Being James Madison:
The Supreme Court's Use of Madison's Arguments in First Amendment Jurisprudence

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Appeals to history and the views of the framers have been used by the United States Supreme Court as interpretative authority since the earliest cases articulated a First Amendment jurisprudence,[1] and it was in response to the historical argument presented by the Plaintiffs-in-Error in *Abrams v. United States* that Justice Holmes first used the historical argument in his dissent to support a broader interpretation of the First Amendment than had previously been embraced by the Court.[2] In an attempt to understand the intent of the framers, perhaps no source is more highly regarded as an authority on that issue than James Madison, not a lawyer yet recognized as the "Father of the Constitution" and the principal author of the Bill of Rights. Madison's notes and writings provide considerable insight for scholars and judges interested in discovering the intent of the Framers, although Madison was rather modest about his own authority in that context.[3]

While there is considerable scholarly literature examining Madison's ideas and political philosophy, there has been no systematic analysis of how the Court has relied upon Madison's views in constitutional adjudication. Several previous scholars have offered limited analyses of the Court's reliance on Madison as authority, particularly his *Federalist* essays, which have recently been cited more frequently than in the first century after their publication.[4] The Court's reference to both *Federalist 10* and *Federalist 39* have been studied more carefully.[5] Madison's writings on the religion clauses of the First Amendment also have received limited attention,[6] although there has been no comprehensive examination of the Court's citation of Madison regarding issues involving these or the other clauses of the First Amendment. That is the goal of this essay.

This study focuses upon First Amendment opinions of the United States Supreme Court that quote Madison's words, constructing Madison's voice and ideas as reflected in the decisions of the Court and demonstrating that the Supreme Court generally reflects—accurately but

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selectively--the overall beliefs from the writings of Madison about freedom of speech and religion issues in many of their important First Amendment cases. By doing so, we also demonstrate the rhetorical nature of judicial interpretation and explicate the interplay of influence between the historical words of the founders, the constant text of the Constitution, and the contemporary uses of public argument in the opinions written by Justices of the Supreme Court of the United States.

Very often justices on the United States Supreme Court interpret and paraphrase Madison's beliefs and words in their judicial decisions, and at other times the Court simply takes excerpts from Madison's writings to occasionally insert a few words within an opinion -- merely borrowing Madison's credibility to apply to the justices' arguments in a particular case.[7] This essay does not examine the words of the justices in interpreting Madison's writings, but rather focuses upon the actual quotation of Madison's works cited to determine the voice of James Madison as reflected in the rhetorical and historical vision of the United States Supreme Court.

The use of Madison's words in United States Supreme Court First Amendment decisions were found to fall into three distinct categories: Madison's republican philosophy of freedom, his beliefs on freedom of speech and press, and his views on freedom of religion, both establishment and free exercise. Historically, Madison wrote mainly of religious freedom, secondarily on freedom of speech and press, and next on the functional philosophy of freedom for a republican form of government. What was discovered in this analysis is that the verbal weight justices give to Madison's words parallel the frequency Madison gave to the same issues.

Supreme Court justices primarily quoted Madison's writings on issues of religious freedom, second on freedom of speech and press, and, third, some justices quoted Madison's views on the function of government. Within the category of freedom of religion, twelve majority opinions quoted Madison, four concurring opinions quoted Madison, and sixteen dissenting opinions quoted at least one statement from Madison's writings. Within the category of freedom of speech and press, eight majority opinions quoted Madison, six concurring opinions quoted Madison, and five dissenting opinions quoted Madison. Within the category of Madison's views on a philosophy of just government, five majority opinions in First Amendment cases quoted Madison, one concurring opinion quoted Madison, and five dissenting opinions included at least one quotation from Madison. These categories will be examined and discussed in reverse order of frequency.

I. Court's Use of Madison on Philosophy of Government

In order to examine the use of Madison's words that were incorporated in decisions to bolster United States Supreme Court arguments, this study provides the Court's use of Madison's words on freedom of speech and freedom of religion issues in First Amendment cases. However, it should also be noted that several First Amendment cases use Madison's words to demonstrate Madison's commitment to separation of powers in government[8], a system of checks on government branches[9], and the Bill of Rights. For example, Madison was quoted in an election case for his contention that reducing qualifications in different states to only one rule would be dissatisfactory to some states and difficult to the Convention.[10] Another Court opinion dealing with the First Amendment used Madison's visualization of an incident he observed at the Constitutional Convention.[11] In another First Amendment case, the Court quoted Madison's words concerning the importance of constitutional commitment by Congress as well as the judiciary.[12]

There were six Court opinions in First Amendment cases that used the words of Madison concerning the adoption of a Bill of Rights. In *Richmond Newspapers, Inc. v. Virginia,* the dissent noted Madison's words that he was "in favor of a bill of rights" but had "not viewed it in an important light" at the time Madison wrote to Thomas Jefferson in October of 1788.[13] The dissent further noted that Madison perceived a need for a constitutional "saving clause."[14] Madison was quoted by the dissent in *Wallace v. Jaffree* as arguing for his proposed amendments.[15] And, one majority and two dissenting opinions quoted the same words of Madison that warned of the incorporation of the amendments and the resulting judicial belief that it is the guardian of the enumerated rights.[16]

Although the words of Madison on separation of powers, checks on government, and the Bill of Rights are important, this study examines the Court's use of Madison's words on issues of either freedom of speech or religion. This article seeks more specifically to examine which words of Madison are being employed by the Court in relation to the First Amendment and how the Court uses them to portray Madison's voice directly within the texts of the Court's pronouncements of the law in 20th century America.

II. Court's Use of Madison on Freedom of Speech and Press

James Madison wrote about his opposition of the Sedition Act, the requirement of freedom of the press and speech, and self-preservation and security as results of a free and informed

citizenry,[17] and the Supreme Court justices who quoted Madison in their opinions consistently cited him on the issue of freedom of speech, freedom of the press, and the importance of an informed citizenry. Madison was most referred to by the Court for his views on the necessary freedom of the press.

Madison recognized the importance of language and rhetoric, and the majority in *Griswold v. Connecticut* noted Madison's words that reflect this interest, citing Madison's statement that "no language is so copious as to supply words and phrases for every complex idea."[18] Madison also wrote of the importance of an informed citizenry. The concurrence in *Press-Enterprise v. Superior Court of California for Riverside* (*Press-Enterprise II*) pointed out the importance of an informed citizenry in the American system of self-government, using the words of Madison as support: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[19] This quotation of Madison represents the most cited of his words by the Supreme Court on the issue of freedom of expression.

Madison offered several articulate passages in support of freedom of speech and the press. The concurrence in *New York Times Co. v. United States* quoted Madison's proposal for inclusion in a Bill of Rights: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable," and the Court noted Madison's further proclamations, "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances," with the Court adding, in Madison's words, the proposition that "[t]he 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."[20]

Madison was adamantly opposed to the Sedition Act. His written expressions on his opposition provides an eloquent selection of passages for the justices to quote within the text of their decisions to bolster their thoughts through the use of framer's intent. Madison was quoted, when speaking of the Sedition Act, for his view that the United States might well have continued

being "miserable colonies, groaning under a foreign yoke."[21] In *Garrison v. Louisiana*, Justice Douglas extensively quoted Madison's words of January 23, 1799, on the Sedition Act in his 1964 concurring opinion regarding criminal libel, provided as follows:

> The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication; and from the existence of State law, it is inferred that Congress possess a similar power of legislation; whence Congress will be endowed with a power of legislation in all cases whatsoever, and the States will be stripped of every right reserved, by the concurrent claims of a paramount Legislature.
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> The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.
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> For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution by an affectation of defining powers, whilst the preamble would admit a construction which would erect the will of Congress into a power paramount in all cases, and therefore limited in none. On the contrary, it is evident that the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of each power granted to the Federal Government; reserving all others to the people, or to the States. And yet it is in vain we search for any specified power embracing the right of legislation against the freedom of the press.
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> Had the States been despoiled of their sovereignty by the generality of the preamble, and had the Federal Government been endowed with whatever they should judge to be instrumental towards union, justice, tranquillity, common defense, general welfare, and the preservation of liberty, nothing could have been more frivolous than an enumeration of powers.
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> It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals, usurpation, States. Calumny may be redressed [*85] by the common judicatures; usurpation can only be controlled by the act of society. Ought usurpation, which is most mischievous, to be rendered less hateful by calumny, which, though injurious, is in a degree less pernicious? But the laws for the correction of calumny were not defective. Every libelous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the General Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any

other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals.

In answer to this, it is urged that every Government possesses an inherent power of self-preservation, entitling it to do whatever it shall judge necessary for that purpose.

This is a repetition of the doctrine of implication and expediency in different language, and admits of a similar and decisive answer, namely, that as the powers of Congress are defined, powers inherent, implied, or expedient, are obviously the creatures of ambition; because the care expended in defining powers would otherwise have been superfluous. Powers extracted from such sources will be indefinitely multiplied by the aid of armies and patronage, which, with the impossibility of controlling them by any demarcation, would presently terminate reasoning, and ultimately swallow up the State sovereignties.

So insatiable is a love of power that it has resorted to a distinction between the freedom and licentiousness of the press for the purpose of converting the third amendment of the Constitution, which was dictated by the most lively anxiety to preserve that freedom, into an instrument for abridging it. Thus usurpation even justifies itself by a precaution against usurpation; and thus an amendment universally designed to quiet every fear is adduced as the source of an act which has produced general terror and alarm.

The distinction between liberty and licentiousness is still a repetition of the Protean doctrine of implication, which is ever ready to work its ends by varying its shape. By its help, the judge as to what is licentious may escape through any constitutional restriction. Under it men of a particular religious opinion might be excluded from office, because such exclusion would not amount to an establishment of religion, and because it might be said that their opinions are licentious. And under it Congress might denominate a religion to be heretical and licentious, and proceed to its suppression. Remember that precedents once established are so much positive power; and that the nation which reposes on the pillow of political confidence, will sooner or later end its political existence in a deadly lethargy. Remember, also, that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion, for disclosing her genuine lustre, and disseminating her salutary doctrines.

The sophistry of a distinction between the liberty and the licentiousness of the press is so forcibly exposed in a late memorial from our late envoys to the Minister of the French Republic, that we here present it to you in their own words:

> "The genius of the Constitution, and the opinion of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered.

> Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye, or to punish such calumnies and invectives otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured."

> As if we were bound to look for security from the personal probity of Congress amidst the frailties of man, and not from the barriers of the Constitution, it has been urged that the accused under the sedition act is allowed to prove the truth of the charge. This argument will not for a moment disguise the unconstitutionality of the act, if it be recollected that opinions as well as facts are made punishable, and that the truth of an opinion is not susceptible of proof. By subjecting the truth of opinion to the regulation, fine, and imprisonment, to be inflicted by those who are of a different opinion, the free range of the human mind is injuriously restrained. The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to [*88] his God alone; yet, under this precedent the truth of religion itself may be ascertained, and its pretended licentiousness punished by a jury of a different creed from that held by the person accused. This law, then, commits the double sacrilege of arresting reason in her progress towards perfection, and of placing in a state of danger the free exercise of religious opinions. But where does the Constitution allow Congress to create crimes and inflict punishment, provided they allow the accused to exhibit evidence in his defense? This doctrine, united with the assertion, that sedition is a common law offense, and therefore within the correcting power of Congress, opens at once the hideous volumes of penal law, and turns loose upon us the utmost invention of insatiable malice and ambition, which, in all ages, have debauched morals, depressed liberty, shackled religion, supported despotism, and deluged the scaffold with blood.[22]

Other cases noted the expressed ideas of Madison's views on the importance of freedom of speech for self-preservation, balancing of federal and state powers for such protection of rights, and recognizing when the government should not act or at least when the government should limit its powers.[23] In *United States v. Robel,* the dissent quoted Madison's words: "Security against foreign danger is one of the primitive objects of civil society . . . . The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."[24] The majority in *Communist Party of the United States* implied Madison's views on foreign danger by quoting his words: "It is an avowed and essential object of

the American Union. The powers requisite for attaining it must be effectually confided to the federal councils."[25] Madison also supported a privileged, necessary, and free communication between representatives of government and their constituents.[26]

It was Madison's belief that government should be limited when the protection of vital freedoms, such as freedom of speech and the press, are at stake. The dissent in *United States v. 12 200-Ft. Reels of Super 8MM* used Madison's expression of government limitation: "Whatever may [have been] the form which the several States . . . adopted in making declarations in favor of particular rights," James Madison stated, "the great object in view [was] to limit and qualify the powers of [the Federal] Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[27] Some of the Supreme Court cases used Madison's words to reflect the necessity of balancing government power with protections of freedom. In *Gertz v. Robert Welch, Inc.*, the Court quoted Madison as stating: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[28]

Madison was against the judicial adoption of Blackstone's concept of common law on freedom of the press under the First Amendment. Madison was quoted in *Bridges v. California*, as stating "the state of the press . . . under the common law, cannot . . . be the standards of its freedom in the United States."[29] In a note, the Court in *Bridges* also quoted Madison's words, "To these observations one fact will be added, which demonstrates that the common law cannot be admitted as the universal expositor of American terms, . . . The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."[30] In *Near v. Minnesota*, Madison was quoted as stating, "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also."[31]

The dissent in *Alexander v. United States*, quoted Madison's argument against adopting a definition of Blackstone, "this idea of the freedom of the press can never be admitted to be the American idea of it. . . ."[32] Similarly, the concurrence in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. AG of Massachusetts*, quoted a previous Supreme Court

case, *Bridges v. California* that quoted Madison's words: "To assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'"[33] The *Bridges* case, as similarly quoted in *Memoirs of a Woman*, quoted Madison as saying: "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are ungarded in the British Constitution."[34]

The Supreme Court is relatively generous with the use of direct quotations of Madison when discussing the freedom of the press. The Court in *12 200-Ft. Reels* stated, in Madison's words, that Madison admonished against any "distinction between the freedom and licentiousness of the press."[35] The concurrence to the *McDonald v. Smith* case used the words of Madison that he stated when the House of Representatives was considering what is now known as the First Amendment:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.[36]

The majority in *Rosenbloom v. Metromedia, Inc.* also quoted Madison's views on the freedom of the press, who in turn was quoting John Marshall:

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.[37]

III. The Court's Use of Madison's Words on Freedom of Religion

The Supreme Court quoted Madison's words on freedom of religion more than any other issue in the Court's First Amendment cases. Madison firmly believed that the government should not

intermeddle in religion or establish a national religion. The dissent in *Everson* quoted Madison as stating, "there is not a shadow of right in the general government to intermeddle with religion."[38] To Madison, the Constitution and the overall American government system was not set up for a national religion, and such government support of religion, to Madison, would result in a negative effect on all civil rights. Madison was quoted as asserting, in *School Dist. of Abington Twp. v. Schempp*, "it is proper to take alarm at the first experiment on our liberties."[39] The dissent in *Wallace* noted Madison's words as expressing that religious freedom meant "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," and he believed that some state conventions thought Congress might rely on the Necessary and Proper Clause to infringe rights of conscious, establish a national religion, and "to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit."[40]

American government, to Madison, should be based on legal foundations of freedom, unlike restrictions and establishments in Europe. Madison was quoted by the dissent in *Everson* as saying that Jefferson's Bill for Establishing Religious Freedom was "a Model of technical precision, and perspicuous brevity."[41] In a Free Exercise Clause argument, the dissent in *O'Lone v. Estate of Shabazz* cited Madison's writing about the practice of Europe being "charters of liberty . . . granted by power" and of America, "charters of power granted by liberty."[42] In *Everson v. Board of Educ. of Ewing*, the majority quoted Madison's letter to a friend, "That diabolical, hell-conceived principle of persecution rages among some . . . This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all."[43]

A. Madison's Discord With Government Intermeddling Into Religion.

Madison noted that most of the states did not want intermeddling by the government. The majority decision in *McGowan* included Madison's statement at the Virginia ratification convention: "Happily for the states, they enjoy the utmost freedom of religion. . . . Fortunately

for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. . . . I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom."[44] The dissent in *Rosenberger* quoted Madison as saying that state support of religion "is a contradiction to the Christian religion itself; for every page of it disavows a dependence on the powers of this world."[45] The dissent further quoted Madison: "[I]n matters of religion, no man's right is abridged by the institution of civil society, and . . . religion is wholly exempt from its cognizance."[46]

The Supreme Court noted in several cases that Madison was firmly against a national religion. A concurring opinion in *Lee v. Weisman* quoted Madison as stating, "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."[47] A Select Committee of the House changed Madison's words to read, "no religion shall be established by law, nor shall the equal rights of conscience be infringed," and Samuel Livermore adjusted the language of the Select Committee to read, "Congress shall make no laws touching religion, or infringing the rights of conscience."[48] The House further rewrote the amendment by language derived from Fisher Ames of Massachusetts: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[49]

Madison argued that the mixing of government and God should not occur. Madison sponsored the Virginia statute for religious freedom written by Thomas Jefferson, and in a letter to Edward Livingston (July 10, 1822), Madison wrote, in regard to the statute, "religion & Govt. will both exist in greater purity, the less they are mixed together."[50] In relation to this belief of non-mixing, the concurrence in *Lee* quoted Madison as suggesting, "rather than let this step beyond the landmarks of power have the effect of legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*. . . ."[51] When the government does not foster religious beliefs, Madison believed, it helps preserve public order. Madison believed in "preserving public order," and wrote a letter after the adoption of the First Amendment stating, "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others."[52]

Madison was fundamentally against government support of one religious belief at the detriment of the several others. The concurring opinion in *Lee* noted Madison as stating that "the practice of sponsoring religious messages tends, over time, 'to narrow the recommendation to the standard of the predominant sect.'"[53] The dissent in *Walz v. Tax Commission of New York* quoted Madison's beliefs that all men enter society "on equal conditions," and such includes the free exercise of religion:

> 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. If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.[54]

Madison argued that people should be able to exercise their beliefs as they so desire, by leaving religion to one's convictions and conscience. The Memorial and Remonstrance Against Religious Assessments was Madison's response to "A Bill establishing a provision for Teachers of the Christian Religion." Madison opposed this Bill and argued in the Memorial and Remonstrance that such Bill would "be a dangerous abuse of power."[55] The dissent in *City of Boerne v. Flores*, quoted the following from the *Memorial and Remonstrance Against Religious Assessments*: "the Religion . . . 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."[56] The dissent in *Flores* further quoted Madison in the "Memorial" as stating that the right to free exercise is "unalienable," because a person's opinion "cannot follow the dictates of others," and because it entails "a duty toward the Creator." On this point, Madison continued:

> This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . Every man who becomes a member of any Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. 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.[57]

In addition, the *Flores* dissent quoted Madison's concluding points of the "Memorial and Remonstrance":

> The equal right of every citizen to the free exercise of his Religion
> according to the dictates of [his] conscience' is held by the same tenure with all our other rights. . . . It is equally the gift of nature; . . . it cannot be less dear to us; . . . it is enumerated with equal solemnity, or rather studied emphasis.[58]

Leaving religion to one's own conviction and conscience creates true religion within people, for, as Madison argued, true religion for people does not come from force. Madison was quoted rather extensively by the majority in *Wallace v. Jaffree* as arguing in his Memorial and Remonstrance Against Religious Assessments:

> 1. Because we hold it for a fundamental and undeniable truth, '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.' 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 unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . 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.
> . . . .
> 3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We reverse this lesson too much, soon to forget it. Who does not see that the same 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?"[59]

This excerpt from Madison's Memorial and Remonstrance Against Religious Assessments was quoted in two other Supreme Court cases. In 1947, Justice Rutledge quoted fifteen points of Madison's Memorial and Remonstrance as appended to the dissenting opinion in *Everson v. Board of Education*.[60] Similarly, in *Walz v. Tax Commn. of New York*, Justice Douglas also appended the fifteen points of Madison's Memorial and Remonstrance to his dissenting opinion.[61] The extensive use of Madison in the 1947 *Everson* opinion appears to be a stimulus for many subsequent uses of Madison's words by the Supreme Court in later judicial decisions. A number of Supreme Court cases cited the *Everson* appendix in their decisions.

The concurring opinion in *Rosenberger v. University of Virginia*, cited Madison's "Memorial and Remonstrance" when arguing that the Virginia assessment "violated that equality which ought to be the basis of every law."[62] Along its same strain of argument, the concurring

opinion cited Madison again as stating, "Who does not see that the same 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."[63] In characterization of the Assessment Bill, Madison was quoted by the dissent as saying, "Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance."[64] The dissent additionally quoted Madison's words:

> Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world . . . . Because the establishment in question is not necessary for the support of Civil Government. . . . What influence in fact have ecclesiastical establishments had on Civil Society? . . . in no instance have they been seen the guardians of the liberties of the people.[65]

And the dissent in *Everson* further quoted Madison as stating: "At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased."[66]

B. Examples of Government Intermeddling

Madison offered several examples of how intermeddling of government in religion was occurring in America. The dissent in *Walz* quoted Madison's beliefs of government encroachment into religious affairs from Madison's paper Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments: "Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history," and Madison was quoted as referring to the "attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes."[67] Similarly, in *Walz*, Madison was quoted as pondering:

> Are there not already examples in the U.S. of ecclesiastical wealth equally beyond its object and the foresight of those who laid the foundation of it? In the U.S. there is a double motive for fixing limits in this case, because wealth may increase not only from additional gifts, but from exorbitant advances in the value of the primitive one. In grants of vacant lands, and of lands in the vicinity of growing towns & Cities the increase of value is often such as if foreseen, would essentially control the liberality confirming them. The people of the U.S. owe their Independence & their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings.[68]

Madison, in a letter to Edward Everett of March 19, 1823, was quoted by a concurring judge in *Schempp* as commenting upon a "project of a prayer . . . intended to comprehend & conciliate College Students of every [Christian] denomination, by a Form composed wholly of texts & phrases of scripture."[69] Another example of intermeddling of government in religion is provided by Madison: "religious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed. Altho' recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers."[70] Madison was further quoted as stating, "the members of a Govt . . . can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities."[71]

Still other examples are provided by Madison concerning the intermeddling by the government in religion. Madison spoke out against the use of a chaplain in Congress, and was further opposed to the idea of the chaplain being paid out of national taxes. A concurring judge quoted Madison as referring to the use of public money to support military and congressional chaplains as "a palpable violation of . . . Constitutional principles."[72] This judge further quoted Madison's words, as written in a letter: "it was not with my approbation, that the deviation from [the immunity of religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury."[73] In reference to the same example, the dissent in *March v. Chambers*, quoted Madison's words:

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?
>
> In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.[74]

It was Madison's belief that the establishment of religion was not needed because Americans are generally religious people who need to search their own conscienceness for their individual religious beliefs. The majority in *School Dist. of Abington Twp. v. Schempp* quoted Madison as saying that life in America reflects a religious people who are "earnestly praying, as .

. . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]"[75] It was Madison's understanding that true religion could not be forced by violence and "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ."[76] The Court in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* quoted Madison's words in the Memorial and Remonstrance Against Religious Assessment:

> We hold it for a fundamental and undeniable truth, '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.' 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.[77]

Madison appeared aware that government control of religion in America, if forced, would not only not be a true religion, but it could breed more violence.

C. Madison's Warnings of the Effects of Government Intermeddling in Religion

The Supreme Court offered several examples of Madison's warnings of the negative effects of ecclesiastical establishments. In *Lee v. Weisman*, Madison was cited by the majority as stating, "Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[78] Madison warned, "the idea of policy [is] associated with religion, whatever be the mode or the occasion, when a function of the latter is assumed by those in power."[79]

Madison also warned of the threat of political manipulation and degrading treatment toward those persons who did not have the same beliefs as those established by a national religion. The concurring judge in *Lee* quoted Madison's words, "An assessment, he wrote, is improper not simply because it forces people to donate 'three pence' to religion, but more broadly, because 'it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.'"[80] Madison was quoted by the dissenting judge in *Wallace* as arguing that he believed "that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent."[81] As the Court in *March, Nebraska State Treasurer, et al. v. Chambers*, stated: "The Establishment Clause 'stands as an expression of principle on the part of the Founders of our

Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.'"[82]

A popular warning of Madison was quoted by several judges of the Supreme Court from Madison's Memorial and Remonstrance against Religious Assessments:

> It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same 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 the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[83]

The above rhetorical question constitutes the most quoted excerpt of Madison's words by the Supreme Court in freedom of religion cases.

It was Madison's belief that a just government supplied protections for all people, and no privileges should be received due to a person's religious beliefs. The concurring opinion in *Rosenberger* continued to quote Madison by stating, "Madison merely wanted the Convention to declare that 'no man or class of men ought, on account of religion[,] to be invested with peculiar emoluments or privileges . . . . '"[84] Madison, the concurrence argued, stressed that "just government" is "best supported by protecting every citizen in the enjoyment of his Religion with the same equal rights of any Sect, nor suffering any Sect to invade those of another."[85] On this same point, Madison, as quoted in *City of Boerne v. Flores*, stated:

> That religion, or the duty we owe 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 equally entitled to the full and free exercise of it, according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with [*84] peculiar 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.[86]

Madison was well aware of the threat of government officials who use religion for secular ends. In *Lee v. Weisman*, a concurring justice cited Madison's warning that such government officials "exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves."[87] Madison noted that a bill that would provide tax funds to religious teachers, for example, "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its

present form, from the Inquisition it differs from it only in degree. The one is the first stop, the other the last in the career of intolerance."[88] The dissent in *Rosenberger* quoted Madison as saying, "The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting."[89] Madison proposed, "either . . . we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred."[90]

Although Madison believed in the strength of conviction and conscience of every citizen and the need to separate government from religion, Madison was not without religious principles. Madison's ceremonial speech where he invoked a belief in God was used by Justice Scalia to support an argument in Scalia's dissenting opinion: "Similarly, James Madison, in his first inaugural address, placed his confidence 'in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.'"[91] Again, Madison's statements of his religious beliefs were quoted by a dissenting Supreme Court judge:

> But the source to which I look . . . is in . . . my fellow-citizens, and in the counsels of those representing them in the other departments associated in the care of the national interests. In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.[92]

Despite Madison's insistence on separation of church and state, he believed that clergymen should be allowed to hold public office, a practice proscribed in several early state constitutions. Thus, although Madison argued against government intermeddling in religion, to deny a segment of the population, the clergy, a position in public service would punish where a civil right should exist. Madison was quoted as disagreeing with Thomas Jefferson and John Locke's belief that clergymen should be prohibited from holding public office.[93] Madison argued:

> Does not The exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right?

> does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other.[94]

James Madison was also cited in a dissenting opinion in the same case before the Court, as stating that the State is "punishing a religious profession with the privation of a civil right."[95]

Conclusion

In any attempt to understand the intent of the framers, scholars can, and most often do, look to James Madison, perhaps the most highly regarded authority on the First Amendment. This essay has provided a systematic analysis of how the Court relied upon Madison's views in constitutional adjudication. Of important note is the discovery that the Supreme Court generally reflects the overall hierarchy of attitude of Madison's views on freedom of speech and religion issues. Madison was opposed to the Sedition Act, believed in a requirement of freedom of the press and speech, and argued that self-preservation and security are results of a free and informed citizenry. It was Madison's belief that government power should be limited when the protection of vital freedoms--such as freedom of conscience, speech and the press--are at stake.

The Supreme Court, in integral First Amendment cases, primarily reflected the fact that Madison was a fundamental supporter of freedom of religion. Madison firmly believed that the government should not intermeddle in religion or establish a national religion. Madison warned that government intermeddling into religion posed a threat of political manipulation, degrading treatment toward persons who had beliefs different from an established national religion, diminished freedom of conscience, and a lack of a truly religious people since religion cannot come by force. The Supreme Court offered several examples of Madison's warnings of the negative effects of ecclesiastical establishments. The Court also noted Madison's views that no privileges should be received or denied due to a person's religious beliefs, and Madison vehemently opposed government officials who used religion for secular ends.

This analysis of the Supreme Court's use of Madison's words in their opinions is important in its own right because it provides insights into whether the Court's search for Madison's intent over time truly reflects Madison's beliefs. The answer to that question is that the Court clearly has accomplished that goal. Although excerpts of Madison's words were taken out of a general context, the Court essentially used Madison's concepts in a manner that reflected Madisonian ideologies for a just republican government, free speech, free press, freedom of

conscience, and freedom of religion. By doing so, the Court demonstrates the rhetorical nature of judicial interpretation and illuminates the interplay of influence between the historical words of the founders, the constant text of the Constitution, and the contemporary uses of public argument in the opinions written by Justices of the Supreme Court of the United States.

This study, however, is only the beginning in a search for understanding the import of Madison's words in First Amendment jurisprudence. Future studies can further illuminate the use of Madison's views in shaping contemporary free speech and free religion theories. For example, an empirical analysis might examine the number of times those citing Madison prevailed and the number of cases in which they were less persuasive. There also seems to be some evidence that the length of the direct quotations vary depending upon whether the opinion is for the Court, a concurrence, or a dissent. It might also be fruitful to see which Justices consistently used Madison's views for evidence and which never cited Madison's position. Furthermore, a longitudinal analysis might discover that Madison's popularity, or at least the frequency with which he was cited, varied with certain contemporary affinities for reliance upon intent of the framers as a means of argument. The possibilities remain almost limitless, but it remains clear that James Madison continues to speak from the grave, and his views on freedom of expression and freedom of religion have proven themselves to be both timeless and persuasive, as much so in the 21st century as they were in the 18th century.

Notes

1 165 U.S. 275 (1897). For a general discussion of the Court's use of history in free speech cases, see Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, MA: Belknap Press, 1969): 71-99.

2 230 U.S. 616 (1919). For the structure and sources of Holmes' argument, see Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (New York: Viking, 1987), and Stephen A. Smith, "*Schenck v. United States* and *Abrams v. United States*," in *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*, ed. Richard A. Parker (Tuscaloosa: University of Alabama Press, 2003).

3 Richard S. Arnold, "Madison Lecture: How James Madison Interpreted the Constitution*," New York University Law Review,* 72 (1997): 267-293.

4 Ira C. Lupa, "Textualism and Original Understanding: Time, the Supreme Court, and *TheFederalist*," *George Washington Law Review*, 66 (1998): 1324-1336; see also, Buckner F. Melton, Jr., "The Supreme Court and *The Federalist*: A Citation List and Analysis, 1789-1996," *Kentucky Law Journal*, 85 (1996): 243-256.

5 J. Christopher Jennings, "Madison's New Audience: The Supreme Court and the Tenth *Federalist* Visited," *Boston University Law Review*, 82 (2002): 817-873; Michael J. Mano, "Contemporary Visions of the Early Federalist

Ideology of James Madison: An Analysis of the United States Supreme Court's Treatment of *The Federalist* No. 39," *Washington University Journal of Law & Policy*, 16 (2004): 257-287.

6 David Reiss, "Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence," *Maryland Law Review*, 61 (2002): 94-176; Steven D. Smith, "Blooming Confusion: Madison's Mixed Legacy," *Indiana Law Journal*, 75 (2000): 61-75.

7 See *Lee v. Weisman*. 505 U.S. 577, 620 (1992) (concurring opinion) ("In Madison's words, the Clause in its final form forbids 'everything like' a national religious establishment.") *citing* Madison's "Detached Memoranda" 3 Wm. & Mary Q. 534, 558 (E. Fleet ed. 1946).

8 The Court in *Buckley v. Valeo* noted that Madison defended against the charge that the three powers of government were not entirely separate, believing that such powers should be, as Montesquieu believed, separate and distinct:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

Buckley v. Valeo, 424 U.S. 1, 120 (1976), *citing* The Federalist No. 47, p. 302-303 (G. P. Putnam's Sons ed. 1908). Madison further added, as quoted in *Buckley*:

9 The Court in *Buckley v. Valeo* noted Madison's words: "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the [*123] several offices in such a manner as that each may be a check on the other -- that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State." *Buckley*, 424 U.S. at 122, *citing* The Federalist No. 51, pp. 323-324 (G. P. Putnam's Sons ed. 1908).

10 Infringement of First Amendment rights surrounded election system questions for the Court in *Tashjian v. Republican Party of Connecticut.* In this case, the Court cited Madison's words:

> To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself.

Tashjian, 479 U.S. 208, 233 (1986) *citing* The Federalist No. 52, p. 354 (J. Cooke ed. 1961).

11 The dissent in *Smith v. Goguen,* cited Madison's "Notes" concerning an incident at the Constitutional Convention:

> Whilst the last members were signing it Doctor Franklin looking towards the President's Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun."

415 U.S. 566, 600 (1974) (dissenting opinion), *citing* 4 Writings of James Madison 482-483 (Hunt ed. 1903).

12 The majority opinion in *City of Boerne v. Flores* wrote that after a House of Representatives member "objected to a debate on the constitutionality of legislation based on the theory that 'it would be officious' to consider the constitutionality of a measure that did not affect the House," Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." *Flores*, 117 S.Ct. 215 (1997) *citing* 1 Annals of Congress 500 (1789).

13 *Richmond Newspapers*, 448 U.S. 555, 579 (1980) (dissenting opinion), quoting 5 Writings of James Madison 271 (G. Hunt ed. 1904).

14 *Richmond Newspapers*, 448 U.S. at 579, n.15 (dissenting opinion), *citing* 1 Annals of Cong. 438-440 (1789).

15 "It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished."

Wallace, 472 U.S. 38, 95-96 (1985) (dissenting opinion), *citing* 1 Annals of Cong., 431-432. A concurring opinion in *Griswold v. Connecticut* included a quotation of Madison's words that were made when Madison was proposing the Ninth Amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one

> of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].

Griswold, 381 U.S. 479, 489 (1965) (concurring opinion), *citing* I Annals of Congress 439 (Gales and Seaton ed. 1834).

16 In a case which included a debate that freedom of speech was absolutely protected, *Konigsberg v. State Bar of California,* the dissenting justice quoted Madison's words: "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." *Konigsberg*, 366 U.S. 36, 42 (1961) (dissenting opinion), *quoting* 1 Annals of Congress 439 (1789); *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971); *see also Valley Forge Christian College v. Americans United for Separation of church & State, Inc.,* 454 U.S. 464, 494 n.6 (1982) (dissenting opinion). Of interesting note is the bracketed section of the quotation in *Konigsberg*, which was later repeated in *New York Times Co*. Madison did not present ten amendments, but presented twenty one amendments. The dissenting judge in 1982 *Valley Forge* case did not include the bracketed mis-information that was provided by two other Court opinions.

17 In The Federalist No. 44, Madison stated, and was quoted by the Supreme Court majority in *Landgraf v. USI Film Products et al.*, as criticizing the abilities of the "influential" to "speculate on public measures" to the detriment of the "more industrious and less informed part of the community." *Landgraf*, 511 U.S. 244, 267 (1994), *quoting* The Federalist No. 44, p. 301 (J. Cooke ed. 1961).

18 381 U.S. 479, 488 n.3 (1965), *citing* The Federalist, No. 37 (Cooke ed. 1961), at 236.

19 *Press-Enterprise v. Superior Ct.,* 478 U.S. 1, 18 (1986) (dissenting opinion) *citing* 9 Writings of James Madison 103 (G. Hunt ed. 1910). *See also Press-Enterprise v. Superior Ct.,* 464 U.S. 501, 518 (1984) (concurring opinion); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982); *Houchins v. KQED, Inc.*, 438 U.S. 1, 31 (1978) (dissenting opinion); *Branzburg v. Hayes*, 408 U.S. 665, 723, 728 (1972).

20 *New York Times Co.,* 403 U.S. 713, 717 (1971) (concurring opinion), *citing* 1 Annals of Cong. 434; *See also First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (concurring opinion) ("The people shall not be deprived or abridged . . . and the freedom of the press . . . shall be inviolable").

21 *Communist Party*, 367 U.S. at 167 (dissenting opinion), *citing* Miller, Crisis in Freedom, 84.

22 *Garrison*, 379 U.S. 64, 83-88 (1964) (Appendix to Douglas' concurring opinion), *citing* VI Writings of James Madison, 1790-1802, pp. 333-337 (Hunt ed. 1906).

23 The dissent in *Gravel v. United States* quoted Madison's words at the time of the Whiskey Rebellion against censure against groups stirring up turmoil against the rebellion: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Gravel*, 408 U.S. 606, 641 (1972) (dissenting opinion), citing Brant, The Madison Heritage, 35 N.Y.U. L. Rev. 882, 900 (1960).

24 *United States v. Robel*, 389 U.S. 258, 289 (1967) (dissenting opinion), *quoting* The Federalist No. 41, pp. 269-270 (Cooke ed. 1961); *see also Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 95 (1961).

25 *Communist Party,* 367 U.S. 1, 95 (1961), *quoting* The Federalist No. 41 (Wright ed. 1961) 295.

26 *See* Appendix A

27 *12 200-Ft. Reels*, 413 U.S. 123, 131 (1973) (dissenting opinion), *citing* 1 Annals of Cong. 437.

28 *Gertz*, 418 U.S. 323, 340 (1974) *citing* 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876); *see also Time, Inc. v. Hill*, 385 U.S. 374, 388-389 (1967).

29 *Bridges*, 314 U.S. at 264, *citing* 5 Writings of James Madison 1790-1802, 387.

30 *Bridges*, 314 U.S. at 265, n.10, *citing* 5 Writings of James Madison 1790-1802, 387.

31 *Near v. Minnesota,* 283 U.S. 697, 713 (1931), *quoting* Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543.

32 *Alexander*, 509 U.S. 544, 567 (1993) (dissenting opinion), *citing* 6 Writings of James Madison 386 (G. Hunt 1906).

33 *Memoirs of a Woman*, 383 U.S. 413, 429 (1966) (concurring opinion), *quoting Bridges*, 314 U.S. 252, 264, *quoting* Schofield, Freedom of the Press in the United States, 9 Publications Amer. Sociol. Soc., 67, 76.

34 *Id.; see also 12 200-Ft. Reels* 413 U.S. at 135-136 (dissenting opinion), *quoting Bridges v. California*, 314 U.S. 264-265. *Bridges v. California*, 314 U.S. 252, 264 (1941), citing 1 Annals of Congress 1789-1790, 434.

35*12 200-Ft. Reels* 413 U.S. at 134 (dissenting opinion), *quoting* S. Padover, The Complete Madison 295 (1953).

36 *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (concurring opinion), *citing* 1 Annals of Cong. 738 (1789); *see also Smith v. California*, 361 U.S. 147, 159 (1959) (concurring opinion).

37 *Rosenbloom*, 403 U.S. 29, 51 (1971), *citing* 6 Writings of James Madison, 1790-1802, p. 336 (G. Hunt ed. 1906); *see also Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 900-901 (1971) (dissenting opinion), *citing* 6 Writings of James Madison, 1790-1802, p. 336 (Hunt ed. 1906).

38 *Everson*, 330 U.S. at 39 (dissenting opinion), *quoting* 5 Madison, 176.

39 *Schempp*, 374 U.S. 203, 225 (1963), *citing* Memorial and Remonstrance, quoted in *Everson* at 65.

40 *Wallace*, 472 U.S. at 95-96 (dissenting opinion), *citing* 1 Annals of Cong., 730.

41 *Everson*, 330 U.S. at 31 (dissenting opinion), *quoting* 9 Writings of James Madison (ed. by Hunt, 1910) 288.

42 *O'Lone*, 482 U.S. 342, 356 (1987) (dissenting opinion).

43 *Everson*, 330 U.S. 1, 11, n.9 (1947), *quoting* I Writings of James Madison (1900) 18, 21.

44 *McGowan* 366 U.S. at 439, *citing* 3 Elliot's Debates (2nd ed. 1836) 330.

45 *Rosenberger*, 515 U.S. at 870, n.1 (dissenting opinion), *citing Everson*, 330 U.S. at 64, *quoting* Madison's Remonstrance.

46 *Id., citing Everson* at 67.

47 *Lee*, 505 U.S. at 612 (concurring opinion) *citing* 1 Annals of Cong. 434 (1789); *see also Wallace v. Jaffree*, 472 U.S. at 95 (1985) (dissenting opinion); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 39 n.27 (1947)

(dissenting opinion); *County of Allegheny*, 492 U.S. 573, 647 (1989) (dissenting opinion); *McGowan*, 366 U.S. at 440.

48 *Lee*, 505 U.S. at 612 (concurring opinion).

49 *Lee* 505 U.S. at 615 (concurring opinion), *citing* 1 Documentary History of the First Federal Congress of the United States of America 136 (Senate Journal) (L. de Pauw ed. 1972).

50 *Lee*, 505 U.S. at 615 (concurring opinion), *citing* 5 The Founders' Constitution, at 105, 106 (P. Kurland & R. Lerner eds. 1987).

51 *Lee* 505 U.S. at 630-631 (concurring opinion), *citing* Madison's *Detached Memoranda* 559.

52 *Everson*, 330 U.S. at 40 (dissenting opinion), *quoting* 9 Madison, 484, 487.

53 *Lee*, 505 U.S. at 616 (concurring opinion), *citing* Madison's *Detached Memoranda*, 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946).

54 *Walz*, 397 U.S. 664, 705 (1970) (dissenting opinion), *citing* Memorial and Remonstrance, para. 4.

55 *Memorial and Remonstrance, 2 The Writings of James Madison* 183-191 (G. Hunt ed. 1901).

56 *Flores*, 117 S.Ct. 215 (1997) (dissenting opinion) *citing* 2 Writings of James Madison 184 (G. Hunt ed. 1901).

57 *Flores*, 117 S.Ct. 215 (1997) (dissenting opinion) *citing* 2 Writings of James Madison, at 184-185.

58 *Flores*, 117 S.Ct. 215 (dissenting opinion), *citing* 2 Writings of James Madison, at 191.

59 *Wallace*, 472 U.S. 38, n. 55 (1985) *citing* The Complete Madison 299-301 (S. Padover ed. 1953).

60 *See Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947).

61 *See Walz*, 397 U.S. 664, 705 (1970). Also, although not an opinion of the Supreme Court, the U.S. District Court for the District of Utah Central Division also appended the same fifteen points of Madison's Memorial and Remonstrance to its opinion. *See Anderson v. Salt Lake City Corp.,* 348 F.Supp. 1170, 1180-1184 (1972).

62 *Rosenberger*, 515 U.S. 819 (1995) (concurring opinion), *citing* Madison's Remonstrance P2, reprinted in *Everson* at 66 (appendix to dissent of Rutledge, J.).

63 *Rosenberger* 515 U.S. at 855 (concurring opinion), *citing* Madison's Remonstrance P3, reprinted in *Everson* at 65; *see also Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen,* 392 U.S. 236, 244 (1968).

64 *Everson*, 330 U.S. at 49 (dissenting opinion), *citing* Remonstrance, Par. 9.

65 *Everson*, 330 U.S. at 54 n.44 (dissenting opinion), *quoting* II Madison 183, 187, 188.

66 *Everson*, 330 U.S. at 54 n.46 (dissenting opinion), *quoting* II Madison 183, 189.

67 *Walz*, 397 U.S. 713-714 (dissenting opinion), *citing* Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Q. (3d ser.) 534, 551, 555 (1946).

68 *Walz*, 397 U.S. at 714 (dissenting opinion), *citing* Fleet, supra, n. 12, at 557-558.

69 *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 287 (1963) (concurring opinion), *quoting* 9 Writings of James Madison (Hunt ed. 1910), 126.

70 *Lee* 505 U.S. at 624-625 (concurring opinion), *citing* "Detached Memoranda," at 560.

71 *Id.*

72 *Lee* 505 U.S. at 625 (concurring opinion), *citing* Madison's "Detached Memoranda" 558.

73 *Lee* 505 U.S. at 625 (concurring opinion), *citing* Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105.

74 *Chambers*, 463 U.S. at 807-808 (dissenting opinion), *citing* Fleet, Madison's "Detached Memoranda, " 3 Wm. & Mary Quarterly 534, 558 (1946).

75 *Schempp*, 374 U.S. 203, *quoting* Memorial and Remonstrance, quoted in *Everson*, 330 U.S. 71-72 (1947) (Appendix to dissenting opinion of Rutledge, J.).

76 *McGowan v. Maryland*, 366 U.S. 420 (1961), *quoting* 9 Hening's Statutes of Virginia 109, 111-112.

77 *Amos*, 483 U.S. 327, 341 n.2 (1987) *citing* J. Madison, Memorial and Remonstrance Against Religious Assessment, in 2 Writings of James Madison 184 (G. Hunt ed. 1901) (quoting Virginia Declaration of Rights, Art. 16).

78 *Lee*, 505 U.S. 577, 590 (1992) *citing* Memorial and Remonstrance Against Religious Assessments (1785), in 8 Papers of James Madison 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973); *see also Everson*, 330 U.S. at 54 n. 45 (dissenting opinion); *Rosenberger*, 515 U.S. at 870 n.1 (dissenting opinion).

79 *Lee* 505 U.S. at 625 (concurring opinion), *citing* "Detached Memoranda," at 562.

80 *Lee* 505 U.S. at 622 (concurring opinion), *citing* J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution 49, 83 (P. Kurland & R. Lerner eds. 1987).

81 *Wallace*, 472 U.S. at 96 (dissenting opinion), *citing* 1 Annals of Cong., 731.

82 *Chambers*, 463 U.S. 783, 804 (1983) *citing Engel v. Vitale*, 370 U.S. at 432, quoting Memorial and Remonstrance against Religious Assessments, 2 Writings of Madison 187.

83*See Engel v. Vitale*, 370 U.S. 421, 436 (1962), *quoting* 2 Writings of Madison 183, at 185-186; *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 41 (1947) (dissenting opinion); *see also Rosenberger*, 515 U.S. at 868 (dissenting opinion), *quoting* James Madison, Memorial and Remonstrance Against Religious Assessments P3, reprinted in *Everson* at 65-66 (appendix to dissent of Rutledge, J.); *See also Lee v. Weisman*, 505 U.S. 577, 622 (1992) (concurring opinion) ("three pence" words alone used by dissent); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (quotes only "three pence" part of quote); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305, 306 n.15 (1986); *Lemon v. Kurtzman*, 411 U.S. 192, 209 (1973) (dissenting opinion); *Lemon v. Kurtzman*, 403 U.S. 602, 633 (1971) (concurring opinion); *Walz v. Tax Commn. of New York*, 397 U.S. 664, 705 (1970) (dissenting opinion);*Flast v. Cohen*, 392 U.S. 83, 103, 107 (1968); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 244 (1968); *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *International Assn. of Machinists v. Street*, 367 U.S. 740 , (1961) p. 779 (concurring opinion) and p. 790 (dissenting opinion).

84 *Rosenberger* 515 U.S. at 857 (concurring opinion), *citing* Madison's Amendments to the Declaration of Rights (May 29-June 12, 1776), in 1 Papers of James Madison 174 (W. Hutchinson & W. Rachal eds. 1962).

85 *Id., quoting* Madison's Remonstrance P8, reprinted in *Everson* at 68.

86 *Flores*, 117 S.Ct. 215 (1997) (dissenting opinion), *quoting* G. Hunt, James Madison and Religious Liberty, 1 Annual Report of the American Historical Association 163, 166-167 (1901) (emphasis added).

87 *Lee*, 505 U.S. at 608, 112 S. Ct. at 2666, *citing* Memorial and Remonstrance against Religious Assessments (1785), in *The Complete Madison* 300 (S. Padover ed. 1953).

88 *Lee*, 505 U.S. at 607 (concurring opinion), *citing* The Complete Madison, at 303.

89 *Id., citing Everson* 220 U.S. at 63-72 (appendix to dissent of Rutledge, J.), quoting Madison's Remonstrance PP7, 8.

90 *Everson* 330 U.S. at 57 (dissenting opinion), *quoting* Remonstrance, Par. 15.

91*Lee* 505 U.S. at 634 (dissenting opinion), *citing* Inaugural Addresses of the Presidents of the United States, 5 Doc. 101-10, p. 28 (1989).

92 *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (dissenting opinion).

93 *McDaniel v. Paty*, 435 U.S. 618, 623 (1978), *citing* 5 Works of John Locke 21 (C. Baldwin ed. 1824) and 6 Papers of Thomas Jefferson 297 (J. Boyd ed. 1952).

94 *McDaniel v. Paty*, 435 U.S. 618, 623-624 (1978), *citing* 5 Writings of James Madison 288 (G. Hunt ed. 1904); *see also Kiryas Joel*, 512 U.S. 687 (1994) (concurring opinion).

95 *McDaniel v. Paty*, 435 U.S. at 626, *citing* 5 Writings of James Madison 288; *see also Kiryas Joel*, 512 U.S. 687 (1994) (dissenting opinion).

But the James Madison problem is a not a new construction, framed by scholars looking to publish new books and articles. Rather, it was known to Madisonâ€™s contemporaries, who accused him of changing his mind concerning the constitutionality of the Bank of the United States. Madison was well aware of these charges, and, late in life, he went to great effort to answer them as controversies over the meaning of federalism became intertwined with a growing sectionalism and eventually with the crisis over nullification. The running thread in these explanations is Madison frequently pointed to his Fe LII. U.S. Supreme Court. WILLIAM MARBURY v. JAMES MADISON, Secretary of State of the United States. WILLIAM MARBURY v. JAMES MADISON, Secretary of State of the United States. Supreme Court. 5 U.S. 137.Â The court ordered the witnesses to be sworn, and their answers taken in writing; but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any. Mr. Lincoln, who had been the acting secretary of state, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing. The speaker was US Supreme Court Justice Hugo Lafayette Black Jr., and the occasion was New York University School of Lawâ€™s James Madison Lecture. There were, Justice Black proclaimed to a packed hall, â€œabsolutesâ€ in the Bill of Rights, â€œput there by men who knew what words meant, and [who] meant their prohibitions to be absolutes.â€ This was especially the case, Black emphatically insisted, with the First Amendment. Its words were â€œplainâ€ and â€œeasily understood.â€Â This paper reviews arguments in support of a very strong view of the free speech rights protected by the First Amendment of the United States Constitution. Similar views have been supported by a minority of scholars over the years, such as Justice Black, and are sometimes called "First Amendment absolutism." In Marbury v. Madison (1803) the Supreme Court announced for the first time the principle that a court may declare an act of Congress void if it is inconsistent with the Constitution. William Marbury had been appointed a justice of the peace for the District of Columbia in the final hours of the Adams administration. When James Madison, Thomas Jeffersonâ€™s secretary of state, refused to deliver Marburyâ€™s commission, Marbury, joined by three other similarly situated appointees, petitioned for a writ of mandamus compelling delivery of the commissions. Chief Justice John Marshall, writing for a un