

AMERICA'S PROBLEMS WITH RELIGIOUS LIBERTY

Two papers on *The Catholic Thing* website some three months apart demonstrate the problems inherent in the concept of religious liberty. On 7th February, 2013 the editors published a contribution by Thomas W. Josziewicz, Professor of history at the University of Dallas, entitled *The Founders' Vision of Religious Liberty*. On 2nd May they published Gerald J Russello's *The New Era of Religious Liberty*. Copies of the papers are reproduced in the Appendix. This article considers the problems.

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I. One must first address the whole issue of belief in God.

The apogee of belief lies in a man's acceptance that it is reasonable to hold that an intellectual and non-material (and therefore invisible) being of supreme power, *a Person*, exists on whom he is utterly dependent; who created him, who keeps him in existence. He accepts additionally that God has revealed himself and his plans for man who is the chief of his material creatures;¹ that God is concerned with, and influences momentarily, his life and the life of every man despite what may at times appear to the contrary. He understands that the issue the human mind must address in relation to belief is not, 'Why is there evil in the world?' but 'Whence comes the good of which evil is the deprivation?'

While this faith begins as something human, because it addresses God the ultimate reality it involves an interchange, a conversation, with him. In this converse God reveals something of his own inner life, notably that in this one supreme being there is not one only, but three persons, Father, Son and Holy Spirit. He reveals also man's flawed nature in consequence of original sin and that the Son became a man, Jesus Christ, to redeem mankind from eternal perdition; that he established a Church, an institution comprised of men of which Christ himself is the head. God confirms the believer's acceptance with a gift, this faith becomes something Divine.

This is the one, the Catholic faith, of whose unity God himself is the source:

[J]ust as the power of the sacred flesh unites in one body all who receive it, so too... the one Holy Spirit is not divided among all those in whom he has come to dwell, but brings all men to a spiritual unity.²

II. He who chooses to reject some aspect of God's revelation compromises this faith and lapses into a merely human religion.³ Of these there are, first, those who

¹ "[I]t is a violation of reason not to believe in the existence of God... a violation of our moral sense not to believe that God has made himself known to man... that the revelation he has given is Christianity; and... that Christianity is Catholicism..." Henry Edward Cardinal Manning, "The Temporal Mission of the Holy Spirit", quoted in *Manning and Chesterton*, Sheridan Gilley, *The Chesterton Review*, vol. xiii, p. 494.

² St Cyril of Alexandria, *Commentary on St John's Gospel*, II, ii.

³ "[H]e who adheres to the teaching of the Church as to an infallible rule, assents to whatever the Church teaches. It is otherwise if he holds what he chooses to hold of the things taught by the Church and rejects what he chooses to reject, for he no longer adheres to the teaching of the Church as to an

accept his revelation only with qualifications.⁴ This is Protestantism which, since *quot homines tot sententiae*, exists in a great variety of forms some close to, others removed from, the faith given by God. Whatever its shade, this faith is of man; mutable; easily turned into another variety, or lost completely.

The category divides secondly into those who reject the vast body of God's revelation but retain basic features—such as that God is the creator, that he is one, that he has promised felicity to those who follow his teaching, and so on—but add features that suit their own proclivities, features arrived at usually through some private 'revelation'. These are the sects, the religions founded on nothing but assertion, lacking any proof that demonstrates a Divine involvement. Of such are the Unitarians, Jehovah's Witnesses, Seventh Day Adventists, Mormons, Mohammedans and the like.

Finally, there are those who reject the assertion of God's existence and its possibility, agnostics, Deists, Freemasons and atheists. Today, the majority of Western peoples fall into this last camp.

Thus, the passage from belief in God in accordance with his gift through the Divine Redeemer, Jesus Christ, to mankind down to a professed atheism follows a logical, if irrational, process.

III. The move from belief in God to belief in 'no-God' brings with it deleterious effects on both intellect and will. As he descends from Divine faith to the blindness of the secular a man departs from the felt need to comply with the demands of reality and constantly to acknowledge the truth as true. He rejects reality when he rejects the truth that he could not exist without some cause of *what* he is or of *that* he is which is itself uncaused. He is disposed by this folly to embrace the simplistic explanations of *materialism* (which contend that natural being has no more than one cause, matter)⁵ and the claims of *subjectivism*, that what matters is not reality, but what he (or the majority of men) think about reality.

The disposing cause of these departures from principle is that the human intellect is feeble, so feeble that no man is capable of comprehending creation in all its immensity and intricacy. If a man will not believe in God he cannot thereby escape the need for belief. If he will not believe in God, he must believe in something else; must rely on the assertions—most of them unproven—of others. The way is open to engage in further folly, a folly not lessened because he shares it with many others.

infallible rule, but to his own will... It is clear that such a heretic with regard to one article has no faith in the other articles, but only a kind of opinion in accordance with his own will." St Thomas Aquinas, *Summa Theologiae*, II-II, q. 5, a. 3; cf. II-II, q. 11, a. 1.

⁴ Such as, the teaching that Christ founded a Church, that he gave the headship of the Church to St Peter and his successors; that it is the Church, and not some self promoting individual, that determines what has been Divinely revealed in the scriptures; that tradition in that Church is to be respected as well as sacred scripture; that marriage is indissoluble; that there are seven sacraments; and so forth.

⁵ Whose dominant thesis is Darwinian evolutionary theory.

IV. Inevitably, when peoples with diverse religious affiliations try to live together in society there are tensions. They will agree over the things they have in common and disagree over the things they do not. The test of unity in matters social is the common good. Pope John XXIII defined it shortly in *Mater et Magistra* as—

“The totality of those conditions of social living which enable men more fully and more readily to achieve their own perfection.”⁶

St Thomas was more expansive in his commentary on book I of Aristotle’s *Ethics*:

“It is evident that insofar as a cause is prior and more powerful it extends to more effects. Hence, insofar as the good, which has the nature of a final cause, is more powerful, it extends to more effects. So, even though the good be the same objective for one man and for the whole state, it seems much better and more perfect to attain, to procure and preserve, the good of the whole state than the good of any one man. Certainly it is a part of that love which should exist among men that a man preserve the good even of a single human being. But it is much better and more divine that this be done for a whole people and for states... more divine because it shows greater likeness to God who is the ultimate cause of all good. But this common good... is the object of... the particular skill called political science. Hence to it, as the most important science, belongs in a most special way the consideration of the ultimate end of human life.”⁷

Now it is religion that addresses the ultimate end of human life. Hence the most fundamental issue affecting the common good is religion. So, Pope Pius XII wrote—

“The origin and the primary scope of social life is the conservation, development and perfection of the human person, helping him to realise accurately the demands and values of religion and culture set by the creator for every man and for all mankind, both as a whole and in its natural ramifications.”⁸

Accordingly, while toleration of a particular religion may be required in a social mix, the extent to which that toleration should be extended is determined by the effect on the common good. No religion, no ideology, harmful to the common good has a right to be fostered or promoted. Indeed, society’s good may demand its suppression.⁹

Where there is no religion—where atheism reigns—the fundamental element underlying the common good is lost and with it the sense which gives life its ultimate purpose, which makes it worth living. The descent into hedonism of western nations whose members flourished under even a *residual* Christianity but the bulk of whom have now resorted to atheism is patent for all to see.

⁶ 15.5.1961, n. 65; and cf. *Gaudium et Spes*, n. 26.

⁷ Book I, Lecture 2, n. 30.

⁸ In his Christmas Message of 1942.

⁹ The demands of the common good were sufficient to justify the outlawing of the Communist Party in Australia in 1950. The Australian High Court erred when it disallowed the *Communist Party Dissolution Act* of Liberal/National Party Government. Sir Owen Dixon, a dominant member of the Court, adverted obliquely to the applicable principle when he endorsed the American view that “it is within the necessary power of [a] federal government to protect its own existence and the unhindered play of its legitimate activities.” [*Australian Communist Party v Commonwealth* (1951) 83 CLR 1, at 188.] While he adverted to the principle which is embodied in Cicero’s aphorism *salus populi suprema lex* in passing—in a citation from an earlier judge of the Court addressing the powers of the Court in time of war, he did not see it as a principle which applied at all times. Legal positivism deprives the modern judge of the realisation that there is no element of posited law which is not an application by the human mind of law imprinted on his being by nature; a further instance of the evils that follow on loss of belief in God.

V. *The Founders' Vision of Religious Liberty*

This is the setting in which to weigh the views of Thomas W. Josziewicz. 'The Founders' to which he refers are, of course, the Founding Fathers of the Republic of the United States of America.

The revolution that destroyed the salutary influence of Christ's Church in France in the late eighteenth century had its effects on the mix of peoples that had gathered, and would gather thereafter, on the north American continent. The burgeoning nation was a melting pot for the religious distortions that flowed from the Protestant Revolt. Yet the dominant influence there was not Protestantism but something that derived from it, the Deism that underlay the French Revolution. This quasi-religion denied that any revelation could come from a supreme being. It offered in lieu a 'religion' derived from reason and nature. Deism's offspring, Freemasonry, soon flourished in innumerable forms in the United States so that Protestantism and even Catholicism became infected with its tenets. The resolution of the issue of religion was not based on the limits demanded by the common good but on a compromise dictated by Deism/Freemasonry. The title of that compromise was 'religious liberty'.

The 'First and the Second Great Commandments' to which Professor Josziewicz refers in his paper are not the first two of the Ten Commandments in *Leviticus* 19: 18, but those Christ referred to in *Mark* 12: 29—

*The first of all the commandments is that you must love the Lord your God with all your heart, with all your soul, all your mind and with all your strength. And the second is like to it, you must love your neighbour as yourself.*¹⁰

Benjamin Franklin's reported perception that the most acceptable service to God was the doing of good to man subordinated God, and the duties owed Him, to the demands of mankind. This is Deism's reduction of religion to a pragmatic atheism. So separated, the second commandment reduces to *altruism*: the acts it inspires are not done for God's sake—not as a return in quasi-justice for the ineffable gifts of creation, conservation and redemption—but for man's sake. Every Mason, every quasi-Mason, substitutes *altruism*, a sort of worship of his fellow man, for *latría*, the worship he owes Almighty God.¹¹

VI. Josziewicz's bland recitation of the vision of America's founders—written be it noted for an allegedly Catholic website—ignores the reality that *every American*, no matter what his religious affiliation, *every man* no matter what his provenance, is created by the One God; that that One God established a religion for mankind's welfare and salvation; that a man reduces *that* religion to parity with any man-made religion at his peril. But that is just what 'religious liberty' does.

He fails to recognise that the critical issue is not as, under the influence of the atheism of the French revolutionaries America's founders thought, *freedom*, but freedom's right usage. He does not see as Leo XIII, the greatest of modern popes,

¹⁰ And *Matthew* 22: 34 et seq.

¹¹ Who, in the blasphemous oaths in which he indulges, mocks God to his face.

saw that the word 'freedom' expresses not one but two realities, *absolute freedom* and *moral freedom*, and that one may not laud 'freedom' let alone 'religious freedom' unless he has first understood the distinction and its implications.

So he treats freedom as if there is no such distinction. He repeats the current learning on religious freedom as if it was Catholic teaching. It is not; it never has been Catholic teaching, the ill considered decision of some 2,300 bishops of the Catholic Church in December 1965 notwithstanding. The very concept of religious liberty is self-contradictory and conflictive as anyone with an ounce of sense can see. Consider Joziewicz's conclusion to his paper:

"[W]e would do better with our Founders' vision of religious liberty, a renewed commitment to ordered liberty and civil conversation that includes religious 'values' and even – dare one say – religious truths?"

For a start *the Founders* were more inclined to atheism than to religion and 'religious freedom' includes *eo ipso* the entitlement to embrace atheism, as Leo XIII noted in *Immortale Dei*.¹² Next, 'religious values' are as various as the religions from which they stem, the 'religious value' of one frequently at odds with the 'religious value' of another. Thirdly, the term 'religious truths' can be said rigorously only of the truths of the Catholic faith because they alone are of God. The 'truths' of other religions are truths only in a qualified sense.

'Religious liberty' is not, as the bishops of Vatican II thought, an expression of *moral* liberty. It is *absolute* liberty by another name. Just as absolute liberty unfettered by the demands of the moral law offends the common good, so does 'religious liberty'. No one has a moral right to follow the religion of his choice unless that religion is the one true religion established by Almighty God. No religion but *this* religion has a moral right to exist. Which is not to say that some society may not tolerate a man-made religion, a *foreign* religion, provided the harm it works does not outweigh the limited advantages it may bring to that society.

VII. *The New Era of Religious Liberty*

The views of Gerald J Russello are hardly less confused than those of Joziewicz, albeit that Russello is alive to the practical problems of endorsing the Deistic concept.

The American legal system suffers the debility—another legacy of France's revolution—of a 'bill of rights' mentality. The mind at work in such a system is inherently atheistic and materialistic. For it involves the implicit assertion of an impossibility, namely, that one can delineate exhaustively the rights that attach to man. Man, the chief of the material creatures of an infinite God, made in God's image, is himself objectively infinite. So is the ambit of his rights.¹³

A much better system of law is that derived from the influence (over one thousand years) of the Catholic Church on the peoples of the British Isles, the English Common

¹² 1st November, 1885, n. 31.

¹³ Experiential proof of this is provided by the recurring exercise by the United States legislature addressing perceived shortcomings in existing 'rights' by 'Amendments' to the Constitution.

Law. Despite the debilitating influence of Protestantism after the sixteenth century, the integrity of the Common Law was largely preserved, continuing with little modification (until recently) in those countries whose legal systems derive from the British.

The Common Law starts with the Catholic assumption that man's freedom is given him by God and is only to be curtailed where necessary, through laws which proscribe actions which offend the moral law, or the demands of society which parallel the moral law. Here everything is permitted except what is forbidden: with a 'bill of rights' system, the tendency is to hold that everything is forbidden except what is permitted.

Underlying a 'bill of rights' system is the preconception that a man's freedom is something given him by his fellows (an element of Rousseau's erroneous thesis of 'the social contract'), not by God. And, what his fellows have given they may take away! The problems with such a system are manifest in the near impossibility of determining with finality the ambit of any of such legislated 'rights'. In Australia we have but one such. Section 92 of the Commonwealth Constitution provides that *trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free*. This provision has been a constant source of litigation. The High Court has changed its interpretation on numerous occasions and it unlikely that the latest ruling will long abide demand for a further change. No lawyer would be surprised in the least, then, at Russello's assertion of the situation in the United States in relation to the guarantee in their First Amendment¹⁴—

“that the jurisprudence of religious liberty has long been a near-hopeless mess.

In a Common Law system the citizen may, where a law is oppressive, vote out the lawmaker in the hope that his replacement will change things for the better. In a 'bill of rights' system the citizen is in the hands of the law's interpreters, the judges, and the ideology to which they currently adhere. Hence, the assertion in Joziewicz's paper is, with respect, naïve that—

“[r]eligious liberty, a protected Constitutional right at federal and state levels, is under renewed attack.”

And if, as Russello complains—

“[c]ourts across [America] have been ruling against religious institutions” it is not *in spite of* 'religious liberty', it is *because of* 'religious liberty'. For 'religious liberty' entitles you to believe or disbelieve *ad libitum*. And if the majority of the people are disbelievers, and the judges are elected by the people, *as they are in America*, the majority will prevail and the rest must suffer the consequences.¹⁵

It was primarily because they operated in a 'bill of rights' system that the members of the United States Supreme Court were free to import into the Constitution the

¹⁴ *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

¹⁵ Democracy's major problem: a wrong thinking majority exercises a sort of tyranny over the right thinking minority.

interpretation of “a wall of separation between church and state”. The reality represented by that expression is not religious, it is Masonic. The ideal situation for any society created by God is active cooperation between the one Church founded by God, the Catholic Church, and the members of that society as Leo XIII taught in *Immortale Dei* (November 1st, 1885) and elsewhere. But Masonry insists on a doctrine whose slogan one may hear on the lips of any schoolchild, as on those of any social commentator, of any politician—‘separation between church and state’: of course the church at which this doctrine is aimed is the Church of God, the Catholic Church.

Consider the material Russello quotes in the address in 1845 of “the great Catholic American thinker Orestes Brownson” —

‘[R]eligious liberty asserts the absolute freedom of conscience before the State, and denies the right of the State, or of any human power whatever, to force it, or in any sense to intermeddle with what concerns it...’

Religious liberty is certainly an aspect of *absolute* liberty, but it is Masonic (derived from Protestantism) to claim that individual conscience is superior to lawful authority. Brownson’s is not a Catholic, but a Masonic, understanding of principle. That religious liberty is not immune from the demands of the moral law nor from rightful intervention by the state for the common good was confirmed in 1851 when Pope Pius IX condemned the proposition —

‘Every man is free to embrace and profess that religion which, led by the light of reason, he thinks to be the true religion.’¹⁶

He repeated this condemnation in 1862¹⁷ and confirmed it formally in the *Syllabus of Errors* annexed to the Bull, *Quanta cura* (December 8th, 1864) in terms which conformed to the requirements laid out six years later (in the Constitution *Pastor Aeternus* of the Vatican Council) for a papal teaching to proclaim an infallible truth.

Just as *absolute* liberty should be proscribed whenever *moral* liberty demands it, so religious liberty should be proscribed whenever it offends the common good, when the harm its exercise brings exceeds any incidental good that results. Hence a good argument could be mounted that, for the good of the American people, Mormonism in its original form at least should have been proscribed. Likewise, an argument can be mounted that Mohammedanism, a religion which troubles the common good of any society in which it is embedded, should be proscribed. This is the practical, if not the theological, reason behind Catholicism’s age-long opposition to Islam.

VIII. Consider the dilemma for America, and Americans. The country proclaims itself ‘the land of the free’. A sort of idolatrous proclamation of freedom, the gift of the heirs of France’s Revolution, stands at the entrance of the country’s chief harbour. Freedom is lauded in America as if it had its home in no other place on earth.

Yet Americans lack many basic freedoms enjoyed by the peoples of other countries. You cannot, for instance, at Christmas time set up in a public place in America a Christmas crib depicting the Holy Family, the shepherds and the wise men who

¹⁶ In the Condemnation *Multiplikes inter*, June 10th 1851.

¹⁷ In the Allocution *Maxima quidem* on June 9th, 1862.

attended them. You would be prosecuted for breaching ‘the wall of separation’; prosecuted, in other words, for offending the Masonic agenda. Americans are deprived by their heritage of the ability to see things other than in fixed categories. Is a foreigner poor or rich? Is he black or white? Is he Protestant or Catholic? That he should be welcomed because he is an individual created by God, because he is a member of the human race, hardly weighs with them.

The obsession with firearms in the name of ‘freedom’, a consequence of the passage of the *Second Amendment*, puts the very life of the country’s citizen, the very ground of his personal freedom, at risk. The suspicion of a breach of a law in America brings with it consequences which are draconian, utterly removed from a sense of balance. The suspect is likely to be constrained in chains that reduce him to the level of a slave, a great irony given the country’s history. The effect is to assume guilt until the suspect proves himself innocent: the ‘social gift’ of freedom is peremptorily taken from him until he can justify to the people why they should return it.

In their naïve obsession with the *concept* of freedom, Americans have betrayed its *reality*. How has this come about? They have adopted the errors of Deism, the errors of the French Revolutionaries. They have confused *absolute* freedom with *moral* freedom. They have confused *moral* freedom with *absolute* freedom.

Some illustrations of the distinction of the two species of freedom

A man is *absolutely* free to kill another man; he is not *morally* free to do so.
A man is *absolutely* free to advocate anarchic political theories in society; he is not *morally* free to do so.
A dealer in obscene literature is *absolutely* free to corrupt the morals of a community; he is not *morally* free to do so.
A man is *absolutely* free—though its tenets mock Almighty God to his face—to embrace Freemasonry; he is not *morally* free to do so.
A man is *absolutely* free to embrace any religion he chooses; he is not *morally* free to do so unless that religion is the religion God has established.

IX. *Adoption of the American Folly by the Bishops of Vatican II*

Why has the world descended into atheism at a rate unprecedented in history? Because the Pope and bishops of the Church at Vatican II decided that *aggiornamento* was more important than adherence to the principles Christ’s Church had laid down. In effectively abandoning the claim of the Catholic Church to be the one true Church of God they gave atheism free reign.

Michael Baker

19th May 2013—*Pentecost Sunday*

APPENDIX

Part I

THE FOUNDERS' VISION OF RELIGIOUS LIBERTY

Thomas W. Joziewicz (Professor of History at the University of Dallas)

The Catholic Thing, 7th February 2013

[<http://www.thecatholicthing.org/columns/2013/the-founders-vision-of-religious-liberty.html>]

It seems politically incorrect today, but the truth is there truly were “Founding *Fathers*” of the American republic in the latter part of the eighteenth century. The most prominent of these Founders (and Framers as those who would write the second constitution in 1787 were called) are familiar names: Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, James Madison, Alexander Hamilton.

Not quite so well known, but part of this company were John Jay, Charles Carroll of Carrollton (the only Catholic signer of the Declaration of Independence), George Mason, Luther Martin [!] (a participant at the Constitutional Convention in 1787 who opposed its ratification particularly because it recognized a legal slave trade for at least another twenty years), James Wilson, and Benjamin Rush, among many others.

The best known earned their historical reputations by their contributions and their willingness to engage various issues at a high level, despite deep differences in their personal views. What, then, of religion, religious toleration, and religious liberty?

It is important that there is no religious test, whether for citizenship or office, in either the Articles of Confederation (1781-1788) or the Constitution (ratified in 1788). Further, the First Amendment (1791) prohibits Congress from making any laws “respecting an establishment of religion or prohibiting the free exercise thereof.” The states were not so restricted.

Beginning in 1776, and continuing with various revisions into the nineteenth century, state constitutions in a number of instances created Protestant church establishments and/or political disabilities for non-Protestants, especially Catholics. There was toleration, but not yet complete religious freedom.

These disabilities were noticed. In a 1789 letter congratulating the newly elected president from several Catholic figures, including Fr. John Carroll (who would soon become the first U.S. Catholic bishop), Washington was reminded of Catholic involvement in the recent Revolutionary War. This surely offered “a well founded title to claim from her [the United States] justice [and] equal rights of citizenship.” The writers would continue to “pray for the preservation of... [equal rights], where they have been granted; and expect the full extension of them from the justice of those States, which still restrict them.”

Washington’s reply implied his recognition of state sovereignty and the immediate prospect of toleration rather than complete religious liberty for all: “As mankind become more liberal, they will be more apt to allow, that all those who conduct themselves as worthy members of the community are equally entitled to the protection of civil government.”

Washington’s liberality regarding America’s future religious liberty was shared by many of the Founders, but not without some unease regarding Catholics. The new republic, as its state constitutions often indicated, was on the local level a Protestant community, perhaps a self-conscious “Christian nation.”

A number of the Founders, while inclined towards Deism or outright Deists, were not necessarily convinced by Protestant theology, but they were more comfortable with various trends at work among Protestant groups toward a more rational religion, such as

Unitarianism, which emphasized right action rather than – often contested right (sic) – doctrine.

Benjamin Franklin understood the proper role of religion to be emphasizing the Second Great Commandment: “that the most acceptable Service of God was the doing Good to man.” Too often, involvement with the First Great Commandment raised thorny issues, and even religious wars, regarding orthodox belief.

As to revelation, Franklin argued that actions were not good or bad according to Divine command, but actually were good or bad, “in their own Natures, all the Circumstances & Situations considered.” In short, reason applied to “the Nature of Man alone” was quite enough to arrive at governing human truths.

In that view, the Catholic Church, with its Creed, along with an insistence on institutional mediation between God and man, introduced the “priestcraft” and clerical abuse associated with the European *ancien régime*, an establishment thus anti-liberal, anti-freedom, anti-republican, and, well, anti-social!

Not all Americans agreed with Franklin, or course, but a habit of anti-Catholicism in the Anglo-American background inclined towards reasonable toleration rather than complete liberty for Catholicism, which might challenge the new regime or even seek to evangelize it.

Franklin or the decidedly anti-Catholic John Adams did not speak for all Americans or all of the Founders, but their vision of religious liberty in the new nation was not quite an absolute commitment to a completely free exercise of religion beyond safeguards against a federal assault on such freedom.

Still, by 1833, all states had eliminated the establishment of religion. And the nation’s history would continue to be marked by an uneasy relationship with Catholicism, which occasionally even led to violence.

It was not easy to overcome this gap. In 1960, John F. Kennedy offended even some Protestant observers with his elevation of Jefferson’s “wall” to breathtaking heights with an absolute personal separation of church and state. Kennedy’s own moral compass appeared to be so thoroughly secular that he seemed to suggest that religion had no legitimate place in the public square.

It was a successful political move, but the Founders would probably have been puzzled at this “naked public square” from which certain personal beliefs, especially religiously grounded beliefs, would apparently be banished.

Religious liberty, a protected Constitutional right at federal and state levels, is under renewed attack. With an absolutist secularism, we have once again begun to trend back toward a religious toleration that is intended to silence any suspicious *sectarian* voices.

Religion, personal and private, is to remain... personal and private.

But we would do better with our Founders’ vision of religious liberty, a renewed commitment to ordered liberty and civil conversation that includes religious “values” and even – dare one say – religious truths?

Part II

THE NEW ERA OF RELIGIOUS LIBERTY

Gerald J Russello

The Catholic Thing, 2nd May 2013

[<http://www.thecatholicthing.org/columns/2013/the-new-era-of-religious-liberty.html>]

It is a truism among legal scholars that the jurisprudence of religious liberty has long been a near-hopeless mess. Almost seventy years ago, the Supreme Court imported into the Constitution the phrase “wall of separation of church and state,” which has caused endless

confusion – since that “wall” was in the mind of no Founder other than perhaps Jefferson, who in any event was in France when the First Amendment was drafted. In response to a perceived need to address this “wall,” the Supreme Court and lower federal courts have devised various tests, standards, and thresholds to interpret the constitutional guarantee of freedom of religion.

Added to the confusion is the Court’s importation of the Amendment’s protections against the states, even though the text itself begins, “Congress shall make no law...” Thus, in religion, as in so many other areas, the federal courts have usurped the democratic process that once allowed citizens of the several states to govern their affairs. And on top of this heavy-handedness lies the secularism of the judiciary and legal elite, which has transformed religion from the first liberty to a begrudged and increasingly threatened privilege.

It was not so long ago, however, that, even with this disarray, those concerned with religious liberty were confident in its preservation. The Court, in cases like *Rosenberg v. University of Virginia* and the earlier *Witters v. Washington Department of Services for the Blind* confirmed that religious institutions and groups could receive the same benefits available to other, nonreligious recipients.

State courts have a more muddled history, but they have been active as well, ruling on their own constitutional and statutory provisions, which may differ in crucial respects from the First Amendment. Many states have so-called “Blaine” amendments for example, which are intended to limit support for “sectarian” (historically Catholic) schools. However, even there, state courts (the most recent being Colorado) are finding that religious persons can support religious institutions if they so choose without raising an issue of excessive and unconstitutional state “entanglement.”

And yet the confusion remains, to religion’s detriment. Courts across the country have been ruling against religious institutions. As the rulings on contraceptive coverage and similar topics show, the courts remain hostile to claims that religious institutions are autonomous at least when that autonomy clashes with a government “value,” such as “health care.”

How to explain these differing paths? On closer inspection, both groups of cases are based on the same assumption: choice conquers all. In many of the school-funding or benefits cases, the determining factor for the courts has been that the benefit passes through another party, usually the parents, who may choose to use the benefit at a religious school or program, but need not. This inoculates the program from constitutional challenge.

The same principle seemingly applies when the state switches from umpire to participant, as in the contraception cases. (The definitive work on the intellectual underpinnings of this shift is Robert Vischer’s *Conscience and the Common Good*.) The right of a person to choose contraceptive coverage, for example, often has inoculated a statute requiring such coverage from constitutional challenge.

Cases in states such as California and New York challenging mini-mandates have failed because the courts find it difficult to reject the premise that state action to further choice is constitutionally problematic. In this way of thinking, a neutral benefit should be provided to all, who may then choose whether to use it.

This solution is superficially attractive, but ultimately dangerous. The “neutrality” in the first set of cases is not the same as in the other. In the contraception cases, the state puts its thumb on the scale by furthering a value that it “neutrally” imposes on all, whether the religious beliefs of people or institutions forced to comply are compatible with that value or not. The school cases do not present that issue at all, and allow all who can receive the benefit to use it as they see fit.

Courts have not yet fully articulated the consequences of this reasoning, though others have. The great American Catholic thinker Orestes Brownson put the case to his countrymen in 1845 in this way:

Has the State the right to legislate for conscience, to subject conscience to its laws? Certainly not. The principle of our American government is, confessedly, that conscience is free, that where conscience begins, there the authority of the State ends. And it must be so, if we enjoy religious liberty as distinguished from religious toleration. Toleration presupposes the right on the part of government to force conscience, but that for certain prudential reasons it forbears to do so; but religious liberty asserts the absolute freedom of conscience before the State, and denies the right of the State, or of any human power whatever, to force it, or in any sense to intermeddle with what concerns it. In this country, the government, according to its profession, does not merely tolerate; it acknowledges religious liberty. Then it confesses that its sovereignty ends where conscience begins. Then I owe no allegiance to the State in matters of conscience; and then it has no right to command me to do what my conscience forbids; and I have the right, in all cases in which it so commands me, to refuse to obey it. If you deny this, you deny religious liberty, and assert for the temporal power the right to force conscience.

The new era of religious liberty—in choosing choice over conscience—promises to be perhaps less confusing, but more threatening to believers.
