly been a source of deceptive and question-begging rhetoric—and trusted our fate entirely to pluralism.

But this conclusion would overlook some crucial complications: it would overlook the ways in which the language of equality and the conditions of pluralism have been mutually complementary, and also the ways in which they are potentially antagonistic. Consider first how the language of equality can complement and support pluralism. Religious pluralism in itself is a sort of cultural fact or condition; it is not initially a theory, or a way of talking and thinking. Still, pluralism does not just automatically and silently work itself out. In practice, pluralism issues are worked out in innumerable conflicts only through a process of talking and thinking. Of course, the conflicts are more decisively worked out through processes like politicking and litigating, but these processes depend in part on talking and thinking. In short, pluralism generates issues that governments at all levels, as well as public entities like school boards and private entities like business corporations, are forced to address. Should we start the meeting (or the class, or the football game) with prayer—and if so, what kind of prayer? Should work cease on religious holidays? Which holidays? What books should the library stock? And so forth.

A pluralistic society has to find viable ways in which these questions can be raised and debated. So what language should we use in discussing the issues of religious pluralism? There is no easy or obvious answer to that question. One possibility—we might call it the sectarian approach—is for everyone to talk in his or her own religious (or perhaps devoutly secular) language. I might urge that questions of public prayer be answered in terms of my understanding of scripture. You could respond by arguing that I have misconstrued the scripture, or that what I regard as scripture is not really scripture at all, or that the very idea of authoritative scripture is implausible or oppressive.

There is a bracing forthrightness to this approach. There are also obvious risks. We might never reach agreement on many issues. Debates might become overheated, or even violent. Consequently, pluralism might be jeopardized by this approach.

Given these risks, it may seem that we should find or develop a substantive language that transcends the more specific religious belief systems that together make up a pluralistic society. Stephen Toulmin explains how, in the aftermath of the seventeenth century wars of religion, thinkers like Leibniz dreamed of a universal language in which all controversies could be discussed and resolved.⁴³ The modern

43. See STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 100 (1990) (discussing Leibniz's "vision of a universal language in his panacea for both political and theological ills").

liberal notion of a discourse of "public reason" can be viewed as a sort of pale, latter-day descendant of this dream.

Not surprisingly, the dream has proven illusory. If such a universal language could be developed, it would not transcend our specific religious languages; rather it would replace them. Why talk in narrowly parochial terms if a universal discourse is available that is both efficacious and satisfactory to people of different faiths and traditions? The dream of a universal language in which profound substantive questions could be satisfactorily answered is in essence the dream of a universal religion to which everyone will be converted. Short of the millennium, when lions will munch grass with lambs, that dream is unlikely to be realized.

So, if the sectarian approach seems too explosive but a more encompassing language is unavailable, then what is the alternative? In matters of diplomacy, or in everyday contexts involving colleagues or neighbors or family members, we often confront something like this same problem; and we often deal with it by finding ways of talking that allow us to express substantive disagreements allusively, or indirectly, or in code, thereby softening the force of our disagreements and criticisms. "A *charming* idea," one of the professors I knew as an undergraduate used to say, and those who knew him understood the condemnation that was intended. Even so, the effect was still a little different—and more gentle—than it would have been if the teacher had simply said "A *stupid* idea" or "A truly *idiotic* idea."

Just how this sort of diplomatic double-talk works is a bit of a mystery to me. If we didn't understand what the code meant, then it wouldn't work. Students who presented papers that were pronounced "charming" would feel encouraged, and they would work to produce more of the same. On the other hand, if we understood the code so immediately that it ceased to be a code, or if the code vocabulary came to be exactly synonymous with a more ordinary vocabulary, then again it wouldn't work: calling an idea "charming" would have exactly the same belittling consequences as calling it "really stupid." Like legal fictions,⁴⁴ diplomatic codes seem to work at two levels, and to require a subtle double-mindedness on the part of both speaker and listeners. So we manage to understand the speaker's real meaning in picking up on his actual assessment of an idea, but then we shift back to the more conventional meaning and away from real meaning for the limited purpose of avoiding offense.

But however it works, this sort of use of language is perfectly familiar, and it might provide an alternative to both the "sectarian" approach and the "universal language" approach in dealing with the issues generated by religious pluralism. To a significant extent, it seems, the language of religious equality and religious neutrality has served just this purpose. And its very question-begging quality, or its propensity to let substantive values and criteria be smuggled in without explicit acknowledgment, is what allows it to serve this function. When it works well, this language allows issues of religious conflict to be debated and resolved, while at the same time reassuring the parties to the conflict that they are equally valued—that no one is an "outsider." Even as an adverse decision is reached and announced, the losers are told that their faith is held in equal esteem with the faith of the winners.

44. See Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 365-70 (1995).

And the winners are reminded that their victory should not be taken as approval for their faith.

From a detached perspective, no doubt, it will seem that a good deal of deception is going on. At least for the moment and for the issue, the faith of the winners *has* been preferred, and the faith of the losers has been rejected.⁴⁵ Couching the decision in the language of equality tries to conceal this fact. But then diplomatic double-talk always involves a degree of concealment.

I don't quite mean to endorse this "diplomatic" deception, which to me is quite troublesome, especially when used by academics who have no very plausible claim to diplomatic immunity. I only mean to observe that as a historical matter the language of equality and neutrality *has* provided the dominant vocabulary by which religious pluralism has worked itself out, and also to suggest a reason why pluralism may have found this question-begging vocabulary attractive and perhaps necessary.

With this approach, as with the "sectarian" approach, however, there are also serious risks. One obvious risk can be noted quickly: the losers in any particular dispute may not be taken in by assurances that their faith has not been disfavored, and they might even feel more offended or alienated by such false assurances than they would feel if a decision were honestly presented as reflecting at least a limited and local rejection of their religious beliefs. In my experience, it is the winners—or those who belong to classes not burdened by government policies and decisions affecting religion—who seem most easily convinced that an outcome is merely a necessary consequence of "equality" or "neutrality." But perhaps there is value even in this. Who knows? Maybe it is better to have a governing class that operates under the illusion that it can and should avoid making judgments about the merits or truth of conflicting religions than a class that realizes such judgments are inevitable and then confidently proceeds to make them. Maybe a brutal candor in this context would eventually lead to more brutal results and policies.

The other side of this point, though, as various sorts of critical studies have pointed out, is that this sort of reassuring illusion can blind governors to the harmful consequences of their decisions; and this observation points to the greater risk posed by a discourse centered on the principle of equality. The risk is that this 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,

45. Although celebrating the ideas of equality and neutrality, Edward Foley acknowledges that both liberalism in general and particular decisions or policies of a liberal government necessarily reject a whole variety of religious beliefs. One of the examples he discusses involves medical care for children:

[T]he liberal state will require parents to give their children medical treatment, even if the parents sincerely believe that their children will burn in hell forever if they receive this medical treatment. . . . [W]ere it really true that giving the child the medicine would cause her to suffer eternal damnation, then obviously the state should not require that the child receive the medicine. But liberalism denies that God would permit humans to invent life-saving medicines and then punish an innocent child for being the beneficiary of this technology.

Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 977 (1993).

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."⁴⁶ Such a campaign would turn equality from being pluralism's ally—admittedly a somewhat unsteady ally—into pluralism's nemesis.⁴⁷

CONCLUSION

My own observation is that over at least the last half-century there have been many such earnest people in this country. Some of them are called "Professor." Some wear black robes. It is hard to tell, of course, whether someone falls into the "innocent" aggressive category or the "shrewd" aggressive category, since both types will talk in pretty much the same way. And though it ought to be impossible, a person might in fact belong to both categories; this is one of the many ways in which human nature scoffs at crude rationality. But in any case, Madison's legacy will continue to have value for us, I think, only to the extent that his first bequest does not manage to overwhelm his second.

46. In my view, the companion cases of *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District v. Ball*, 473 U.S. 373 (1985), provide a dramatic illustration of this possibility. In those cases, the Supreme Court invalidated remedial education programs that by all accounts had benefitted hundreds of thousands of children based on strained and largely speculative perceptions of possible inconsistencies with constitutional neutrality requirements developed by the Court. The decisions were largely overruled in *Agostini v. Felton*, 521 U.S. 203 (1997).

47. These risks are not exhaustive. Perhaps an even more worrisome possibility is that the discourse of equality might so habituate us to dealing with fundamental questions in a question-begging, sophisticated way that we become incapacitated to consider such questions directly and honestly. That possibility is worrisome because it would potentially threaten not only the health of democracy but also what is arguably among the most essential of human qualities—the ability to *really believe* something, as opposed to the practice of endorsing or advocating one or another idea for purely pragmatic or tactical reasons. But this concern goes well beyond the scope of a short essay.