

Book Review

Religious Liberty in a Polarized Age

Religious Liberty in a Polarized Age. By Thomas C. Berg. William B. Eerdmans, 2023. Pp. 359. ISBN: 978-0-8028-8169-4.

Review by Jeremy Patrick*

One of the unavoidable dangers of writing a book about contemporary politics and law is that events on the ground can quickly make its analysis seem outmoded, irrelevant, or even quaint. Thomas Berg's *Religious Liberty in a Polarized Age*¹ may unfortunately be just such a book: a victim of an America where just a year or two of dramatic developments are enough to completely change the context it was written to address. Every book is a product of its time, of course, but by relying so heavily on then-contemporary political issues and conceptions of how law and governance work, already the cultural and policy prescriptions in the book (although laudable in the abstract) can seem hopelessly naïve.

The book's overarching theme is that religious liberty, properly understood, can reduce political polarisation in the United States. This is a principled stance, and one Berg develops well.

Using Donald Trump's early Muslim-majority country travel ban (upheld by the Supreme Court in 2018²) and litigation over a conservative Christian baker's refusal to sell a custom cake to a same-sex couple (upheld by the Supreme Court the same year³) as recurrent examples, Berg argues that both conservatives and liberals display inconsistency and hypocrisy in their support for religious liberty.⁴ On Berg's account, conservatives should have supported the religious liberty of Muslims in the first case, and liberals should have supported the religious liberty of the conservative Christian in the second case. The argument, which is perhaps oversimplistic, is that genuine fear of liberal overreach on matters of sexuality and gender fuelled evangelical support for Trump even in the face of his dubious (to say the least) moral character and policies: '[A]s to matters of religious liberty, the fear and resentment of the last decade are understandable. Progressives have disregarded or denigrated important rights of traditionalists. Reducing traditionalists' understandable fears is a necessary part of reducing polarization.'⁵ But, by the same token according to Berg, there has been a tendency for the right to strongly support religious freedom for themselves but to a far lesser degree for non-Christian and minority faiths.⁶ He also discusses the seemingly intractable challenge of reconciling conservative Christians and LGBTQI+ people:

Conflicts between LGBTQ people and conservative religious believers present one of the greatest religious-freedom challenges to our polarized nation. For one thing, the interests on both sides are deeply felt, and strong. LGBTQ people face discrimination, especially in conservative parts of America. They must have the

* Senior Lecturer, University of Southern Queensland.

¹ Thomas Berg, *Religious Liberty in a Polarized Age* (William B Eerdmans, 2023).

² *Trump v Hawaii*, 585 US 667 (2018).

³ *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, 584 US 617 (2018).

⁴ Berg (n 1) 14.

⁵ Ibid 146.

⁶ Ibid 229.

ability to live their lives, form families, and participate fully in the economy and civil society. On the other side, teachings about sex and marriage are central to many religious traditions, including those widely practiced in America. Religious groups cannot exercise religion freely if they are penalized for acting according to those teachings. The harms and potential harms to each side provoke fear and resentment, aggravating polarization.⁷

In conjunction with an excellent first chapter discussing how political tribalism became so extreme in the country, Berg offers the following thesis on how the problem can be ameliorated:

First, we should place a strong value on religious freedom, which I define as the ability of people and religious communities to live consistently with their deepest, most comprehensive beliefs and identity, unless there is a very strong reason to prevent them from doing so. We must balance that freedom with other values. But it should receive heavy weight in the balance. *Second*, that strong freedom must extend equally to all faiths. We need to protect Muslims *and* traditionalist Christians. . . . *Finally*, the commitment to religious freedom must recognize boundaries on that freedom, set by the rights of other individuals and the interests of society. If religious freedom becomes a trump on all other interests, it will inflame conflict rather than soothe it. The same will happen if we protect only religious freedom and not other important rights.⁸

More concretely, Berg argues that non-discrimination laws need ‘meaningful religious exemptions’, discrimination against LGBTQI+ people shouldn’t be treated as analogous to racial discrimination (but instead as analogous to religious discrimination), and nonprofit religious organisations should have strong religious liberty rights but that commercial religious providers should receive ‘significantly narrower protections’.⁹

Australian readers can find value in the book, despite Berg’s often excessive focus (like many American legal scholars) on US Supreme Court doctrine to the exclusion of broader philosophical or pragmatic concerns that would inform his analysis. Many of the issues that Berg canvasses — like the relationship between religious liberty and queer equality — are ones that hold obvious resonance with Australian politics over the past few years. There are certainly strong analogies that can be made between his recommendations for resolving these issues in the US and insights that could be developed in the Australian context.

Religious Liberty in a Polarized Age is well researched and persuasive. However, from one vantage point it is hard to see who it is written *for*. One of the unfortunate side effects of the vicious downward spiral of tribalism and politics-as-identity is that notions of sound policy, principle, reason, and the ‘greater good’ all fall away: What matters is *winning*. In a zero-sum game, there is no incentive for one side to give in on any particular policy battle in the hopes that such a good faith step will be reciprocated. And in the world of realpolitik and legal realism, the dominance of the Supreme Court by one party, control of the House and Senate by MAGA-linked Republicans, and the clear willingness of Trump to defy conventional norms and legal niceties all point to the possibility that ‘compromise’ or ‘fairness’ are sadly past their sell-by date as solutions. At this point, politics has arguably become a new religion for most

⁷ Ibid 257.

⁸ Ibid 7–8.

⁹ Ibid 260.

Americans,¹⁰ and it is hard to see how a book like Berg's — no matter how well-intended and well-written — can possibly contribute to lowering the temperature in the country. Still, for those readers who maintain hope that the law and politics of religious liberty can be set on a better course in the US, the book offers a valuable roadmap.

¹⁰ See, e.g., Perry Bacon Jr., Kate Cohen, and Shadi Hamid, 'Are politics replacing religion in American life?' *Washington Post* (9 May 2024) <<https://www.washingtonpost.com/opinions/2024/05/09/america-religion-impromptu-podcast/>> (stating that "political intensity is replacing religious intensity as the grounding force of what Americans believe in. We've become political believers rather than religious believers.").