

## Separation Anxiety

*Can the American approach to religion work outside the West?*

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**LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF  
RELIGIOUS EQUALITY** BY MARTHA C. NUSSBAUM • BASIC BOOKS • 2008 •  
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“S

omething there is that doesn't love a wall, That wants it down,” wrote Robert Frost. Martha Nussbaum doesn't cite Frost directly, but the spirit of that poem hovers over her new book, even if what she has in mind is less Frost's rural New England than Thomas Jefferson and the conventional shibboleths of East Coast liberalism. In this powerfully argued and often moving book, Nussbaum, a distinguished professor of philosophy at the University of Chicago, takes a deftly wielded sledgehammer to the “wall of separation” between church and the state much beloved of liberals—not, as some would have it, to allow a religious takeover of the public sphere, but to make for a neutral public sphere, safe for religious and non-religious citizens, of all shapes and sizes. Informed by religious teachings and traditions, she argues, this approach would in turn make for a richer liberalism.

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I live in Jerusalem, where we are surrounded, and often defined, by walls of all kinds. Stepping out of our apartment building in the Abu Tor neighborhood, at one end of the block you can see the walls of the Old City, and at the other the separation wall between Israel and the Palestinian territories and, off in the distance, the Judean desert. The Old City walls project a stately image of an ordered world; the separation wall, a much darker image of a bitter conflict in which religious and national identities are hopelessly intertwined. Living here has taught me that the world needs America, because the world needs hope, including the hope that religious-national conflict is not the last word in human experience. This makes Nussbaum's book an important read, but a poignant one too. Can all people—wherever they are and whatever they have inherited—live by the conviction that all men are created equal? She thinks so. I hope so.

**A**s her title makes clear, in Nussbaum's reading, the American constitutional tradition, thought through to its deepest intentions and most enduring foundations, is concerned above all with equality—with enabling all citizens to cultivate themselves and act on their moral choices in keeping with the dictates of their consciences, by the lights of their various religious or non-religious traditions, and in peaceful concert with others. She repeatedly argues, in a manner at once philosophical analysis and a lawyer's brief (she does, after all, have a joint appointment at Chicago's law school), that the idea of "separation" is, true to its name, a barrier to genuine understanding of the Religion Clauses in the Constitution, an understanding better captured by equality and the religious neutrality that term implies.

Nussbaum wages a dual polemic. On the one side, she departs from conservatives like Antonin Scalia who are willing to countenance varying forms of government engagement with specific, and usually majority, religion in the public square. On the other, she takes on liberals who dismiss religion as a tissue of nonsense, a stance which she believes unnecessarily denigrates vast masses of the citizenry and shortsightedly dispenses with the positive resources religion offers for individual moral cultivation—and thus for democratic citizenship.

Nussbaum walks through the history of the First Amendment's Religion Clauses, addressing specific themes in the context of the times in which they arose as matters of discussion and controversy. The hero of her narrative is Roger Williams, best known as the founder of Rhode Island and, since his scholarly rediscovery in the 1950s, hailed for the proposition that disestablishment benefits religion and keeps it out of the clutches of the state. But, following other more recent scholars such as Clark Gilpin and Edwin Gaustad, and drawing on her own intensive reading of the primary sources, Nussbaum goes further still,

arguing that Williams' defense of religious liberty—liberty of church from state and individual from church—was not merely a prophylactic against majoritarian persecution. Rather, it was grounded in a deep conviction about the “holy Light” of conscience: a universal, God-given faculty of freedom of thought and decision shared by all people, no matter their specific religion. God wants His creatures to choose well, which also entails choosing for themselves in freedom.

Nussbaum has written elsewhere, among other things, substantial and important works on Stoicism and its resonances for contemporary moral life, and she sees a strong Stoic influence in Williams and other early American thinkers, Christians and Deists alike. While she is undoubtedly right on that score, at the same time Williams was deeply Protestant—often in ways deeper than she acknowledges—ways that have significant implications for the ability of his ideas to travel.

Alongside her hero Williams, in a supporting—and, at times, troublesome—role is the better-known and vastly more influential John Locke. “Locke diverges from Williams,” she finds, “by explicitly insisting that once a generally applicable law has been made by an impartial principle in a sphere the state regulates, people may have no dispensation from that law for religious reasons. If their conscience leads them to disobey, they will just have to pay the price and go to jail.” Williams, by contrast, maintains the inviolability of conscience—and its God-given right to express itself in action. These two positions came together at the founding of the Republic, and the tension between them plays itself out in constitutional jurisprudence down to the present.

Indeed, when it came to fashioning a public sphere at the Republic's founding, James Madison, in his 1785 document “Memorial and Remonstrance Against Religious Assessments,” channeled Williams in his reading of the “self-evident” truth of equality as expressed in the Declaration of Independence: “If ‘all men are by nature equally free and independent’...Above all are they to be considered as retaining an ‘equal title to the free exercise of Religion according to the dictates of conscience.’” Thus the two Religion Clauses of the Bill of Rights together establish the equality of citizens. The Establishment Clause prevents government from unequally distributing burdens and benefits on a religious basis, while the Free Exercise Clause secures the protection of individual conscience and its expression in action.

**I**n Nussbaum's telling, it was not until the twentieth century that the constitutional tradition of political and civil liberties came to a deeper self-understanding: that protection of individual conscience is at the very heart of the Religion Clauses' protection of minorities. And, we might add, of the public sphere. Her account of the postwar era, a crucial period here as elsewhere in

Constitutional law, begins with the 1947 decision *Everson v. Board of Education*, in which Justice Hugo Black decided that a tax subsidizing student transportation to Catholic schools, along with other non-profit schools, did not violate the Establishment Clause. The decision, in Nussbaum's view rightly decided, nonetheless made a crucial and problematic move, invoking Jeffersonian "separation" while deciding the case on essentially neutrality/fairness-cum-freedom of choice grounds. Right result, wrong reason. Why? "The rhetoric of 'separation,'" Nussbaum writes, "applied without a deeper theoretical analysis, wrongly suggests that the goal of the Establishment Clause is to purify the public square of all reference to religion, in effect establishing secularism as the theory of government."

This notion of "separation" came to full and problematic doctrinal flower in the much-cited 1971 case *Lemon v. Kurtzman*, in which the Supreme Court enunciated a famous "three-pronged" test, by which government action concerning religion "must have a secular legislative purpose"; its principal effect must be one that "neither advances nor inhibits religion," and it "must not foster an excessive entanglement" with religion, a formulation which was taken by many to inscribe "separation" into the very mechanics of constitutional adjudication.

Nussbaum writes that this sense of "separation," which has come to define most liberals' position on religion in the public sphere, muddies the equality principle and creates unnecessarily contorted questions of government involvement in the activities of religious people and organizations, in an era in which government is ubiquitous in citizens' lives. Moreover, liberals' reliance on the language of separation enables them to overlook the rich and complex religious traditions themselves; as a result they fail to see that genuinely religious people may themselves be offended by Creationism and by a Pledge of Allegiance that includes the words "under God."

A better version of separation, she writes, is the "endorsement test" put forth by Justice Sandra Day O'Connor in 1984's *Lynch v. Donnelly*. It holds that the test for a government action is whether it sends "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." This test, Nussbaum writes, makes better sense of "separation" by highlighting that a constitutionally illegitimate engagement with religion is one which "offends against other constitutional values, above all liberty and equality." O'Connor's test thus makes it possible for government to engage when necessary and desirable with religion while maintaining the core idea of equality.

"Endorsement" is nonetheless a subtle idea, and it has—in more conservative jurisprudence as enunciated by, among others, Scalia—shaded off into the

idea of “noncoercion,” which holds that government engagement with religion is bad when coercive (e.g., tax money used for religious schools) and fine when ostensibly non-coercive (e.g., religious displays on public property). Nussbaum points out, however, that such a reading simply collapses the Establishment Clause into the Free Exercise Clause, and it does nothing to prevent preferential treatment for one (almost invariably the majority’s) religion.

To that end, she devotes great space to the saga of the Religious Freedom Restoration Act. In the 1990 case, *Employment Division v. Smith* (regarding the use of peyote in religious ceremonies), the Court reversed several decades of precedent and ruled that the First Amendment protects belief and not conduct: Thus if a law is not aimed at suppressing any one religion, it can and must be applied even if it disadvantages religious minorities. In response, in 1993 an overwhelming majority of Congress passed the Religious Freedom Restoration Act, which the Court declared unconstitutional in 1997. Since then, versions of the Act have been enacted into state laws, and Congress has enacted more narrowly tailored versions of the law in those areas where it has greater regulatory power, such as interstate commerce or state uses of federal funds.

Scalia, the author of the *Smith* opinion, would indeed seem to have a point, the same one made by Locke: If a law is fair and reasonable, why should religious people get a special break and be singled out for greater protection? Why shouldn’t an atheist claim some exemption? Indeed, in today’s America atheists look exactly like the kind of persecuted minority Williams had in mind. Nussbaum grants the force of these arguments and the weakness of many of the claims adduced to refute them. She returns to Williams for an answer:

For Williams, the faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly...It is the faculty, not its goal, that is the basis of political respect...From the respect we have for the persons’ conscience, the 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, except when that search violates the rights of others or comes up against some compelling state interest. Political respect is addressed, in the first instance, to a capability of people, one that demands both development and exercise; it is not addressed, except derivatively, to the functions such a faculty performs.

The word “capability” points to a major theme in much of Nussbaum’s other work, one of great—if, oddly, unstated—relevance to her discussion here. In her scholarly and practical work on development, especially in India and with the economist Amartya Sen, Nussbaum has developed what she calls “the capabili-

ties approach,” by which the primary goal of political liberalism is to enable individuals to develop their own capabilities. Indeed, in one of her earlier books, *Women and Human Development*, the “capabilities approach” was marshaled in an attack on Scalia’s reasoning in *Smith*.

Nussbaum’s approach, in turn, yields a vision of the public sphere which animates her entire project. It is a public sphere which enables the employment of public reason, in which all people, religious and non-religious, may bring their full selves to bear. In Nussbaum’s public sphere, “They recognize...that the space they share with others is a space of diverse opinions about ultimate matters, and they respect the springs of conscience in their fellow citizens that lead them to diverse conclusions by diverse routes, even when they find these routes and these conclusions profoundly mistaken.”

**W**hat does this mean for current debates over religion? Nussbaum posits that including the words “under God” in the Pledge of Allegiance does violence not only to atheists but to religious people as well, who may see this as conflating God with the state—a possibility that the language of “separation” simply does not capture. She opposes the forced teaching of Creationism (or Intelligent Design), since it simply cannot be called science; yet, she simultaneously argues that proponents of evolution may themselves be deeply religious, and that atheist scientists ought to stop treating all religious people as idiots.

Reading Nussbaum’s book in Jerusalem, I found myself asking over and over, “Can this travel?” This celebration of conscience, this determined reasonableness and commitment to liberal fairness—is it any kind of model for the rest of the world? This question has assumed greater significance in the light of democratization’s brief—and thus far tragic—appearance as one policy answer to the religious wars currently wracking the world. In a globalized world, it is a question crucial for the liberal tradition’s own self-understanding.

There is something deep, undeniably and structurally Protestant in Nussbaum’s ideas, certainly with regards to the centrality of conscience and its complex relation to religious truth. This is not meant as criticism as such, nor is it terribly surprising given Protestantism’s centrality not only to America but to much of that welter of forces we call modernity. (Nussbaum is herself Jewish and draws regularly and meaningfully on her own religious life and experiences). The philosopher Charles Taylor has pointed to the crucially “neo-Augustinian” turn of modern thought, in which the truth is to be found deep within the inner self. Yet if for Augustine the neo-Platonist God lay at the foundation, for modern philosophers at the base is the human person itself,

as created by nature or by God. This inward turn towards the truth—and its corresponding claim that truth demands self-expression—played no small role in the development of Romanticism, Modernism, and other movements. Yet to this day the celebration of conscience as such bears enough of the traces of its religious origin to remind us that it is anchored in very specific traditions, and in an assertion of a very definite religious truth, of the unique, indeed God-given, nature of the inner self. Williams is, in this sense, very much a part of the neo-Augustinian turn.

Is this bad? No. But it points to the limits and very culturally grounded nature of these ideas. And this seems of a piece with Nussbaum's (no doubt intentional) skirting of the metaphysical apparatus of religion. One asks repeatedly, where, if anywhere, is metaphysics in all of this? Where is the transcendent order which

animates religious belief and life, and which underpins so many political doctrines, including liberalism itself?

In a deep sense, all Americans are Protestants. Or, put a little less dramatically, all Americans partake of Protestantism's deep roots within our culture: a sense of religion as a matter of conscience; of salvation as something that

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does not come by virtue of membership; the separation of temporal from clerical power; and, where religion is concerned, an essentially neutral public sphere. Thus American Jews were able to win acceptance by making their religious affiliation less of a national identity and more of a creed. And in some ways a crucial question facing American Muslims today is what sort of syntheses they will strike between their inherited traditions and the deeply Protestant thought structures of American life.

There may be a good argument for the whole world to become Protestants in this way, one way or another. Twentieth-century America's leading Catholic thinker, John Courtney Murray, argued that we should think of the Constitution's Religion Clauses as "the Articles of Peace." By this reading, we do not check our religious beliefs at the door to the public square; rather we bring to that square a supreme religious value—peace—which in turn makes tolerance a religious obligation. As Murray wrote in his 1954 essay, "The Problem of Pluralism in America": "To speak of expediency here is altogether to misunderstand the moral nature of the community and its collective moral obligation toward its own common good. The origins of our fundamental law are in moral principle; the obligations it imposes are moral obligations, binding in conscience. One may

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not, without moral fault, act against these articles of peace.” Murray’s conception still leaves open the possibility of corporate truth in the familiar pre-modern manner, but it subordinates it to a higher, equally corporate, value.

One does not necessarily have to choose between Murray’s very attractive conception of peace and Nussbaum’s very attractive conception of equality to maintain a decent social and political order, one which guarantees negative freedom from religious inequality and positive freedom to develop one’s own religious (or non-religious) life. What I am less sure of is whether either of those conceptions can long endure entirely unmoored from their original anchorage in some larger, call it metaphysical, truth with a capital T. Can these ideas which ultimately are grounded in basic conceptions of the human person, of society, and of God take root in societies—in the Middle East and Asia—with very different basic conceptions of themselves engaging with modernity in all its varied forms? The twentieth century offered just the latest in a series of gloomy historical lessons in just how murderous Truth-wielders can be. The question that remains for liberals, and which Nussbaum has yet fully to answer, is whether the truth-wielders can, in the end, be met and bettered without some other Truths of our own. ■