

Mark David Hall

WHY TOLERATE RELIGION?

The Rise and Fall of
Religious Liberty in America

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THE RISE OF RELIGIOUS LIBERTY

Historically, civic authorities often used their power to protect, promote, and encourage religion. This often included discriminating against or even persecuting those who deviate from their understanding of religious truth. America's earliest colonial leaders, from north to south, were not immune to this temptation. For instance, both Virginia and Massachusetts had statutes prohibiting members of the

Society of Friends (Quakers) from entering these colonies, and in the mid-seventeenth century four Quakers were hanged in Boston Common for violating such laws.

Fortunately, the way Americans approached religious liberty changed in important ways between the establishment of the early colonies and the founding era. It did so for several reasons. At a practical level, despite a desire for homogeneity, almost from the start America attracted diverse groups of immigrants from England and continental Europe. Even in Congregational New England and the Anglican South there were, from an early date, dissenters, and the mid-Atlantic colonies were always a muddle. This diversity forced civic authorities to negotiate laws and policies encouraging different groups to get along (sometimes with more success than others).

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Colonial officials were also confronted with powerful arguments for liberty of conscience. Indisputably pious men, including Roger Williams, William Penn, Elisha Williams, Samuel Davies, and John Leland, contended that a proper understanding of the Bible and Christian theology requires religious liberty for all. These arguments became pronounced during the First Great Awakening, those great revivals that swept America in the 1730s and 1740s. They often included the claim that men and women have a natural right to religious freedom. In the roughly 160 years from the earliest settlements to the founding era, the colonies became more accepting of dissenters and dissenting practices.

Debates in Virginia illustrate these developments well. In 1776, the Virginia Convention authorized a committee to write a bill of rights. This task fell largely to George Mason, who drafted what became Article XVI of Virginia's Declaration of Rights. It reads:

That as religion, or the duty which we owe to our divine and omnipotent Creator, and the manner of discharging it, can be governed only by reason and conviction, not by force or violence; and therefore that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate...

Note that Mason grounded the case for religious liberty on the premise that individuals have a "duty which we owe to our divine and omnipotent Creator." The vast majority of arguments for religious liberty in the founding era were based on theological or biblical claims of this nature.

Mason's draft of Article XVI was printed and circulated throughout the states. But it was not the draft that became law. James Madison, in his first significant public act, objected to the use of "toleration" in the article, believing it implied religious liberty was a grant from the state that could be revoked at will. The Virginia Convention agreed, and Article XVI was amended to make it clear that "the free exercise of religion" is a right, not a privilege granted by the state.

By the end of the revolutionary era, every state offered significant protection of religious liberty. The federal constitution of 1787 did not, but only because its supporters believed the national government did not have the delegated power to pass laws interfering with religious beliefs or practices. In face of popular outcry, the first Congress proposed and the states ratified a constitutional amendment stipulating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

There were few non-Christians in late eighteenth century America, but there were some, and America's founders believed they had a right to act according to the dictates of their consciences. An excellent illustration of this is George Washington's 1790 letter to the "Hebrew Congregation" in Newport, Rhode Island. He wrote to this tiny religious minority that:

All possess alike liberty and conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

. . . May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while everyone shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.

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Like Madison, Washington rejected the idea of “toleration,” insisting instead that all citizens have the right to religious freedom.

The exact scope of religious liberty protected by the First Amendment has been hotly debated, but at a minimum it prohibits Congress from, in the words of James Madison, compelling “men to worship God in any manner contrary to their conscience.” It certainly means more than this, but exactly how much more is controversial. Particularly divisive, even among originalists, is the question of whether the Free Exercise

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Clause requires exemptions to general, neutrally applicable laws. I am sympathetic to the argument that it does, but regardless of how one comes down on this question, there is no doubt that the founders believed legislatures could craft exemptions to protect religious citizens.

Government was far less intrusive in eighteenth century America. Most state legal codes were published in one volume, and the national government passed few laws that directly affected individuals. But there were two major policy areas where some religious citizens ran afoul of general, neutrally applicable laws: military service and oath requirements. Military service, at the local, state, and national level, was necessary for protecting life, liberty, and property. And oaths were considered important for ensuring that citizens were loyal, that witnesses tell the truth in judicial proceedings, and that public officials would serve the common good rather than their own self-interest. Despite these important policy goals, America’s civic leaders crafted exemptions to laws on these matters to protect religious minorities.

MILITARY SERVICE

Among the roles of the civil government, few are as important as national security. In the modern era, localities, states, and nations have regularly relied upon compulsory militia service or conscription to raise armies. Quakers, Moravians, and other religious pacifists asked to be excused from such service.

Consider the government’s options when faced with such requests. Rather than force pacifists to act against their sincerely held religious convictions, civic leaders might eliminate the draft requirement for all. But, assuming conscription is necessary for self-defense, doing so might harm the public good. On the other hand, states could force pacifists to serve in the military, and jail or execute them if they refuse. Far too many governments have taken this approach. Fortunately, America’s civil leaders have often chosen a third way.

As early as the 1670s, a few states began excusing Quakers from military service provided they pay a fine or hire a substitute. All colonies did so by the mid-eighteenth century, often expanding accommodations to include other religious citizens. During the War for Independence, the Continental Congress supported these accommodations with the following July 18, 1775 resolution:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Fourteen years later, during the debates in the first federal Congress over the Bill of Rights, James Madison proposed a version of what became the Second Amendment that stipulated that “no person religiously scrupulous, shall be compelled to bear arms.” His proposal was approved by the House but not by the Senate. It was ultimately rejected, but only because many founders thought that such accommodations should be passed by state legislatures.

Two months after approving what became the First Amendment, Representatives returned to this issue when they debated a bill regulating the militia when called into national service. Madison offered an amendment to exempt from militia service,

persons conscientiously scrupulous of bearing arms. It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved,

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than has heretofore been known. The Quaker merits some attention on this delicate point, liberty of conscience: they had it in their own power to establish their religion by law, they did not.

He was disposed to make the exception gratuitous, but supposed it impracticable. The amended bill eventually passed, but with the requirement that conscientious objectors must hire a substitute.

Fortunately, states and, later, Congress significantly expanded protections for religious pacifists. In WWI, pacifists from certain denominations were permitted to perform alternative service, and in WWII (and to the present day), all religious pacifists have this option. There is no reason to believe that these accommodations have seriously hindered the ability of the United States of America to protect itself.

OATHS

Historically, oaths have been seen as necessary for ensuring the loyalty and fidelity of citizens and elected officials. They were also viewed as essential for the effective functioning of judicial systems. In his Farewell Address, President George Washington wrote:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indisputable supports.... A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?

Given the importance and solemnity of oaths, the government faces a problem if some of its citizens refuse to take them for religious reasons. Again, Quakers, and a few other religious minorities, dissented from the majority. They took (and take) literally biblical passages

such as Matthew 5:33–5:37, where Jesus says: “Swear not at all.... But let your yea be yea and your nay be nay.”

In England, Quakers were routinely jailed for failing to swear oaths in courts or, after the Revolution of 1688, swearing oaths promising loyalty to the new regime. They were banned altogether in some early American colonies, but by 1710 they were permitted in all of them and many legislatures had begun to permit them to affirm rather than swear oaths. By the founding era, all states permitted Quakers and other religious minorities to do so.

The most famous oath accommodations from this era are found in the United States Constitution. Article II’s presidential oath of office, for instance, permits individuals either to swear or to affirm:

Before he [the President] enter on the execution of his office, he shall take the following oath or affirmation: ‘I do solemnly swear, (or affirm,) that I will faithfully execute....’

One does not need to be religious to take advantage of these provisions, but in the context in which they were written, there is little doubt that these accommodations were intended for Quakers and others who had religious objections to taking oaths. These accommodations were expanded in the nineteenth and twentieth centuries, and today no one is forced to swear if he or she objects to doing so.

MID-TWENTIETH CENTURY CONSENSUS

By the mid-twentieth century, states and the national government rarely attempted to ban a religious belief or practice *per se*. Threats to religious liberty came almost solely from general, neutrally applicable laws. The explosive growth of government at both the state and national levels in the twentieth century made accommodations even more important for protecting religious minorities. Because religious liberty was highly valued by both Democrats and Republicans, legislatures routinely craft accommodations to protect citizens. By

one count from the early 1990s, there were approximately 2,000 federal or state laws that accommodate religious Americans.

In the latter third of the twentieth century, the Supreme Court developed a framework for thinking through how to accommodate religious objectors to general laws. In 1963, under the leadership of liberal Justice William J. Brennan, the Court adopted the principle that government actions that burden a religious practice must be justified by a compelling state interest. Later, the Court added the requirement that this interest must be pursued in the least restrictive manner possible. In other words, citizens should not be forced to violate their religious beliefs unless necessary. Whenever possible, an accommodation should be found. Although this test was developed to help jurists interpret the First Amendment's Free Exercise Clause, it is also a useful guide for legislatively crafted accommodations.

When a majority of Supreme Court Justices repudiated this test with respect to interpreting the Free Exercise clause in the 1990 case of *Oregon v. Smith* (involving the use of an illegal drug in religious rituals), Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993 to restore it. It is noteworthy that the bill was passed in the House without a dissenting vote, was approved 97 to 3 by the Senate, and was signed into law by President Bill Clinton. The next year, Congress amended the American Indian Religious Freedom Act to require the 22 states that did not previously permit Native Americans to use peyote in religious ceremonies

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to do so. A few years later, Congress passed the Religious Land Use and Institutionalized Persons Act (2000).

Of course, not all religious practices should be accommodated. State and national governments sometimes refused to protect religious citizens, or have even withdrawn protections when they determine that the actions in question are extremely damaging to the common good. For instance, in the early-twentieth century, many states first accommodated parents who had religious objections to providing medical treatment for their children and then abolished these accommodations as it became evident that children were dying from illnesses that medical advances had rendered easily treatable. But most religious practices can be accommodated. For instance, Jehovah's Witnesses have been protected from

being compelled to salute and pledge allegiance to the American flag, Muslim prisoners have been permitted to grow beards in spite of regulations requiring inmates to be clean shaven, members of a New Mexican branch of a Brazilian church have been allowed to use hallucinogenic tea in religious ceremonies, and Amish families have been exempted from compulsory school attendance laws. There is little evidence that these accommodations have been detrimental to the common good.

THE FALL OF RELIGIOUS LIBERTY

By the late twentieth century, a consensus had emerged that religious liberty was a core American value that should be robustly protected. Alas, in the twenty-first century this consensus seems to be unraveling. Robert P. George, of Princeton University, observed in 2012 that there is "a massive assault on religious liberty going on in this country right now." Although most civic leaders and jurists remain committed to religious liberty in the abstract, support for protecting citizens from neutral laws that infringe upon religious convictions has deteriorated.

In the political arena, the Obama Administration showed little concern for religious liberty when it required businesses to provide contraceptives and abortifacients to employees even when the business owners had religious convictions against doing so. It also offered a rare challenge to the doctrine of ministerial exception, a legal protection which holds that religious groups should be free to choose, in the words of Chief Justice John Roberts, "who will preach their beliefs, teach their faith, and carry out their mission." In both instances, the Supreme Court rebuffed the Obama Administration and protected religious citizens.

In 2016, the U.S. Commission on Civil Rights issued a report that said religious accommodations should be virtually non-existent. The Commission's Chair, Martin R. Castro, remarked in his personal statement that:

The phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.

Reasonable people can disagree about the propriety of certain accommodations, but surely religious convictions should be treated with greater charity.

The Trump Administration has been friendlier to religious citizens than its predecessor, but cause for concern remains. The President's 2017 executive order aimed at better protecting religious liberty was described by ACLU director Anthony Romero as "an elaborate photo-op with no discernible policy outcome." He went on to say that his organization would not bother to challenge it. Since then, President Trump has taken additional steps to better protect religious liberty, but of course every executive action he has taken could be repealed by the next administration. Religious liberty should not depend upon who is president.

At the state level, over the past several years, a few small-business owners who have religious objections to participating in same-sex marriage ceremonies have been prosecuted for declining to do so. Courts in these states have given little weight to arguments that the religious liberty provisions of state or national constitutions offer these photographers, florists, and bakers any protection. In 2015, when Indiana and Arkansas considered bills virtually identical to the national RFRA, at least in part to help protect such citizens, a virtual firestorm erupted.

In the academy, professors Marci Hamilton, Brian Leiter, Richard Schragger, John Corvino, and others have made well-publicized arguments contending that citizens should seldom, if ever, be exempted from generally applicable laws because of their religious convictions. Particularly worrisome is their contention that religion is not "special." America's founders certainly did not agree. Others have contended that religious accommodations (or at least some of them) violate the Establishment Clause. With one minor exception, the Supreme Court has regularly rejected this argument.

THE FUTURE OF RELIGIOUS LIBERTY

The Supreme Court's most recent religious liberty case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), has been celebrated by those who value religious liberty. The case involved Jack Phillips, a baker who declined to bake a cake to celebrate a same sex wedding in 2012. Same sex marriages were not legally recognized in the state at the time, but the couple planned to get married in Massachusetts and celebrate their union in Colorado. They filed a complaint with the Colorado Civil Rights Commission,

which found probable cause of a violation and referred the case to an administrative law judge. This "judge" ruled against Phillips, the Commission (which had referred the case to the judge—welcome to the bizarre world of administrative law!) upheld the ruling, as did the Colorado Court of Appeals.

In this case, seven Justices agreed that the Colorado Civil Rights Commission acted with such obvious animus against Phillip's religious convictions that it violated the First Amendment's Free Exercise Clause. In his majority opinion, Justice Kennedy noted that one Commissioner described Phillips' "faith as 'one of the most despicable pieces of rhetoric that people can use'" and explained that it was constitutionally problematic to "disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." Kennedy also remarked that at the time of Phillips' hearing, other Commissioners made similar comments and that no one on the CCRC seemed to understand that bias against religious faith was inappropriate.

Alas, *Masterpiece Cakeshop* is but a temporary victory for Jack Phillips. Another complaint has been filed against

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Phillips at the Colorado Civil Rights Commission, this time complaining that he declined an invitation to create a cake celebrating the anniversary of when an attorney became a transvestite. Given the Court's opinion, it is not clear that he would prevail once more, especially since one would expect the commissioners to be far more careful in their next review to hide their anti-religious bias. Religious liberty cannot not depend upon anti-religious bigots being open about their animus.

Many readers may not agree with Mr. Phillip's decisions in these cases. But whether one agrees with

Phillips or not is beside the point. Phillips is trying to run his business by a code of ethics informed by his religious convictions. He declines to create cakes for a number of other events, such as celebrating Halloween or divorces. He is willing to sell premade baked goods to anyone who wants them, but draws the line at using his creative talents to communicate messages with which he disagrees. He should be free to do so, and if local citizens are offended by the choices he makes they are free to boycott his bakery.

All who would live up to the founders' ideal for freedom of conscience must insist that, except in the

most extreme circumstances, every American has a right to live according to his or her religious convictions, no matter how unpopular they may be. This includes permitting bakers not to participate in same-sex wedding ceremonies, Jehovah's Witnesses to refuse to salute the American flag, and Muslims to build mosques on the same terms that Christians can build churches. The moment we start picking and choosing between which convictions we protect and which we don't is the moment we abandon the founders' commitment to defending "the sacred rights of conscience."

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