

REVIEW ESSAY

AN IMPERFECT VOCABULARY OF RELIGIOUS LIBERTY

LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY. By Martha C. Nussbaum. Basic Books 2008. Pp. 406. \$28.95. ISBN: 0-465-05164-2.

*Reviewed by Marci A. Hamilton**

Professor Martha Nussbaum's *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* is a book that is worth reading, though not because one will ultimately agree with its analysis. Nussbaum has brought together history, legal doctrine, theology, and philosophy to craft a theory that "equality" can explain free exercise and disestablishment principles. It should go without saying that finding any single principle to explain either free exercise or disestablishment is difficult, and *Liberty of Conscience* does not deliver on that score. These are irreducible concepts. Yet, given the dominance of equality and anti-discrimination as paradigmatic ways of reasoning in United States culture today, she has pursued a worthwhile venture. I will focus on the discourse on religious liberty to explain why I am not persuaded that her theory of "equality" draws the best constitutional line.

To be frank, Nussbaum's description of the Supreme Court's free exercise doctrine is unoriginal. It echoes the dominant complaints made about the doctrine since 1990 when the Supreme Court announced that religious motivation is not a defense to neutral, generally applicable laws. Predictably, she says that the Supreme Court's decision, *Employment Division v. Smith*,¹ is the end of religious liberty in apocalyptic terms, labeling it "The Demise of Accommodation," and repeatedly refers to its author, Justice Antonin Scalia, individually as though he was the only vote for his majority opinion. (147, 153-57)

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1. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Equally predictably, Nussbaum says that *Sherbert v. Verner*² and *Wisconsin v. Yoder*,³ which applied strict scrutiny to free exercise cases, instituted a better regime. She fails to acknowledge that these cases are outliers—most free exercise cases had not applied strict scrutiny. She relies heavily on the legal scholars who misstated and overstated free exercise doctrine following *Smith*, Professors Douglas Laycock and (now-Judge) Michael McConnell, and fails to approach their work with the sort of critical distance that might have yielded more interesting and accurate insights.

Also predictably, she states that the purpose of religious accommodation is to deal with “the dangers faced by minority religion in a majority society.” (147) Thus, she tries to squeeze the square peg of religious accommodation into the round hole of discrimination theory. Her free exercise discussion is the now-trite script behind the unfortunate and misguided Religious Freedom Restoration Act (RFRA)⁴ and Religious Land Use and Institutionalized Persons Act (RLUIPA).⁵

It is a script without empirical support. The *Smith* majority (Justices Scalia, Kennedy, Stevens, and White, and Chief Justice Rehnquist) accurately surveyed the free exercise landscape to conclude that *Sherbert* and *Yoder* were anomalies, not strong precedents. In fact, *Yoder* is the only case in which the Supreme Court applied strict scrutiny to a neutral, generally applicable law, and if one re-reads it today, it is disturbing in its deference to the Amish and complete lack of concern about the children in the Amish community who would not, as a result, receive even a high school education. Only Justice Douglas, in concurrence, noted that one might have some reservations about the impact on children.⁶

In a remarkable overstatement, Nussbaum posits that the “U.S. public was outraged by *Smith*.” (157) To the contrary, the academic intelligentsia and religious lobbyists were the ones who objected to *Smith*, like Laycock and McConnell.⁷ They, among others, exaggerated

2. *Sherbert v. Verner*, 374 U.S. 398(1963).

3. *Wisconsin v. Yoder*, 406 U.S. 205(1972).

4. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb (2000) *invalidated by City of Boerne v. Flores*, 521 U.S. 507(1997).

5. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc (2000).

6. *Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting in part and concurring in part).

7. See Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & RELIGION 99 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. &

Supreme Court doctrine to take advantage of the moment to extend *Yoder* to all cases, including the many cases where strict scrutiny would not have been applied in the past.⁸ Fundamental common sense supports the Court's holding that the state was not required to pay unemployment compensation to drug and alcohol counselors who used illegal drugs in any setting, and if you stopped any average citizen on the street following the decision, they would not have been outraged.

What actually outrages the public is when they learn that the strict scrutiny-in-every-category approach was codified in laws like RLUIPA, and now their neighborhoods are subject to large religious land use projects demanding the right to trump the zoning and land use laws that make their neighborhoods livable.⁹ Nussbaum is so naïve about the actual impact of such a law that she refers to the supposed "enduring appeal of RFRA and [posits] its widespread popular support will doubtless lead to the expansion of this list." (161) While she is correct that soon after the 1997 invalidation of RFRA in *Boerne v. Flores*,¹⁰ thirteen states enacted "mini-RFRAs", their appeal soon lost luster as children's advocates and others pointed out the actual dangers inherent in such a formula,¹¹ leading the movement to stall. Moreover, when a RFRA clone—the Religious Liberty Protection Act—was introduced in Congress after RFRA was held unconstitutional, it failed.

In any event, Nussbaum's central thesis about free exercise is that it exists for the purpose of protecting minority religions from the majority. She borrows the language of racial discrimination to talk about religious liberty, assuming (1) there is a majority religion (there is not); (2) minority religions cannot defend or represent themselves in the political process (despite the fact that small, cohesive groups do quite well in the legislative process); and (3) accommodation of religious conduct is needed to end inequality (it actually increases inequality).

PUB. POL'Y 181 (1992); Michael McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

8. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

9. See, e.g., Marci Hamilton, *The Connecticut Supreme Court Reaches the Right Decision In a Case Under the Religious Land Use and Institutionalized Persons Act* (Feb. 5, 2008) (see FindLaw), <http://writ.news.findlaw.com/hamilton/20080205.html>; Marci Hamilton, *When Churches Seek to Host Tent Cities of Homeless Persons, Can Localities Deny a Permit? The Controversy in Washington State, and What State Legislators Should Do About It* (Mar. 8, 2007) see FindLaw, <http://writ.news.findlaw.com/hamilton/20070308.html>.

10. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

11. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* ch. 2 (Cambridge U. Press 2005).

Once again, the facts do not back up her thesis. Which minority religious practices would she say should be accommodated that are not accommodated under current law? Following *Smith*, Native American Church members received exemptions for the use of peyote from many states and the federal government.¹² Despite losing at the Supreme Court, Jewish men in the military may wear yarmulkes, along with other religious believers who may also wear their religious headgear.¹³ Going back to Prohibition, Catholics, who were hardly a powerful majority at the time, were permitted to use wine in their religious ceremonies.¹⁴ As the *Smith* majority pointed out, there is every reason to believe that the United States will be generous with accommodation:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.¹⁵

At the same time, she fails to acknowledge the harm that religious entities are capable of inflicting, acting as though any restriction on a religiously motivated practice is cause for constitutional shame. She seems to say that religiously motivated polygamy is a victimless crime (190-98) without any reference to the known practices of child sex abuse within the Fundamentalist Mormon or other religious polygamous communities.¹⁶ Nor does she make any attempt to come to terms with

12. In response to *Employment Div. v. Smith*, Congress exempted the use, possession, or transportation of peyote by an Indian person for bona fide religious purposes. 42 U.S.C. § 1996a (2000). Moreover, in the text of the statute itself, Congress recognized that by that time “at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners[.]” 42 U.S.C. § 1996a(a)(3) (2000).

13. Following the decision in *Goldman v. Weinberger* for example, Congress enacted legislation which allowed members of the military to wear religious apparel while in uniform unless it would interfere with duties or is not “neat and conservative.” 10 U.S.C. § 774 (2000).

14. During Prohibition, the Volstead Act expressly allowed sacramental wine. National Prohibition (Volstead) Act, Pub. L. No. 66, Ch. 85, 41 Stat. 305 (1919) (repealed 1933 by U.S. Const. Amend. XXI).

15. 494 U.S. at 890.

16. See, e.g., ANDREA MOORE-EMMETT, *GOD’S BROTHEL: THE EXTORTION OF SEX FOR SALVATION IN CONTEMPORARY MORMON AND CHRISTIAN FUNDAMENTALIST POLYGAMY AND THE STORIES OF 18 WOMEN WHO ESCAPED* (Pince-Nez Press 2004); CAROLYN JESSOP & LAURA PALMER, *ESCAPE* (Broadway Books 2007); IRENE SPENCER, *SHATTERED DREAMS: MY LIFE AS A*

the clergy abuse of children in multiple religious cultures, the prison gangs that use religion to organize their dangerous activities, or the deaths of children from treatable medical ailments in faith-healing homes.

The minority/majority dichotomy she has chosen to frame the issues makes it difficult for her to get to the facts, because the discrimination paradigm places the majority in the role of oppressor and the minority in the role of oppressed before any analysis has gone forth. The result is a misleading and misguided theory. If the minority is not permitted to act, from within this worldview, it is the result of structural and endemic bias, rather than sound public policy. Try to defend a law that draws distinctions according to race. It is virtually impossible, even though doctrinally possible. The same is true in Nussbaum's universe of religious liberty.

The difference, though, is profound. In the case of civil rights for minorities according to race, the laws are making sure that individuals are treated as well as everyone else.¹⁷ With respect to religious entities, "liberty" from the law means being treated better than everyone else. The religious landowner with RLUIPA in his pocket is in a far better position than his home-owning neighbor, while the African-American who wins the fair housing case has simply obtained the rights that all others have in the market.

To be sure, Nussbaum is not alone in her resort to the language of discrimination to explain religious liberty. United States' culture is saturated in talk of "equality" and its antithesis, "discrimination." The Platonic Form, "equality," has become an unassailable ideal, while the epithet "discrimination" has become an exclusively derogatory term that is invoked routinely to lambaste government or private actions, and carries the moral force of "wrong" or "immoral" or even "evil." The problem with these terms, though, is that when they become this important to a culture, they start to lose their explanatory force. Worse, they lead intelligent people to make empirical assumptions that cannot be supported by the facts. In the instance of religion, that means more harm is permitted than a civilized society can or should have to tolerate.

POLYGAMIST'S WIFE (Center Street 2007); CAROLE A. WESTERN, *INSIDE THE WORLD OF WARREN JEFFS: THE POWER IN POLYGAMY* (Wyndham House Publishing 2007).

17. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that anti-miscegenation laws banning interracial marriage violated the Due Process and Equal Protection clauses of the Fourteenth Amendment).