

BOOK REVIEW

Conscience Reexamined: Liberty, Equality, and the Legacy of Roger Williams

LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY. By Martha C. Nussbaum. Basic Books 2008. Pp. 406. \$28.95. ISBN: 978-0-465-05164-9.

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Introduction

In *Liberty of Conscience*, Martha Nussbaum offers a highly readable and accessible contribution to the ever-expanding literature on the First Amendment's Religion Clauses. As the title suggests, Nussbaum identifies liberty of conscience as a motivating value behind much of the American tradition of religious freedom. Nussbaum is not, of course, breaking new ground on this point: Noah Feldman, Michael McConnell, and others have made similar arguments in recent years.¹ Nor is she the first to note the divisions that exist between liberals and conservatives over the role of religion in American life, or to see the threats to religious freedom that exist in the contemporary political climate. While some of these threats come from the left in the form of "arrogant secularism" (p. 10), Nussbaum is primarily concerned with threats from the right in the form of "[a]n organized, highly funded, and widespread political movement [that] wants the values of a particular brand of conservative evangelical Christianity to

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1. See, e.g., Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 682 (2002); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416 (1990).

define the United States” (p. 4). But unlike some other commentators, Nussbaum does not argue for a compromise solution in which partisans on the left and right each give up some of what they want in the name of religious harmony.² Rather, she argues for an ideal solution in which all Americans vigilantly defend the noblest aspects of our constitutional tradition in the name of religious equality.

Indeed, the American tradition of religious equality arguably plays a more prominent role in Nussbaum’s book than does liberty of conscience *per se*. For in Nussbaum’s telling, the Religion Clauses are centrally about equality: “The Free Exercise Clause and the Establishment Clause are difficult to interpret and even more difficult to relate to one another. . . . But a central thread that connects them, directing some of their most important applications, is this idea of a government that does not play favorites” (p. 18). This is not to suggest that liberty of conscience does not have intrinsic value. On the contrary, “[t]he idea of equality has to be supplemented by an independent idea of the worth of liberty of conscience, since we might have been equal by all (equally) lacking religious liberty” (pp. 21–22). Yet as we will see, it is a particular conception of liberty of conscience that Nussbaum principally defends—a conception that is strongly influenced by the thought of the intellectual hero of Nussbaum’s book, Roger Williams. This twin focus on the Williams-inspired theory of conscience and on religious equality is one of the book’s greatest strengths: it highlights the intellectual legacy of a vastly under-appreciated thinker and provides a compelling, unifying interpretive theme for both of the Religion Clauses. However, the tightness of the book’s focus is also its principal weakness—for it downplays the importance of other strands of thought on the subject of conscience, and occasionally obscures other values that lay behind the Establishment Clause in particular.

I. Liberty of Conscience in the Intellectual History

Nussbaum writes that her book is “above all a work of philosophical analysis” (p. 29). Accordingly, she devotes substantial attention to the philosophical background of the American tradition of liberty of

2. *Cf.* NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT* 9 (2005) (“Is there a third way that could produce reconciliation between Republican and Democrat, red and blue, evangelicals and secularists? In the pages that follow, I propose a different approach to the question of religion and government, one that eschews the extremes of both the values evangelicals and the legal secularists. In place of their mutually exclusive visions, I suggest that we should permit and tolerate symbolic invocation of religious values and inclusive displays of religion while rigorously protecting the financial and organizational separation of religious institutions from institutions of government.”).

conscience. Whereas many legal scholars tend to focus on the ideas of the Framers themselves and their antecedents in the writings of John Locke, Nussbaum concentrates instead on the seventeenth-century writings of Roger Williams. “We should not focus only on the eighteenth-century arguments of the Framers, ignoring this prior, and distinctively American, tradition, quintessentially embodied in Williams’s *The Bloudy Tenent of Persecution* (1644)” (p. 36). Beginning with the idea of conscience itself, Nussbaum notes that Williams was strongly influenced by the Stoic idea “that all human beings are of equal worth in virtue of their inner capacity for moral striving and choice, and that all human beings, whoever and wherever they are, are owed respect” (p. 45). Williams understands the faculty of conscience in much the same way that the Stoics understood the faculty of moral striving—i.e., “as a general power of choice, the directing capacity of our lives” (p. 52). But Williams goes beyond the Stoics in adding emotional and imaginative elements to this capacity, and in emphasizing its susceptibility to harm. “Williams . . . sees that the conscience is not invulnerable: it can be damaged and crushed, and it needs space to unfold itself” (p. 53). Violation of a person’s liberty of conscience is a terrible wrong, evocatively described by Williams as “Soule rape” (p. 37).

Williams’s emphasis is on the religious elements of conscience, and on its role in leading the individual to acceptance of religious truth and hence to salvation (p. 52). However, Nussbaum argues that the instrumental goal of salvation is not what motivates Williams to defend liberty of conscience: “what he reveres is the committed search, the sincere quest for meaning” (p. 52). Consequently, Williams favors broad liberty of conscience for all who undertake that quest. Consider the broad protections for religious liberty contained in the charter Williams obtained for the colony of Rhode Island:

[N]oe [*sic*] person within sayd colonye . . . shall bee any wise molested, punished, disquieted, or call in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of sayd colony; but that all and everye person and persons may . . . freely and fully have and enjoye his and their owne judgments and consciences, in matters of religious commitments, . . . any lawe, statute, or clause . . . to the contrary hereof, in any wise, notwithstanding. (p. 49)

Nussbaum interprets this language to afford broad protection to acts of worship as well as expressions of opinion—even for those people who were religiously misguided, and even in those cases where a generally applicable law would otherwise stand in the way. Although “[t]he

disruptive behavior of some Quakers put his principles under severe strain,” Williams’s charter “nonetheless provided a model of religious fairness that the other colonies increasingly adopted, whether they were following Williams or simply learning his truths for themselves” (p. 51).

Nussbaum thus credits Williams with being a seminal thinker whose “radical ideas were centuries ahead of their time” (p. 74). She specifically credits him with anticipating many of the elements of John Locke’s thought, which in turn helped to shape the American constitutional tradition of religious liberty. Indeed, she directly compares the writings of Williams and Locke, and finds Williams to be the stronger advocate of religious liberty in several key respects. For example, whereas Locke appears to believe that “benign” establishments are compatible with religious liberty, Williams recognizes that establishments of any kind threaten both liberty and equality (p. 67). Williams also trumps Locke on the issue of religious accommodation: whereas Locke rejects the idea of conscientious exemptions from neutral laws of general applicability, Williams allows for such exemptions as long as they do not threaten public peace and safety (p. 67). Finally, whereas Locke argues that the realms of religion and politics should be kept completely separate, Williams understands that the two realms can “meet and overlap” in the form of shared moral discourse (p. 68). In sum, Williams evinces an appreciation for “the whole family of principles that form what [Nussbaum has] called the distinctive American approach to religious fairness”—namely, the principles of equality, respect for conscience, liberty, accommodation, and non-establishment (pp. 68–69).

Nussbaum’s discussion of Williams serves the laudable purpose of elevating him to a prominent place in the pantheon of American political theorists. However, there are points at which her claims about Williams’s influence seem a bit stretched—such as when she finds echoes of Williams in the writings of Immanuel Kant and John Rawls, even while admitting that it is unlikely that either of these moral and political philosophers ever read Williams’s work (pp. 56–58, 66–67). There are other points at which Nussbaum under-examines earlier arguments in favor of the dignity of conscience, and thus may overstate the novelty of some of Williams’s positions. Nussbaum devotes little attention, for example, to situating Williams’s ideas about conscience within the context of earlier ideas developed by Martin Luther, John Calvin, or other Protestant thinkers; she simply notes that “Williams came by his ideas because of his immersion in the Protestant tradition” (p. 58). But what is much more striking is Nussbaum’s near total inattention to early defenses of conscience that appear in the Roman Catholic tradition. Indeed, while Nussbaum finds support for the idea of liberty of conscience in Greek and Roman Stoicism,

modern human rights theory, and, above all, Protestantism, she appears to believe that Catholicism is a relative latecomer to the discussion: “By now, moreover, religious traditions that once made less of conscience than did the Protestant tradition have become more focused on the dignity of conscience: certainly contemporary Catholic doctrine lies closer to Protestantism in this regard than do some earlier Catholic doctrines” (p. 58). This characterization of Catholicism’s role in the intellectual history is seriously incomplete.

Elsewhere in her book, Nussbaum expresses surprise that leading public intellectuals, well trained in philosophy, should appear to have little familiarity with Thomas Aquinas and his role in the Catholic tradition (p. 278). The same sense of surprise follows from Nussbaum’s failure to engage with Thomas’s extensive treatment of the idea of conscience and his insistence upon its primacy. For it was Thomas who undertook the first truly comprehensive discussion of conscience in Western thought, centuries before Roger Williams began writing on the subject.³ Like Williams, Thomas offers an account of conscience that is remarkably egalitarian—especially given the historical, political, and religious context in which it was written. Thomas argues, for instance, that the fundamental moral principles that govern human life are innately and universally accessible to all people, regardless of a person’s particular religious beliefs.⁴ Conscience itself is the act of applying this innate knowledge of moral principles to concrete moral questions, and Thomas argues that every judgment of conscience is morally binding upon the actor.⁵ This conclusion holds even when conscience is in error on matters of religious truth. Thus, Thomas maintains that if a person’s conscience tells her that belief in Christ is evil, then that person would sin by adopting the Christian faith over her conscientious objections.⁶ Similarly, Thomas insists that the children of non-Christians should not be baptized without the consent of their parents, and that those who never embraced the Christian faith should not be

3. Thomas wrote his principal works on conscience between the years 1257 and 1274. See generally ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I, Q. 79, at 396–408; Pt. I–II, Q. 19, at 671–80 (Fathers of the English Dominican Province trans., Benzinger Bros. 1948) [hereinafter *SUMMA THEOLOGICA*]; ST. THOMAS AQUINAS, *DEBATED QUESTIONS ON TRUTH*, translated in TIMOTHY C. POTTS, *CONSCIENCE IN MEDIEVAL PHILOSOPHY* 122, 122–36 (Timothy C. Potts trans., Cambridge Univ. Press 1980) [hereinafter *DEBATED QUESTIONS*].

4. These moral principles are accessible through the disposition of *synderesis*. For further discussion and analysis of *synderesis* in Thomas’s thought, see generally POTTS, *supra* note 3; ERIC D’ARCY, *CONSCIENCE AND ITS RIGHT TO FREEDOM* (1961).

5. See *DEBATED QUESTIONS*, *supra* note 3, at 135–36; *SUMMA THEOLOGICA*, *supra* note 3, Pt. I–II, Q. 19, Art. 5, at 674–75.

6. *SUMMA THEOLOGICA*, *supra* note 3, Part I–II, Q. 19, Art. 5, at 675.

compelled to do so.⁷ Hence, when a twentieth-century Catholic thinker like Jacques Maritain endorses broad freedom of conscience, he is not simply catching up to Roger Williams and the Protestant tradition (pp. 58, 276); he is rather harkening back to Thomas Aquinas within his own Catholic tradition.⁸

To be sure, there are significant limitations in Thomas's account of freedom of conscience.⁹ To be equally sure, the Catholic Church as a whole was not quick to embrace the principles of religious liberty that are arguably implicit in Thomas's teaching. The Church long held that "error has no rights," and did not promulgate its Declaration on Religious Freedom until Vatican II.¹⁰ And in fairness to Nussbaum, it should be noted that her concern is with the *American* tradition of liberty of conscience—and I do not claim that Thomas had a direct influence on Williams, Locke, or the Framers. But at the same time, it should also be noted that Nussbaum does not hold back from crediting Williams with making almost unique contributions to the concept of liberty of conscience and with anticipating the work of numerous writers upon whom he had no direct influence. Thomas's writing indicates that Williams's understanding of conscience may not have been quite so singular, and that Thomas may have anticipated Williams in much the same way that Williams anticipated others.

II. Liberty of Conscience and Liberty of Religion

Nussbaum's own debt to Williams is reflected in her theory of what the right to liberty of conscience should protect. Above all, Nussbaum argues that liberty of conscience should protect liberty of religious belief and practice. She advocates for a return to the pre-*Employment Division v.*

7. *Id.* Pt. II–II, Q. 10, Art. 12, at 1216–18; Pt. II–II, Q. 10, Art. 8, at 1212–13.

8. Nussbaum does note that Maritain found support for his ideas "in the (Catholic branch of the) natural law tradition" (p. 53). She does not, however, elaborate on the details of this tradition or Thomas's place therein.

9. For instance, while Thomas approves of religious toleration for non-Christians where some good may be achieved or some evil avoided, he does not explicitly argue for a right to toleration. See *SUMMA THEOLOGICA*, *supra* note 3, Pt. II–II, Q. 10, Art. 11, at 1216. Cf. D'ARCY, *supra* note 4, at 190–237 (arguing that a right to religious free exercise is implicit in Thomas's theory).

10. See Pope Paul VI, *Dignitatis Humanae* (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vatii_decl_19651207_dignitatishumanae_en.html (setting forth "the right of the person and of communities to social and civil freedom in matters religious," and holding that "the freedom of man is to be respected as far as possible and is not to be curtailed except when and insofar as necessary").

Smith standard for evaluating Free Exercise Clause claims,¹¹ under which some accommodations for religiously-motivated conduct are constitutionally required and many others are constitutionally permitted (pp. 173–74). While Nussbaum concedes that this standard cannot unequivocally be said to reflect the original understanding of the Framers, she argues that it is nevertheless defensible both normatively and historically.

Nussbaum is consistent and truly vigorous in her defense of all religious faiths—be they theistic or non-theistic—and expresses special solicitude for minority religions that the majority may consider unfamiliar, dangerous, or subversive. She devotes the longest chapter of her book to a critical analysis of periods of persecution against three religions that have struck Americans as being particularly dangerous and subversive: Mormonism, the Jehovah’s Witnesses tradition, and Roman Catholicism. She focuses on these three cases for a number of reasons—not the least of which being that “[t]hey prompt us to look around us today and ask whether there may not be other groups in our society who are being ill treated in much the same way that the Mormons, Jehovah’s Witnesses, and Roman Catholics were treated between 1850 and 1945” (p. 178). When Nussbaum refers to such “other groups,” one might think that she has in mind the experience of Muslims in the wake of 9/11. But Nussbaum notes (with cautious optimism) that “despite some highly regrettable individual instances of assault against peaceful Muslims, and despite the undoubted existence of religion-based profiling in airports and other places of surveillance, there has been no massive public outcry against U.S. citizens, residents and visitors who are Muslims” (p. 346). Indeed, she finds it both “striking and reassuring” that there has been so little First Amendment litigation over the religious rights of Muslims in America (p. 347). Much of the credit for this apparent lack of religiously based suspicion goes to the First Amendment tradition itself: “A tradition that regards religious conscience as precious and worthy of respect, and worthy of respect even when it enjoins conduct that refuses assimilation” (p. 347).

Yet religious conscience is not the only form of conscience that is worthy of respect and legal protection. This point is sometimes blurred in Nussbaum’s book, as it is in the title (for “Liberty of Conscience” in its fullest sense involves much more than a “Tradition of Religious Equality”). Part of the explanation for Nussbaum’s focus on religious conscience is to

11. See *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not require exemptions for religiously motivated conduct, and that the First Amendment is not offended if prohibiting the free exercise of religion is not the purpose but merely the incidental effect of an otherwise valid law).

be found in the history and text of the First Amendment. As Nussbaum notes, “[u]nder our Constitution, religion is special. The framers rejected wording that spoke in general of ‘rights of conscience’ and chose wording that singled out religion for free exercise protection” (p. 164). Another part of the explanation for Nussbaum’s focus is to be found in the writings of Roger Williams. In Williams’s thought, conscience is primarily about searching for religious or quasi-religious truth: it is the quest for “the ultimate meaning of life,” and it “is worthy of respect whether the person is using it well or badly” (pp. 168–69). Nussbaum is strongly influenced by Williams’s account of conscience, and believes that it helps us to “make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy” (p. 169).

To her credit, Nussbaum acknowledges that non-religious claims of conscience can and do arise. She also recognizes that those who seek exemptions from certain laws for weighty but secular reasons may be receiving unfair treatment “when they are denied exemptions just because their reasons are not religious in nature” (p. 164). And she also argues that legislative accommodations should be made for some non-religious claims of conscience, at least insofar as they resemble the searches for ultimate truth that are of concern to Williams: “From the respect we have for the person’s conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life” (p. 169).

But what about claims of conscience that are not motivated by a search for ultimate meaning? It is clear that Nussbaum wants to extend a certain measure of respect to “skeptics and anti-metaphysical dogmatists” (p. 169), but it is less clear how far she is willing to go in extending protection to claims that do not fit neatly within the Williams paradigm. What, for example, of the claims raised by people who understand conscience in less grandiose terms than Williams, but who feel bound by its judgments nonetheless—e.g., those who would define conscience simply as “a sincere conviction about what is morally required or forbidden”?¹² Are such claims also entitled to protection, or are they too far removed from religion and the Williams-inspired theory of conscience? Nussbaum seems to be reluctant to extend equal protection to all moral judgments about right and wrong, in part because such a broad liberty right could be difficult to administer. She certainly does not appear ready to give unqualified endorsement to the view that privileging religious claims of conscience over non-religious claims “is normatively unjustified and unattractive in its

12. See Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 328 (2005).

practical implications”¹³—for she admits to being swayed by “the pragmatic and historical arguments for giving religion a special place” (p. 173). This is, of course, a reasonable and defensible position to take. Nevertheless, it may not satisfy those who would like to see Nussbaum carry her arguments about conscientious equality to their fullest conclusions.

III. Liberty of Conscience or Equality of Religion?

A final point about Nussbaum’s focus on equality should also be made. As noted above, Nussbaum argues that religious equality was the driving force behind both Religion Clauses. She is particularly emphatic about the nexus between a commitment to equality and the Establishment Clause: “For Madison . . . and for most of his contemporaries, the issue was one of equality: establishments, however benign, create ranks and orders of citizens, defining the status of some as unequal to that of others” (p. 75). This argument about the connection between the Establishment Clause and the value of religious equality is buttressed by Nussbaum’s analyses of Madison’s *Memorial and Remonstrance* and modern Supreme Court opinions. But what is the connection between the Establishment Clause and the value of liberty of conscience itself?

This is a question that is obscured somewhat by Nussbaum’s consistent focus on equality. That is not to say that Nussbaum ignores the connection between the Establishment Clause and liberty of conscience entirely; it is more a matter of emphasis. In this respect, Nussbaum’s treatment of the origins of the Establishment Clause stands in contrast with Noah Feldman’s recent writings on the subject. For Feldman emphasizes that “[i]n the time between the proposal of the Constitution and the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience.”¹⁴ In Feldman’s account, establishments violated liberty of conscience because “an established religion would, by definition, compel citizens to contribute to its support.”¹⁵ Feldman contends that the primary value behind the Establishment Clause was thus not equality of religion but liberty of conscience—notwithstanding the Supreme Court’s “transformation” of the clause through its twentieth-century

13. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

14. Feldman, *The Intellectual Origins of the Establishment Clause*, *supra* note 1, at 398.

15. FELDMAN, *supra* note 2, at 48.

jurisprudence.¹⁶ As compelling as Nussbaum's interpretation of the legal and intellectual purpose of the Establishment Clause surely is, it would have been stronger still had it engaged with Feldman's contrasting interpretation more directly.¹⁷

Overall, it is sometimes easy to forget that the title of Nussbaum's book is *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, rather than something like *Religious Equality: In Defense of America's Tradition of Liberty of Conscience*. For her primary concern often appears to be religious equality, with liberty of conscience playing only a supplementary role. This is certainly the case in her discussion of the purpose and proper interpretation of the Establishment Clause: the clause is mainly about preserving equality by preventing hierarchies of citizenship on the basis of religion; protecting liberty of conscience is only a subsidiary concern. The same emphasis on equality is evident in her discussion of what liberty of conscience should protect under the Free Exercise Clause: it should protect all forms of religious belief and practice equally, but should protect non-religious claims only to the extent they resemble religious searches for "ultimate meaning." Even this level of protection for non-religious claims is defended more on the basis of fairness and equality than on the basis of the fundamental importance of conscience in all its manifestations (pp. 173–74). Once again, religious equality dominates over liberty of conscience *per se*.

None of this is to argue that religious equality is not a legally or normatively attractive theory for understanding the Religion Clauses—to the contrary, Nussbaum makes a strong case for her analytical framework. But just as Nussbaum's focus on Roger Williams leads her to understate the importance of other thinkers in the intellectual tradition, so too does her focus on religious equality occasionally lead her to under-examine the importance of liberty of conscience as an independent, co-equal value. The result is a work that examines certain aspects of the American constitutional tradition with great clarity and insight, but which may leave

16. See Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, *supra* note 1.

17. Although Nussbaum does not engage directly with Feldman's arguments about the Establishment Clause's original purpose, she does assay some of the arguments that he and others have made about its contemporary interpretation. For example, Feldman argues that the Supreme Court should abandon the "secular purpose" and "endorsement" tests in Free Exercise Clause cases, and should instead adopt a "no coercion and no money" standard. See FELDMAN, *supra* note 2, at 237. Nussbaum does not reference Feldman directly on this point, but she does argue that the coercion test "is not supported by history or precedent" (p. 268) and that to categorically deny equal funding to religious institutions may constitute "an illicit form of discrimination against religion" (p. 231).

the reader wishing that the lens of exploration had been somewhat wider than it was.

Conclusion

Nussbaum concludes her book with some reflections on our constitutional past and some observations about our constitutional future. Once again, the twin focus on equality and on the legacy of Roger Williams lies at the heart of her discussion. Looking back, she laments the periods of panic against Mormons, Jehovah's Witnesses, Catholics, and other religious minorities whose equal rights she has championed throughout her book. Yet she also notes that these panics produced some positive consequences: "Americans achieved, gradually, a new depth of insight into their own founding document and its principles, articulating ever more precisely an analytic framework, based on its central ideas, that could be applied to the bewildering range of cases that the growing size and reach of government brought before the courts" (p. 357). Looking forward, she urges us not to become complacent about our success in the ongoing struggle for religious equality. Her hope is that all Americans will commit themselves to building an "overlapping consensus"—one inspired by Williams as much as by Rawls—in which we recognize that "the space [we] share with others is a space of diverse opinions about ultimate matters, and [we] respect the springs of conscience in [our] fellow citizens that lead them to diverse conclusions by diverse routes, even when [we] find these routes and conclusions profoundly mistaken" (p. 362). This will be no easy task—but Nussbaum's book is a valuable contribution to the effort.

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