

EDITORIAL

Religion, State, and the Fragility of Democracy

M. Christian Green

Co-editor, *Journal of Law and Religion*; Senior Fellow, Center for the Study of Law and Religion, Emory University

In a range of facets and ways, the authors contributing to this issue attest to the persistence of that most perennial of law and religion issues: the relation between religion and the state. They do so at a time when Americans, of a variety of political stripes and in a highly polarized society, express a range of doubts and distrust of government and the state. They also do so at a time when governments and states around the world are trending toward autocracy and straining to retain democracy. In the United States, there can be no greater testimony to skepticism of the state than the siege of the US Capitol building on January 6, 2021. Democracy is reeling in places like Hong Kong, Myanmar, and an Afghanistan recently reclaimed by the Taliban. And the threat of autocracy seems to be rising. As noted journalist and historian Anne Applebaum recently observed, “If the 20th century was the story of a slow, uneven struggle, ending with the victory of liberal democracy over other ideologies—communism, fascism, virulent nationalism—the 21st century is, so far, a story of the reverse.”¹ Autocracy is the hypertrophy of the state, but it is often achieved at the expense of democracy, the form of the state that was said to be “winning” toward the end of the twentieth century.²

Religion-state conflict is real because the two institutions have different origins, natures, and purposes. Religion, for many, is a claim of faith, and it is a community of belonging, akin to family and tribe for others. The state is an artificial structure with some similarities to family in the provision of basic needs, along with similarities to both family and church in its hierarchies and structures. But even while proponents of religion defend family, faith, and freedom, it is the state that has the power to give or take lives, liberties, and livelihood. People in capitalist societies, especially hyper-capitalist societies such as the United States, sometimes experience cognitive dissonance—even shame—around their reliance on government services. One thinks of the protest sign reading “Keep government out of my Medicare!” in the 2010 US healthcare debates. Some opponents of government value libertarianism more than liberty, and their ire—an ire that can find both its source and expression in religion—is often directed at the state.

Others challenge the state, not to be let alone but to be let in. The roundtable of essays on Congressman John Lewis chronicles the life, liberty, and religiosity of a statesman who did not hesitate to get in “good trouble” with the state, surrendering his liberty to the state on dozens of occasions in arrests for civil disobedience. Originally something of a disrupter on the Atlanta city council, he became the “conscience of Congress,” where he became known for speaking conscientious truth to power—especially the power of the state. Heir to the call of Protestant Reformer Martin Luther (the subject of an article in this issue) to levy the power of conscience against tyrannical regimes both sacred and secular, Lewis had to

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¹ Anne Applebaum, “The Bad Guys Are Winning,” *The Atlantic*, November 15, 2021, <https://www.theatlantic.com/magazine/archive/2021/12/the-autocrats-are-winning/620526/>.

² Francis Fukuyama, “The End of History,” *National Interest*, no. 16 (1989): 3–18.



tone down his address that was the warm-up to that of Martin Luther King Jr. at the 1963 March on Washington. Lewis harnessed the power of Black theology and Black politics, often building interfaith bridges to Jewish and Muslim Americans and groups marginalized within American politics. Lewis called the nation to live up to its ideals of justice, especially in his clarion call for racial justice, which has become such a concern yet again in the United States' ongoing confrontation with history. He was ahead of his time in addressing the plight of migrants, the need for prison and criminal justice reform, and the equality of LGBTQ people. Lewis was a statesman who challenged the state to be better than its history in service of a more just and equal future.

The book review symposium on Michael McNally's *Defend the Sacred: Native American Religious Freedom beyond the First Amendment*, examines the complicated history of Native American peoples with the state. It is a history that pits the sovereignty of the federal state against the tribal sovereignty of indigenous Americans over their land, much of which is imbued with sacred meaning. Native Americans have also played an interesting role in the development of US religion jurisprudence. After all, it was the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), a dispute over Native Americans' freedom to ingest peyote in a manner consistent with their traditional religious rituals that narrowed the scope of free exercise under the First Amendment and spawned federal, state, and international religious freedom restoration acts, in what was seen by many law and religion observers at the time, as a necessary rebalancing of free exercise against disestablishment principles. Now, thirty years later, the Free Exercise Clause seems to have bested the Establishment Clause, with ruling upon ruling emanating from the Supreme Court to the increasing favor of free exercise, with some observers prognosticating the Establishment Clause's imminent demise as anything but a constitutional dead letter if the current Court has its way.

In his state-of-the-field essay, co-editor Mark Movsesian, takes up what has become one of the most cutting-edge issues in religion-state jurisprudence: the extent of the power of the state to enforce COVID-19 mitigation measures in the current pandemic. In the United States, the law and religion debate around COVID-19 mitigation measures has tended to be framed politically in rather individualistic terms, with individuals asserting their "rights and freedoms," perceived to be under siege from mandated lockdowns, masks, and now vaccines. But a number of more collective goods are also at stake, including important associational freedoms for religious people and congregations, such as access to communal rituals and practices. In some cases, particularly in parts of the world where government's political and economic provisions for the people's needs are strained even in good times, the provision and service of religious bodies can be even more crucial in a pandemic context. For these reasons and others, the COVID-19 pandemic seems destined to play an outsized role in religion-state jurisprudence for the foreseeable future.

Each in their own way, these conversations offer reflections on the precarity of the state: the power, penetration, and paralysis of the state exemplified in the life of John Lewis; the ongoing contestation over Native American sovereignty, rights, and religious freedom; and the difficulty that even advanced democracies have had in quelling the COVID-19 pandemic. For those of us whose entry into the field of law and religion was through the door of human rights, the precarity of the state is jarring to ponder. The field of international human rights law is premised on the notion that even though states have done some terrible things to their people in the past, States Parties—always capitalized and plural as if to emphasize collectivity and power—are the entities tasked with securing human rights both within their borders and abroad. States are viewed as not only powerful, but potentially—if perhaps idyllically—beneficent, and capable of articulating, enforcing, and making accessible a range of civil, political, economic, social, and other rights for their people. If one is tempted to question the positive power of the state, particularly the democratic state, one need only consider the plight of the *stateless*, particularly those made so by necessary migrations at great peril to escape conflict, poverty, or even the inexorable forces of climate change.

There is, to be sure, the state that exercised its power arresting John Lewis dozens of times, particularly in the Southern states. But it is the powerful resistance by which powerful individuals challenge powerful states to live up to their powerful ideas that makes the experience of civil disobedience meaningful. There is the example of the United States trying to allow free exercise of religion, especially by minority religions and indigenous peoples, while also preserving the judicious separation that the juxtaposition of free exercise and antiestablishment clauses in our Constitution seems to counsel. But in its recent cases, the US Supreme Court has seemed to throw disestablishment to the wind, affording religious claimants—but almost never indigenous claimants—accommodations and exceptions in the name of religious freedom that come perilously close to establishment in the eyes of some observers and risk the Court’s becoming a rubber stamp for religion, concerns for equality and non-discrimination notwithstanding.

In these new religious freedom cases, as noted astutely by my fellow co-editor Cathleen Kaveny, the claimant’s challenge is not always limited to the particular ways by which the state regulates education, health, employment, and other sectors, but to the authority of the state to mandate at all.³ After all, as Movsesian observes, the development of COVID-19-related religion jurisprudence—part of the larger field of what is being called “epidemic law” elsewhere—is occurring in the context of cultural and political divides that make “consensual resolution of conflicts over religious freedom increasingly problematic, and sometimes impossible, even during a once-in-a-lifetime pandemic.”⁴ The debate is often no longer *what* the state can (let alone should) do, but *whether* the state can do anything at all.

The example of one governor of a Southern US state illustrates the point. Praised for “biting his tongue” in difficult negotiations with the Trump administration to secure ventilators for his state,⁵ Louisiana governor John Bel Edwards, the subject of multiple attempts by the state legislature to remove his executive power to declare public health emergencies, spoke frankly with the residents of his state during the fourth wave of COVID-19 that hit the state in August 2021: “Did you hear a word that was said up here by these health care professionals as to what’s happening here in Louisiana? Do you give a damn? I do. I’ve heard it said often: Louisiana is the most pro-life state in the nation. I want to believe that. It ought to mean something. In this context, it ought to mean something.”⁶ At another of his many public press conferences, which have typically been loaded with authorities from medicine and science, Edwards confessed—with regret but without resignation—that people in the state needed to hear the truth about COVID-19 but that perhaps he, representing the power of the state, was not the best messenger.

For civil rights activists, religious freedom proponents, and so-called anti-vaxxers alike, the state retains its power and is a focus of activism. But we ignore threats to the state at our peril. Governor Edwards’s diplomacy around COVID-19 mitigation efforts has been contrasted with the response of Alabama governor Kay Ivey, who said, “It’s time to start blaming the unvaccinated folks, not the regular folks. It’s the unvaccinated folks that are letting us down.”⁷ Ivey’s remark was deemed impolitic in some quarters—but it was also, in a way, a testament to the importance of the state. For what does it mean to be “regular folks,”

³ Cathleen Kaveny, “The Ironies of the New Religious Freedom Litigation,” *Daedalus* 149, no. 3 (2020): 72–86, at 73.

⁴ Mark L. Movsesian, “Law, Religion, and the COVID-19 Crisis,” *Journal of Law and Religion* 37, no. 1 (2022) (this issue).

⁵ David Montgomery, “Louisiana Gov. John Bel Edwards Is the Democratic Governor Trump Scorned before He Praised,” *Washington Post*, April 11, 2020, https://www.washingtonpost.com/national/louisiana-gov-john-bel-edwards-is-the-democratic-governor-president-trump-scorned-before-he-praised/2020/04/11/1b6d6330-7c1c-11ea-a130-df573469f094_story.html.

⁶ Stephanie Grace, “After Asking Nicely, John Bel Edwards Tries to Scare Vaccine Resisters Straight,” *New Orleans Advocate/Times Picayune*, August 3, 2021, https://www.nola.com/opinions/stephanie_grace/article_a69a319c-f47d-11eb-8fdf-f7024ed72d41.html.

⁷ Grace, “After Asking Nicely.”

if not to submit oneself to regulation by government in service of higher aims and the common good.

For publications like the *Journal of Law and Religion* and institutions like the Center for the Study of Law and Religion that is our home, the interactions of religion and the state are our “bread-and-butter” issues. Religion can make a space for “rendering unto Caesar,” but it can also be a source and a site of resistance to regulation. Moreover, the state continues to be a place where religion is defined through law and sometimes through necessary regulation, when religion resorts to the courts for adjudication. Law and religion—both normative fields—have a special affinity for “regular folks” who comply with rules and norms, but law and religion also include considerable resources for resistance. The articles, essays, and book reviews in this issue showcase these varieties of religion-state interaction and renew attention to questions of state power and democratic tradition for the study of law and religion.