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**The American Debate Between Tolerance and Liberty of Conscience**

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by

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## Introduction

The government's role in religious affairs has been debated throughout the history of Western Civilization. During the American founding, men such as George Mason supported a framework around tolerance, while James Madison advocated for liberty of conscience. Though Madison won the debate in his day, this conversation continues in modern America. Understanding the differences between toleration and liberty of conscience and Madison's arguments in "Memorial and Remonstrance" can create a framework for understanding the current debate.

### Toleration vs. Liberty of Conscience

This American debate began in 1776 when James Madison was serving on the committee to draft a Declaration of Rights for the Virginia constitution. When George Mason, the committee's chair, presented his draft, he included the phrase, "all Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience."<sup>1</sup> Madison took issue with the word 'toleration' because it implied that those who believed in a different religion deserved a second-class status.<sup>2</sup> Toleration requires the state to allow a religious belief, but it does not necessarily compel the state to respect every conviction equally. Further, this language implies that religious activity is a privilege granted by the state that can be revoked.<sup>3</sup>

While toleration is an improvement over religious tyranny, Madison viewed toleration as inadequate for protecting religious liberty. In arguing against toleration, he concluded that religious toleration, regardless of the context, was inconsistent with liberty of conscience.<sup>4</sup> Further, Madison argued that "Conscience is the most sacred of all property" and that the state has no more right to violate a man's conscience than they have to invade his home.<sup>5</sup> Rather than developing a framework for governing religious liberty, Madison fought to remove matters of conscience from the state's purview.<sup>6</sup>

Madison won this debate in the committee and successfully removed the word 'toleration' from the Declaration of Rights. However, this debate continued in the following years. In 1779, Thomas Jefferson introduced the Virginia Statute for Religious Freedom to end state-sponsored churches in Virginia and provide religious freedom to "the Jew, the Gentile, the Christian, the Mahometan, the Hindoo, and [the] infidel of every denomination."<sup>7</sup> The bill was

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<sup>1</sup> George Mason, "The Virginia Declaration of Rights - First Draft," *George Mason's Gunston Hall* (blog), accessed November 28, 2022, <https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/virginia-declaration-of-rights-first-draft/>.

<sup>2</sup> James H. Read, "Memorial and Remonstrance," Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/870/memorial-and-remonstrance>.

<sup>3</sup> Daniel L. Dreisbach, "George Mason's Pursuit of Religious Liberty in Revolutionary Virginia," *The Virginia Magazine of History and Biography* 108, no. 1 (2000): 12-13, <https://go.openathens.net/redirector/liberty.edu?url=https://www.proquest.com/scholarly-journals/george-masons-pursuit-religious-liberty/docview/195921466/se-2>.

<sup>4</sup> Dreisbach, 13.

<sup>5</sup> James Madison, "Property," The University of Chicago Press, March 29, 1792, <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

<sup>6</sup> Dreisbach, 15.

<sup>7</sup> Matthew Harris, "Virginia Statute for Religious Freedom," Middle Tennessee State University, 2009, <https://www.mtsu.edu/first-amendment/article/880/virginia-statute-for-religious-freedom>.

postponed, and Patrick Henry countered this bill in 1784 with one that would impose a general tax to fund “Teachers of the Christian Religion.”<sup>8</sup> Madison viewed this bill as a threat to liberty of conscience and authored the “Memorial and Remonstrance Against Religious Assessment” pamphlet in response.

### **Memorial and Remonstrance Against Religious Assessment**

Madison’s pamphlet begins with a preamble outlining the importance of religious liberty before discussing Henry’s bill and warning future legislatures who will consider this issue.<sup>9</sup> His arguments can be divided into three sections: liberty of conscience as an inalienable right, the danger of government involvement in matters of conscience, and the harm that government involvement does to the church.

### **Liberty of Conscience as an Inalienable Right**

While there was widespread agreement that the state could not coerce religion, Madison went a step further and argued that liberty of conscience is a God-given right: “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.”<sup>10</sup> By categorizing liberty of conscience as inalienable, Madison placed it equally with other rights such as life, liberty, and the pursuit of happiness:

Either we must say, that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration.<sup>11</sup>

If the civil magistrate recognizes its responsibility to respect inalienable rights, it cannot neglect liberty of conscience in promoting Christianity.

Further, Madison argues that violating another man’s conscience to promote Christianity is a sin against God: “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 offence against God, not against man: To God, therefore, not to man, must an account of it be rendered.”<sup>12</sup> Since many Americans supported Henry’s bill at this time, Madison must remind the legislature that they are ultimately accountable to God for their actions. While they may not receive significant backlash from the American people, violating a minority’s inalienable rights is still a violation of God’s law, and there would be consequences.

### **The Danger of Government Involvement in Conscience**

Madison’s subsequent arguments are more practical and address the dangers of government involvement in conscience. While Henry’s bill was not an immediate danger to religious liberty, Madison recognized the slippery slope and argued against the underlying principle: “The free men of America did not wait till usurped power had strengthened itself by

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<sup>8</sup> Harris.

<sup>9</sup> Harris.

<sup>10</sup> James Madison, “Memorial and Remonstrance against Religious Assessments,” June 20, 1785, <https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002>.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.”<sup>13</sup> Madison’s argument rested on the principle that a minor invasion of conscience is an invasion nevertheless and should not be tolerated.

Further, Madison argued that using government authority to promote Christianity would set a precedent that could lead to the exclusion of their beliefs in the future: “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?”<sup>14</sup> Government power is a dangerous tool and should not be used to determine or promote religious truth. Madison states that “the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.”<sup>15</sup> History demonstrates the dangers of government involvement in religion, and Madison fought to keep the American people from making the same mistake as other civilizations.

### **The Harm of Government Involvement to the Church**

Finally, Madison argues that government involvement has historically been more harmful than profitable: “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation...Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not.”<sup>16</sup> God does not need the civil magistrate’s assistance to grow his church and attempts to harness the state’s power to promote Christianity are bound to end with tyranny. Instead, Madison suggests that “a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”<sup>17</sup> In other words, the civil magistrate should protect liberty of conscience rather than promoting religious truth.

### **Modern Application**

The debate over toleration vs. liberty of conscience continues in the United States today. In numerous cases, the Supreme Court has been asked to decide whether an individual’s religious liberty extends to a specific scenario. One case was *Masterpiece Cake Shop v. Colorado Civil Rights Commission* in 2018.

### **Masterpiece Cake Shop v. Colorado Civil Rights Commission**

This case represented a conflict between a Colorado homosexual couple and a Christian cake shop owner. In 2012, the couple entered Masterpiece Cake Shop and requested that the owner bake and decorate a cake for their wedding. The owner respectfully declined their business and said his Christian beliefs prevented him from using his God-given talents to support a same-sex wedding. The couple interpreted his refusal as discrimination based on sexual

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

orientation and filed a lawsuit with the Colorado Civil Rights Commission, which eventually was appealed to the Supreme Court.<sup>18</sup>

The central question in this case considered whether Colorado is violating the baker's First Amendment rights if they force him to bake and decorate a cake for a homosexual wedding against his sincerely held religious beliefs.<sup>19</sup> In the Majority Opinion, Justice Kennedy determined that the baker's First Amendment rights were violated by the Colorado Civil Rights Commission's hostility.<sup>20</sup> However, the extent of the Colorado Civil Rights Commission's hostility allowed the Court to rule on the Free Exercise clause violation rather than the broader question of whether liberty of conscience allows for private discrimination based on sexual orientation.<sup>21</sup>

### **Recommendations**

The current case law surrounding matters of conscience is hardly coherent and largely consists of creating exceptions to an unclear rule.<sup>22</sup> Unfortunately, the Supreme Court has been unwilling to decide a landmark case that would bring coherence to the American government's role in matters of conscience. In order to protect religious liberty, the Supreme Court must return to the Founding Father's standard and protect liberty of conscience.

A liberty of conscience standard would interpret the Free Exercise clause to assume that laws which substantially burden sincere conscience are unconstitutional.<sup>23</sup> This standard would shift the burden of proof from the religious person to the state and ensure that religious people are not persecuted for sincerely held beliefs. In other words, the state would be obligated to prove that their actions do not invade conscience rather than the religious person having to argue that their conscience is infringed. This would elevate liberty of conscience as an inalienable right and treat violations of conscience in the same manner as life, liberty, and property.

### **Conclusion**

Studying the Founding Father's view of liberty of conscience can inform our modern understanding of religious liberty. The major push in the United States today is to elevate tolerance as the standard for religious matters. In *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, this included telling the Christian baker that he must use his artwork to show tolerance towards the homosexual couple rather than telling the couple that they must respect the baker's liberty of conscience. As Thomas Paine said, "Toleration is not the opposite of Intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it."<sup>24</sup> To ensure the protection of

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<sup>18</sup> "Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission," Oyez, June 4, 2018, <https://www.oyez.org/cases/2017/16-111>.

<sup>19</sup> "Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission."

<sup>20</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (U.S. Supreme Court June 4, 2018).

<sup>21</sup> "Masterpiece Cakeshop v. Colorado Civil Rights Commission," Alliance Defending Freedom, April 20, 2020, <https://adflegal.org/case/masterpiece-cakeshop-v-colorado-civil-rights-commission>.

<sup>22</sup> Nelson Tebbe, "The Principle and Politics of Liberty of Conscience," *Harvard Law Review* 135, no. 1 (2021): 268-269, <https://heinonline.org/HOL/P?h=hein.journals/hlr135&i=275>.

<sup>23</sup> Tebbe. 270.

<sup>24</sup> Thomas Paine, *The Rights of Man*, 1791.

religious liberty, the United States must elevate liberty of conscience as an inalienable right over toleration.

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