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2018: Institutional Religious Freedom in Review

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Individual religious freedom and freedom of conscience are well understood in the United States, albeit not equally well protected in practice. Less understood is what religious freedom might entail for organizations and why it is important to them, so I am glad for the opportunity to review a few recent books that can help us develop a better grasp of institutional religious freedom. Many thanks to series editor Byron Borger for assisting me in the selection of books.

As a quick definition, we can say that institutional religious freedom is the protected legal space that churches and other faith-based organizations need so that they can be faithful (to their respective religious missions) and faith-full (manifesting their religious convictions in their operations and practices), even when those convictions would lead them to operate and serve differently than the laws and public consensus regard as right and normal.

If I may say so, the best book about how this freedom is vital for faith-based organizations is [*Free to Serve: Protecting the Religious Freedom of Faith-Based Organizations \(2015\)*](#). Co-authored by the late Steve Monsma and, well, me, the book surveys the strengthening headwinds of adverse court decisions, government rules and public opinion and assesses the inadequate views of freedom, religion, and diversity that speed those headwinds. It proposes a robust civic pluralism as an alternative between privilege for religion and dominance for secularism and offers guidance to faith-based organizations on how they, themselves, can act to safeguard the religious freedom they need. As good as [*Free to Serve*](#) is, though, institutional religious freedom has additional facets and exists within wider political, cultural and intellectual currents, so don't stop your reading there.

Os Guinness's new book, [*Last Call for Liberty: How America's Genius for Freedom Has Become Its Greatest Threat*](#), strongly and rightly emphasizes that the degree of freedom available to persons and organizations expands and (now) contracts not only due to changes in laws and court decisions but, more fundamentally, due to changes in how freedom itself is understood by a society. His argument is dense, and so this book is not the accessible read his earlier books touching on similar themes have been. Yet, his analysis deserves attention in this time of polarization and change.

Guinness proceeds through a set of ten questions to his American readers: “Do You Know Where Your Freedom Came From?”, “Are There Enough Americans Who Care About Freedom?”, “How Do You Plan to Sustain Freedom?” and more. Each is a mini-essay on a key dimension of the freedoms that sustain a society where people can live consistently with their convictions in public and private life, alone and together with others, exercising our gifts and serving our neighbors.

Why should we be concerned that we are losing our liberty? Americans are far along, Guinness argues, in transferring our allegiance from the freedom ideas of the American Revolution to the nearly opposite freedom ideas of the French Revolution. The former were grounded in the Jewish and Christian conviction of humans living in a covenant with God, such that persons, governments and organizations are accountable outside of themselves; freedoms—political, economic, religious—are to be both protected and limited; and we are hopeful and yet sober in our expectations for the future. The French revolutionaries, in sharp contrast, presuming that God and religions are destructive illusions, called for unlimited freedom and aimed for a future of ever-greater perfection. Yet the project of suppressing religion and supercharging government in order to crush restrictions on freedom and various inequalities paradoxically yields less freedom. Instead society is subject to increased regimentation, there is government respect more for *avant garde* than for traditional convictions, and opportunity is protected more for ideologically favored than disfavored economic and political projects. This analysis, in Guinness’ approach, is not a celebration of Tea Partiers but rather a sharp questioning of secular progressivism as it has taken over much of politics, academia, the legal profession, the media and cultural circles.

However precise his overall framework, surely Guinness is right to challenge us to assess the broad currents shaping political views, policy preferences and public controversies these days. That assessment needs to go beyond the media’s preoccupation with poking and exposing populism and white nationalism to considering carefully the consequences of progressivism and its dismissal or opposition to religion and its approval (to be sure, with good intentions) of an enlarged government and expanded regulation. Consider: more regimentation via expanding government can only intensify conflict as America becomes ever more diverse in religion and values.

In his chapter on freedom and diversity, Guinness takes on the popular view that religious freedom is just another name for discrimination against LGBT persons and religious minorities. That cannot be the full story, he reminds us: “The demand for freedom of religion and conscience has always been the cry of the weak, the powerless, the marginalized, and the oppressed—those who know that it takes truth to make a stand against power.” So, what is needed? Neither a totalitarianism of the religious right nor of the secular left will do, he says, calling again, as he often has, for a “civil public square.” We need a commitment on all sides to a concept of public life in which all participate without shedding their distinctive faiths and commitments. Rather participation should be within an agreement to respect all others and thus to aim for the common good and not for sectarian advantage.

Guinness is right, in principle, and yet does not this prescription sidestep the very challenge we face: the application of nondiscrimination requirements in a way that “stifle[s] dissent and override conscientious objection”? Saying (rightly) that the government should protect religious freedom for all does not get us very far when the claim is that certain actions are wrongful discrimination that the law must not protect, no matter whether the actions are motivated by religious conviction. We need a reconsideration of that claim of wrongful discrimination, but without overlooking possible harms.

Somehow the legitimate claims both of those who believe that God (or nature) has a design for human intimate relationships and sexuality, and those convinced of the moral equivalence of traditional and same-sex marriages and of every sexual orientation and gender identity, need to be protected in the law. Protection of legitimate interests all around requires something more detailed and substantial than a renewed call for limits on an overly expansive interpretation of discrimination and for a renewed honoring of the principle of religious freedom.

A key public policy “tool” for crafting government rules that promote public goods, such as nondiscrimination, while enacting constitutional protections for religious exercise is the addition of religious exemptions to otherwise generally applicable laws. Think of the 2015 Supreme Court decision in *Holt v. Hobbs* that a Muslim prisoner must be allowed to grow a half-inch beard, for reasons of religious duty, despite the prison-system rule that only quarter-inch beards are allowable. Or recall the 2014 Supreme Court decision freeing the Hobby Lobby corporation from the Obamacare requirement that employee health plans must include coverage of all contraceptives. The contrasting public reactions to those two decisions show that the exemptions tool is by no means a universally approved public policy method to reconcile a requirement of uniformity with the claim of freedom for countercultural convictions. Protection for the prisoner was hardly controversial, but the Hobby Lobby decision supercharged the progressives’ claim that religious freedom promotes discrimination and harm.

When, then, should claims for religious exemptions be accepted because they honor living by conviction, and when should they be denied to protect others from harm? This is a central question in the new book [*Religious Exemptions*](#), edited by Kevin Vallier and Michael Weber. This is not an easy topic nor a simple read. Rather, the question of the appropriateness of religious exemptions is highly controversial and deeply complex. Here’s one of the simpler issues: Michael Perry’s chapter discusses with wisdom the following question: whether the U.S. Constitution and adherence to good political norms require that exemptions to honor conscience claims be given only to religious people, or if they must be provided also to those with moral or secular claims. The answer is not obvious, so paying attention as Perry constructs his argument that exemptions must cover both secular and religious claims is a valuable exercise. Read this book for a good introduction to the many dimensions and complexities of the religious-exemption public policy tool. Bonus tip: for a big blast of clarifying air, dig into Richard Garnett’s “Religious Freedom and the Nondiscrimination Norm” in Austin Sarat, ed., [*Legal Responses to Religious Practices in the United States: Accommodation and its Limits*](#) (Cambridge Univ. Press, 2012).

Given our nation’s diversity of fundamental beliefs and the normative duty of government to respect those diverse convictions, as far as is consistent with the common good, and not simply suppress them, religious exemptions cannot be neglected in public policymaking. But they have this deep problem: a law is passed to promote the good of everyone and then, behold, some part of the public, pleading divine guidance, gets to simply disregard the rule that was adopted to promote the common good! It is no surprise that religious exemptions are controversial.

But the scenario just suggested is misleading. The reason religious exemptions are even considered is that, with our diversity of fundamental beliefs, we do not all agree on what every significant good is, much less on what constitutes the common good. For example, the owners of Hobby Lobby claimed that some of the contraceptives mandated for health plans are actually abortifacients and thus end actual early life. In lifting from Hobby Lobby the requirement to cover those contraceptives, the

Supreme Court forced the federal government to respect these owners' pro-life convictions and their understanding of how certain contraceptives operate.

Did not the Supreme Court thereby simply create a new burden and injustice—protecting the convictions of Hobby Lobby's owners by denying the claims of its women employees, who desired access to all of the contraceptives and who regard use of any and all of the contraceptives to be not only morally unproblematic, but practically essential?

Fortunately, the Supreme Court, in fact, was not restricted to the universal-requirement/free-from-obligation dynamics of simply planting religious exemptions into general laws. Rather, the justices reminded the federal government that it had multiple ways to ensure that female employees of Hobby Lobby would have access to all contraceptives without, as Hobby Lobby's owners regarded it, "hijacking" their employee health plan (but the Obama and Trump administrations [disagreed](#) about what the alternative should be, and the issue is now in the courts).

Religious exemptions are a vital but imperfect tool to deal with the many deeply rooted religious, philosophical and moral differences in our society, and they are not the only available tool. John Inazu calls for a more flexible approach in his [Confident Pluralism: Surviving and Thriving through Deep Difference](#), which has just been reissued as a paperback with a new Preface. Half of the book gives wise instruction about how we—you and me—should interact with our neighbors who hold very different convictions from us. Inazu explains and illustrates a series of "civic practices" that can enable us, if we are willing, to reduce, rather than amp up, polarization. He urges us to engage with each other across divisions by undertaking concrete initiatives that foster outcomes that we can all agree are good.

In the other half of the book, in legal and constitutional analyses, Inazu considers features of our governmental system and of our political principles that aid in accommodating our diverse convictions, preferences and practices. Among the tools, principles and methods that he examines are: providing divergent voices access to publicly controlled spaces, not excluding from government funding groups that hold disfavored views, and religious exemptions. This is a repertoire broader than many governments today and historically accept. It is our own governments' use of the repertoire that has allowed us to become "e pluribus Unum," one out of many.

Yet, as Inazu shows in his analyses, these tools and principles to accommodate diversity are very imperfect. In his new Preface he notes that they are clearly manifesting their inadequacies these days as polarization, and not simple diversity, grows deeper. Without saying how—John Inazu, we need your next book—he rightly says that the major accommodation tools we have "are woefully inadequate." We need better principles and practices so that "the people we entrust to govern us [can more adequately] honor basic constitutional principles that protect difference and dissent."

The identification or creation of better principles and practices is important particularly to the Institutional Religious Freedom Alliance, the division of CPJ that I founded and direct. In IRFA's view, and in CPJ's, religious freedom is one, though an essential, dimension of the civic pluralism that the government should construct and preserve as the appropriate way to deal with the many faiths and ways of life in our society. As with other Christians, we work and pray for all to respond with gratitude to God's call, God's ways; because there are, and always will be, multiple spiritual directions

in society, we ask of government not to try to force such responses, but to protect space within which people can live consistently with their deep convictions.

To find or create those better principles and practices, engaged citizens—emphatically including policymakers and government executives—should carefully study Hans-Martien ten Napel’s [*Constitutionalism, Democracy and Religious Freedom: To Be Fully Human*](#). Here is a treatment of religious freedom and public policy that breaks free of the American predisposition to regard our society’s architecture as comprised only of individuals, government, and business, neglecting churches, faith-based organizations and the many other components of civil society, and that goes beyond our propensity to deal with diverse convictions mainly by (often very reluctantly) conceding exemptions to laws otherwise considered to justifiably demand uniformity.

Ten Napel, who teaches at Leiden University, is rooted in the Dutch Calvinist tradition--think Abraham Kuyper—and this gives him a deeply and affirmatively pluralist approach to the protection of religion and conscience in public policy. He is, further, a frequent participant in religious freedom conferences and research initiatives in the United States. This means that he writes into our less-thoroughly-pluralist framework, helping to illuminate shortcomings and to be able to suggest a more capacious framework and a broader set of tools and principles. Unusually for a discussion of these weighty topics, Ten Napel references throughout the book how engagement in those various conferences and research initiatives has led him to develop his thinking about government and diversity. Rather than being off-putting, though, this thread helps to make what are complex discussions more accessible to the reader.

Ten Napel’s book is illuminating precisely because he begins by accepting the fact of deep differences of worldview, both in concepts and in practices, and by assuming as the default for public policy the accommodation of diversity, rather than a striving for uniformity. This means giving full value to non-religious, along with religious, reasons not to go along with the public consensus and generally accepted laws. Also, especially, fully to accept that civil society—nonprofits, houses of worship, companies—is a major component of our lives and not to be ignored in considering how to achieve a unity that respects diversity. Remember: while government presses toward uniformity and acts by compulsion, civil society is the place for orderly, structured, institutionalized diversity achieved by voluntary, rather than coerced, action. In civil society, with its diverse options that accommodate varying preferences in employment, the provision of services and choices of products, you will find a school that fits your values even as I find one that matches mine. Diversity is here more readily accommodated than in the I win-you lose pattern that is the default of government action (although pluralist devices can make government rules more protective of diversity).

Achieving Os Guinness’s “civil public square” needs not only a strong commitment to freedom of conscience and religion coupled with an agreement of each to act for the good of all. It also needs specific pluralistic tools and principles and methodologies, going beyond general constitutional maxims and the tool of religious exemptions. Study Hans-Martien ten Napel’s [*Constitutionalism, Democracy and Religious Freedom*](#) and John Inazu’s [*Confident Pluralism*](#) to understand the vital role of civil society and pluralist government policies and practices in making it possible for us to live together as civic neighbors with, and not only despite, our deep differences.

One final note: William Galston, who was a domestic policy advisor to President Bill Clinton and has continued as a major public intellectual on the left side of the spectrum through his work with the

Brookings Institution, has made signal pro-pluralism contributions to U.S. political theory and public policy thinking. Especially his [*Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*](#) (2002) strongly advocated that governments should protect the “maximum feasible” degree of pluralism, in significant part by refusing to overly regulate, and thus overly regiment, civil society institutions, even though many of them embody and propagate values strongly disliked by much of the public. This is a strong alternative to the conventional framework in American public policy thinking.

Recently, Galston published another book on pluralism. This one, treating not public policy and constitutional principles, but rather the polarization and deconstruction of our current moment of public debate and action, is entitled [*Anti-Pluralism: The Populist Threat to Liberal Democracy*](#) (2018). It is a strong defense of liberal democracy, of those American Revolution principles that Os Guinness calls us back to. And it is in many ways an illuminating analysis of how populist forces and thinking in the United States and elsewhere undermine those invaluable liberal-democratic principles and practices, including protections for religious freedom and free speech, limited government, a large space for civil society and mutual respect despite deep differences. Yet it harbors a huge blind spot. Galston, as it were, begins with the populist reaction—which, as he well describes, is very corrosive to liberal democratic principles, practices, and governing institutions—but largely ignores what populists are reacting to. The subject of their ire and distrust is not liberal democracy, though their actions injure it, but rather progressive democracy, that child of French Revolution thinking, with its secularism and ready propensity to use government power to compel non-progressive people and organizations to toe the line of the latest moral, cultural and political ideas.

If our practice of liberal democracy were in fact pluralistic rather than drifting toward progressive enforced uniformity, it seems unlikely that populism would have gained the steam it has, and thus perhaps we would not have entered the current downward cycle of further eroding liberal democracy. To be sure, liberal democracy and pluralism are themselves imperfect means to secure the common good when nations are so internally divided. And yet, by protecting space for Christians and others to exercise our respective faiths, in public as well as private life, these political forms and principles enable a diverse people, peacefully to contend for their divergent beliefs.

To respond to the author of this article please email PJR@cpjustice.org. The articles in the *Public Justice Review* do not represent a consensus of positions on questions of public policy. We do not expect our readers will agree with all the arguments they find here, but we believe that within the broad tradition of what we call public justice we can do more by providing a forum for the debate and exchange of Christians, within those bounds, to work out public policy faithful to God and in service of our neighbors. We do not necessarily share the views expressed, but we do accept responsibility for giving them a chance to appear.