



**RELIGIOUS  
FREEDOM AND THE  
COMMON GOOD:**

**THE IMPORTANCE OF RELIGIOUS  
ACTORS AND IDEAS IN PUBLIC LIFE**

CARDUS

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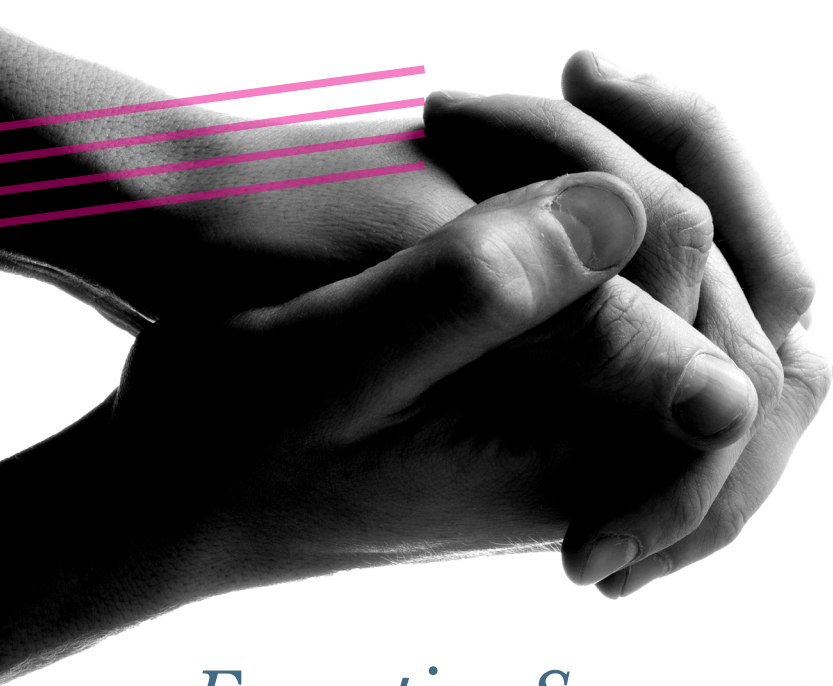
**THOMAS F. FARR**



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## *Executive Summary*

Professor Tom Farr’s clearly written paper traces for the reader the development of the idea of religious freedom in the American context from the founding days of the republic during the Enlightenment through to our times in which the very acceptance of religious freedom as a core principle in our society is under threat.

Farr argues persuasively that the United States’ founding fathers created a system of religious freedom based on the free exercise principle that was genuinely new. This system recognized a public faith, one that reflected the interior faith lives of citizens in how they conducted themselves religiously in the public space. This was possible due to the conception held by the vast majority of Americans that they were a religious people, yet this historic understanding has shifted fundamentally.

Farr buttresses this civic understanding of religious freedom with the Catholic understanding of religious freedom and its insistence on human dignity and conscience leading to an exploration of how religious freedom is exercised by faithful individuals and those self-same individuals existing as and operating within communities of faith.

Farr offers a clear warning around the growing intolerance for religious freedom in the United States in the face of non-discrimination laws and a rejection of religious freedom as being intrinsically bound up in the common good. This state of affairs has led to a collective forgetting of what religious freedom means. It is an amnesia that is hindering the United States’ ability to engage religion when it confronts it in the world of international affairs.

— Dr. Andrew P.W. Bennett,  
Program Director, Cardus Law

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## *Introduction*

In what follows, I will summarize part of a book project I am undertaking. The book has two related subjects: the meaning and value of religious freedom as it was understood at the American founding and practiced for two centuries, and the significant opposition to that understanding which has emerged in recent years. I will also note Catholic teachings that are consistent with the traditional American view, and I will conclude with some implications of the decline of religious freedom in the United States.

Here's my argument in a nutshell: the American founders, while drawing on classical, medieval, and early modern sources, nevertheless created a system of religious freedom that was genuinely new in the history of humankind. It was, in a word, revolutionary. Among its unprecedented characteristics was the placement of religious ideas and actors at the centre of the democratic political system.

That placement had multiple purposes that had not yet been attempted, let alone achieved, anywhere else by the late eighteenth century. Among those new goals were establishing in law and culture the principles of (1) equality among all religious communities, (2) religion as an indispensable limit on government, and (3) religious ideas as necessary contributors to the political common good, that is, to laws and public policies that reflect society's understanding of public norms and civic virtues to be encouraged by the state, or behaviours to be discouraged.

# *The American Understanding*

Let me unpack those ideas a bit. Two fundamental principles may fairly be said to characterize the system constructed by America's founders. First, *religion* has distinct, intrinsic, and universal value for free individuals and free societies. This value includes both its interior spiritual value for individuals and its public contributions to limited government, civic virtue, and the determination by free and equal citizens of the common good, including the extent to which the common good should be reflected in law and public policy.

Second, the value of religion for individuals, groups, and society at large warrants broad and vigorous protections for religious freedom. Those protections should provide exemptions from otherwise neutral laws of general applicability for those who object on grounds of religious conscience. More importantly, however, protection should also be provided to the free exercise of religion by individuals and groups in the public life of the nation, especially those who wish to engage in the *political* process with religious, or religiously informed, moral arguments. Properly limited and properly encouraged, public manifestations of religion in society and politics can generate distinct benefits for everyone.

## **THE IMPORTANCE OF RELIGION**

From their earliest settlements in the seventeenth century to the founding of the United States in the late eighteenth, Americans were on balance a religious people. Despite significant differences over religious practice and religion-state relationships, most settlers and colonists believed that religion was a primary source of public morality and civic virtue, as well as other social goods, and required special protection.

Let me summarize four ways the US constitutional settlement relied on religion. First, the founders venerated the role of the religious conscience in human nature and human prospering. Most agreed with Thomas Jefferson and James Madison in defining religion as “the duty which we owe to our Creator and the manner of discharging it.” They understood conscience as the means by which, along with the intellect and will, people discern and carry out their duty to God. The duty of following one's religious conscience is so important that, as Madison put it, the duty is “precedent, both in order of time and degree of obligation to the claims of Civil Society.”

Second, the revolutionary democratic principle of limited government, and the need for checks and balances, are supported by a fundamental Christian concept: the inherent sinfulness of humankind, which is the root cause of the corruptions endemic to concentrations of power. Even the saints cannot not be trusted with unchecked political or religious power. Limits on government are supported by the commitment of religious citizens to an authority beyond the

state, and by the important role of religious communities in the voluntary institutions of civil society. These institutions perform services that otherwise might be provided by government.

Third, most believed that the new Republic would fail without a virtuous citizenry, and that a central source of virtue was religion. They came to accept that religion's contribution to the common good in law and public policy was not through establishments and religious monopolies but through the free and peaceful contention of citizens' moral arguments derived primarily from religion. The ban on a religious establishment was similar to the constitutional guarantee of a free press. Just as government should not control the press, whose job is to help mold public opinion, so too it should not control religion, whose task is, *inter alia*, to mold public morality and to influence citizens' views of public policy. This view was perhaps best expressed by the first president, George Washington, in his 1796 farewell address: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."

Fourth, religion supports equality. The Declaration of Independence asserted a radical religious truth claim, namely, that "all men are created equal, and they are endowed by their Creator with certain unalienable rights." Thus did Thomas Jefferson, the most heterodox and religiously skeptical of the founders, lay the religious predicate for American democracy itself. Drawing on scriptural sources he at times professed to disdain (for example, the revelation that all human beings are created in the image and likeness of God, that God loves each, and that *for this reason* Christians are called to love others), Jefferson's truth claim established a secure grounding for human equality in the new Republic.

Colonial belief in the supreme importance of religion, the individual conscience in pursuing the duty of religion, and the role of both in supporting limited government and producing laws and public policies to elevate the common good, including equality, led to the ban on an establishment of religion. Although the Establishment Clause applied only to the national government, the states abandoned their own establishments by the 1830s. As they set aside religious establishments, however, Americans were not sanctioning the separation of religion from politics. By ending state control of doctrine and funding of churches, as well as government meddling in religious communities, they were endeavouring to protect religion itself. In so doing, they were laying the groundwork for supporting the idea of "the free exercise of religion."

## THE IMPORTANCE OF FREE EXERCISE

Three elements in the American Constitution highlight the benefits of protecting religious free exercise.

First, the First Amendment protects the "free exercise of religion," not the "rights of conscience." Both phrases appeared in early drafts, so both were considered. While conscience was asso-

ciated with interior belief, “free exercise” meant conduct. This choice of phrase, writes First Amendment scholar Michael McConnell, shows an intent to grant constitutional protection for *public* religious conduct, as well as for the interior beliefs that give rise to religious conduct.

Second, the religious free exercise provision was intended to protect the *religious* conscience and religion-related conduct, not *secular* conscience and conduct. The framers knew that secular beliefs and expressions were protected by the First Amendment’s guarantee of free speech. But they sought to provide special protection for both the interior religious conscience and for religiously inspired action in the public sphere. Until recently, Supreme Courts have accepted this view of what is protected under the free exercise clause. Religion, in short, has long been understood in American law and culture as something identifiable, distinct from other motives for action, and deserving of special protection.

Third, the guarantee of free exercise was extended to religious communities as well as individuals. Professor McConnell observes that an “important difference between the terms ‘conscience’ and ‘religion’ is that ‘conscience’ emphasizes individual judgment, while ‘religion’ also encompasses the corporate or institutional aspects of religious belief.”

This understanding of the meaning and value of free exercise and non-establishment remained dominant in American culture until well into the nineteenth century, and in the courts until the mid-twentieth century. A standard modern counter-narrative focuses on President Thomas Jefferson’s 1802 letter to the Danbury Baptists, in which he endorsed a “wall of separation between church and state.” According to this narrative, the founders intended the Establishment Clause to codify a wall of separation that would protect the state from religion and keep religion out of political life. That interpretation has been thoroughly dissected and disproved by Philip Hamburger’s magisterial study *Separation of Church and State*. Hamburger demonstrates that the idea of separating religion from political life first emerged during the nineteenth century among nativist Protestant groups reacting to the surge of Catholic immigrants from Ireland and elsewhere in Europe.

Ironically, anti-Catholic Protestants who supported the separation of religion from public life were joined by late nineteenth-century anti-Protestant secularists. These secular groups recognized that separation was not present in the Constitution. For this reason they tried, and failed, to secure a separationist constitutional amendment. Although the Supreme Court referred to Jefferson’s wall in its 1879 *Reynolds* decision, separation reached the status of judicial doctrine only with the 1947 *Everson* decision. *Everson* led to rulings barring religion from some public spaces, and to court (and academic) theories requiring “secular reasons” for laws. But inconsistencies and disagreements in the courts and within American society have kept the boundaries of religious free exercise relatively undefined and still contested, at least until now.





## *The Catholic Understanding of Religious Freedom*

Let me now turn briefly to a treatment of the Catholic understanding of religious freedom. Its modern expression emerged at the Second Vatican Council in 1965 with the document *Dignitatis Humanae*, the Declaration on Religious Freedom. There are several principles in *Dignitatis* that are consistent with the American system, but let me focus on three.

First, *Dignitatis* emphasizes that coercion has no place in religion. Man cannot perform his duty to God except through a free exercise of conscience. Religious freedom in this sense constitutes an immunity from coercion by any human agent, especially the state. This is similar to the views expressed by James Madison. The church adds in *Dignitatis* a long-standing Catholic teaching that a person must follow one's conscience in matters religious, even if it errs. No person's conscience may be coerced in matters religious.

Second, *Dignitatis's* use of the term "conscience" is consistent with the founders' understanding, namely, that conscience is given by God to every human being, that it is a means of discerning God's truth about and for humankind, and that it is therefore both a source and reflection of the dignity of every person. In the words of *Dignitatis*: "It is in accord with their dignity as persons . . . that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth once it is known, and to order their lives in accord with the demands of the truth."

However, *Dignitatis* adds a particular Catholic twist to the understanding of conscience. Conscience is not simply an expression of will. If the conscience is not properly formed, the result can be catastrophic. John Courtney Murray, an American theological expert at Vatican II and highly influential in the production of *Dignitatis*, provided explanatory footnotes to an early edition. In footnote five, the document notes: "Neither the Declaration nor the American Constitution affirms that a man has a right to believe what is false or to do what is wrong. This would be moral nonsense. Neither error nor evil can be the object of a right, only what is true and good. It is, however, true and good that a man should enjoy freedom from coercion in matters religious." Here Murray and *Dignitatis* are distinguishing between a moral right and a civil

right. He continues: “The Declaration nowhere lends its authority to the theory for which the phrase [“freedom of conscience”] frequently stands [today], namely that I have the right to do what my conscience tells me to do simply because my conscience tells me to do it. This is a perilous theory. Its particular peril is subjectivism—the notion that in the end, it is my conscience, and not the objective truth, which determines what is right or wrong, true or false.”

Third, just as the right of religious freedom extends to individuals, it also extends to religious associations and communities. This too echoes the American founders, although the corporate aspects of religious freedom are less explicit in the founding, both because of the Protestant emphasis on the individual conscience, and because of the founders’ rejection of the more corporate understandings in Catholic doctrine. In *Dignitatis*, however, this teaching is explicit in order to emphasize the freedom of the Church to make its truth claims in civil society, including its claims about who the Church is, and to propose its views of justice and the common good.

## *The Breakdown of the American Understanding*

Let me continue with a few words on how the traditional American understanding is under serious pressure, and how its decline has implications that go beyond the United States.

Two elements of the problem will show its significance. The first is that the treatment of American Muslims as equal citizens in law and culture is at risk. The unfortunate campaign rhetoric of the US president has deepened in that community a sense of unease and even fear. To the extent this fear is borne out, it presents a major challenge to the American system of religious freedom.

The second challenge derives from emerging non-discrimination laws and social norms that reject mainstream Christian teachings on what a human being is, on the source of human dignity, and on the meaning of marriage and the family. The most long-standing tension in this area has been over the right to abortion. A related development has been the treatment of divorce as, in effect, an individual human right to be facilitated by the state. More recently, American law and public policy has recognized homosexuals as a protected class of persons whose dignity stems from their sexual orientation and, separately, “gender identity” as a protected category of choice.

Over the last half century American progressives have come to view traditional religious communities as barriers to moral and social progress. Only recently, however, have some begun to argue that such religious communities should have no voice and should be, in effect, banned from public life. The rise of sexual non-discrimination norms and the creation by the Supreme Court of a right to same-sex marriage have made it safe, indeed required in some progressive circles, to put “religious freedom” in scare quotes and to assault this basic constitutional principle as a front for bigotry. On these subjects, Christians are now to remain silent.

Here are but three among many examples of this new assault on religious freedom. First, in its decision on same-sex marriage, the Supreme Court reached the apogee of its “animus” judicial doctrine, which has been developing since the 1990s. It is the doctrine that those Americans who believe in traditional biblical morality are motivated by animus against homosexuals. As Justice Kennedy expressed it for the majority in *Windsor*—a decision that overturned the federal Defense of Marriage Act—those supporting traditional marriage are motivated by a “desire to harm,” “to humiliate,” and “to injure.” The court has in effect given permission for progressives to label traditional religious ideas as bigoted and to insist on their removal from political life.

Second, following the court’s lead, a report by the US Commission on Civil Rights—an official US agency with the task of promoting civil rights for all Americans—stated that “the phrases ‘religious liberty’ and ‘religious freedom’ [are] code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, [and] Christian supremacy.”

Third, in a 2015 speech, Democratic presidential candidate Hillary Clinton spoke of the court-established right to abortion: “Laws have to be backed up with resources and political will. . . . Deep-seated . . . religious beliefs . . . have to be changed.” Law, in other words, must be used to alter the teachings of religions that oppose abortion. With the benefit of Wikileaks we have discovered that Secretary Clinton’s closest aides were hard at work doing just that—funneling money to fake “Catholic” organizations that are designed to change the teachings of the Church on abortion, sexual morality, and marriage.

As a Catholic and a citizen, I oppose these developments precisely on the ground that they are destructive of the common good. But what I wish to emphasize here is less the policies themselves than the undermining of the historic American understanding of religious freedom, designed in part to help adjudicate such deep disagreements. The attack on religious freedom surely has as one of its aims the banning of traditional religious ideas from debates over the common good. This, it seems to me, constitutes a danger—not only to the American system of religious freedom but also to American democracy itself.



## *The Implications for International Affairs*

Let me end with a word about the implications of this problem beyond America's shores. Religious freedom is in grave crisis around the world. The non-partisan Pew Research Center has issued a series of reports in recent years showing that three-quarters of the world's population lives in countries where religion is either highly, or very highly, restricted. In most of these countries, religious freedom can hardly be said to exist—certainly not in the vigorous way discussed in this paper.

The causes are many. They include authoritarian governments that are theocratic, secular, or atheist. They include the aggressive secularism we are seeing in Western democracies, most recently in the United States. They include violent religious extremism, including those of Christian, Hindu, and Buddhist varieties, but most destructively that of Islamic origin, such as the genocidal ISIS, or the vile depredations of groups like Al Qaeda, Boko Haram, Al Shabaab, and the like. As a result, millions of human beings are subject to vicious, violent religious persecution, including rape, torture, unjust imprisonment, forced emigration, and murder—because of either their religious beliefs and practices or those of their persecutors.

These terrible realities constitute in my view a global crisis in religious freedom. The crisis has catastrophic humanitarian dimensions that cause human suffering on a horrific scale. But it also has international and national security implications. Religious persecution destabilizes. It stymies economic growth, especially harms women and children, and undermines any opportunity for systems of ordered liberty. It incubates, nurtures, and exports violent religious extremism around the world, including to our own countries.

What is its antidote? What can Western democracies do? The answer to that question has many elements, but at its core must be the advancement of religious freedom. The United States has for almost twenty years had this as a goal of its foreign policy. Notwithstanding the heroic efforts of a few, it is difficult to conclude that US policy has succeeded.

So let me conclude with this thought. Among the many causes of the ineffectiveness of America's international religious freedom policy must be this: We no longer understand what religious freedom means or why it is important. It is, in short, very difficult to sell a product in which you no longer believe. We owe it to ourselves, and to posterity, to retrieve a genuine commitment in law and culture to religious freedom for everyone, everywhere.