Francis Bacon Takes on the Ghouls

The "First Principles" of Religious Freedom

John Witte, Jr.
Religion and the American Constitutional Experiment: Essential Rights and Liberties
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This is a great time for students of the First Amendment's Religion Clauses and of what Professor John Witte calls the American "experiment" with religious freedom. We've been blessed these past few years with an in-print seminar – an upper-division offering, team-taught by faculty heavyweights – on this experiment, its products and prospects, and the values that have shaped it. Our teachers and texts have included, to name just a few, Professor Steven Smith's *Foreordained Failure: The Constitutional Quest for a Constitutional Principle of Religious Freedom* (1995); Dean John Garvey's *What Are Freedoms For?* (1996); Judge John Noonan's *The Lustre of Our Country: The American Experience of Religious Freedom* (1998); and now Professor Witte's *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (2000). And though each of these texts, standing alone, is an achievement and an education, each is perhaps best read as one interlocutor's contribution to our lively seminar discussion on the meaning, purpose, and even the existence of the First Amend-

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ment's "first principles."[1]

Professor Witte's study provides an engaging history (and pre-history) of the First Amendment and of the efforts of state and federal courts these past two centuries to identify, understand, and vindicate the Amendment's requirements and ideals. *Religion and the American Constitutional Experiment* contains a clear, appropriately critical roadmap through the First Amendment Fire Swamp,[2] highlighting the "theological visions and values" the Amendment reflected (p. 5). The book's detailed appendices alone ("Drafts of the Federal Religion Clauses"; "State Constitutional Provisions on Religion"; and "United States Supreme Court Decisions Relating to Religious Liberty") are well worth the price of admission.

Witte contends that what Thomas Jefferson called our "novel experiment" (p. 1) with religious freedom – an experiment that "inspired exuberant rhetoric throughout the young republic and beyond" (p. 1) – has been thrown out of whack because the Supreme Court has lost sight of the theological and political principles that were to have governed that experiment. These "interlocking" principles were and should be "mutually supportive and mutually subservient to the highest goal" of guaranteeing religious freedom (p. 55), a task to which any one (or two) of them, standing alone, is inadequate.

But the Court has been bewitched by a "Scylla and Charybdis"[3] model of the First Amendment, a model that "ignor[es] the *range* of [these] interlocking first principles" (p. 217). Thus, "free exercise" and "non-establishment" values are pitted against, rather than arrayed alongside, each other. Public expressions of faith are restricted, leaving little room in civil society for the specifically *religious* freedom the Amendment was designed to achieve.[4] In the Establishment Clause context, the Court's "almost single-minded … devotion to the principle of separation of church and state" has produced "secularist dicta and decisions that seem[] anomalous to a nation so widely devoted to a public religion and to a religious public" (p. 4); while its emphasis on the single norm of "neutrality" has effectively – I assume the pun is intentional – "neutralized" the Free Exercise Clause (p. 4). Witte insists that the Free Exercise and Establishment Clauses should not work at cross-purposes; instead, they "provide[] *complementary* protections to the [other] first principles" (p. 6) (emphasis

1 Professor Smith has already reviewed *Religion and the American Constitutional Experiment*, *see* Steven D. Smith, *Prisoner of Principles*, First Things 58 (April 2000); Professor Witte discussed recently *The Lustre of Our Country* in these same pages, *see* John Witte, Jr., *Oracle of Religious Liberty*, 2 Green Bag 2d 327 (Spring 1999); and Judge Noonan contributed a glowing back-cover blurb to Witte's book. Smith argues in *Foreordained Failure* that courts will never identify, because the Framers never agreed upon, a single substantive theory of religious freedom, Steven D. Smith, Foreordained Failure: The Constitutional Quest for a Constitutional Principle of Religious Freedom 12 (1995); and Witte responds in *Religion and the Constitutional Experiment* with no fewer than six "first principles" – six "essential rights and liberties of religion" (p. 37) – that "inspired and informed the original American experiment" (p. 3).

2 In William Goldman's *The Princess Bride*, the Fire Swamp is a forbidding slough of lightning sand, unpredictable bursts of flame, and R.O.U.S.'s ("Rodents of Unusual Size"). *Cf.* John Bunyan, Pilgrim's Progress 15-16 (Constable & Co. 1926) (1678) (describing Pilgrim's travails in the Slough of Despond).

3 *See, e.g.*, Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) ("By broadly construing both [Religion] Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.").

4 *See generally, e.g.*, Richard Neuhaus, The Naked Public Square (1984).

added). His hope is that an "integrated" (p. 6) "constitutional balance" (p. 232) of the "multiple principles on which the American religious experiment was founded" (p. 235) could lead both to greater coherence in the law and religious freedom in the public square.

Witte's defense of the American religious-liberty "experiment" and his arguments for its re-direction are shaped by the advice of Francis Bacon, "the seventeenth-century 'father' of the experimental method" (p. 3): When an experiment becomes a "kind of wandering inquiry, without any regular system of operations" – and Witte thinks this can fairly be said of the "thickets of casuistry in which First Amendment scholarship has become heavily entangled" (p. xiii) – "prudence commends three correctives" (p. 3). *First*, "we must 'return to first principles and axioms,' reassess them in light of our experience, and 'if necessary refine them.'" *Second*, having fine-tuned our principles, we must "assess 'our experience with the experiment' in light of these first principles, to determine 'where the experiment should be adjusted.'" And *finally*, "we must 'compare our experiments' and experiences with those of fellow scientists, and where we see in that comparison 'superior techniques,' we must 'amend our experiments' and even our first principles accordingly" (p. 3).

In keeping with these "correctives," Witte's opening chapters identify and expound the "first principles and axioms" that he thinks "inspired and informed the original American experiment" (p. 3). As Witte observes, the Framers "did not create their experiment on religious liberty out of whole cloth" (p. 7). Instead, "[t]hey had more than a century and a half of colonial experience and more than a millennium and a half of European experience from which they could draw both examples and counterexamples" (p. 7). Colonial America's political thinkers – not just its religious ministers – were inspired by the Bible's "bracing aphorisms on freedom," by "impassioned sermons in defense of spiritual and civil liberty," and by the inspiring examples of "the martyred prophets of religious liberty in the West" (p. 7). These streams of influence converged with the political-liberty themes in the works of Locke, Montesquieu, and Blackstone.

To set up the theological and political context of the American experiment, Witte opens with a whirlwind tour of the "main events and figures in the Western tradition of religious liberty" (p. 8).[5] These are impressively dense pages, intended to show that "[t]he eighteenth-century American experiment in religious freedom was …, at once, very old and very new" (p. 21); it drew on over a thousand years of European thinking and experience even as it reflected late-eighteenth-century "theological and political sentiments" (p. 23). Witte presents these foundational "sentiments" in two taxonomical pairs. On the one hand are the *theological* views of congregational Puritans, who saw church and state as distinct yet cooperating "covenantal associations" (p. 25), and Free Church Evangelicals, who were as leery of state benevolence as they were of state repression. On the other hand are the *political* claims of Enlightenment theory, which promoted liberty of conscience by making religion "primarily a matter of private reason and conscience and only secondarily a matter of communal association and corporate confession" (p. 33),[6] and Civic Republicanism, which aimed toward a "common religious ethic and ethos" (p. 34) and therefore toler-

5 Judge Noonan provides a similar tour, in question-and-answer, "catechetical" form, in his chapter, "To Kill a Quaker, To Beat a Baptist: Religious Liberty Before the Revolution." John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 41-58 (1998).

6 The views of James Madison are Witte's leading example of Enlightenment influence, and are also the organizing subject of Noonan's The Lustre of Our Country. *See* Noonan, *supra* note 5, at 61-91.

ated such "mild and equitable establishments" of public religion as the health of civil society might require (p. 36).

These four groups "held up the four corners of a wide and swaying canopy of opinion on religious liberty" (p. 24) beneath which were gathered the six "essential rights and liberties" of religion: *Liberty of conscience* – the "cardinal principle for the new experiment" (p. 42) – preserves "the unalienable right of private judgment in matters of religion" (p. 39). *Free exercise of religion* is the "right to act publicly on the choices of conscience once made," consistent with the rights of others and the peace of the community (p. 43). *Religious pluralism* includes both "confessional pluralism" – *i.e.*, "a plurality of forms of religious expression" – and "social pluralism," or the "maintenance and accommodation of a plurality of associations" that serve as "important bulwarks against state encroachment on natural liberties" (p. 44, 45). *Religious equality* demands that the state not "skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths" (p. 46). *Separation of church and state* protects both the integrity of true religion and the "liberty of conscience of [] religious believer[s]" (p. 50). And finally, *disestablishment of religion* shores up the other principles by forbidding government prescription of certain forms of worship, favoritism toward certain religious bodies, and "intermeddling" with religious institutions (p. 52).

These six principles provided "an interwoven shield" for religious freedom (p. 55).[7] "No single principle could by itself guarantee such religious liberty. … Religion was simply too vital and too valuable a source of individual flourishing and social cohesion to be left unguarded on any side" (p. 55). Thus, Witte insists, these complementary principles were not only translated into the new States' constitutions, they also – this is, Witte thinks, the lesson for courts today – circumscribe "the range of plausible meanings that can be assigned to the final text of the First Amendment" (p. 57). True, the constitutional text enshrines explicitly only two of the six principles, but the Amendment's no-establishment and free-exercise provisions, and similar language in the States' constitutions, "can [and should] be read to incorporate the full range of 'essential rights and liberties' discussed in the Eighteenth Century" (p. 86).

The heart of *Religion and the American Constitutional Experiment* is an analysis and critique of state and federal courts' treatment of religious-liberty questions in light of first principles. Because, "[f]or the first 150 years of the republic, principal responsibility for the American experiment in religious rights and liberties lay with the States" (p. 87), Chapter Five focuses on state cases and constitutions, noting the "prevalent pattern of balancing the freedom of all private religions with the patronage of one public religion" (p. 98). Witte then discusses, in Chapter Six, how in the relatively few federal religion cases decided in this period the Court interpreted and applied religious-liberty principles in ways that would shape later First Amendment doctrine.

In *Cantwell v. Connecticut*[8] and *Everson v. Board of Education*[9] the Supreme Court "incorporated" the Religion Clauses into the Fourteenth Amendment, ending the religious-freedom principles' state-court incubation

7 *But see* Smith, *Prisoner of Principles*, *supra* note 1, at 60-61 ("Just why *this* should be the list is never made clear … . Surely some of these elements could be collapsed into others … . [T]he principles are overlapping and indistinct … .").

8 310 U.S. 296 (1940).

9 330 U.S. 855 (1947).

period. Chapters Seven and Eight, accordingly, trace the wandering astray of "modern" free-exercise and no-establishment law (Appendix Three – "United States Supreme Court Decisions Relating to Religious Liberty" – is a godsend for law-school study groups). The Court's free-exercise jurisprudence, Witte thinks, started out strong; for forty years after *Cantwell* the Court interpreted "free exercise" as an "umbrella term that incorporated the principles of liberty of conscience, separation of church and state, and equality of a plurality of faiths" (p. 126). Over time, though, the Court "slowly reduced the free exercise clause to a single and simple principle of neutrality" (p. 137) and by *Employment Division v. Smith,*[10] the Court had "systematically read each of the[] constitutive principles out of the free exercise clause" (p. 137), a move that would drive many religious-freedom claimants to the Free Speech Clause for constitutional protection (pp. 141-146).

The Establishment Clause story is the Court's efforts since *Everson* to supplement single-minded separationism with equality and liberty-of-conscience principles. It was in *Everson*, remember, that Justice Black famously constitutionalized Jefferson's "high and impregnable" wall of separation (p. 114). Justice Black purported to root this radically separationist metaphor in the Framers' design but, Witte insists, he failed to look beyond Enlightenment thinkers to the Puritans, Evangelicals, and Civic Republicans at the other four corners of the religious-liberty "canopy" (pp. 114-115).

More recently, the Court has toyed with a variety of approaches and "tests" in Establishment Clause cases – "accommodationism," "neutrality," "endorsement," "coercion," and "equal treatment" (pp. 152-163) – all of which are moves toward a "more integrative" law of disestablishment (p. 175). Still, "[f]ew areas of law today are so riven with wild generalizations and hair-splitting distinctions, so given to grand statements of principle and petty applications of precept, so rife with selective readings of history and inventive renderings of precedent" (p. 182). This disarray can be blamed, Witte thinks, on the fetishization of strict separation at the expense of other religious-liberty principles, an error that "trivializes the place of religion in public and private life" and diminishes the Constitution "from a coda of constitutional principles of national law into a codex of petty precepts of local life" (p. 184).

In keeping with Bacon's corrective method, Witte concludes by turning to "the emerging traditions of other people" to find a "more integrated approach" that "embrace[s] the long-standing traditions of *our people*" (p. 218). He looks to "international legal and human rights norms" to "help to confirm, refine, and integrate prevailing First Amendment principles and cases" (p. 219), and to re-capture "the best of American, and other Western, constitutional learning on religious liberty" (p. 220). Toward this end, Witte analyzes several leading human-rights documents, including the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). It turns out, Witte thinks, that international efforts to protect and foster religious liberty "confirm and prioritize" our own first principles (p. 225), with at least one important exception: Witte emphasizes that "[c]onspicuously absent from international human rights instruments are the more radical demands for separationism, rooted in certain strands of enlightenment reasoning and reified in the popular American metaphor of a 'wall of separation between church and state'" (p. 226).

Witte's "Concluding Reflections" are powerful. He recalls John Adams's warning that if

10 496 U.S. 913 (1990).

Americans, having been given the chance for true religious freedom, were to "betray their trust, their guilt [would] merit … the indignation of heaven" (p. 231).[11] Maybe we have not betrayed our trust, but we have, Witte thinks, lost our balance. To recover, we must recapture the Founders' insight that religion is "special"; it is a "unique source of individual and personal identity," not "simply a peculiar form of speech and assembly, privacy and autonomy." The challenge is to "balance the freedom of all religions with the maintenance of a public religion that is neither a newly established secularism nor a traditionally established Christianity" (p. 235). Such a balance need not reduce religion to the watered-down "American Shinto" celebrated in the Court's "plastic reindeer" cases (p. 236), nor should it require religious claimants to translate their faith, for litigation purposes, into free-speech jargon. Instead:

> Public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free *just because they are religious* (p. 237).

This is great stuff. It is refreshing to be reminded that the First Amendment protects religious liberty precisely because *religion*, no less than liberty, is worth protecting.[12] And Witte's basic point – that the Court's First Amendment case law is a mess at least in part because Establishment Clause cases are driven by a religion-wary separationism and the Free Exercise Clause is now redundant of the Equal Protection Clause – seems correct. If nothing else, Witte's *leitmotif* should be etched indelibly into the sound-bite thinking of the talk-show commentariat (not to mention the *United States Reports*): "Separation of church and state" does not require the banishment of faith from the public square.

Still, these diagnoses inspire more confidence than do Witte's specific prescriptions for treatment. Witte aspires, remember, to more than just a demonstration that there is more to religious freedom than strict separationism and neutrality. He also insists and takes care to show that there are precisely six first principles found in the precisely four theological and political traditions that converged at the Founding; that these six principles were consciously incorporated into the First Amendment via the insertion in its text of two of them; and that constitutional doctrine could be made more "coherent" if judges were carefully to "balance" and "integrate" these "interlocking" and "cooperating" principles. Appropriate here are the words of the biblical father whose son Christ cured of evil spirits, "I believe; help my unbelief."[13] For while Justice Witte would likely succeed where the Court has often failed at using the Religion Clauses to protect both religion and liberty, few proposals seem less likely to lead to more coherence in *any* area of law than a call for judges to "integrate" and "balance" six eighteenth-century first principles.[14]

But putting aside any churlish skepticism

11 4 The Works of John Adams 290, 292-293, 298 (C.F. Adams ed., 1850-1856).

12 *See generally,* John H. Garvey, What Are Freedoms For? (1996).

13 Mark 9:24.

14 This skepticism about the place of "principle" in Religion Clause jurisprudence is the theme of Steven Smith's Foreordained Failure – another good reason to read Smith and Witte together. *See also, e.g.*, Smith, *Prisoner of Principles*, *supra* note 1, at 62 ("[B]y multiplying the independent factors to be 'judicially balanc[ed],' Witte's approach would make the law even more subjective and unpredictable than it already is.").

about judges' ability to put Witte's Baconesque "correctives" to good use and to "balance" their way to principled coherence, several more general – for lack of a better word, "sectarian"[15] – concerns might be warranted about the principles themselves, and about the traditions from which, in Witte's account, they emerge. These concerns require and deserve a more thorough exploration than can be provided here but, in a nutshell, if John Noonan's *The Lustre of Our Country* is a "reflection on [the] experience" of growing up Catholic,[16] *Religion and the American Constitutional Experiment* is, in a way, a reflection on the religious-liberty experiment of Protestants.

For starters, Witte's opening tour of the "main events and figures in the Western tradition of religious liberty" (p. 8) from which the Founders drew their inspiration is, while never tendentious,[17] thoroughly Protestant as it breezes through "The First Millennium" (pp. 9-11) and then moves from the Protestant Reformation to Founding-era thinking about faith and religious liberty (pp. 14-19). One wonders whether the Catholic (or "Counter") Reformation, the foundation and activities – particularly among the English recusants – of St. Ignatius of Loyola's Society of Jesus, St. Frances DeSales's apologetical battles with the Geneva Calvinists, the sweeping reforms of the Council of Trent, *etc.*, might also be significant to the genealogy of religious liberty in the West. And perhaps Henry VIII's repressive nationalizing of the Catholic Church in England is better understood not as a step on the path to religious freedom but rather as the greedy power play of an unhinged megalomaniac. Witte observes that the American experiment was inspired by the "martyred prophets of religious liberty in the West – Thomas Becket, John Wycliff, John Hus, and an ample number of the early modern Continental Anabaptists and English Levellers" (p. 7). But surely any pantheon worthy of the name for "martyred prophets of religious liberty in the West" must also include Thomas More, Margaret Clitherow, John Fisher, and an "ample number" of martyred English Jesuits and recusants.

Witte cannot be faulted, of course, when telling the religious-liberty story that in fact moved the Framers, for telling a Protestant story. This is not a plea for equal time. Still, it is worth wondering whether the fact that it was a distinctively Protestant story that shaped the Framers' aspirations for their experiment principles matters – not just to the story's outsiders, but also to the prospects for the experiment itself. Witte claims, again, that the six principles that emerged from this decidedly "sectarian" story not only informed the meaning of the First Amendment at the outset, but can and should also guide courts to coherence today. Is it possible, instead, that the experiment's present disarray is somehow rooted in the particularistic narrative that was its inspiration?

Moving forward from the Founding, it is, with all due respect, a glaring omission in Witte's treatment of the 150 years between ratification and incorporation that there is

15 *See* Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term 'Sectarian,'* 6 J. L. & Pol. 449 (1990).

16 Noonan, *supra* note 5, at 3.

17 In fact, Witte carefully avoids the triumphalism of those for whom the Protestant Reformation is the genesis of the notion of individual rights. As Witte observes, "[t]he Protestant Reformation did not 'invent' the individual or the concept of individual rights, as too many exuberant commentators still maintain" (p. 16); rather, "[m]any of the common formulations of religious rights and liberties that came to prevail in the eighteenth-century American experiment were first forged … by obscure Catholic theologians and canon lawyers more than four centuries before them" (p. 13).

almost *no* discussion of the virulent yet respectable anti-Catholicism of those years' "*de facto* Protestant Establishment."[18] There is nothing, for example, about the protestantizing aspirations of Horace Mann and the common-school movement, nothing about *The Awful Disclosures of Maria Monk* and the Massachusetts nunnery-investigation committees, nothing about arson of parochial schools or the whipping of "public" school students who would not read the King James Version, not a word about the Know Nothings, and only one line about the "agitation" (p. 87) that surrounded the cynically anti-Catholic Blaine Amendment and the state constitutional provisions it inspired.[19]

True, *Religion and the American Constitutional Experiment* is not a history textbook. But its argument does rest, in large part, on historical claims about the emergence and development of certain principles. And we might reasonably be cautious about entrusting the protection of religious liberty to six principles that were nurtured for a century-and-a-half in the arms of what Arthur Schlesinger, Sr. once called the "the deepest bias in the history of the American people."[20] This bias had not disappeared by the time the Court decided *Everson*, nor has it been entirely absent from subsequent decisions.[21] It could well be – particularly in the Court's Establishment Clause cases dealing with public funds and parochial schools (pp. 170-179) – that a seventh principle, anti-Catholicism, has distorted the American experiment as much as the failure properly to integrate the other six.

Finally, Witte closes with the suggestion that the first principles of religious freedom have not been as dis-integrated in translation abroad as they have been in litigation at home.[22] Similarly, Judge Noonan discusses the extra-national influence of American "free exercise" ideas in *The Lustre of Our Country*,[23] including on his own paradigmatically international Church, "a church that formally denied free exercise and … has now come to champion it."[24] In particular, Noonan treats at some length the Second Vatican Council's Declaration on Religious Liberty – *Dignitatis humanae* – and the work of the then-controversial American Jesuit, John Courtney Murray, in the development of Catholic teaching on religious freedom.[25]

18 Mark DeWolfe Howe, The Garden and the Wilderness 31 (1965).

19 "The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace." Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999), *cert. denied*, 120 S. Ct. 283 (1999).

20 John Tracy Ellis, American Catholicism 151 (1969). On nineteenth century anti-Catholicism, particularly in education, see generally, *e.g.*, Charles Leslie Glenn, Jr., The Myth of the Common School (1988); Lloyd P. Jorgenson, The State and the Non-Public School 1825-1925 (1987).

21 *See generally, e.g.*, Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 375, 385 (1999) (describing place of anti-Catholicism and negative stereotypes about Catholic education in the development of modern Establishment Clause doctrine); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. Am. Hist. 97 (1997).

22 Witte is, of course, an expert in the treatment of religious freedom around the world. *See, e.g.*, John Witte, Jr. & Johan D. van der Vyver, Religious Human Rights in Global Perspective (1996).

23 Noonan, *supra* note 5, at 265-328.

24 *Id.* at 3.

25 *Id.* at 331-353.

Witte addresses these matters briefly in his own review of Noonan's book,[26] but a more fleshed-out analysis of *Dignitatis humanae* and its more recent progeny, in light of the principles and premises Witte ascribes to the American experiment, would have worked well in his concluding chapter.

Indeed, such a discussion might have identified precisely the kind of "integrated" approach to religious freedom Witte seeks. As one commentator has observed, it could be said that the Catholic Church, long suspicious of "liberal" ideas of religious freedom, embraced and began to champion those ideas just as America – the land, in Witte's view, of the original experiment – began to privatize religion, exclude it from civil society, and marginalize its moral demands.[27] As Noonan notes, in *Dignitatis humanae*, the "Catholic Church had set a new course … as the champion of religious freedom everywhere for everyone. The demand of human nature for such freedom had been affirmed."[28]

Noonan's remark – that "human nature" demands religious freedom – points to the importance in Catholic social teaching of the dignity and social nature of the human person. This is a way of thinking that, as Professor Mary Ann Glendon demonstrates in a forthcoming book on the Universal Declaration of Human Rights, has had a profound impact on international efforts to protect human rights generally, and religious freedom specifically.[29] It is an approach that has been "assisted by a diffuse glow from America,"[30] but it is not a mere transplant of the American experiment. Similarly, as Noonan observes, the Second Vatican Council was influenced by Murray and the American experience as it composed *Dignitatis humanae*, but it also followed the French Thomist Jacques Maritain and others in "translat[ing] into the language of person the traditional claims of conscience."[31] Could the American experiment benefit from imported "dignitarian" principles?

Recall that, for Witte, liberty of individual conscience was the "cardinal principle" (p. 42) for the American experiment, the foundation upon which the experiment was built. This principle, like the Enlightenment political theory it reflected (pp. 31-34), complements and supports an individualistic "voluntarism" in matters of faith. Consider, for example, the famous "mystery passage" of *Planned Parenthood v. Casey*:[32] "[T]he heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The emphasis in *Dignitatis humanae*, though, and perhaps also in the Universal Declaration, is subtly different (cf. pp. 225-26[33]). There, the objective dignity, perhaps more than the subjective autonomy, of the person is paramount. The person has a right to liberty of conscience, but also a duty "to honor God

26 Witte, *supra* note 1, at 328-329.

27 D.R. Whitt, O.P., Book Review (reviewing The Lustre of Our Country) (forthcoming Jurist 2000) (on file with author).

28 Noonan, *supra* note 5, at 352.

29 Mary Ann Glendon, *Propter Honoris Respectum, Knowing the Universal Declaration of Human Rights*, 73 Notre Dame L. Rev. 1153, 1162-1173 (1998)("Dignity enjoys pride of place in the Declaration; it is affirmed ahead of rights … .").

30 Noonan, *supra* note 5, at 334.

31 *Id.* at 336.

32 505 U.S. 833 (1992).

33 "The principles of liberty of conscience [and others] form the backbone of the international norms on religious rights and liberties. Liberty of conscience rights, with their inherent protections of voluntarism … are absolute rights … ."

according to the dictate of an upright conscience."[34] The person enjoys, or should enjoy, religious freedom not so much because she is an "isolated, sovereign individual,"[35] but more because her dignity, and that which she was made to be, requires it. As Pope John Paul II has written, "[r]espect for the dignity of the person, which implies the defense and promotion of human rights, demands the recognition of the religious dimension of the individual. … *Religious freedom, an essential requirement of the dignity of every person, is a cornerstone of the structure of human rights*[.]"[36]

Witte notes that "[t]o compare First Amendment law with international norms is, in a real sense, to judge American law by an international standard it has helped to shape" (p. 220). True, but it could also be that "American law," and the atomistic anthropology and religious voluntarism inherent in the American experiment, have shaped international norms less than the Christian personalism that animates the last century of Catholic social teaching. It could also be that, as we follow Bacon, and Witte, and turn to other countries' and international bodies' ongoing efforts to achieve religious liberty, we should not only ask how the first principles of *our* experiment are playing out, but also "reassess" and "refine" our principles in light of the dignitarian commitments that continue to shape *theirs*.[37]

34 Pope John XXIII, *Pacem in terris* (1963).

35 Glendon, *supra* note 29, at 1172.

36 *Christifideles laici* § 39 (1988).

37 *Cf.* Whitt, *supra* note 27 ("The American experience has lighted up the skies. But perhaps the torch has been passed.").