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,"

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

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

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

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

"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, an41.82 51 (7(e)(on) 21h) -1 (i)

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"?

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.

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

represents an ongoing tradition of shared beliefs, an organic entity not reducible to

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 –

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.

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 5oyment(o) -1 (( ) 1

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

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 dime

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

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

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-

. . 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

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.