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'The Freedom of the Church': (Towards) an Exposition, Translation, and Defense

Richard W. Garnett
Notre Dame Law School, rgarnett@nd.edu

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RICHARD W. GARNETT*

In his *Law and Revolution*, Harold Berman identified and discussed, among (many) other things, the implications and effects of a "revolutionary change within the church and in the relation of the church to the secular authorities" that took place in western Europe during the late-eleventh and early-twelfth centuries.[1] This "revolution," he argued, involved more than intra-church arrangements, or relations among popes, bishops, kings, and emperors, and "include[d] within its scope all the interrelated changes that took place at that time," including "the revolution in agriculture and commerce, the rise of cities and of kingdoms as autonomous territorial polities, the rise of the universities and of scholastic thought, and other major transformations"—including the "invention of the concept of the State" and "the creation of modern legal systems"—"which accompanied the birth of the West."[2] And, a powerful "slogan" of the revolutionaries

 Professor of Law, University of Notre Dame. I am grateful to Larry Alexander and Steven Smith, not only for organizing the engaging conference at which this paper was presented but also for the generous help and inspiring examples they have provided to me and many others. Thanks are also due to Paul Horwitz, John Inazu, Michael Moreland, Marc DeGirolami, Andy Koppelman, Micah Schwartzman, Richard Schragger, Fred Gedicks, Randy Kozel, and others for encouragement, suggestions, constructive criticism, and productive disagreement. I am also thankful for the contributions of my research assistant, Andrew Kleczek.

1. HAROLD BERMAN, LAW AND REVOLUTION 87 (1983).
2. *Id.* at 23, 87.

was *libertas ecclesiae,* "the freedom of the church,"[3] a "'Great Idea', whose entrance into history marked the beginning of a new civilizational era."[4]

According to Brian Tierney, "[i]t is impossible really to understand the growth of Western constitutional thought unless we consider constantly, side by side, ecclesiology and political theory, ideas about the church and ideas about the state."[5] Relatedly, I suggested several years ago, in a short essay about the Second Vatican Council's *Declaration on Religious Freedom*, that the "idea" of the "freedom of the church"—or something like it—remains a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government.[6] What *is* this "idea," though, and is there anything to this suggestion about its importance and relevance? Michael McConnell noted recently that the "'freedom of the church' was the first kind of religious freedom to appear in the western world, but got short shrift from the Court for decades."[7] However, he also observed, "it has again taken center stage."[8] It seems that it has,[9] and perhaps not only because legal scholars, needing topics, are straining to make something old new again. Chief Justice Roberts, in the *Hosanna-Tabor* case, gestured towards its place in the *Magna Carta* on the way to concluding for a unanimous court that the Constitution "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers."[10] Should we welcome or worry about (or both) this development? And if, as the chief justice also observed, the "freedom of the church" may, "in many

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3. *Id.* at 87.

4. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN EXPERIENCE, 202 (1960).

5. BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650 1 (1982).

6. Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2006).

7. Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 836 (2012).

8. *Id.*

9. *See, e.g.*, Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 249 (Austin Sarat ed., 2012); BRAD S. GREGORY, THE UNINTENDED REFORMATION 129–79 (2012); Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, 7 GEO. J.L. & PUB. POL'Y 29 (2009).

10. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 702 (2012) (noting that, "in the very first clause of Magna Carta", "King John agreed that 'the English church shall be free, and shall have its rights undiminished and its liberties unimpaired'").

cases . . . have been more theoretical than real,"[11] are there good reasons it can or should be made more "real" today?

But again, what *is* this idea? What are we talking about when we talk about the "freedom of the church" and its emergence, foundations, role, significance, neglect, and (possible) re-emergence? In Berman's account, and in its Investiture Crisis context,[12] it was the "freedom of the clergy, under the pope, from emperor, kings, and feudal lords."[13] It was "the assertion of papal primacy over the entire Western church and of the independence of the church from secular control."[14] While we might well hear echoes of such an assertion in contemporary disputes between the Holy See and the People's Republic of China,[15] the question remains whether it has any relevance, let alone importance, for the American context.

I continue to think that it does. I will try, in this paper, to describe or expound this idea—really, this cluster of several historical, political, legal, and moral ideas, proposals, claims, assumptions, and intuitions—and also to respond to some criticisms of and reservations about it. In particular, appreciating the risk of anachronism that attends invocations of this once-revolutionary-but-now-ancient (some might say "medieval"[16]) idea, I will suggest some workable and, I hope, faithful translations of it for use in present-day cases, doctrine, and conversations.

I.

Tierney opened his *Crisis of Church and State 1050-1300*—his study of "the great clashes of spiritual and secular power that occurred" during

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11. *Id.*

12. *See generally, e.g.*, WALTER ULLMANN, A SHORT HISTORY OF THE PAPACY IN THE MIDDLE AGES (2003); UTA-RENATE BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY (1991); BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE: 1050–1300 (Univ. of Toronto, 1988).

13. BERMAN, *supra* note 1, at 94.

14. BERMAN, *supra* note 1, at 50. *See also* JOHN WITTE JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 7 (3d ed. 2011) (noting Pope Gregory VII's claim that "[o]nly the pope . . . had authority to ordain, discipline, depose, and reinstate bishops, to convoke and control church councils, and to establish and administer abbeys and bishroprics").

15. *See* Letter of Pope Benedict XVI to the Bishops, Priests, Consecrated Persons and Lay Faithful of the Catholic Church in the People's Republic of China (2007).

16. *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

that time—with a chapter called "The First Thousand Years."[17] It would not be possible, even if it were necessary, to provide here a comprehensive, authoritative account of that millennium. It is enough, though, to borrow Tierney's observations that "[t]he possibility of a continuing tension between church and state was inherent in the very beginnings of the Christian religion" and that "from the first there was always the possibility of a conflict of loyalties":

> There could be little likelihood of a simple, straightforward identification of spiritual with temporal authority in the religion of a Founder who had said: "Render therefore to Caesar the things that are Caesar's; and to God the things that are God's" (Luke 20:25).[18]

Pope Benedict XVI often pressed a similar point, insisting, for example, that "[f]undamental to Christianity is the distinction between what belongs to Caesar and what belongs to God, in other words, the distinction between Church and State, or . . . the autonomy of the temporal sphere."[19] He has also proposed and elaborated on the suggestion that Christianity "brought the idea of the separation of Church and state into the world"[20] and thereby "deprived the state of its sacral nature."[21]

Maybe so. During Tierney's "First Thousand Years" anyway, in most places and for most of the time, it would have been a challenge to identify "states," and such political or secular authority as existed would have often been regarded by those who sought, held, and wielded it as having something of a "sacral nature" and as being attached to extra-temporal, spiritual responsibilities.[22] Still, for the present purpose of expounding the "freedom of the church" idea, it seems fair to say that, over the course of the centuries after Constantine and preceding the Investiture Controversy and the "Murder in the Cathedral,"[23] political or secular authority in the west was often fragmented, diffuse, unstable, and vulnerable, and religious or spiritual authority—also often similarly spread out—was meaningfully distinct, even if not sharply separated, from political or secular authority.[24] And, this was the context—the reality—at and

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17. TIERNEY, *supra* note 5, at 7.
18. *Id.* at 7–8.
19. Pope Benedict XVI, *Deus caritas est* ¶ 28(a) (2005).
20. JOSEPH RATZINGER, THE SALT OF THE EARTH 239 (1997) ("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.").
21. *Id.* at 240.
22. BERMAN, *supra* note 1, at 88 (recalling that the "kings and emperors of western Europe in the sixth to eleventh centuries . . . were 'deputies of Christ,' sacral figures, who were considered to be the religious leaders of their people").
23. T.S. ELIOT, MURDER IN THE CATHEDRAL (Harcourt 1964).
24. *See, e.g.*, PETER BROWN, THE RISE OF WESTERN CHRISTENDOM (2d ed. 1996).

around the time the "freedom of the church" was asserted by the papal revolutionaries.

Today's context is, obviously, different, though not so different—not *too* different. In trying to identify the possible content of the "freedom of the church" today, there does not seem to be any reason we cannot start with what a constitutional lawyer might call its "original meaning" —again, the freedom of the church to govern and order itself and the limits on the secular power to interfere with that governance. If the "idea" means anything, it means this. And, the Supreme Court in *Hosanna-Tabor* appears to have (unanimously) ruled that the freedom of religion which is recognized in and protected by our Constitution includes at least this much. "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,'" Chief Justice Roberts wrote, "the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[25] Later, when affirming that an implication of these prohibitions is the so-called "ministerial exception," he explained that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[26] This is not so different from what Pope Gregory VII told Henry IV, and it seems to establish that there is at least *something* to the "Freedom of the Church in the Modern Era."

There is more to the idea, though, than its core, and I think there is more to its foundation than the text of the First Amendment. Instead, perhaps we can think about the "freedom of the church" not only as a "black letter" rule, and not even so much as a single, albeit broad organizing principle like "equality,"[27] "neutrality,"[28] or "liberty of conscience."[29] Maybe, today, it is not so much a single "idea" or assertion as a way of

25. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 703 (2012).

26. *Id.* at 706.

27. *Cf.* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2010).

28. *Cf.* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2012).

29. *Cf.* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2010).

describing the confluence, overlapping, cooperation, and reinforcing of a number of constitutional, political, and moral arguments or themes. If this is true, then the "freedom of the church" might end up functioning less as a rule, standard, or doctrine (though it will function this way sometimes, as in *Hosanna-Tabor*, *Hull Church*,[30] *etc.*), and might—somewhat maddeningly—work more like an animating value, even a mood. What are some of these arguments or themes that, taken together, where they meet, comprise the "freedom of the church"?

Constitutionalism and Structure

"Constitutionalism" may be described as the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways. The Constitution of the United States supplies an example. Those who designed and ratified our Constitution understood and embraced the idea 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.[31] Our Constitution is more than a litany of prohibitions or a catalogue of individual rights. Our constitutional law is, at bottom, "the law governing the structure of, and the allocation of authority among, the various institutions of the national government."[32] And our constitutional experiment reflects, among other things, the belief that the structure of government matters for, and contributes to, the good of human persons. "Th[e] constitutionally mandated division of authority," Chief Justice Rehnquist once wrote, "was adopted by the Framers to ensure protection of our fundamental liberties."[33] The "[s]eparation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."[34]

We could go on, gathering observations by Madison and Montesquieu, Tocqueville and Tiebout; expounding on "checks and balances," subsidiarity, localism, and pluralism; and compiling imposing citation lists in support of the proposition that our Constitution was designed to

30. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (holding, among other things, that the First Amendment does not permit civil courts to resolve "controversies over religious doctrine and practice").

31. *See, e.g.*, THE FEDERALIST No. 51 (James Madison).

32. Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS L.J. 885, 885 (2005).

33. United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

34. Clinton v. City of New York, 524 U.S 417, 450 (1998) (Kennedy, J., concurring).

protect individual liberty by dividing, enumerating, and reserving governments' powers and authority. The ratification of the Fourteenth Amendment and other liberty-enhancing centralizations and concentrations of power notwithstanding, 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."[35]

What's more, constitutionalism relies, both in theory and in fact, not only on the separation and limitation of the powers of the political authority, but also on the existence and the health of authorities and associations outside, and meaningfully independent of, that political authority, or "the state." If Berman, Tierney, and many others are right, our tradition of constitutionalism was made possible, and might still depend today, on the independence of the church from secular control—that is, on the "freedom of the church." It would be a mistake, then, to regard "religion" only as a private practice or social phenomenon to which constitutions respond or react. In addition, the differentiation of religious and political authorities is, like "separation of powers" and "federalism," both a structural feature of our Constitution and an arrangement that contributes to its success.[36]

Institutions and Infrastructure

In recent years, several prominent scholars—most notably Paul Horwitz[37] and Fred Schauer[38]—have called attention to the importance of the "various 'First Amendment institutions'" that "serve positively to shape and enhance public discourse[.]"[39] This renewed interest comes in response, and as a correction to, the fact that—as Schauer explains—our free-speech law "has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural,

35. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 (1992).

36. On "differentiation," that is, the "degree of mutual autonomy between religious bodies and state institutions in their foundational legal authority," see Daniel Philpott, *Explaining the Political Ambivalence of Religion*, 101 AM. POL. SCI. REV. 505 (2007).

37. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2012).

38. *See, e.g.*, Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

39. Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 113 (2009).

political and economic differences among the differentiated institutions that together comprise a society."[40] In fact, he insists, there are "socially important institutional distinctions," and recognizing and giving doctrinal effect to these distinctions "might well serve important First Amendment values and purposes."[41]

I have suggested elsewhere that there is a place for the "institutionalism" of scholars like Horwitz and Schauer in our thinking about the First Amendment's Religion Clauses and about religious freedom and church-state relations more generally.[42] This suggestion has been evaluated at length and forcefully criticized by Richard Schragger and Micah Schwartzman.[43] For now, though, what should be noted is that the "religious institutionalism" claim is not only that religious institutions are, for constitutional purposes, actors possessing religious-freedom rights that are not reducible to the religious-freedom rights of those individuals who participate in and contribute to those institutions. It is also a claim—one that complements the "structural" points made above—about these institutions' "infrastructural" role.

Jack Balkin and others have emphasized and explored the "infrastructure of free expression,"[44] noting that the freedom of expression requires "more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices and technological structures that foster and promote [it]."[45] That is, the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of, certain institutions—newspapers, political parties, interest groups, libraries, expressive associations, universities and so on. These "First Amendment institutions" are free-speech actors, but they also play a structural—again, an "infrastructural"—role in clearing out and protecting the civil-society space within which the freedom of speech can be well exercised, and in creating the conditions and opportunities for that exercise. I have suggested, again, that similar "infrastructural" claims can and should be proposed with respect to the freedom of religion.

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40. Schauer, *supra* note 38, at 84.

41. Frederick Schauer, *Institutions as Legal and Constitutional Categories,* 54 UCLA L. REV. 1747, 1750, 1755 (2007).

42. *See* Richard W. Garnett, *Do Churches Matter?: Towards an Institutional Understanding of the Religion Clauses,* 53 VILL. L. REV. 273 (2008).

43. Schragger & Schwartzman, *supra* note 16.

44. *See* Jack M. Balkin, Address at the Second Access to Knowledge Conference at Yale University: Two Ideas for Access to Knowledge: The Infrastructure of Free Expression and Margins of Appreciation (May 5, 2007) (transcript available at http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html).

45. Jack M. Balkin, *The Infrastructure of Religious Freedom,* BALKINIZATION, (Apr. 30, 2007) http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html.

Like the freedom of speech, religious freedom has and requires an infrastructure, and the idea of the "freedom of the church" could be helpful as we think and talk about that infrastructure. Like free expression, religious freedom is not exercised only by individuals; like free expression, its exercise requires more than an individual with something to say; like free expression, it involves more than protecting a solitary conscience. The freedom of religion is not only lived and experienced through institutions, it is also protected, nourished, and facilitated by them. And so, if we want to understand well the content and implications of our constitutional commitment to religious liberty, we need to ask, as Professors Lupu and Tuttle have put it, whether "religious entities occupy a distinctive place in our constitutional order[.]"[46]

We should acknowledge and take care of this "distinctive place," and attend carefully to the health of religious freedom's institutional infrastructure. We can take on board the Second Vatican Council's call for governments to exercise respectful care for the "conditions for the fostering of religious life," that is, the conditions within which "people may be truly enabled to exercise their religious rights and to fulfill their religious duties."[47] To do this is not to abandon the idea that civil governments' legislation should have a "secular purpose,"[48] but instead to appreciate that supporting the conditions—again, the infrastructure—that make it possible for people to pursue a human good and enjoy a human right has such a purpose.

Pluralism and Powers

I noted above that "constitutionalism" relies not only on the separation and limitation of the powers of the political authority, but also on the existence and the health of authorities and associations outside, and meaningfully independent of, that political authority. Indeed, as Berman put it, "[p]erhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. It is this plurality of jurisdictions and legal systems that makes the supremacy of law both

46. Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002).
47. Pope Paul VI, *Dignitatis humanae*, at ¶ 6 (1965).
48. *See generally,* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

necessary and possible."[49] The "freedom of the church" claim, in other words, is a *pluralistic* claim, a claim that "refuses to limit the domain of law to the law of the state"[50] and that refuses to regard non-state "authority" as existing and exercised only by state concession.

The Supreme Court decision that arguably constitutionalized the "spirit of freedom for religious organizations" and their "independence from secular control or manipulation," and that perhaps most clearly affirmed, as a constitutional matter, their "power to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine," was *Kedroff v. Saint Nicholas Cathedral.*[51] In resolving what looked to some like a garden-variety land-use dispute, the Court invalidated a state law that purported to transfer control of a church building from one religious authority to another, and, in so doing, engaged and took sides concerning what Mark DeWolfe Howe called "a classic problem of political theory," that is, the

> pluralistic thesis . . . that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority. To make this assertion is to suggest that private groups have liberties similar to those of individuals and that those liberties, as such, are to be secured by law from governmental infringement.[52]

Similarly, John Courtney Murray read *Kedroff* as a reminder that "[w]ithin society, as distinct from the state, there is room for the independent exercise of an authority which is not that of the state."[53] To be sure, "pluralism" in political theory is a complicated and rich subject.[54] That said, it seems fair to say that to embrace the "freedom of the church" is to embrace this "pluralistic thesis," and vice-versa.

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49. BERMAN, *supra* note 1, at 10.

50. Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 963–64 (1991).

51. 344 U.S. 94, 116 (1952) (discussing Watson v. Jones, 80 U.S. 679 (1872)). *See generally* Richard W. Garnett, *"Things That Are Not Caesar's": The Story of* Kedroff v. St. Nicholas Cathedral, *in* FIRST AMENDMENT STORIES (Richard W. Garnett & Andrew Koppelman eds., 2011).

52. Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV 91 (1953).

53. MURRAY, *supra* note 4, at 70–71.

54. *See, e.g.*, VICTOR M. MUNIZ-FRATICELLI, THE STRUCTURE OF PLURALISM (2014); MARK BEVIR, ED., MODERN PLURALISM: ANGLO-AMERICAN DEBATES SINCE 1800 (2012); Michael P. Moreland, "Institutional Conscience: From Free Exercise to Freedom of Association and Church Autonomy" (on file with author).

Jurisdiction and Abstention

Law-and-religion scholars are familiar with the idea that there are some questions–"religious" questions–that civil, or secular, courts do not answer.[55] Professor Tribe, in his treatise, cites the refusal, described in the Acts of the Apostles, of Gallio, a Roman proconsul in Greece, to judge a complaint that Paul was "inducing people to worship God contrary to the law." "If it were a matter of some crime or malicious fraud," Gallio said to Paul's accusers, "I should with reason hear [your] complaint . . . ; but since it is a question of arguments over doctrine . . . and your own [that is, Jewish] law, see to it yourselves. I do not wish to be a judge of such matters."[56] And in the *Blue Hull* case, for example, Justice Brennan warned that judicial interpretation of religious doctrine, intervention in religious disputes, and (attempted) resolution of religious questions are undesirable because when "civil courts undertake to resolve [religious] controversies . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[57] Relatedly, secular authorities are not supposed to decide whether a person's religious beliefs are true.[58] Public officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs.[59] Courts are cautious when inquiring into the "centrality" of a particular religious belief or practice.[60] The Constitution does not permit state action that creates or requires "excessive entanglement" between the government and religious institutions, practices, and teachings.[61] It commands that "secular and religious authorities . . . not interfere with each other's respective spheres of choice and influence."[62] And so on.

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55. For an argument that secular courts should be more willing, in some circumstances, to answer such questions, see Michael A. Helfand, *Litigating Religion*, 93 BOSTON U. L. REV. 493 (2013).

56. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1237 n.73 (2d ed. 1988) (citing *Acts* 18:12–18).

57. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

58. United States v. Ballard, 322 U.S. 78 (1944).

59. *See, e.g.*, Thomas v. Review Board, 450 U.S. 707 (1981).

60. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990).

61. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1985).

62. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 946–51 (2d ed. 2005).

Now, I have suggested elsewhere that Justice Brennan's statement in *Blue Hull* reflects questionable, unspoken premises about the "development of doctrine" and also that, sometimes, the reason why secular courts do not answer religious questions is because they may not. That is, it is not simply that secular authorities have no "interest" in such matters, because they are matters of purely "ecclesiastical concern." It is also that, at some point, the legitimate authority of a secular, constitutional government over these matters runs out.[63] Still, "abstention" by secular authorities from "religious" disputes and questions would seem to facilitate—by leaving breathing room and even "autonomy" to religious communities and institutions—the "freedom of the church," just as a commitment to the "freedom of the church" should be seen as requiring not only that secular authorities "abstain" from interfering in religious matters but also that they acknowledge the limits on their jurisdiction over such matters.

It is not only, as then-Justice Rehnquist thought, that "civil courts. . . should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible. . ."[64] It is not only that—in Tribe's words—"religious truth by its nature [is] not subject to a test of validity determined by rational thought and empiric knowledge,"[65] that religious questions necessarily involve the interpretation of unfamiliar, esoteric, unusually challenging materials, or that grappling with religious questions is beyond the intellectual competence (as opposed to the authorized reach) of some judges.[66] The bedrock reason, at least in some cases, for "abstention" from religious questions—for a "hands-off" approach to religious doctrine[67]—is a lack of secular jurisdiction over such questions, a lack that is both an implication of, and a protection for, the "freedom of the church."

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In my earlier essay, I expressed some doubt whether —despite the idea's importance—our constitutional doctrines and traditions evidence a strong commitment to anything like the "freedom of the church." "It

63. *See* Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004).

64. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 735 (1976) (Rehnquist, J., dissenting).

65. TRIBE, *supra* note 56, at 1232 n.46 (quoting P. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964)).

66. *Cf. Serbian Eastern Orthodox Diocese*, 426 U.S. at 714 n.8 ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes[.]").

67. *See* Richard W. Garnett, *The Supreme Court's "Hands-Off" Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009).

could well be," I worried, "that we are living off the capital of this idea—that is, we enjoy, embrace, and depend upon its freedom enabling effects—without a real appreciation for or even a memory of what it is, implies, and presumes."[68] Although Murray saw a continuity between the ancient idea and the "American consensus,"[69] he insisted that our Constitution guarantees religious freedom "to the Church as an organized society with its own law and jurisdiction,"[70] and contended that the First Amendment actually "codified" the "freedom of the Church."[71] However, I was troubled by what I characterized as the "grab-bag" character of the familiar, if still controversial, "church autonomy" doctrine,[72] and the apparent lack of a clear rule, prohibition, or principle connected to that doctrine. I expressed some concern that "it remains unclear and unsettled what exactly are the content and textual home in the Constitution for the church-autonomy principle" and admitted that "[i]t does not seem unfair to suggest that the doctrine has something of an emanations-and-penumbras air about it."[73]

In the meantime, though, the Supreme Court has resoundingly affirmed, in *Hosanna-Tabor*, what I have suggested is the core of the "freedom of the church" claim, and the apparent fact that this "great idea" is not reducible to one rule, test, or textual home seems, somehow, less worrisome than it did. That its traces and influence appear in many places—in the Court's "expressive association" doctrine,[74] in the Establishment Clause's ban on policies that create "excessive entanglement" between religious and political authority,[75] in the intriguing scholarly work of neo-formalists and institutionalists, and so on—could signal or reflect not so much the idea's vulnerability as its pervasive, foundational quality, and thereby confirm Berman's provocatively sweeping proposal about its role in the

68. Garnett, *supra* note 6, at 64.
69. MURRAY, *supra* note 4, at 30–39.
70. MURRAY, *supra* note 4, at 70.
71. Michael J. Baxter, *John Courtney Murray, in* THE BLACKWELL COMPANION TO POLITICAL THEOLOGY 153 (Peter Scott & William T. Cavanaugh eds. 2004).
72. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373 (1981); Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057 (1987).
73. Garnett, *supra* note 6, at 76.
74. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).
75. *See* Lupu & Tuttle, *supra* note 46, at 62.

development not merely of First Amendment doctrine in the United States, but of law and constitutionalism generally. The idea, then, is actually many ideas. And, maybe the *Hosanna-Tabor* case, by anchoring the idea's paradigmatic application firmly in our Constitution and tradition, has provided something of a fixed point of reference and contact for the various other complementing, supporting, and operationalizing themes.

II.

Each of the themes, claims, or arguments that, I have suggested, help to make up the "freedom of the church" idea have been closely examined and powerfully criticized in scholarly literature and elsewhere. Some of these criticisms are more familiar than others. Some of these objections strike me, despite their familiarity and frequency, as not requiring very much in the way of a response. For example, the fact that ideas like "church autonomy" or the "freedom of the church" can be abused, or deployed to protect or advance deeply objectionable or immoral activities and programs, does not mean that the ideas are not foundationally important and, all things considered, important to the common good and human flourishing.[76] The argument that rights and liberties properly belong to individuals only, and not to groups, associations, corporate entities, etc., has some political appeal at present, but is hard to square with our practice or jurisprudence. The complaint that using or protecting the "freedom of the church" in law requires difficult line-drawing and close-call distinctions has some force, but does not establish that this idea –but not all the many others about which the complaint could be lodged—should be rejected. The objection that the idea, whatever its theoretical appeal or merits, has no place in our Constitution was difficult to sustain before and—as a descriptive matter, anyway—is now refuted by *Hosanna-Tabor*.

Here, I want to say more in response to three criticisms of the "freedom of the church" that strike me as having some force and that have been pressed powerfully by a number of accomplished scholars, including Richard Schragger and Micah Schwartzman. These are the "misplaced nostalgia" objection, the "religion isn't special" objection, and the "individual conscience" objection.[77]

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76. *Cf.* Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 51 (discussing "the dark side of groups and group rights").

77. Schragger and Schwartzman advance other objections, too, in *Against Religious Institutionalism*, *supra* note 16.

Misplaced Nostalgia

According to Schwartzman and Schragger, the "historical account offered by some religious institutionalists is . . . incomplete[] and reactionary."[78] "[G]rounding post-enlightenment religious liberty in the eleventh century is anachronistic"[79] and "selective."[80] And, in any event, the "freedom of the church" invoked in the 11th century "did not mean freedom of *churches*," but only the "freedom of the Roman Catholic Church," and certainly did not include within its scope "a more modern freedom of conscience."[81] Those who invoke, for present-day use, the "freedom of the church" display a "neo-medievalism," in which "it is easy to sense a form of religious nostalgia, a certain melancholy for the passage of an age in which everyone—or at least all Christians— shared a thick set of religious beliefs and perhaps also a way of life based on common rituals and practices."[82]

As I see it, though, the "freedom of the church" does not—or, at least, it need not—involve nostalgia or melancholy.[83] It should not be heard, and then dismissed, as a reactionary call for a return to a time or discourse of organic social unity, before the collapse of "the sacred canopy,"[84] the disenchantment of the world, and the invention of penicillin. Although we might well regret the loss or blurring of what C.S. Lewis called "the discarded image,"[85] whether or not we do is a separate matter from the place of the "freedom of the church" in our thought and practice relating to religious freedom and church-state relations.

For the most part, the project is not the retrieval or re-creation of Christendom or feudalism, though it is fair to say that, like pluralist political theory more generally, it challenges the tendency in some quarters to treat as given and permanent the post-Westphalian "state" system. The charge that the "freedom of the church" idea, or the "religious institutionalism" approach, reflects a fear of diversity and difference is

78. *Id.* at 932.
79. *Id.* at 933.
80. *Id.* at 932.
81. *Id.* at 936.
82. *Id.* at 938.
83. *See* GREGORY, *supra* note 9, at 365–87 ("Conclusion: Against Nostalgia").
84. PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION (1990).
85. C.S. LEWIS, THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE (1964).

misplaced, and more than a little unfair.[86] In fact, the relevant literature is shot-through with endorsements, celebrations, and defenses of pluralism, in both its political-theory and in its "diversity of views" varieties.[87] On the other side, however, there is more than a little influence of a shopworn Rawlsian liberalism, the attractiveness and authority of which is more often assumed or asserted than established.

It is, of course, true that appeals to, or efforts to mine, the "freedom of the church" risk falling into anachronism. There is a need for translation, not transplantation, of this idea. It is also true that, like most appeals to history in the context of law-and-religion and First Amendment scholarship, references to Canossa, Runnymede, and Canterbury are incomplete. It could be true, though—I am confident that it is true—*both* that those who ratified the original Constitution and the Bill of Rights did not understand themselves to be constitutionalizing Pope Gregory VII's claims about papal and imperial power *and* that the ratification of these texts is part of a story that extends further back than the *Memorial and Remonstrance* and that includes, yes, the "Crisis of Church and State, 1050-1300."[88]

True, whatever role papal assertions of power to appoint bishops might have played, centuries ago, in the tangled, often unedifying history of pre-Lockean Europe, or in the development of western constitutionalism, our constitutional strategy and our values were (and are) different. But the "freedom of the church" claim is a modest one, neither nostalgic or reactionary: It is that the relevant history, or genealogy, of religious liberty under and through law in the United States is more than, and more interesting than, Hobbes-to-Locke-to-Madison-to-Rawls. The story began before the St. Bartholomew's Day massacre, and, Justice Black to the contrary notwithstanding, is not reducible entirely to a reaction by "freedom-loving colonials" against "centuries . . . filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."[89] In any event, the "freedom of the church" project does not aim so much to tell an alternate, or parallel, story as to make *our* story longer, richer, and truer.

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86. Schragger & Schwartzman, *supra* note 16, at 938–39.

87. *See, e.g.*, Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J. L. & RELIGION 503 (2007).

88. TIERNEY, *supra* note 12.

89. Everson v. Board of Ed., 330 U.S. 1, 8, 9 (1947).

Religion Isn't Special

First Amendment scholars have been wrestling for some time with doubts about the justifiability of treating "religious" claims for exemptions differently—that is, with more solicitude—than non-religious, conscientious claims for exemptions.[90] Hundreds of articles, chapters, and books have explored the question whether and why "religion is special" (usually for accommodations-and-exemptions purposes and less often as part of a critique of no-aid separationism in debates about public funding for religious schools and charities). Micah Schwartzman's *What if Religion Isn't Special* is a recent and important contribution to the discussion.[91]

The "freedom of the church" idea presumes and proposes that religion *is* special—or, more precisely, that religious institutions, communities, and authorities are and should be differentiated both from political authorities and from non-state institutions and voluntary associations generally.[92] To embrace this idea as still-relevant is to claim that religious institutions "have a distinctive place in our constitutional order"[93]—and not a distinctively worrisome or harmful one. It is to suggest that churches are not "just like the Boy Scouts"[94] and that, while they to a large extent function in civil society in the same way and deliver the same Tocquevillian benefits as any number of voluntary associations, they are, in the end, different.

However, it is objected, "in a world of religious and associational pluralism it is extraordinarily problematic to recognize and distinguish some conscience-based organizations over others."[95] Problematic or not, this is, as Andrew Koppelman has emphasized, "what American law

90. *See, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. J. 555 (1998); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000).

91. *See also, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2012); EISGRUBER & SAGER, *supra* note 27; James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005).

92. As William Cavanaugh and others have shown, the category of "religion" is problematic and it has often been used, for political reasons, to shore up a myth that "religion" causes violence. WILLIAM T. CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE (2009).

93. Schragger & Schwartzman, *supra* note 16, at 949.

94. Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007).

95. Schragger & Schwartzman, *supra* note 16, at 956.

does."[96] He continues, "American law singles out religion by treating it as a good thing. The fact that conduct is religious counts as a reason to accommodate it[.]"[97] Koppelman has argued in other work that it is not only true that American law gives religion special treatment, it is also fair and reasonable that it does.[98] Other prominent scholars have also offered justifications for the "singling out" of religion,[99] with John H. Garvey's suggestion that "religion is a lot like insanity" being perhaps the most provocative.[100] I tend to agree with Steven Smith that it is increasingly difficult, within the boundaries of argument imposed by present-day liberalism, to justify, on principled grounds, special treatment for religious liberty.[101] But, so what? In our history and tradition, it is a fact that "religious" institutions and authorities have acted and been regarded as special, and distinct, whether or not "religion" was or should be understood as neatly and sharply separate from "culture," "conscience," or "morality." Obviously, the empirical claims made about the distinctiveness of religious institutions—about their work, their effects, their contributions—can and should be evaluated, tested, and—if necessary—falsified. However, we live under a written Constitution that "singles out" religion, and inhabit a tradition—the entire history of the west—in which "church" and "state" have, in a special way, cooperated and contended. If it is possibly "anachronistic" to invoke the "freedom of the church," it is certainly ahistorical to deny the distinctive (for better or worse) place and role of religious actors in that tradition, and today.

Individual Conscience

Proposals to bring "the freedom of the church" back to "center stage" —or at least to the cast of characters—have been criticized for neglecting, or even supplanting, the rights-bearing individuals who appropriately star in the post-Enlightenment show, or for allowing "churches . . . more religious freedom than individuals."[102] The "new institutionalists" are said to be proposing a "move from freedom of conscience to freedom of

96. Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 967 (2010).

97. *Id.*

98. *See generally* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571.

99. *See generally* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000).

100. John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798 (1985).

101. *See generally, e.g.*, Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, 122 HARV. L. REV. 1869 (2009).

102. Schragger & Schwartzman, *supra* note 16, at 921.

the church."[103] The "freedom of the church," some critics worry, "put[s] church first, [and thereby] inverts the usual formulation whereby institutional autonomy is derived from individual rights of conscience."[104] Historically, it is claimed; "in the aftermath of the Protestant Reformation[,] . . . [t]he freedom of the church gave way to the 'freedom of conscience,' with its emphasis on the rights of individual believers rather than the sovereignty of religious institutions."[105]

The "freedom of the church" proposal, however, is not to subordinate individuals' religious-liberty rights to those of institutions, and the claim is not that the freedom of the religious conscience from government coercion "derives" from the autonomy, sovereignty, or independence of churches or other religious institutions. It should be emphasized, at the risk of inviting charges of neo-medievalism or sectarianism, that the Second Vatican Council's *Declaration on Religious Freedom* both asserted the "freedom of the church" and stated that the "right to religious freedom has its foundation in the very dignity of the human person."[106] The one is not "derived" from the other; instead, the *Declaration* claims a "harmony" between individuals' "civil right not to be hindered in living their lives in accordance with their consciences" and the church's independence from state oversight and control over internal matters.[107] And when Murray hailed the "freedom of the church" as a "Great Idea," he did not present it as the source or the substitute for the immunity of the person from coercion in religious matters, but rather as a structural protection for that immunity. The historical and continuing significance of the "freedom of the church" is not that it somehow grounds or trumps individuals' religious liberty and freedom of conscience, but that it "check[s] the encroachments of civil power," "limit[s] the reach of the [public] power over the people," and helps to make the person—every person—more "secure in all the freedoms that his sacredness demands."[108]

The "freedom of the church" can and should be seen as a structural feature of social and political life—one that promotes and enhances

103. *Id.* at 970.
104. *Id.* at 929. *See also id.* at 930 (characterizing Steven Smith as claiming that "individual rights of conscience are derived (historically and conceptually) from the institutional freedom of the church, not the other way around).
105. *Id.* at 937.
106. *Dignitatis humanae,* at ¶¶ 2, 9.
107. *Id.* at ¶ 13.
108. MURRAY, *supra* note 4, at 204–05.

freedom by limiting government—and also as a moral right to be enjoyed by religious communities. It is not simply an effect or implication of private, individual claims to freedom of conscience and immunity from government coercion in matters of religious belief. The immunity of conscience from coercion in religious matters can be said to depend on the "freedom of the church," not in the sense that institutions are somehow prior to persons, and not in the sense that this immunity is somehow conferred by a church, but in a more practical, political sense. Murray's claim was that "the protection of . . . aspects of life from the inherently expansive power of the state . . . depended historically on the freedom of the Church as an independent spiritual authority."[109] True, he worried that the conscience of the individual was vulnerable, that it was not up to the task of protecting itself, and that the modern state should not be trusted to honor it. But he did not seek to subordinate it, or to substitute for it the "freedom of the church."

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These few pages are only the beginning of the response that the various criticisms of the "freedom of the church" and "religious institutionalism" deserve. There is no getting around the fact that the idea is a challenge to many contemporary assumptions, premises, and commitments. It remains to be seen whether, or to what extent, it can be incorporated faithfully—that is, in a way that is faithful to the idea—into an account of religious liberty and church-state relations that is plausible, let alone attractive, to present-day citizens and scholars. It may be that it cannot. If not, we should be willing to question both the idea itself and the standards we use to identify attractive accounts.

III.

I suggested earlier that the idea of the "freedom of the church"—or something like it—remains a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government. I also acknowledged the risks of anachronism and the need for translation, not merely transplantation, of that idea. Is such a translation—a faithful one, even if not a slavishly literal one—possible? The point, after all, of the new interest in the "freedom of the church" should not be the gathering of intellectual-history souvenirs, or a scholarly

109. Francis Canavan, *Religious Freedom: John Courtney Murray, S.J. and Vatican II*, *in* JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION 172 (Robert P. Hunt & Kenneth L. Grasso eds., 1992).

version of adventure tourism, but instead the genuine improvement of our legal regime and its justifications.

There are (at least) four substantial obstacles—some critics would insist that they are insurmountable—to this translation effort. The first (in no particular order) is the centrality in contemporary political theory and morality of the individual. I have already suggested that the "freedom of the church" need not be seen as a proposed substitute for liberty of religious conscience. Still, the appeal of an idea that seems to privilege "institutions" over "individuals" can only wane as we continue to think, more and more, in terms of personal spirituality than in terms of institutional affiliation, public worship, and tradition. It is common (and understandable) to regard churches and their autonomy-claims as dangerous centers and sources of potentially oppressive power, and less as structural protections for private conscience than as threats to it, in need of supervision and regulation by the state.

Next, there is the reality of religious difference and diversity. Today, it is not Pope Gregory VII toe-to-toe with Henry IV, and there is no "church" any more than there is a "state." As Schragger and Schwartzman note, "[t]he Investiture Controversy involved a bipolar conflict between *one* secular sovereign and *one* Church."[110] Murray asked, echoing Pope Gelasius,[111] "are there two or one?" but, Schragger and Schwartzman insist,

> [The question is] falsely posed. The question is rather: Are there *many* or one? The issue is how the freedom of the church can be made plural—how to move from the Middle Ages to the Reformation and eventually to our modern experience of religiously diverse, liberal democratic societies, without losing the claim of church sovereignty that drives the various forms of religious institutionalism.
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> Although institutionalists differ in how they confront this problem, none of them have solved it.[112]

They are right about the "problem" and they may also be right that it is (so far) unsolved.[113] I am not convinced, though, that it is unsolvable.

The third obstacle, which resembles the second, is the rise of the modern, liberal, sovereign state and the tension between its claims and any pluralist

110. Schragger & Schwartzman, *supra* note 16, at 936.

111. "Two there are, august Emperor, by which this world is ruled on the title of original and sovereign right—the consecrated authority of the priesthood and the royal power." *See* Garnett, *supra* note 6, at 67.

112. Schragger & Schwartzman, *supra* note 16, at 936.

113. *Cf.* Smith, *supra* note 9, at 278–83 ("A Retrievable Commitment?").

account of authority. Even if it stops short of attacking non-state authorities as "worms within the entrails" of the body politic, and even if its powers are constitutionally conferred, enumerated, and limited, the state seems likely to regard non-state authority as provisionally and by concession held and exercised, and also to attempt to require that more and more of this authority is exercised in accord with the same norms that (appropriately) govern the state itself.[114] In addition, even a careful and disciplined liberal state is not likely to settle for night-watchman status. A state that does more and more, in the service of its understanding of the common good and public order, will, more and more, given the above-mentioned increase in religious diversity, bump up against the claims and objections of religious individuals and institutions alike. Conflict is unavoidable, and the "freedom of the church" might seem to exacerbate, rather than ameliorate, this conflict.[115]

The fourth, and probably most formidable, obstacle to translation is the lack of interest in translating. As always, there are those who are comfortable with, or who have a stake in maintaining, the doctrinal and conceptual *status quo*.[116] And, as Steven Smith has observed, "any . . . reorientation would require judges and scholars—and citizens generally —to unthink and unlearn much that has come to be taken for granted, and to recover interpretive possibilities that have largely been forgotten."[117] Even if the charges that the recent flowering of interest in the "freedom of the church" reflects reactionary or sectarian neo-medievalism are misplaced, there is no getting around the fact that law-and-religion accounts built upon individualism, Justice Black, and the Founders are likely to have more curb-appeal than ones highlighting plural authorities, Kuyper and Murray, and the Investiture Controversy.

All that said, the idea of, and the on-the-ground struggle for, "freedom of the church" mattered in the past and matter today. It would be a good thing if it were incorporated, in a coherent and workable way, into our doctrines, thinking, and practice. Some things—many things, even—would

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114. *Cf.* Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625 (2001).

115. *See* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 101 (2002) ("In the modern world the government plays a more active role in our everyday lives than it did a century or two ago. . . . In a society that is pervasively regulated, as ours now is, there are many more occasions for conflict between the government and religious actors.")

116. Smith, *supra* note 9, at 283 ("The more sweeping and ambitious agenda of current jurisprudence has, of course, developed its supporting constituencies . . . , who would resist retrenchment.").

117. *See id.* ("[A]ny such reorientation would require judges and scholars—and citizens generally—to unthink and unlearn much that has come to be taken for granted, and to recover interpretive possibilities that have largely been forgotten.").

not need to change. Notwithstanding the charge that the "freedom of the church" involves the subordination of individual religious conscience to the internal-governance rights of religious institutions, there is no reason to think that a translation of the idea would require us to discard or water down constitutional and statutory protections for religious belief and (such as they are) exercise. For example, the rule that governments should not punish or burden activity because of its "religious" character or motivation would seem untouched—or, at least, not undermined—by any such incorporation.[118] The same is true for the prohibition on government actions purporting to require or compel religious observances or expression.[119] The various "no religious decisions" cases—including *Hosanna-Tabor*—would stand, but on an arguably firmer foundation.[120]

A doctrinal regime informed or animated by the "freedom of the church" idea would, for starters, do a better job of making "church-state" law about the nexus between "church" and "state." This is no small thing. After all, it has been suggested 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.'"[121] Philip Hamburger argued that Jefferson's *Letter to the Danbury Baptists* supplied, for better or worse, what many regard as the "authoritative interpretation" of the First Amendment's Religion Clauses.[122] "Separation of church and state" certainly can be misunderstood, and certainly can serve as cliché, a "misleading metaphor," or a "figure of speech."[123] Seen through the lens of the "freedom of the church," though, "separation" is no longer an implausible call for a "secular" public square or a limit on "religious" arguments in politics but a realistic (and attractive) differentiation between religious and political authority.

With the "metaphor" rehabilitated, our actual Establishment Clause doctrines could change in at least two ways. First, the so-called

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118. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

119. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

120. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

121. Daniel L. Dreisbach, *Origins and Dangers of the "Wall and Separation" Between Church and State*, 35 IMPRIMIS 1, 1 (Oct. 2006).

122. Philip Hamburger, *Separation and Interpretation*, 18 J.L. & POL. 7, 7 (2002).

123. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

"endorsement test" could be abandoned. Under that test, government policies and expression are unconstitutional if they convey, to the "reasonable observer," an official message that "nonadherents . . . are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[124] Put another way, courts applying the test ask "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[125] The test and the judicial inquiry it invites have been repeatedly and, in my view, devastatingly criticized, by Steven Smith and others.[126] For present purposes, I will note only that the "symbolic union" just mentioned above usually does not actually involve a "church" and the "denominations" in question are not actually "controlling." That a particular government action or display communicates a message having to do with a "symbolic" connection between religious faith and politics could well be a reason to oppose that action as a matter of the morality of liberal democracy or of the norms of civic friendship. Such "messages," though, will rarely amount to an "establishment" of religion, properly understood.

Relatedly, the version of the "*Lemon* test" that is applied in public-funding cases could, informed by the "freedom of the church," be simplified and improved. The Framers, after all, knew what an "establishment of religion" looked like. They were familiar with "institutional integration" of churches and governments; such integration was a live option, and it was rejected in our "original disestablishment decision."[127] It involved, among other features, official control over doctrine and personnel, official suppression of alternative and dissenting faiths and religious practices, actual political entanglement between religious authorities and government, and compelled support—not of "religion" but of the established church.[128]

Many others have told the story of gradual move from "church and state" to "religion and public life" as the subject-matter of the First

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124. Lynch v Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

125. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985).

126. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). *See also, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002).

127. Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 971–75 (1989).

128. MICHAEL W. MCCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 17–20 (2d ed., 2006).

Amendment's Establishment Clause. Today, in an Establishment Clause case, we usually ask—applying the second part of the "*Lemon* test"—whether a particular policy or official action "endorses" or "advances" "religion." A translation and (re-)incorporation of the "freedom of the church" would move us away from these questions. Instead of asking, as the Court did in a line of now-largely-abandoned school-aid cases, whether the government program in question has the "effect" of "advancing" religion, or whether it is likely to create "political divisiveness along religious lines,"[129] it would ask whether it creates an institutional relationship or connection that is reasonably characterizable as a religious "establishment."

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The "freedom of the church" is an old, but still important idea. It is significantly, but not entirely, out of place in today's constitutional-law and law-and-religion conversations. If it can be retrieved and translated, then it should, not out of nostalgia or reaction, but so that the law will better identify and protect the things that matter.

129. *See generally* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).