



BOSTON COLLEGE

BOISI CENTER
FOR RELIGION AND AMERICAN PUBLIC LIFE

Individuals, Institutions, and Religious Freedom

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I am very happy and honored to be here at Boston College, among so many friends and colleagues, old and new. And, it is a special pleasure to join all of you here at the Boisi Center, which has long been both at the heart, and at the forefront, of our ongoing conversations about religion and public life, about faith and politics, about the sacred and the secular.

Religious-freedom questions are always of interest, but they seem particularly pressing today. In a recent statement, “Our First, Most Cherished Liberty,” the nation’s Catholic bishops expressed gratitude for the “gift of liberty

which is ours as Americans” but noted also the importance of remaining on guard against threats to that gift.

I agree. Religious freedom is a human right, grounded in human dignity, and essential for human flourishing. Every person, *because* he or she is a person, has the right to religious liberty, and that right includes the right to be – in the majority’s view – “wrong.” This right, and this freedom, should be recognized, respected, protected, and promoted in law and policy. Religious freedom is sometimes inconvenient for governments and politicians, but it is crucially important to good government and stable politics.

To say this is not, at all, to deny that political authority and the government’s laws should be “secular.” Absolutely, they should be. It is, instead, to endorse what Pope Benedict XVI has repeatedly called, with admiration, America’s “positive” or “healthy” secularity. This is an arrangement that distinguishes between church and state *precisely* in order to protect religious freedom in private, in public, in civil society, and in politics.

In my view, the Bishops are right to celebrate the long American tradition of using the rule of law to protect religious liberty. They are also right to be concerned. What the great Catholic legal scholar and judge, John Noonan, called the “American experiment” in religious liberty is both vital and vulnerable. Our

religious-freedom protections are robust, but incomplete. As the Archbishop of Philadelphia put it recently, “[t]he Constitution” – the First Amendment to which protects religious exercise – “is a great achievement in ordered liberty. But it’s just another elegant scrap of paper unless [we] keep it alive with [our] convictions and lived witness.”

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I will try, during our time together, to flesh out these claims. They involve questions and commitments that *matter*, and that are important to me as a lawyer, teacher, and scholar. They are also important to me – as they are, maybe, to many of you – as a citizen, and a Christian.

Our topic, as I said, is timely. It is also timeless. And while it is always risky to make confident statements about the Founding, I think it is safe to say that we Americans have been wrestling with it from our beginning. Thomas Jefferson regarded the religious-freedom guarantees that were enacted after our Revolution as a “fair” and “novel” experiment. And, it was the confident hope of James Madison that this experiment “promised a lustre to our country.” Madison believed that a specifically “American model” of religious freedom was emerging, and that it would distinguish, shape, and strengthen us. He and many other leaders among the Founding generation seem to have been keenly aware that they were

attempting something new, something that *could* change the world, and for the better.

Prof. John Witte, one of the leading scholars of religious-liberty law in America, has reported that the “bold constitutional experiment in granting religious liberty to all remains in place, and in progress, in the United States.” It does, but how goes that progress? Have our efforts added – as Madison hoped they would, and as Pope Benedict seems to believe – “lustre to our Country”?

Before I take up these questions, I hope you will forgive something of a “personal” note. As you’ve heard, I teach, study, and write at Notre Dame’s Law School. There, my colleagues and I invite – and maybe, I hope, we occasionally inspire – our students to bring their commitments and hopes *to* their studies, and also to carry them out – in good repair, and perhaps better understood – to their lives in the law. In our view, we cannot expect young lawyers to think deeply and well about service, about justice, and about their contributions to the common good if we tell them to privatize their ideals, or to radically separate their thoughts about the meaning of life from the practice of law. And so, we urge our students to approach their vocations – and lawyering, after all, *should* be a vocation – as whole persons. We challenge them to *integrate* what they do with what they profess and with what they cherish. We ask them to remember always who they are, what they

believe, and whom they love, and to resist the temptation to “check their faith at the door” of their professional and public lives.

Now, with respect to our subject today, I start from a proposition that is quite similar to the challenge I present to my students: As I see it, we are entirely free – and, again, our laws should protect and nourish this freedom – to participate in public life, and to cooperate and contend with our fellow citizens in seeking and securing the common good, as whole, *integrated* persons and in coherent, similarly integrated, communities, associations, and institutions.

The Philosopher was right: *We are* “political animals.” We are also, many of us believe, creatures made in the image and likeness of God. We are – in a way – “hard wired” to search for, and cling to, the One who made, sustains, and loves us. It is our nature, then – it is part of what it means to be human – to be both “religious” and “political.” And, nothing in the text, history, or structure of the American Constitution requires us to deny this. Nothing in America’s traditions, and nothing about our “healthy” secularity, requires us to accept dis-integration as the “price of admission” to the practice of engaged, responsible citizenship.

To be sure, we wisely distinguish, or “separate,” the institutions and authorities of religion from those of government. We do this, though, not so much by building or imagining a “wall” between “private” and “public”, or between

“religion” and “public life,” but by respecting the distinction between these different spheres. We do this not to cage religion, but precisely in order to protect religious freedom, which includes the freedom to construct and live a faithful, integrated, balanced, public life. What’s more, and again, this is true not only for individual persons, but also for associations, communities, and institutions, which both facilitate and enjoy the right to religious liberty.

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“Religious freedom,” President Clinton once said, “is literally our first freedom.” His point was not that religious liberty happens to come first in what we now know as our Bill of Rights. It was, instead, that the freedom of religion was *central* to the Founders’ vision for the American political community. That is, it was not only an *object* of their protective concern; it was also, they thought, a crucial *prerequisite* for the success of their enterprise.

And so, our Founders put religious liberty at the heart of their bold new project. And yet, what this liberty *meant* had to be worked out. At the outset, John Adams foresaw a “glorious uncertainty” in the law of religious liberty and a “noble diversity” of understandings of its details. History has confirmed his prediction. The early Americans, like Americans today, did not always agree about what, precisely, the “freedom of religion” means, or about how, precisely, it should be

protected in law. Still, they knew, as we do, that religious freedom matters. They knew that, unless our most sacred things are protected, our other freedoms – of the press, speech, conscience, privacy -- are vulnerable. Religious freedom was widely seen – as it should be – as part of the very *structure* of a free society, not merely as a grudging concession made by a tolerant sovereign.

It should be emphasized, then, that the religious-freedom protections afforded through our constitutional text and in our constitutional traditions are not accidents or anachronisms. They are not, as one prominent scholar has claimed, “aberration[s] in [our] secular state.” They are features, not bugs. Our Constitution (at its best, and properly understood) does not regard religious faith with grudging suspicion, as a bizarre quirk or quaint relic, left over from our simpler past. The purpose of our First Amendment is not to push religion to the margins, in the hope that it will wither, but rather to safeguard and support it, so that it can flourish – in private and in public, alone and in community, on the Sabbath and on Monday morning.

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How does this work? That is, how do and should our laws “safeguard” and “support” religion, so that it can “flourish”?

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It is easy to think, and we are used to thinking, of religion – that is, of religious belief and practice, ritual and worship, expression and profession – as an object of human-rights laws; that is, as something that these laws protect, or at least aspire to protect. The leading human rights instruments – the Universal Declaration of Human Rights, for example, or the European Convention on Human Rights -- confirm us in this entirely reasonable, if not quite complete, way of thinking. And, of course, our Constitution also puts religious liberty – that is, the “free exercise” of religion – on the receiving end of the First Amendment’s protection. But, there is more. It is one thing to profess, and to entrench in law, a commitment to protecting religious liberty. It is another thing, though, to make good on that commitment. This “walk the walk” task involves at least two related, but distinct, challenges. First, we need to identify the content of the “freedom of religion” that we are resolved to protect. This is easier said than done, as many present-day controversies show. We can confidently declare that “everyone has the right to freedom of religion,” but what, exactly, are we talking about? What is “religion,” anyway, and what does it mean for it to be “free”? Free from what? To do what? What does it mean to “have the right to freedom,” of religion or anything else? What distinguishes “religious liberty” from plain-vanilla “liberty,” and can this distinction be justified, assuming it can be captured in law? And so on.

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Assume, for now, that we are able to find our way to plausible, attractive answers to these questions – answers that cohere with human nature, experiences, needs, and aspirations. With our “ends” in view, we turn next to the question of “means.” We have to decide, in other words, what are the legal and other mechanisms that we will use to sustain and vindicate, in practice, the commitment we have professed. Our hope, after all, is to do more than erect what James Madison called “mere parchment barriers” to violations of religious freedom. Some mechanisms might be better (or less well) designed for the purpose and so might work better (or less well) than others; some actors and authorities might be more (or less) reliable and effective protectors than others. Our optimistic expectations for some processes might be unrealistic; our skepticism or even cynicism about others might be unfounded. The point is, the project of protecting human rights – including the right to religious freedom – involves reflecting on human goods and goals, but it also requires wrestling with questions about institutional design and competence.

So, which means should we employ? We would almost certainly point to judicially enforced, constitutionally entrenched constraints on government – constraints like those set out in the Bill of Rights – as a key means of translating our aspirations into practice. It is true, as Judge Learned Hand wisely warned, that “liberty lies in the hearts of men and women; when it dies there, no constitution, no

law, no court can save it.” Still, constitutions, laws, and courts seem important to the effort.

So far, so good. But again, what else? What other steps might we take, or tools might we use, to help religious liberty to flower, not only in the “hearts of men and women” but also in the rough-and-tumble world of scarcity, self-interest, compromise, and disagreement? One step, I want to suggest, is to appreciate and embrace the fact that the “right to freedom of religion” belongs not only to individuals, but also to institutions, associations, communities, and congregations. Just as every person has the right to seek religious truth and to cling to it when it is found, religious communities have the right to hold and teach their own doctrines; just as every person ought to be free from official coercion when it comes to religious practices or professions, religious institutions are entitled to govern themselves, and to exercise appropriate authority, free from official interference; just as every person has the right to select the religious teachings he will embrace, churches have the right to select the ministers they will ordain. “Religion” is, Justice William Douglas observed in his *Wisconsin v. Yoder* (1972) opinion, “an individual experience,” and it certainly is, but it is not only that. After all, as Justice William Brennan reminded us, in *Corporation of the Presiding Bishop v. Amos* (1987), “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community

represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” Such “organic entities” are subjects, not just results or by-products, of religious liberty. At the center of religious freedom, then, is what is called in American constitutional law “church autonomy,” or what the American Jesuit and church-state scholar John Courtney Murray (and many others) called “the Freedom of the Church.”

This right to church autonomy – one dimension of religious freedom – is, again, an object of our laws’ protections. (The Supreme Court clearly affirmed as much, last January, in its *Hosanna-Tabor* decision.) It is also, though, a means -- a structural mechanism – for protecting both the freedom of religion and human rights more generally. That is, the relationship between the enterprise of protecting the human rights of all, and religious communities’ right to self-determination, is a dynamic, mutually reinforcing one. Our laws, in other words, protect church autonomy – they protect the freedom of religious communities to govern and organize themselves, to decide religious matters without government interference, to establish their own criteria for membership, leadership, and orthodoxy, *etc.* – and, in turn, church autonomy promotes the enjoyment and exercise of human rights. This mechanism is, Murray thought, “Christianity’s basic contribution to freedom in the political order.” If we understand and appreciate this contribution,

we will better understand and appreciate that often misunderstood and misused idea, “the separation of church and state.”

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This might sound strange. After all, Americans’ thinking and talking about rights is thoroughly, even “ruggedly,” individualistic. Rights, we think, attach to particular people; they protect individuals, their privacy, their interests, and their autonomy from outside authorities. It should come as no surprise, then, that American judicial decisions and public conversations about religious freedom tend to focus on matters of individuals’ rights, beliefs, consciences, and practices. However, as Mary Ann Glendon demonstrated almost twenty years ago, in her compelling critique of American political discourse and of the legal regime that it reflects and produces, this focus on “lone individuals and their rights” is myopic and distorting. It causes us to overlook and neglect the social context in which persons are situated and formed as well as the distinctive nature, role, and freedoms of groups, associations, and institutions.

To be sure, the individual human person – every one – matters. Each of us is, as my colleague Tom Shaffer once put it, “infinitely valuable, relentlessly unique, endlessly interesting.” Every person carries, in C.S. Lewis’s words, the “Weight of Glory.” “There are no ordinary people,” he insisted: “You have never talked to a mere mortal. Nations, cultures, arts, civilizations – these are mortal,

and their life is to ours as the life of a gnat. But it is immortals whom we joke with, work with, marry, snub, and exploit – immortal horrors or everlasting splendors.”

It is fitting, then, that the image of the lone religious dissenter, heroically confronting overbearing officials or extravagant assertions of state power, armed only with claims of conscience, is, for us, evocative and timeless. Think of St. Thomas More, as he is depicted in *A Man for All Seasons* (and perhaps also of those dissenters he helped to persecute). No account of religious freedom would be complete if it neglected such clashes or failed to celebrate such courage.

Still, Glendon was right. Something goes missing when the freedom of religion is reduced to the individual’s liberty of conscience, to her freedom of belief, or even to her right to engage in worship or religiously motivated action. A legal regime of human rights that is designed to protect only this reduced notion of religious freedom will leave vulnerable and unprotected other important aspects of that freedom. Such a regime will misfire, because it describes and categorizes the world in an incomplete and perhaps even distorted way, passing over and leaving out things that matter. We should want our laws -- and perhaps especially our human rights laws – to capture faithfully what is significant, and what really matters, about the real world that these laws govern and to which they speak. We should want, in other words, our laws to “see,” and so to respect and protect, the

freedom that belongs rightfully to religious groups, associations, institutions, and communities.

What is this freedom, then – this “institutional” dimension of religious freedom – that complements and helps to sustain individuals’ enjoyment of their rights to religious liberty? It makes sense to start with the basic proposition that, in Murray’s words, the Constitution guarantees religious freedom not only to individual believers but also “to the Church as an organized society with its own law and jurisdiction.” What the United States Supreme Court has called “ecclesiastical right[s],” no less than individuals’ rights, are protected by the First Amendment, as well as by other human rights instruments. The Court’s unanimous decision last year in the *Hosanna-Tabor* case was a resounding confirmation of this fact. These rights are not – at least, they should not be regarded as – merely derivative of or proxies for individuals’ rights; their protection is not simply a vehicle for securing individuals’ liberties. The point here is not merely that religious faith and experience have a communal dimension (though they do). The freedom to be enjoyed by religious communities is not defended merely as an incident of individuals’ religious exercise, but as these communities’ moral right, a right that is rooted – as the right to religious freedom more generally is rooted – in the dignity of the person and in God’s plan for the world.



So, the freedom of religion which the Constitution protects is enjoyed by institutions as well as individuals. What, then, is the specific content of this protection? What, exactly, is “church autonomy,” and what does it mean, “on the ground” and in practical terms?

The church autonomy principle – the “freedom of the church” – is implicated in a wide variety of disputes and contexts: the supervision of diocesan finances by a bankruptcy court or administrative agency, a requirement that religiously affiliated organizations pay for employees’ contraception or that doctors in religiously-affiliated hospitals perform abortions, litigation regarding church discipline proceedings or membership requirements, the division of church property after a schism or split, the application of nondiscrimination laws to churches’ and religious schools’ decisions about the hiring and firing of clergy and teachers, and efforts by governments to control or regulate churches’ selection of their leaders, to mention just a few. The principle is probably not reducible to any single legal “test.” In many ways, the church-autonomy “doctrine” is less a rule than a collection of themes, animated by what the Court once called a “spirit of freedom for religious organizations.” We know that the First Amendment does not permit state action that creates or requires “excessive entanglement” between the government and religious institutions, practices, teachings, and decisions. It commands that the “secular and religious authorities . . . not interfere with each

other's respective spheres of choice and influence." The Justices have refused to "undertake to resolve [religious] controversies" because "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." The Court has affirmed, time and again – and again last year – the "fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine' [.]". The late Justice Brennan put the matter in a particularly helpful way, observing that religious organizations' "autonomy in ordering their internal affairs" includes the freedom to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institution." This formulation captures nicely a wide and reasonably complete range of the challenges to religious institutions' freedom and of the circumstances in which they arise.

I suggested earlier that following through on a stated commitment to the freedom of religion requires thinking both about the content of that freedom – about, in other words, what it is we are committed to protecting – and about the means and mechanisms to be employed. So far, I have tried to make the case that "freedom of religion" has a communal, corporate, public dimension, as well as a private one. It is enjoyed by and safeguards the rights of institutions as well as

individuals. How can this freedom, so understood, effectively be preserved and promoted?

One way, which I mentioned before, is obvious (especially to lawyers): Today, most well-functioning political communities both express and advance their commitments to fundamental human rights, including the right to religious liberty, by “entrenching” these rights in their constitutions – thereby putting them, at least to some extent, beyond the reach of ordinary politics – and by authorizing courts to limit or strike down actions of governments and officials that invade these rights. It is good advice to “put not our trust in princes,” but it nevertheless makes sense to enlist the political authority, including its judicial arm, in the work of protecting human rights. But, it takes nothing away from the importance of constitutionally entrenched and judicially enforceable human rights provisions to propose that other, complementary, structural mechanisms are helpful, even necessary, to ensure that religious freedom flourishes. We protect human rights not only by listing various things that governments may not do, but also by designing and situating governments in such a way that they are less likely, and less able, to do such things. Constitutionalism is about more than composing a litany of aspirations or prohibitions; it is also the enterprise of ordering our lives together and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways.



The American Constitution provides a helpful illustration. As (we should hope) every law student learns, and as Madison famously explained in *The Federalist*, those who designed and ratified the Constitution believed that political liberties are best served through competition and cooperation among plural authorities and jurisdictions, and through structures and mechanisms that check, diffuse, and divide power. The American Constitution is more than a catalogue of rights; our constitutional law is, in the end, “the law governing the structure of, and the allocation of authority among, the various institutions of the national government.” The American constitutional experiment reflects, among other things, the belief that the structure of government – like government’s actions – matters for, and contributes to, the good of human persons. There is no need to belabor even a point as fundamental as this one: “The genius of the American Constitution” – of American *constitutionalism* – “lies in its use of structural devices to preserve individual liberty.

I have suggested that one dimension of the freedom of religion is the right of religious institutions to govern themselves and to exercise appropriate authority without interference from governments. This right, like the immunity of individuals’ religious conscience from coercion, is rooted in the dignity of the human person, which is the foundation for the morality of human rights more generally. Add now to this claim another one, namely, that church autonomy is –

like federalism, like the separation of powers, like “checks and balances” – a structural principle, which enables self-determining religious communities to play a structural role in our constitutional order. These communities are protected, but also protectors; they enjoy and exercise religious freedom rights for themselves, but also – through that enjoyment and exercise – contribute to the enjoyment and exercise of these rights by others.

It might seem strange at first, but constitutional government depends for its success on the existence and activities of non-governmental authorities. It should protect, but it also requires, self-governing religious communities that operate and evolve outside and independent of governments. It is a mistake, then, to regard “religion” merely as a private practice, or even as a social phenomenon, to which constitutions and governments respond or react. Instead, we should understand the ongoing enterprise of constitutionalism as one to which religious freedom contributes. Human rights depend for protection and flourishing not only on enforceable constraints on government but also on the structure of the social order and of civil society. The autonomy that religious institutions enjoy, with respect to matters of polity, doctrine, leadership, and membership contributes to, even as it benefits from, that structure.

All of this goes to show how the “separation of church and state” in fact supports the freedom of religion. Of course, in contemporary public debates,

“separation” is often regarded, both by its opponents and many of its self-styled defenders, as a policy that mandates a public square scrubbed clean of religious symbols, expression, and activism. It is thought, or feared, that the separation of church and state requires religious believers to keep their faith strictly private, to wall off their religious commitments from their public lives and arguments about how we ought to order society. On this view, separation serves the enterprise of human-rights protection, if at all, by constraining religious believers and institutions, and by reducing the potential for social conflict and persecution.

There is, however, another, better view: The “separation of church and state”, properly understood, is a structural arrangement in which the institutions of religion are distinct from, other than, and meaningfully independent of the institutions of government. It is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state and thereby clears out and protects a social space, within which persons are formed and educated, and without which religious liberty is vulnerable. So understood, “separation” is not an anti-religious ideology, but an important component of any worthy account of religious freedom under and through constitutionally limited government. “Fundamental to Christianity,” Pope Benedict XVI recently reaffirmed, “is the distinction between what belongs to Caesar and what belongs to God . . . , in other words, the distinction between

Church and State[.]” In a similar vein, he has emphasized that it was Christianity that “brought the idea of the separation of Church and state into the world. Until then the political constitution and religion were always united. It was the norm in all cultures for the state to have sacrality in itself and be the supreme protector of sacrality.” Christianity, however, “deprived the state of its sacral nature.... In this sense,” he has insisted, “separation is ultimately a primordial Christian legacy.”

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It is also a very familiar theme for Americans. In 1988, while out on the campaign trail, then-Vice President George H.W. Bush recalled being shot down over the South Pacific, as a young pilot during World War II. He said, “[w]as I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them, and God and faith—and the separation of church and state.”

Now, this train-of-thought seems absurd. At the same time, though, it is entirely American. That the would-be President apparently thought he could not identify “God” and “faith” as “fundamental values” without awkwardly appending “the separation of church and state” reveals a lot about how we Americans think about the content and implications of religious freedom. Of course, an earlier

President, Thomas Jefferson, in his 1801 Letter to the Danbury Baptists, similarly professed his “sovereign reverence” for the decision of the American people to constitutionalize church-state “separation.” In so doing, he supplied what is for many the “authoritative interpretation” of the First Amendment’s Religion Clauses. Indeed, one prominent scholar observed not long ago that “[n]o metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson’s ‘wall of separation between church and state.’” “Jefferson’s words,” another noted, “seem to have shaped the nation” and are, for many of us, “more familiar than the words of the First Amendment itself.”

However, that we are familiar, even intimate, with Jefferson’s words hardly means we agree about their meaning. Notwithstanding our third President’s “reverence” for church-state separation and the comfort it supplied to our 41st President, the idea remains both controversial and contestable. What does it mean, really, for “church” and “state” to be “separate”? Not long ago, then-Rep. Katherine Harris complained that the separation of church and state is a “lie we have been told” to keep religious believers out of politics and public life. Her charge drew widespread, forceful criticism, and seems well off the mark. Still, Professors Eisgruber and Sager have reminded us that “it is easy to overlook just how odd and puzzling the idea of separation is”; indeed, “[t]he notion of literally separating the modern state and the modern church is implausible in the extreme. .

. . Church and state are not separate in the United States, and could not possibly be separate. The question is not *whether* the state should be permitted to affect religion, or religion permitted to affect the state; the question is *how* they should be permitted to affect each other.”

This is not to deny that the institutions of religion (the “church”) are and should be distinguished, and different, from the institutions of government (the “state”). It is, instead, only to echo Justice Douglas, who noted more than fifty years ago that the “separation” does not and, given our traditions, cannot mean that “the state and religion [must] be aliens to each other.” After all, given the size, reach, powers, and aims of contemporary governments, the segregation of “church” from “state” – let alone of religion from society, or faith from politics – seems neither possible nor desirable.

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But still, the idea of church-state “separation” has, for better or worse, long been at the heart of our doctrines and debates about religious liberty under law. And, whatever we might think of Jefferson’s “misleading metaphor”, or about the constitutionalization of that metaphor in the Court’s 1947 decision, *Everson v. Board of Education*, it is important that we get this idea right. It would be a mistake either to embrace, or to war against, a misguided version of it.

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I have argued that churches and other religious communities enjoy a broad freedom to organize, govern, and direct themselves and their affairs, in accord with their own teachings and doctrines. I have suggested that this freedom not only benefits from, but also contributes to, the enterprises of human rights law and of constitutionalism more generally. That said, there is no avoiding the fact that church autonomy principles and premises are vulnerable and, in some contexts, under attack. The right clearly exists, but its scope and foundations are, increasingly, contested.

Thank you.