

# Is Religious Liberty under Threat? An Introduction to the Symposium

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## Abstract

This introduction surveys the contributions to this issue, which were originally delivered at Oxford University in 2018. By exploring the interconnections and shared motifs, this article suggests that the answer to this symposium is a tentative ‘yes’, but that the sources of those threats arise from the background culture within which these papers are situated.

## Keywords

religious liberty, establishment, liberalism, American Constitution

The articles presented in this issue were first delivered at a 2018 conference with the same name, which was cosponsored by the McDonald Centre at Oxford University and the Center for the Study of Law and Religion at Emory University. Because the conference was a shared venture by the two institutions, it embraced its Anglophone orientation, narrowing its focus to questions about religious liberty within both the United States and the United Kingdom. Yet while the title of the symposium is itself instructive, the poster advertising the conference was perhaps more telling for the discussions that ensued there, and that are contained in these papers. Behind the script of the name lay a shadow, which was beginning to shade over various religious icons and symbols. The poster contained in that way an answer to many of the questions it posed: many of the speakers voiced concern about the stability of religious freedom within the English speaking world (especially the conference keynote lecture, by Mary Ann Glendon, whose paper has been reprinted elsewhere).<sup>1</sup> But the reasons for those concerns are, as

1. Mary Ann Glendon, ‘Making the Case for Religious Freedom in Secular Societies’, *Journal of Law and Religion* 33.3 (2018), pp. 329–39.

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the articles herein indicate, subtle—and may arise less from the actual legal doctrines at work in each context as from the contentious and anxious social environment within which those legal decisions are made.

Interdisciplinary convenings typically suffer from the challenge of overcoming what appears to be the inherent superficiality required in order to make technical work within one discipline available to non-specialists. The benefits of constructive engagement from diverse standpoints are frequently accompanied by the loss of intra-disciplinary rigor—which sometimes threatens to defeat the purpose of interdisciplinary gatherings in the first place. I dare say this symposium avoids that pitfall—which is a credit to the clarity of both thought and prose from the estimable thinkers contained herein. The arguments frequently rely on or involve matters of technical, legal or philosophical detail, but do not lose the readability or accessibility that makes them of interest to non-specialists. Such a deft touch is increasingly rare within academic gatherings, and it is a credit to this conference that it found scholars able and willing to practice it.

It is salutary in thinking about the future of religious liberty to remember that it came from *somewhere*—and that the current arrangements of the UK and the United States, which allow so much freedom and flexibility to religious believers, are not necessarily fixed givens. Mark Hill's tour through the 'historical hinterlands' of religious liberty tells a story about the emergence of the current order within the United Kingdom through seven stages, and in doing so raises fundamental normative questions that later authors will take up. His reminder that the establishment of Anglicanism was accompanied by sharp and sometimes bloody restrictions on other religions helpfully prepares the way for the dialogue between Nigel Biggar and Cecile Laborde on whether the present form of establishment in the United Kingdom can be sufficiently liberal. At the same time, Hill's account of the role that Baptist dissidents against the crown played in broadening negative freedoms for religious actors is a sharp reminder of both the cost and value of dissenting in establishing freedoms for subsequent individuals. It is hard to leave off reading Hill's essay without being reminded of the precarious origins of the present social order in the English speaking world.

John Witte's contribution names this precariousness explicitly, as he considers both the historical origins and normative foundations of the American order. Witte looks to John Adams's dialectical model of religious liberty for resources that might help Americans balance religious interests with countervailing concerns from the state today. Witte names three keys within the founders' approach that he thinks are preserving religious liberty, including the Constitution's recognition of the specialness of religion among the panoply of rights it names. Such distinctiveness, Witte argues, was buttressed by an inclusive pluralism about which religions counted, though he also observes the (ongoing) failure of US Courts to recognize the distinctive claims of Native American actors. Witte's third key includes maintaining the delicate balance between the First Amendment's free-exercise guarantee and its no-establishment guarantee.

Witte suggests these keys have been mainstays of modern US constitutional jurisprudence—but he worries, despite naming several high-profile victories at the Supreme Court for religious liberty, that religious liberty stands in danger of being minimized or downplayed in the future. Some of the sources of Witte's worries arise from legal questions about how non-discrimination laws intersect with religious practices—but he also

observes (rightly) that religions have imposed self-inflicted wounds on themselves by their hypocrisy. Yet where Witte sees reason for concern, others might suggest the string of high-profile victories for religious rights at the Supreme Court gives sound reason for optimism about the future of religious liberty within the American context. That such cases have inflamed both sides of America's never-ending culture war is inevitable—and raises even more difficult and disturbing questions about what will happen to American society if the Courts give neither side the total, zero-sum victory Witte notes they long for.

At the same time, Witte is right to observe that a major question within these debates is whether the US Constitution's apparent emphasis on the uniqueness of religion will endure. While Americans' adherence to the Constitution and their (still) fervent religiosity mean religion is unlikely to disappear from the scene altogether, courts will doubtlessly turn toward normative, philosophical arguments of the kind that Francis Beckwith supplies here to ground judgments in favor of religious liberty. Beckwith sets his account against theories of religious rights that he argues (ironically) eliminate the distinctively religious content from the practices they evaluate, and thus fail to accurately characterize how religious believers understand their own actions. On Beckwith's argument, the specialness of at least some religions arises from what he calls the 'two sovereigns' view—namely, that religious believers are not simply compelled by any moral beliefs they might have chosen, but act beneath an independent sovereign will, to whom they did not choose to owe fealty. Beckwith's approach helpfully clarifies how at least some religious claims might be distinct from non-religious claims, and thus supplies some reason to avoid flattening religious rights into those of conscience. But while Beckwith contends the 'two sovereigns' view engenders modesty, in that it heightens the stakes of coercing other individuals, one might wonder how this squares with religious belief and action historically (or even in our own time). Moreover, questions arise about how the view might be extended to include non-theistic religions or those such as Buddhism and Hinduism, which do not seem to easily fit the theistic framework Beckwith starts from.

While Beckwith's approach focuses on the American court context, Julian Rivers' examination of equality law's relationship to religious liberty from within the UK context raises similar worries. On his understanding, there is no principled opposition between equality and liberty rights, even if Rivers echoes Beckwith's concerns about non-discrimination laws with his worry that equality laws diminish the 'distinctive force of religious motivation and the possibility of personal conviction' (p. XXX). Unlike Witte, Rivers takes a single recent UK court ruling in favor of a religious claim and optimistically concludes that equality law is not an inexorable steamroller of religious claims as it is sometimes portrayed. Yet, like Witte, Rivers sees reason for concern within the understanding of 'equality' at work in the background culture. Rivers challenges postmodern conceptions of equality as inimical to religious liberty claims, setting them against Jeremy Waldron's theistic conception of equality. Yet as Rivers notes, endorsing Waldron's conception of equality within the law would risk returning us to a confessional state. Yet Rivers also seems to imply that contemporary non-religious accounts of equality are equivalent in their confessional qualities, leaving those interested in preserving a putatively neutral conception of the state suspended in the air with no way of getting down.

Similar dynamics arise within Rick Garnett's defense of 'church autonomy', which he describes as a 'grab-bag' of themes and holdings that indicate the state's deference to religious institutions and corporations' self-governance. On Garnett's account, 'thriving, independent and free institutions are crucial for religious and political freedom under law' (p. XXX). Garnett allows that rights discourse tends to focus on individuals as rights-bearers, but contends that institutions and corporations set the infrastructure within which religious freedom and human rights more generally are cultivated and enjoyed. The relationship between these two dimensions on Garnett's account is both mutual and self-reinforcing: human rights offer protections for corporate religious liberty, which thereby promotes and fosters a community where human rights are secure. Drawing inspiration from John Courtney Murray, Garnett contends that should the autonomy of the church wither, the freedom of individuals would wither along with it. As the infrastructure for religious freedom, corporate religious liberty precedes individual religious liberty. And from Garnett's American standpoint, not all is well with the environment in which religious liberty sits. Despite the United States Supreme Court's recent strong affirmation of the right of church autonomy in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, Garnett raises worries similar to Julian Rivers and John Witte that the pressures might eventually corrode religious liberty within the United States—bad behavior by churches eroding their credibility, the deinstitutionalization of society, and so on.

If 'church autonomy' names a distinctively American way of arranging the churches and the state, and thereby securing religious freedom for all, the final papers in this symposium question whether the establishment of a particular religious tradition might plausibly be another. Whether the establishment of the Church of England, particularly, secures the equal liberty of citizens of every or no faith is the question that Nigel Biggar and Cecile Laborde pursue in the only direct dialogue this symposium contains. While Biggar defends the Anglican establishment, Laborde argues that his account fails to demonstrate how establishment can be sufficiently (politically) liberal. While not speaking as a representative of America, Laborde notes that Rawlsian political liberalism (of which her view is one instance) has been influenced by the American constitutional separation of church and state. Though questions of church autonomy or American constitutionalism do not appear within the Biggar-Laborde dialogue, how distinct or independent a church (or churches, in the case of multi-establishment) must be from their governments lies at the center of their debate.

On Biggar's account, the establishment of Anglicanism is not only compatible with liberalism, but conducive to it. Biggar argues that Rawlsian liberalism—which is indisputably the main version on offer in the English speaking world—is not viewpoint-neutral, and that it needs support from the background culture and from reasonable 'comprehensive doctrines' to produce citizens who have the virtues necessary to sustain liberalism. One way governments might do this would be to give symbolic priority or precedence to a sufficiently humanistic outlook. A range of such views might satisfy, but unsurprisingly Biggar defends his own Anglican humanism, which he contends engenders virtues of modesty and restraint that are commensurate with and support liberal standards. Empirically, Biggar marshalls evidence that might suggest that such an establishment is not viewed as inherently discriminatory by adherents to other religions or

faiths. Normatively, he argues that even if an establishment does discriminate against certain doctrines, it is no more disrespectful for doing so than a non-neutral political liberalism that views some comprehensive doctrines as ‘unreasonable’.

Cecile Laborde, though, challenges Biggar’s argument that Anglican establishment is sufficiently liberal. For their disagreement over the practical question about establishment, there are more points of concord between them than one might expect. Laborde concurs that liberalism—or at least her own version of it—has its own substantive moral outlook, even if an intentionally minimalist one. And she affirms Biggar’s contention that subjective feelings of alienation by minority groups are insufficient to indicate that establishment constitutes invidious discrimination or fails to satisfy the state’s responsibility to preserve civic equality. If Anglicanism is commensurate with liberalism, Laborde contends, that does not entail its establishment is. Laborde’s approach is focused on normative political questions, and she agrees that there might be contexts in which establishment is benign. But she also questions whether establishment has been as conducive to liberalism as Biggar suggests, and raises weighty objections about Biggar’s empirical appeal to the views of minority religious groups in the UK. In response to the extremely challenging and exceedingly important question of whether establishment is commensurate with civic equality for every citizen irrespective of religion, Laborde argues establishment fails to be sufficiently liberal if and where it contributes to the ‘social vulnerability’ of already marginalized groups.

While adjudicating the strength of these two essays is finally the reader’s business, it is worth observing that Mark Hill’s essay on the emergence of religious liberty provides its own historically grounded challenge to Biggar’s thesis that Anglican humanism is conducive to English liberalism. Hill reminds us of the sharp penalties on minority religions that accompanied establishment and suggests that their alleviation may owe more to dissenters than the established church itself. If so, then Biggar is right that the Anglican establishment was conducive to liberalism—but not quite in the way he suggests. At the same time, Biggar’s thesis is normative—and he might equally contend that establishment itself arose out of dissent, and that the early Anglican failure to secure religious liberty for all derived in part from the way it self-consciously set itself against the Pope. An Anglicanism that is not dominated by this contrast has more adequately supported religious freedoms for everyone. Even so, it may not matter for Biggar’s view whether Anglicanism is originally the source of British liberalism, so much that within our own context it provides the resources to preserve liberal freedoms when abstract commitments to Rawlsian principles struggle to do so.

In that way, the discussion raises fundamental questions about how liberalism is justified, and how it can be made commensurate with duties of equal treatment. Biggar’s argument seems to provide a pragmatic justification for the Anglican establishment: it is, crucially, liberal *enough*. Laborde’s political liberalism is not a pragmatic thesis, though, but a normative one: it establishes desiderata for liberal societies in advance, and judges the Anglican establishment accordingly. The most crucial of these criteria for their disagreement is equality. Neither Biggar nor Laborde want any commerce with a view of equality that treats subjective alienation as determinative of wrongdoing, which would be a species much closer to the postmodern version of equality that Rivers worries about. But they come apart on what equality demands. Biggar seems to adopt

the stance that establishment can still satisfy equal treatment of persons, even if their views are not represented. Yet Laborde's concern that viewpoint discrimination contributes to the pre-existing vulnerability of marginalized social groups calls the neat distinction between views and their adherents into question. The question of what account of equality we ought to adopt (which Rivers also worries about) extends beyond the scope of this symposium, into the realm of first order political philosophy and theology. But it is a credit to the dialogue between Laborde and Biggar that such fundamental concerns rise to the surface here.

Substantively, the essays presented herein helpfully tease out both the promise and the limitations of normative reflection about religious liberty. As such a discussion is (naturally) dominated by lawyers and political theorists, it can sometimes lose sight of the historical and social forces that surround legal opinions and arguments about the permissibility (or lack thereof) of state coercion on religious actors. Yet everywhere within these papers there is a conscious recognition of the role non-legal, cultural factors have in determining the shape and future of religious liberty in the UK and US. John Witte recognizes that religious liberty has won often of late in the United States, and still worries about the hypocrisy of the churches and the encroaching cultural pressures; Rick Garnett does the same. Julian Rivers contends equality law and religious liberty are not necessarily on a collision course, but issues an invective against postmodern theories of equality that are popular within the broader background culture. Theoretical reflection about the law must be done in close contact with empirical realities, lest it become too idealistic and detached from the actual communities we are reflecting about. At the same time, theoretical resolutions to the contentious questions of balancing religious liberty with equality or other interests will only deepen the stability and cohesiveness of our societies if citizens are pre-disposed to be liberal toward each other in the first place. And therein lies the trouble.

This gap between the idealistic or theoretical nature of discussions about religious liberty and the cultural context within which it is in fact promoted (or not) is itself a reminder of how delicate religious liberty is, and how difficult it is to preserve. The various aspects of preserving religious liberty that, for instance, John Witte's paper highlights must be held together—but done so in a way that takes into account countervailing claims, and the possibility that the exercise or enjoyment of religious freedoms might in some cases exacerbate, as Cecile Laborde puts it, the 'social vulnerability' of some citizens. If this symposium largely does answer 'yes' to the question of whether religious liberty is under threat, it does so mainly because harmonious resolution to the many problems requires surgical precision within a cultural environment that increasingly seems to know only how to bludgeon one another with the strokes of a broadsword.