Liberty of Conscience: InDefense ofAmerica’s Tradition of ReligiousEquality

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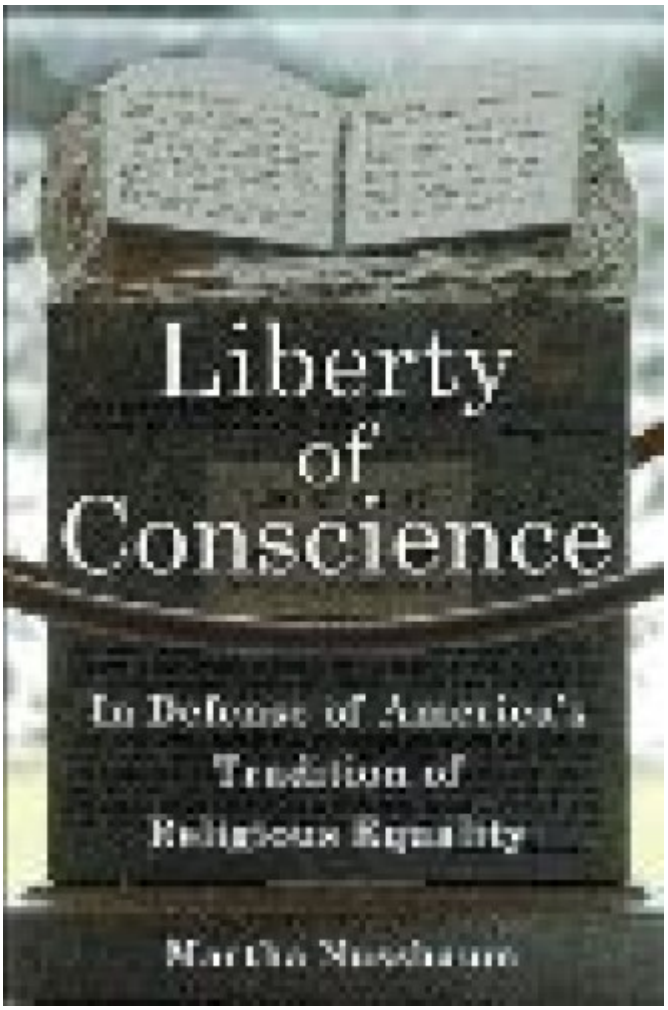

Liberty of Conscience: In Defense of America's Tradition of Religious Equality

Martha C. Nussbaum

Basic Books

My university had long used students' Social Security numbers as a means of identification on class attendance sheets, financial aid forms and campus ID cards. It was a convenient practice. Each number was guaranteed to be unique, and the number both pre- and postdated the student's time on campus—a useful feature for the alumni office in keeping track of students after graduation. Several years ago, in admittedly more innocent times, professors would actually post grades on their office doors using Social Security numbers rather than names, thus "protecting" the students' identity.

Clearly, times had changed. In an age of identity theft and heightened federal protections of private information, the university had to find another means of identifying students. A simple plan was hatched: upon each student's admission, a computer would randomly generate and assign to the student a unique nine-digit number. It, and not the Social Security number, would stay with the student during campus years and beyond. Problem solved.

Or so we thought. Soon after the new program was initiated, university officials began to receive complaints from students. The concern, oddly enough, was religious. It seems that several Christian students had received ID numbers containing the sequence "666" and felt that they could not go through their college career with the "mark of the devil" as a personal identifier. A student from China complained that the abundance of 4s in her ID number signaled bad fortune in Confucian tradition. She, too, demanded a new number on religious grounds. Unwittingly, the university had created its own constitutional crisis.

The registrar initially balked at the student requests: we are not discriminating against any student by using randomly generated numbers; all students are being treated equally under a sensible and neutral policy, and we should not be compelled to allow people to choose their own "lucky numbers." This isn't Vegas.

The university attorney disagreed. A public institution must take reasonable steps to protect religious practice if, through its actions, a burden has been placed on the free exercise of religion. Equality in applying a policy is not enough; religious conscience must be accommodated, even if it means granting certain special benefits to some students and not others. Demonic numbers had to go, at least for the students who requested a change on religious grounds.

The fact that these very real legal issues could be generated from a seemingly innocuous change in bureaucratic policy underlines the complexity of current church-state relations in the U.S. A concept that seems so simple and intuitive—as a nation, we guarantee religious liberty—is anything but simple in practice. This is the central theme of Martha Nussbaum's fascinating and timely book *Liberty of Conscience*. What exactly does it mean to respect, and even to protect, religious freedoms? The answer has rarely been clear, even to experts. By some estimates, over 10 percent of the cases that have come before the U.S. Supreme Court over the past 50 years have had something to do with religious freedoms, and yet no legal consensus has emerged regarding how best to interpret the Constitution's religion clause. Just the opposite: we have a host of seemingly contradictory legal precedents in place under current constitutional law, and deep divisions persist in the ways that everyday Americans conceive of religious protections. The disagreement between the registrar and the attorney at my university is a case in point.

Nussbaum—a professor with joint appointments in law, philosophy and divinity at the University of Chicago—is uniquely qualified to guide the reader through the sometimes dense thicket of legal history and constitutional debate. She reveals that the challenges faced by my university are part of a larger national division—one that has existed for decades and that has yet to be bridged by legal experts or by the courts.

Take, for example, *Employment Division v. Smith*, a 1990 Supreme Court case that set off a widespread national outcry from the defenders of religious freedom. As Nussbaum explains, the case involved the question of whether the state of Oregon was within its rights to fire a Native American employee who had been found to be using peyote off the job as part of a religious ritual. In writing for the majority, Justice Antonin Scalia found that the state, in general, had a valid reason to fire employees found to be in violation of state drug laws and that it was simply applying its sound policies consistently in firing Alfred Smith, a full-blood member of the Klamath tribe, from his state job as an alcohol counselor. No special accommodations for religious practice had to be provided. The law is supreme, he cautioned, and "any society adopting a system [of religious accommodation] will be courting anarchy."

Despite Scalia's dramatic claims, Nussbaum shows, the Supreme Court has often adopted just such an allegedly anarchic stance. An example is *Sherbert v. Verner*, a 1963 case involving a Seventh-day Adventist who lost her job at a mill by refusing to

work Saturdays (her Sabbath) and who subsequently was denied unemployment benefits by the state of South Carolina. By refusing to work on Saturdays, the state argued, Adell Sherbert had “declined available suitable work.” Here the message sent by the court was very different from that put forth in the Smith case. Justice William Brennan, writing for the majority, warned that the religious requirements of a minority religion can easily be “trod upon” by the practices of the majority unless the nation offers specific protections. Brennan argued that in cases in which the state places a substantial burden on a person’s free exercise of religion, religious practice must be accommodated—even if it means offering some individuals special advantages—unless there exists “a compelling state interest” for not doing so. Sherbert was granted her unemployment benefits.

The reason we should care about the Smith and Sherbert cases is not merely that they represent two sides of a constitutional debate that is older than the nation itself. (Nussbaum does a superb job of tracing this history through figures such as Roger Williams and James Madison.) It is not merely that both precedents have been left to stand simultaneously by the Supreme Court, spurring legal confusion to this day. (If my university’s attorney had inclined toward the precedent in Smith rather than the one in Sherbert, there would be a number of students walking around my campus today with the mark of the devil on their ID cards.) No, the reason we should care about the Smith and Sherbert cases is that they represent the two basic sides in an increasingly acrimonious battle between fundamental political ideologies. As a nation, should we continue to make the sacrifices required to protect the freedoms of the minority, or should we yield, out of convenience or contempt, to the interests of the majority?

“People love homogeneity and are startled by difference,” Nussbaum tells us. In a range of contemporary contexts—from the debate over gay marriage to disagreements over whether to allow Muslim girls to wear head scarves when there are unsympathetic school dress codes—Nussbaum illustrates that “people are very fond of establishing orthodoxies that favor themselves.” It is also true, Nussbaum warns, that religious protections are at greatest risk in time of national fear. Wars, economic downturns and panic about the future all create a context in which Americans tend to diverge “from the fundamental constitutional commitment to equal citizenship and equal liberty in religious matters.”

Put simply, it’s easier to forgo religious protections than to defend them, especially when seemingly more important issues are at hand. It’s easier to create a society

that yields to the wishes of the majority rather than one that defends the interests of the minority. It’s easier to refuse to accommodate Sherbert’s quirky work preferences or the requests of students troubled by their ID numbers. It’s easier and it’s tempting, but is it right?

The 17th-century British theologian Roger Williams challenged the new American colonies to find and to learn to inhabit a shared moral space, and to do so without turning the nation into a sectarian enterprise that privileges some views and some people over others. Three centuries later, this is a lesson we are still struggling to learn.