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AGAINST RELIGIOUS INSTITUTIONALISM

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INTRODUCTION

THE idea that religious institutions should play a central role in understanding the First Amendment has become increasingly prominent in recent years. Litigation over the application of civil rights laws has elicited calls for a doctrine of church sovereignty based on an institutional conception of the religion clauses. For example, in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, decided last Term, the Supreme Court held that the “ministerial exception” prevented ministers from bringing employment discrimination claims against their church employers.¹ Although the Court did not explicitly invoke the concept of “church autonomy,”² some scholars have understood *Hosanna-Tabor* to endorse an institutional theory of the First Amendment’s religion clauses.³ An institution-centered concept of religious free exercise has also emerged in the ongoing controversy over the Obama administration’s efforts to require large employers, including Catholic hospitals and universities, to provide their employees with insurance that would cover contraception. Church leaders have asserted the Church’s right not to be implicated in individual employee decisions that violate religious tenets.⁴ Religion clause scholarship has also taken an institutional turn, with some theorists arguing

¹ 132 S. Ct. 694, 702 (2012).

² But see *id.* at 710 (Thomas, J., concurring) (“[T]he Religion Clauses guarantee religious organizations autonomy in matters of internal governance”); *id.* at 712 (Alito, J., concurring) (“Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance.”).

³ See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175–77 (2011).

⁴ See, e.g., U.S. Conference of Catholic Bishops Ad Hoc Comm. for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty* 3 (2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf>; see also Michael P. Moreland, *The Bishops & Religious Liberty*, *Commonweal* (May 30, 2012, 3:50 PM), <http://www.commonwealmagazine.org/bishops-religious-liberty> (“The state cannot interfere with the internal decisions of churches not because the state has granted an exemption from an otherwise generally applicable law but because religious institutions are free and autonomous groups within the state.”).

that religious groups have jurisdictional sovereignty, or what some have called the “freedom of the church,” which is distinguishable and different from the protection of rights of conscience.⁵ At least one prominent scholar has gone so far as to reject the idea of freedom of *religion*, instead contending that freedom of the *church*, with its emphasis on institutions, is the appropriate way to understand religious liberty.⁶

In this Article, we present various grounds for skepticism about religious institutionalism, especially the concept of “freedom of the church,” which we distinguish from the seemingly related but importantly distinct idea of “church autonomy.”⁷ The idea of freedom of the church refers to a set of claims about religious institutions, beginning with the proposition that they are sovereign entities with the power to assert jurisdictional limits against the state.⁸ Religious organizations are not protected by rights that can be balanced against the rights of others or measured against important state interests; rather, their sovereign authority places absolute constraints on the state’s power to enforce its laws. Furthermore, religious organizations are distinctive in having this form of sovereignty. Unlike non-religious voluntary associations, they are entitled to special legal protections. As we shall see, proponents of freedom of the church offer different justifications to explain the unique status of religious institutions. Common among them, however, is the view that religious groups do not owe their distinction to the rights and

⁵ See generally Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 *Vill. L. Rev.* 273 (2008) [hereinafter, Garnett, *Do Churches Matter?*]; Richard W. Garnett, *The Freedom of the Church*, 4 *J. Catholic Soc. Thought* 59 (2007) [hereinafter Garnett, *Freedom of the Church*]; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 *St. John’s J. Legal Comment.* 515 (2007) [hereinafter Garnett, *Religion and Group Rights*]; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 *Harv. C.R.-C.L. L. Rev.* 79 (2009).

⁶ See Steven D. Smith, *Freedom of Religion or Freedom of the Church?* (Aug. 17, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1911412>.

⁷ Proponents of “church autonomy” are not necessarily committed to claims about the sovereignty of religious groups, the irreducibility of their moral status, or even the distinctiveness of such groups as compared with non-religious voluntary associations. See Douglas Laycock, *Church Autonomy Revisited*, 7 *Geo. J.L. & Pub. Pol’y* 253, 266–68 (2009) [hereinafter Laycock, *Church Autonomy*]; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 *Colum. L. Rev.* 1373, 1373–74 (1981) [hereinafter Laycock, *Towards a General Theory*].

⁸ See *infra* text accompanying notes 16–17.

interests of their members. Their sovereignty is basic and irreducible, not a function of anything more legally or morally fundamental.⁹

In what follows, we resist all of these claims. In doing so, we also explain why individual rights of conscience are sufficient to protect the free exercise and anti-establishment values of the First Amendment. Our argument, contrary to some recent scholarship, is that institutions do not, in themselves, give rise to any distinctive set of rights, autonomy, or sovereignty, and that what might be called institutional or church autonomy is ultimately derived from individual rights of conscience. Indeed, for purposes of understanding religious liberty, we contend that any notion of institutional autonomy—to the extent it exists—can come from nowhere else.

This argument is not particularly novel: the sanctity of individual conscience is at the heart of the Lockean justification for free exercise and disestablishment.¹⁰ And indeed, the institutional church—at least since medieval times, and again in the alternative forms it has taken throughout the ages—has often been the enemy of toleration and of religious liberty.¹¹ That is not to say that we should take this prioritization of the autonomous individual for granted. The liberal commitment to individual rights has been challenged by both the scholarly left and right on the ground that it understates the role of community, church, family, group, and association in guiding and constraining human agency.¹² If these institutions are the building blocks of society, then a religion clause doctrine premised on the exercise of individual conscience is going to be partial.

Nevertheless, it seems appropriate to place the burden on those who would advocate an institutional approach to religious liberty to explain

⁹ See *infra* Part I.

¹⁰ Locke did not argue for disestablishment, but arguments based on his theory of religious toleration were turned against religious establishments during and after the Founding era. See Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* 72–78, 86–87 (1996) (discussing Locke's pervasive influence on the Founders); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002) (same).

¹¹ See generally 1 Henry Charles Lea, *A History of the Inquisition of Spain* (1906); *Tolerance and Intolerance in the European Reformation* (Ole Peter Grell & Bob Scribner eds., 2002).

¹² See, e.g., Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991) (from the right); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *Left Legalism/Left Critique* (Wendy Brown & Janet Halley eds., 2002) (from the left); Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984) (same).

why churches have more religious freedom than individuals and where such freedom might come from.¹³ We think such an institutional defense is not available and that any corporate right ultimately requires reference to individual conscience. That does not mean that mediating institutions are not relevant—individuals inevitably exercise their rights within and through institutions and associations. But those institutions and associations do not ground the rights at issue—individual rights of conscience do all of the conceptual and normative work. Institutions are inevitable, but their rights are derivative.

This Article is organized as follows. In Part I, we describe the new religious institutionalism, identifying a corporatist and a neo-medievalist strand and distinguishing both from the more conventional voluntarist account of church autonomy. In Part II, we make four broad-based criticisms of the new institutionalism. We argue that “freedom of the church” relies on selective history, violates basic republican political principles, has no limiting principle, and fails to explain why churches are different from other mediating institutions. Part III argues that churches derive their right to self-govern from the conscience and associational rights of their members—as do all voluntary associations. Churches are no different in this respect.

Part IV considers the implications of this view for constitutional doctrine, arguing that “freedom of the church” is not necessary to ground any of the existing doctrines that fall under the rubric of church autonomy. We further argue that the type of sovereignty that seems to be contemplated by the concept of freedom of the church is unthinkable in a post-Enlightenment world of rights-bearing individuals. In the course of doing so, we consider what it means to say that churches enjoy free exercise rights. We conclude that church autonomy is a function of individual autonomy and that general principles of freedom of association, privacy, and conscience are sufficient to protect all conscience-based associations, including churches.

¹³ We mean “more” freedom both doctrinally and conceptually. Doctrinally, the embrace of a robust institutional freedom could mean that some religiously-motivated activities that would be barred by generally applicable neutral laws when undertaken by an individual, see *Employment Division v. Smith*, 494 U.S. 872, 885, 886 n.3 (1990), would be permitted if undertaken by an institution. Conceptually, a robust institutional freedom would in some cases permit institutional “conscience” claims to override individual conscience claims when the two conflict. See Elizabeth Sepper, *Taking Conscience Seriously*, 98 Va. L. Rev. 1501, 1518–25 (2012).

I. THE NEW RELIGIOUS INSTITUTIONALISM

What we are calling religious institutionalism is really a set of arguments that coalesce around the conclusion that churches are constitutionally unique and that they should have significant autonomy to regulate their own affairs. Stated thusly, this conclusion may seem relatively unremarkable—the concept of church autonomy has been around for some time, immanent in the doctrine and explicit in commentary on religious liberty.¹⁴ Nevertheless, the claim that institutional freedom is a defining, if not *the* defining, concept of religious liberty, has been taken up in a more potent form recently. This in turn leads us to ask about the foundations underlying the more commonplace claim that “religious institutions have free exercise rights.”¹⁵

The more robust institutional claims often deploy the language of jurisdiction, separate spheres, or sovereignty.¹⁶ These kinds of claims favor the language of power over the language of rights, for the argument often takes the following form: the church exercises powers that the state lacks authority to exercise.¹⁷ The religion clauses, on this account, are jurisdictional in the sense that the church freely acts in its sphere of authority, a sphere that the state cannot enter not because it would be an invasion of rights, but because it would be a violation of sovereignty. Not all claims for church autonomy read this way, and so it is important to distinguish those that do from those that do not. But the sovereignty-like claim is at the heart of the most aggressive forms of institutionalism. Here we identify two strands in the more recent institutionalist literature. We call the first “corporatist” and the second “neo-medieval.”

A. Corporatism

An assertive and increasingly prominent form of religious institutionalism is a species of First Amendment institutionalism more generally.

¹⁴ See generally Laycock, *Towards a General Theory*, *supra* note 7.

¹⁵ *Id.* at 1386.

¹⁶ See Perry Dane, *The Varieties of Religious Autonomy*, in *Church Autonomy* 117, 122 (Gerhard Robbers ed., 2001) (“Claims to religious liberty implicate not only the libertarian language of ‘rights-talk’, but the existential language of ‘sovereignty-talk.’”).

¹⁷ See, e.g., Berg et al., *supra* note 3, at 176 (“The civil authority . . . lacks ‘competence’ to intervene in such questions [about selecting ministers], not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdiction.”); Paul Horwitz, *Act III of the Ministerial Exception*, 106 *Nw. U. L. Rev.* 973, 980–82 (2012) (advancing an “authority-based argument for the ministerial exception”).

This theory has its origins in dissatisfaction with traditional free speech doctrine.¹⁸ This dissatisfaction argues for a more context-specific approach to First Amendment problems, one that recognizes that speech occurs in particular settings and under particular institutional conditions. The argument is that a doctrine that is inattentive to those settings will often be a poor fit, over-protecting speech that does not serve free speech values and under-protecting speech that does.¹⁹

By itself such doctrinal mismatch does not argue for any particular form of institutional autonomy; it merely calls for attention to the institutional setting. Indeed, Professor Frederick Schauer, who is often invoked as the originator of the institutional First Amendment, argues less for specific doctrinal outcomes and more for the proposition that courts should consider institutional context in formulating specific doctrines.²⁰ In the church-state context, however, institutionalism has come to be identified with deference to institutional actors as sovereign entities. This requires something more robust than an instrumental justification for non-interference with particular institutions; it must make stronger claims about how those institutions are either embedded within, or are perhaps constitutive of, our ethical and social life.

Thus, the stronger form of the institutional argument embraces something much more akin to corporatism, with its emphasis on an organic social order. On this account, society is divided into separate and distinct spheres, each governed by its own institutions. These institutions do not merely advance particular public ends; they are also features of the “real world,” as distinguished from the “made-up world” of the law inhabited by lawyers and judges.²¹ They are “pre-legal” entities,²² or “natural features of the social landscape.”²³ First Amendment law should recognize

¹⁸ See Frederick Schauer, Comment, Principles, Institutions, and the First Amendment, 112 Harv. L. Rev. 84, 85–86 (1998); Frederick Schauer, Towards an Institutional First Amendment, 89 Minn. L. Rev. 1256, 1258–59 (2005) [hereinafter Schauer, Towards an Institutional First Amendment].

¹⁹ See Horwitz, *supra* note 5, at 86.

²⁰ See Schauer, Towards an Institutional First Amendment, *supra* note 18, at 1276–77 (“An institutional perspective on the First Amendment would not necessarily serve as a vehicle for more First Amendment protection . . .”).

²¹ Garnett, Do Churches Matter?, *supra* note 5, at 276, 284.

²² *Id.* at 283.

²³ Horwitz, *supra* note 5, at 87. For an early expression of this view, see John Neville Figgis, Churches in the Modern States 47 (1913) (“Now the State did not create the family, nor did it create the Churches; nor even in any real sense can it be said to have created the club or the trades union; nor in the Middle Ages the guild or the religious order, hardly even the

those institutions that are a “natural and intrinsically worthy part of both social discourse and individual human flourishing.”²⁴ When faced with a First Amendment question, then, one should ask first whether the litigant is an identifiable First Amendment institution, that is, “is it an identifiable sovereign sphere whose fundamental role in the social order is to contribute to public discourse?”²⁵

The embrace of “natural” and organic sovereign institutions as checks on the impersonal state seems to evoke Ferdinand Tönnies’ distinction between community and society, *gemeinschaft* and *gesellschaft*.²⁶ Implicit in this argument is the notion that the church, along with the family, the guild, the commune, and the university, gain their authority by acting as counter-weights to the overweening state. These forms of association are personal and communal; members are bound by affective ties and (self-) regulated by common mores. In these communities, individual members are more oriented to the collective than to their own self-interest.²⁷ The state, by contrast, is characterized by the proliferation of formal, rational, impersonal ties and organizations. Moreover, it is destructive of local associational life, thus necessitating limits on its authority. The conflict between *gemeinschaft* and *gesellschaft* is an abiding concern of those who worry about the rationalization and disenchantment of the modern world.

We do not want to overstate this aspect of religious institutionalism, for the instrumental reasons for church autonomy—that it advances First Amendment values—are often difficult to disentangle from the naturalizing rhetoric of separate spheres.²⁸ Nevertheless, advocates of religious

universities: they have arisen out of the natural associative instincts of mankind, and should all be treated as having a life original and guaranteed, to be controlled and directed like persons . . .”).

²⁴ Horwitz, *supra* note 5, at 111.

²⁵ *Id.*

²⁶ See Ferdinand Tönnies, *Community and Civil Society* (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887).

²⁷ Cf. John H. Garvey, *What Are Freedoms For?* 149 (2000) (“The church is usually viewed as a kind of unified whole, different from the sum of its parts. The glue that holds it together is not contractual . . . The church is thought to be something real with a good of its own, not a procedural device for advancing members’ interests.”).

²⁸ Professor Paul Horwitz resists our characterization of his past writings as embracing an organic corporatism, see Paul Horwitz, *Defending (Religious) Institutionalism*, 99 *Va. L. Rev.* 1049, 1053 (2013), but the term “natural” used in the previous quotes, see *supra* text accompanying notes 22–24, is his. His reliance on Abraham Kuyper, see *infra* text accompanying notes 32–35, and Figgis, see Horwitz, *supra*, at 1063 & n.84, can also be understood as embracing a form of organicism.

institutionalism must explain why churches should receive more deference than other kinds of mediating institutions, which might also perform similar functions. In other words, they must explain why they are not simply offering a general and particularly robust theory of associational freedom.²⁹

Of course, for certain religionists, the church's special institutional authority stems from God;³⁰ it goes without saying that *their church* is different from any other secular association—or other (false) churches, for that matter.³¹ In order to accommodate religious pluralism, however, one could generalize and argue instead that the social order—with its multiple spheres of jurisdiction—as a whole is God-given. For example, some institutionalists have turned toward the separate spheres theory of the neo-Calvinist Dutch theologian Abraham Kuyper.³² Kuyper's organicism is theological,³³ and his institutional spheres are God-given,³⁴ though contemporary institutionalists do not explicitly embrace that foundation.³⁵ A different justification, not based in religious dogma, could instead contend that all churches (and perhaps a limited set of other institutions) are organic and important in a way that many (or most) other forms of association are not.

Indeed, this seems to be the most common (non-religious) argument for religious institutionalism: that church independence fosters a unique form of human flourishing. Churches, it is argued, are not just like any other mediating or voluntary associations.³⁶ First, churches are preemi-

²⁹ We develop this claim in Part IV.

³⁰ See, e.g., Garvey, *supra* note 27, at 149–50; Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 *Pepp. L. Rev.* 1159 (2013).

³¹ See Patrick McKinley Brennan, *Differentiating the Church and State (Without Losing the Church)*, 7 *Geo. J.L. & Pub. Pol'y* 29, 44–45 (2009); Patrick McKinley Brennan, *The Liberty of the Church: Scope, Source, and Scandal*, 21 *J. Contemp. Legal Issues* (forthcoming 2013) (manuscript at 2–3) (on file with authors) [hereinafter Brennan, *Liberty of the Church*].

³² See Horwitz, *supra* note 5, at 91–99.

³³ See Abraham Kuyper, *Lectures on Calvinism* 59 (2007) (1898) (“In its essence, for the Calvinist, the Church is a spiritual organism, including heaven and earth, but having at present its center, and the starting-point for its action, not upon earth, but in heaven.”).

³⁴ *Id.* at 98 (“From this *one* source, in God, *sovereignty in the individual sphere*, in the family and in every social circle, is just as directly derived as the *supremacy of State authority*.”).

³⁵ See Horwitz, *supra* note 5, at 93–94 (defending sphere sovereignty theory without endorsing Kuyper's Calvinist theological foundations).

³⁶ For a summary of the arguments that follow, see Garnett, *Freedom of the Church*, *supra* note 5, at 82–83.

ment in protecting individuals against the state by providing them with the collective resources to resist state encroachment. Churches also provide an institutional base for counter-politics. In this way, they are essential to the securing of constitutionally limited government.³⁷ Second, churches create the social space in which a meaningful pluralism can occur—without *religious* institutions, individual acts of conscience are not particularly meaningful.³⁸ And, third, churches speak in a “prophetic voice,” and can transform existing national values in light of new visions.³⁹ Thus, the non-religious justifications for religious autonomy are that it ensures individual liberty and advances the aims of the wider society. These justifications are instrumental in nature, but they depend on a view of religious institutions as both unique and intrinsically valuable.⁴⁰

B. Neo-Medievalism

The intrinsic value of the church is reflected in the Catholic concept of *libertas ecclesiae*, or “freedom of the church,” which underlies the most aggressive form of the new religious institutionalism. “Freedom of the church” made its appearance during the Investiture Controversy at the end of the eleventh century, when Pope Gregory VII sought to revoke the traditional authority of temporal rulers to select and govern clergy in their territories—thus instigating the Wars of Investiture, a fifty-year conflict.⁴¹ A number of legal scholars have recently claimed that these pre-modern political battles (and literal wars) between popes and

³⁷ See Garvey, *supra* note 27, at 153 (“Religious groups are one of the most important of those associations that stand intermediate between the individual and the state, and provide a buffer that is the best protection for personal freedom . . .”); Horwitz, *supra* note 5, at 83 (“These institutions serve as a counterweight to the state, ensuring that it ‘may never become an octopus, which stifles the whole of life.’” (quoting Kuyper, *supra* note 33, at 96)); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) (“[T]he autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”).

³⁸ See Garvey, *supra* note 27, at 51; Angela C. Carmella, Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion, 73 *Notre Dame L. Rev.* 1191, 1211–12 (1998).

³⁹ See Kathleen A. Brady, Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For, 49 *Vill. L. Rev.* 77, 156–57 (2004); Horwitz, *supra* note 5, at 125.

⁴⁰ See Garnett, *Freedom of the Church*, *supra* note 5, at 81–82.

⁴¹ See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 87 (1983); Brian Tierney, *The Crisis of Church and State 1050–1300*, at 45–73 (1988).

kings are either at the origins of the modern concept of religious freedom or are instructive as to those origins.⁴² Freedom of the church, on this understanding, represented the first sustained effort to assert the separate authorities of church and state. Indeed, for some scholars, writing in a more grandiloquent style, the Investiture Controversy led to the important idea that royal authority was not unbounded, which in turn created the conditions for the development of the limited, constitutional state.⁴³ And for at least one religion clause scholar, the institution-based freedom of the church is a more accurate account of the American tradition of religious liberty than the individual-based freedom of religion or freedom of conscience.⁴⁴

This is a complex set of claims, with aspects that are historical, conceptual, and normative. The argument seems to be something like this: (1) the Investiture Controversy was a defining moment in the history of church-state relations; (2) the pope's assertion of sovereignty, of authority over all matters religious, especially the appointment of bishops and priests, generated a theological/political concept of ecclesiastical liberty, or "freedom of the church"; (3) during the religious fragmentation of the Reformation, the "freedom of the church" eventually morphed into the better-known concept of freedom of conscience, which eventually made its way into the American tradition; (4) over time, however, freedom of conscience has undermined its own religious foundations and produced an internal contradiction in the theory of religious liberty; and (5) a recovery of freedom of the church and its religious presuppositions is necessary for a coherent conception of freedom of conscience and religious liberty more generally.⁴⁵

⁴² See Garnett, *Freedom of the Church*, supra note 5, at 59–61 (“[E]ngagement with the 11th century Investiture Crisis, the ‘Papal Revolution,’ and the *libertas ecclesiae* principle could be helpful, if not essential, to an understanding of constitutionalism generally and, more specifically, of the religious freedom protected by the First Amendment to our Constitution.”); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 *Harv. L. Rev.* 1869, 1869–70 (2009) (book review).

⁴³ See John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* 204 (1960) (“The question has always been that of identifying the limiting norm that will check the encroachments of secular power Western civilization first found this norm in the pregnant principle, the freedom of the Church.”); Berman, supra note 41, at 115; George Weigel, *The Cube and the Cathedral: Europe, America, and Politics Without God* 101 (2005).

⁴⁴ See Smith, supra note 6, at 45.

⁴⁵ See Smith, supra note 42, at 1873–83.

Of course, freedom of the church as it has been deployed recently is a gloss on Catholic religious doctrine—concerned as it is with the temporal and spiritual power of the Catholic Church as an institution, its political and theological jurisdiction, and the legitimacy of the exercise of its hierarchical authority.⁴⁶ To the extent they have invoked freedom of the church, legal scholars have understood it in defensive terms—as the church’s protection of its authority in the face of an overbearing state, as the spiritual beating back of the depredations of the temporal. But that is anachronistic obviously. The medieval Church was not—in the eleventh century or for generations thereafter—disentangled from something we would identify as “the state” or from the civil authorities, no more than the Church was disentangled from something we would identify as “society” or “economy.”⁴⁷ Bishops and priests exercised temporal executive and judicial authority, and papal assertion of control over their appointments was part of a larger effort to consolidate power in the Church.⁴⁸ In short, whatever was claimed under the banner of *libertas ecclesiae*, it did not include the Church renouncing the exercise of temporal power.⁴⁹ The papacy not only sought to be free from the power of temporal rulers, but also sought their subordination to the Church. The Church did not simply want to be left alone, but rather to *rule*—perhaps indirectly,⁵⁰ but to rule nonetheless.⁵¹

⁴⁶ See, e.g., Brennan, *Liberty of the Church*, supra note 31, at 3–4, 15–16.

⁴⁷ See generally R. W. Southern, *Western Society and the Church in the Middle Ages* 16–23 (1970) (“The identification of the church with the whole of organized society is the fundamental feature which distinguishes the Middle Ages from earlier and later periods of history.”).

⁴⁸ See generally Walter Ullmann, *The Growth of the Papal Government in the Middle Ages: A Study in the Ideological Relation of Clerical to Lay Power* (3d ed. 1970).

⁴⁹ Though there were (attempted) exceptions. In 1111, Pope Paschal II proposed that in exchange for secular rulers not interfering with the investiture of bishops, the German churches would give up “all the vast lands and jurisdictions with which they had been endowed over the course of the centuries.” Tierney, supra note 41, at 85. Emperor Henry V accepted the offer, but the agreement was condemned by the cardinals in Rome, along with the German bishops, and was eventually repudiated. *Id.* at 85–86; see also Berman, supra note 41, at 105 (noting the rejection of Paschal II’s proposal).

⁵⁰ See Tierney, supra note 41, at 4 (contrasting “a starkly simple theocratic doctrine” with the “doctrine of ‘indirect’ power”).

⁵¹ See Berman, supra note 41, at 87 (“Pope Gregory VIII declared political and legal supremacy of the papacy over the entire church and the independence of the clergy from secular control. Gregory also asserted the ultimate supremacy of the pope in secular matters, including authority to depose emperors and kings.”); Tierney, supra note 41, at 56 (“The flat assertion of the *Dictatus Papae* that the pope had the power to depose emperors . . . seems to

That does not mean that the ultimate settlement between church and state was not an initial step toward church-state separation. Of course, how the concept gets into the U.S. Constitution is a good question (and one we discuss further below). But even if the concept is based in a particular sect's political theology, one cannot reject it out of hand—at least it provides some basis for a doctrine of institutional deference independent of the right of association. The difficulty is moving from the historical claim and its conceptual offspring—freedom of the church—to our modern-day concepts of freedom of conscience and church autonomy.

Thus far, legal scholars have made two kinds of claims in this regard. The first, made by scholars writing from within the Catholic tradition, has been to view the freedom of the church as an instructive idea, a way of linking church sovereignty to freedom of conscience, and arguing that the former is a necessary precondition of the latter. Professor Richard Garnett makes this claim, borrowing heavily from the Catholic theologian John Courtney Murray, who argued that freedom of the church had been codified by the First Amendment—a claim that Garnett is careful not to endorse, but which he nonetheless argues is suggestive.⁵² Garnett may not embrace Murray's history (which is dubious), but he does embrace the sentiment. True religious liberty, on his account, requires freedom of the church, understood as a non-subordinate and exclusive institutional authority over spiritual matters.⁵³ By putting church first, this argument inverts the usual formulation whereby institutional autonomy is derived from individual rights of conscience. We will contest that inversion below, but for now, we think it is an accurate statement of the claim.

The second claim—adopted in its strongest form by Professor Steven Smith—is somewhat more complex.⁵⁴ Smith's argument starts by deconstructing the religious/secular binary—a technique borrowed from left-leaning critical theorists that has become increasingly popular among religion scholars across the ideological spectrum.⁵⁵ The central

establish beyond all doubt that Gregory did claim the right to dethrone secular rulers.”). See generally Walter Ullmann, *A Short History of the Papacy in the Middle Ages* (2003).

⁵² See Garnett, *Freedom of the Church*, supra note 5, at 61–63.

⁵³ *Id.* at 80–81.

⁵⁴ See Smith, supra note 6, at 1.

⁵⁵ See generally *After Secular Law* (Winnifred Fallers Sullivan et al. eds., 2011) (collecting historical and ethnographic criticisms of legal secularism). But see Andrew F. March, *Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake About Reli-*

claim here is that the religious/secular divide is itself a product of religious dogma, a reflection of the Christian tradition of distinguishing between the two kingdoms, the earthly and the heavenly, the temporal and the spiritual. This religiously-inspired bifurcation—understood as a supreme and central act of jurisdictional division—it is argued, undergirds all of the Western legal tradition, which is thus deeply religious (or at least indebted to religion) in its most basic categories. On this account, law's secularity is a *result* of theological work done by Christians, not a rejection of it; and to the extent that law's secularity is the basis for religious freedom, so is the modern protection of conscience.⁵⁶

The consequence these theorists draw from this history is that religious freedom as a conceptual matter is “impossible” or a “myth” because there is no non-religious perspective from which the state can govern. Not only are the state's most basic categories derived from religious sources, its activities are themselves infused with religion or assertions of religious dogma—though masked by the concept of secularism. This is an argument about hegemony, which is why it appeals to critical theorists; the claim is that religion is not a thing that occurs outside the social and political world, but is already completely and utterly entwined within it. The secular state, on this account, enforces its own religion, which it calls *secularism*; and because the state gets to determine what counts as a religion (and therefore what counts as secular), it cannot avoid making theological claims.⁵⁷

This leads some scholars back to the original (as they see it) institutional settlement: the freedom of the church. Steven Smith, for one, asserts that while one cannot make claims about where the religious and the secular begin and end, one *can* make claims (even if they are disputed) about the appropriate jurisdictional reach of churches and states.⁵⁸ Moreover, he claims that individual rights of conscience are derived (historically and conceptually) from the institutional freedom of the church, not the other way around. Again, the institution precedes the individual, which is exactly the opposite of our current way of thinking

gion?, 40 Pol. Theory 319 (2012) (responding to various criticisms from the left of secular liberalism).

⁵⁶ See Smith, *supra* note 6, at 22–27; see also Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* 152–53 (2005); Robert A. Yelle, *Moses' Veil: Secularization as Christian Myth*, in *After Secular Law*, *supra* note 55, at 33.

⁵⁷ See Sullivan, *supra* note 56, at 1–12.

⁵⁸ See Smith, *supra* note 6, at 26–27.

about church autonomy. On this account, the rights-talk that is the hallmark of religious liberty discourse in the United States (and most of the world over) is mistaken. Instead, we should be talking about powers, as they did in the eleventh century. The only questions that are possible to answer are jurisdictional ones: which sphere does this activity belong in and which institution exercises sovereignty in that sphere? Indeed, church institutionalists analogize churches to foreign states.⁵⁹

What motivates this deconstructive and ultimately quite skeptical project is a belief that modern democratic societies are in crisis. When one reads this literature one uncovers any number of crises: the crisis of secularism,⁶⁰ the crisis of liberalism,⁶¹ and the crisis of Western legal thought.⁶² There is not the time here to delve into the extensive literature describing one or the other of these crises. The core problem seems to be a lack of foundations.⁶³ According to the critical literature, our theory of church-state separation, and more specifically, our current religion clause doctrine, is built on sand (as our current secular liberal state is built on sand)—or what is worse, on a contradiction. Modern religious liberty has a religious foundation, and though its primal categories cannot be acknowledged *as* religious, the instantiation of those categories in the world forces a psychological and social separatism that is not congruent with how people view their lives or how our public life is lived.⁶⁴ The freedom of the church, on this account, exposes a rhetoric masking the exercise of power by the currently dominant *religious* regime. But that regime cannot actually be a basis for true religious liberty, or true freedom of conscience. The problem is built into our existing justifica-

⁵⁹ See *id.* at 42; Smith, *supra* note 42, at 1883; see also Horwitz, *supra* note 17, at 161 (“The state can no more intervene in the sovereign affairs of churches than it can in the sovereign affairs of Mexico or Canada.”).

⁶⁰ See Winnifred Fallers Sullivan et al., Introduction *to* After Secular Law, *supra* note 55, at 1 (describing “what now appears to be an existential crisis for secular liberalism”); see also Rajeev Barghava, States, Religious Diversity, and the Crisis of Secularism, 12 *Hedgehog Rev.* 8, 8 (2010); Tariq Modood, Is There a Crisis of Secularism in Western Europe?, 73 *Soc. Religion* 130, 131 (2012).

⁶¹ See generally Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 1–5 (1981); Steven D. Smith, *The Disenchantment of Secular Discourse* (2010).

⁶² See Berman, *supra* note 41, at 33–41.

⁶³ See, e.g., Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*, at x (2003) (“And today it is not evident what new fundamental beliefs have replaced orthodox religious beliefs as a foundation on which our legal institutions rest. Consequently, our legal discourse, our network of legal values, lacks the power and vitality that it once had.”).

⁶⁴ See Sullivan, *supra* note 56, at 1–12.

tions. As Smith writes: “The constraints of modern secular discourse preclude reliance on the sorts of premises and rationales from which our commitments to church-state separation and freedom of conscience derive.”⁶⁵ Without those, we are left with nothing.

II. FOUR OBJECTIONS TO RELIGIOUS INSTITUTIONALISM

This is dramatic stuff and we do not want to pretend that we have canvassed it all. We also realize that not all arguments for church autonomy are driven by medieval organicism or a deep critique of the liberal state. Church autonomy traditionally has been considered a corollary of individual free exercise.⁶⁶ But this claim of church autonomy also requires some argument for the distinctiveness of religious institutions vis-à-vis other forms of association. We must determine what it means for institutions to have free exercise rights. Is this different in kind than saying that the New York Times Company has First Amendment rights, or that IBM has property rights? If so, what accounts for the difference? If not, what does church autonomy mean exactly?

We will turn to this question (in Part III) after making some critical observations about the stronger forms of the institutional arguments sketched above. More specifically, we present four objections: (1) that the historical account offered by some religious institutionalists is anachronistic, incomplete, and reactionary; (2) that granting jurisdictional sovereignty to religious groups runs counter to republican and democratic commitments; (3) that the scope of religious autonomy claims are potentially unlimited; and (4) that religious institutions cannot be distinguished from other voluntary associations in a manner that warrants special forms of deference from the state.

A. Selective History

One of the most striking innovations of the new religious institutionalism is the way in which it reframes the historical narrative about religious liberty in the United States. Given the seemingly interminable debates about the historical foundations of the religion clauses, which have dominated legal conflicts over the last century, it is perhaps understand-

⁶⁵ See Smith, *supra* note 42, at 1903.

⁶⁶ See Laycock, *Church Autonomy*, *supra* note 7, at 260.

able that scholars would look for new vantage points.⁶⁷ But the shift in perspective here is radical and the lessons to be drawn are, as we argue below, at best dubious, if not misleading.

Why do lawyers with present-day doctrinal agendas invoke history? It is not usually to tell us something we did not know about what actually happened in the world, but rather to validate and legitimize some normative claim. For institutionalists, the eleventh-century Investiture Controversy serves as a touchstone for twenty-first-century religious liberty not primarily because it comports with an originalist reading of the Constitution (though one can intuit that kind of claim lurking beneath the surface) but rather because the medieval history proves that the institutional separation of church and state is an *old* idea with *theological* origins.⁶⁸

Why its age and pedigree should matter is not explained. Even if the historical story does indeed show that institutional separation is an old idea (something we contest), no legal scholar is seriously claiming that the Constitution's drafters or ratifiers had the eleventh century in mind when debating the First Amendment. (Nor would this matter to non-originalists.) Nevertheless, historical narratives seem to have particular attraction in religion clause debates. We thus feel it necessary to address two glaring weaknesses in this one. First, grounding post-Enlightenment religious liberty in the eleventh century is anachronistic. Second, the narrative fails to do the conceptual work that advocates of "freedom of the church" need it to do.

Recall the basic outlines of the institutionalist's tale.⁶⁹ It all starts in the winter of 1077 with Emperor Henry IV, barefoot in the snow at Ca-

⁶⁷ See Donald L. Drakeman, Church, State, and Original Intent 149–95 (2010) (summarizing more than a half-century of scholarly debate about the original meaning of the religion clauses and asking, "Will This Debate Ever End?"); Steven K. Green, Understanding the "Christian Nation" Myth, 2010 Cardozo L. Rev. de novo 245, 245 (2010), http://www.cardozolawreview.com/Joomla1.5/content/denovo/GREEN_2010_245.pdf ("One debate that apparently has no ending point is the one over the nation's religious foundations.").

⁶⁸ Cf. Garnett, Religion and Group Rights, *supra* note 5, at 529 ("[W]e pushed deeper, past President Jefferson and the Danbury Baptists, to the 'revolutionary' significance in the history of western constitutionalism of *libertas ecclesiae*."); Smith, *supra* note 6, at 22 ("For all their significance and even novelty, the seminal American enactments addressing religion . . . did not spring fresh and fully formed out of the fertile brains of Thomas Jefferson or James Madison.").

⁶⁹ See Berg et al., *supra* note 3, at 179; Garnett, Freedom of the Church, *supra* note 5, at 59–61; Garnett, Religion and Group Rights, *supra* note 5, at 524–25; Ira C. Lupu & Robert Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 37–38 (2002); Smith, *supra* note 6, at 23–27; Smith, *supra* note 42, at 1869–70.

nossa, begging Pope Gregory VII to grant him absolution. In 1075, Gregory had written what one scholar has described as a “Papal Manifesto,” entitled *Dictatus Papae* (*Dictates of the Pope*),⁷⁰ which declared, inter alia, that the pope had sole authority to appoint bishops, that he had the power to depose emperors, and that his judgment was supreme and the Church’s inerrant.⁷¹ Unsurprisingly, Henry reacted rather badly to all of this. He denounced Gregory as a “false monk,” demanded that he relinquish the papacy, and exhorted the pope to “[g]o down, go down [*Descende, descende*], to be damned throughout the ages.”⁷² At which point Gregory issued a decree excommunicating Henry and deposing him as emperor.⁷³ In the face of the pope’s decree, Henry confronted a crisis of legitimacy among the nobles and clergy who had previously supported him, which he headed off by obtaining the pope’s pardon.

The immediate issue in the contest between Henry IV and Gregory VII involved the appointment of bishops. In asserting the “freedom of the church,” Gregory denied the power of laymen—including emperors and kings—to “invest” clergy with ecclesiastical authority. He asserted papal supremacy over the Church, including the exclusive and final power to determine membership in the clergy.⁷⁴ As a number of religious institutionalists recently put it, “what [Gregory] secured was ‘the independence of the clergy from secular control’ in ecclesiastical matters like clergy selection.”⁷⁵ This was a revolutionary act, changing forever the relationship between church and state. After Gregory’s “Papal Revolution,” the Church claimed for itself sovereignty in its own domain, thereby establishing a separation between secular and religious institutions, with the effect of limiting the authority, if not the ambition, of secular rulers throughout the Western world.⁷⁶ Gregory is thus presented as the chief protagonist and hero of religious liberty. And Henry IV represents unbounded state power, a predecessor to modern forms of secular totalitarianism.⁷⁷

⁷⁰ See Berman, *supra* note 41, at 95–96.

⁷¹ See Tierney, *supra* note 41, at 49.

⁷² See Berman, *supra* note 41, at 96.

⁷³ See Tierney, *supra* note 41, at 53.

⁷⁴ *Id.*

⁷⁵ Berg et al., *supra* note 3, at 180 (quoting Berman, *supra* note 41, at 87).

⁷⁶ *Id.* (“The freedom to select religious clergy was a landmark in the development of limited government in the West.”); Berman, *supra* note 41, at 98–99.

⁷⁷ Cf. Murray, *supra* note 43, at 208 (decrying the “totalitarianizing tendency inherent in the contemporary idolatry of the democratic process”).

This story is obviously incomplete, and scholars who invoke it clearly recognize that a great deal has happened between 1077 and 1789, and between 1077 and today. Nevertheless, even with these commonsense caveats, the history is highly selective. Religious institutionalists tend not to dwell on two central characteristics of the Investiture Controversy: (1) the fusion of religious and civil authority in the clergy and (2) the Church's claims to religious *and* secular supremacy. In asserting the principle of *libertas ecclesiae*, Gregory was not merely attempting to limit the emperor's power over matters internal to the church. In the feudal system of eleventh-century Europe, bishops were not only spiritual leaders but also royal officials who possessed and administered the large estates and property holdings that accompanied their bishoprics.⁷⁸ As such, they wielded tremendous civil authority within the feudal hierarchy led by the emperor.⁷⁹ Thus, accepting Gregory's declarations would have meant ceding effective control over civil and executive authority. For this reason, as Professor Brian Tierney notes, "[t]he prohibition of lay investiture . . . was a demand that no king of that time could have accepted. No king did accept it."⁸⁰ Moreover, Gregory did not only assert exclusive power to select and depose clergy, with all of the implications that power had for controlling the operation of the emperor's civil administration. Freedom of the church also entailed the pope's power to depose kings and emperors. In effect, the Church claimed a veto power—an absolute right to dethrone any secular ruler who contravened its commands. This was an implicit or "indirect" theocratic claim, putting the emperor ultimately at the service of the pope.⁸¹

The social-political context in which the Investiture Controversy took place has almost nothing in common with our modern, post-Enlightenment, democratic society. Institutionalists certainly do not deny this. Nevertheless, they *do* make grand conceptual claims in the name of an eleventh-century theological concept using a particular version of

⁷⁸ See Tierney, *supra* note 41, at 34–35.

⁷⁹ See Berman, *supra* note 41, at 88 ("The bishopric was often a principal agency of civil administration. Bishops were important members of the feudal hierarchy."); *id.* at 97 ("Since the empire and kingdoms were administered chiefly by clergy, they affected the very nature of both the ecclesiastical authority and the imperial or royal authority.").

⁸⁰ See Tierney, *supra* note 41, at 47.

⁸¹ See Berman, *supra* note 41, at 87 ("Gregory also asserted the ultimate supremacy of the pope in secular matters, including the authority to depose emperors and kings."); *id.* at 98 (stating that Gregory's claim to depose secular rulers "arrogated to popes theocratic powers"); Tierney, *supra* note 41, at 56.

eleventh-century history. Gregory, like Thomas á Becket after him,⁸² represents the freedom of the church, which is foundational to “political and religious liberty for all, believers and nonbelievers alike.”⁸³ And the freedom of the church sets a precedent for containing the totalitarian ambitions of secular state, even though the Investiture Controversy can easily be read as its opposite—the secular state’s resistance to the totalizing and theocratic impulse implicit in the Church’s claims of papal supremacy.

This historical problem is matched by a deeper conceptual one. Even if one views the Investiture Controversy as a moment in which the Church checked the state, as opposed to the other way around, the conclusions one can draw from this are limited, if not inapposite. The Investiture Controversy involved a bipolar conflict between *one* secular sovereign and *one* church. In this contest, “freedom of the church” meant freedom of the Roman Catholic Church. It did not mean freedom of *churches*. In its Gelasian formulation,⁸⁴ John Courtney Murray’s question—“Are there *two* or one?”—is thus falsely posed.⁸⁵ 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.⁸⁶

Although institutionalists differ in how they confront this problem, none of them have solved it. Corporatists may be inclined to absorb post-Reformation religious pluralism by coupling freedom of the church with a more modern freedom of conscience.⁸⁷ But this attempt at synthesizing the two principles seems ad hoc. The freedom of conscience was not contemplated at Canossa—far from it. And so some other historical narrative must be developed to supplement and, in important ways, to

⁸² See Berman, *supra* note 41, at 254–69; Garnett, *Freedom of the Church*, *supra* note 5, at 67–68.

⁸³ Berg et al., *supra* note 3, at 180; see also Garnett, *Freedom of the Church*, *supra* note 5, at 60.

⁸⁴ Pope Gelasius wrote to Emperor Anastasius (in 494 CE), “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.” Murray, *supra* note 43, at 202.

⁸⁵ *Id.* at 197 (emphasis added).

⁸⁶ We discuss the problem of translation in more detail in Richard Schragger and Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 *J. Contemp. Legal Issues* (forthcoming 2013).

⁸⁷ See, e.g., Garnett, *Freedom of the Church*, *supra* note 5, at 64.

modify the one beginning with the Investiture Controversy. Even if it were not marred by various anachronisms, the corporatist narrative is seriously incomplete.⁸⁸ The challenge is to bring it up to date without undermining the integrity of either freedom of the church or freedom of conscience.

Unfortunately for corporatists, however, the neo-medievalist view suggests that providing a unified account of freedom of the church and freedom of the conscience, at least in its modern form, may be impossible. For neo-medievalists, the Investiture Controversy marked the beginning of a tradition of separating the institutions of church and state. But that tradition was radically transformed in the aftermath of the Protestant Reformation. The 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.⁸⁹

For the neo-medievalist account, it is here that things begin to unravel. At some point, and for reasons that are philosophically, sociologically, and historically complex, the freedom of conscience became decoupled from its theological foundations.⁹⁰ Rather than protecting an individual’s authority to pursue salvation without interference from the state, it has been interpreted to require that the state respect the freedom and equality of individuals to form and revise their conceptions of the good. This requirement, in turn, has served as a justification for excluding the state’s reliance on religious grounds, including in the development of doctrines for protecting the freedom of conscience (and, a fortiori, the freedom of the church). This has made it difficult, and perhaps even impossible, to make sense of legal doctrines that single out religion or the church for distinctive treatment.⁹¹ At which point, nothing is left of the ancient idea that the church is uniquely sovereign in its relation to the secular state. Paradoxically, then, the Protestant conception of freedom of conscience has contributed to the demise of a centuries-long tradition of religious liberty premised on a jurisdictional separation between church and state.⁹² And as if that were not enough, because this

⁸⁸ Cf. *id.* at 68 (putting aside the “obvious challenges posed to the principle and the Church’s claims by the Protestant Reformation, the Peace of Augsburg, the French Revolution, and 19th-century anti-clericalism”).

⁸⁹ Smith, *supra* note 42, at 1876–78.

⁹⁰ *Id.* at 1880–83.

⁹¹ *Id.* at 1883.

⁹² *Id.*

jurisdictional separation is the basis for limited government, its undoing signals nothing less than the downfall of the entire constitutional order.⁹³

For neo-medievalists, and perhaps for some corporatists, the answer to this predicament is to recover the theological foundations of the freedom of the church (and the freedom of conscience). The process of political secularization must be rolled back and the religious sources of *libertas ecclesia* reasserted. Only in this way can the special and unique status of religion in the constitutional structure of limited government be restored.

Unlike the corporatist account, which is both anachronistic and historically incomplete, the neo-medievalist narrative is at least more comprehensive. But it also begs fundamental questions. Suppose the neo-medieval history is correct, and secularization has transformed the freedom of conscience to the point of encompassing non-religious moral, ethical, and philosophical doctrines. And suppose the same social and historical processes have produced secular constraints on political and legal decision-making in modern, liberal democratic states. So what? One needs a reason to bemoan and critique this state of affairs—and freedom of the church does not provide it. Indeed, nothing in the history of the eleventh century provides a normative standpoint from which to resist the transition from Church sovereignty to liberty of conscience.

In neo-medievalism, 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. With all of that shattered by the radical pluralism of modernity, there is no basis for mutual understanding—no shared fund of concepts, categories, and vocabularies that can serve as starting points for productive argumentation.⁹⁴ All of that is lost. Except that we might hang on to some of the vestiges, some of the relics that we still find within our midst. Maybe one day, in the distant future, we will be able to use those relics to

⁹³ See Murray, *supra* note 43, at 213 (“[H]as the *conscientia exlex* of modernity succumbed to *hubris*, and is therefore headed for downfall—its own downfall, the downfall of the concept of the moral order amid bits and pieces of a purely ‘situational’ ethics, and the downfall of the political order projected by the spirit of modernity?”). These sound to us like rhetorical questions.

⁹⁴ See, e.g., MacIntyre, *supra* note 61, at 1–22.

reestablish an order long gone—from the “dusk” of the Western tradition to a new theological dawn.⁹⁵

This rhetoric strikes us reactionary. It is based on an anachronistic history, which largely ignores vast assertions of power by the Church (and later by other churches). Furthermore, in uncritically recovering the Catholic doctrine of the freedom of the church, it fails to consider why that doctrine receded in the face of growing religious and secular pluralism. When religious institutionalists take up that question, it is mainly to criticize the secularizing effects of democratic pluralism and to show how it threatens the freedom of the church.⁹⁶ But this, of course, is entirely circular. Why should we value the freedom of the church, at least in its received form? What is needed here is a justification for the special status of religious organizations. Whatever that justification might be, we are confident that we will not find it standing at Canossa.

B. Anti-Republican

Even if we had a compelling historical account of freedom of the church, identifying religious institutions as presiding over a uniquely sovereign sphere clashes dramatically with our republican and democratic political commitments. To illustrate, consider another sovereign entity that co-existed with the Church and the crown in the eleventh century: the medieval city.

The freedom of the church—as it was articulated in the eleventh century—has been interpreted as an extraordinarily liberating concept, indeed as a foundation for individual freedom more generally.⁹⁷ But of all the institutions in the medieval world, the city arguably did the most to

⁹⁵ Smith, *supra* note 42, at 1907 (“The discourse of religious freedom will no doubt continue, for a time anyway, but pending some new (or perhaps renewed?) illumination, the discourse will be stumbling along in the dusk.”); see also Berman, *supra* note 63, at xii (“There is, of course, no going back to the past But is there not a possibility and a need to go back to what was good in it? And was not the belief in the religious foundations of law an important part of what was good in it?”); Murray, *supra* note 43, at 217 (“Thus the new era would have a new premise on which to pursue the experiment in freedom and justice which political society perennially is It is the law of reality itself This perhaps would be the altered premise—a rational premise—that a new work of thought might beget.”).

⁹⁶ See, e.g., Murray, *supra* note 43, at 210–11 (arguing that democratic and secular “*monis[m]*” is “the refined essence of political modernity” and that “[i]ts significance lies in the fact that it confronts us with an experiment in human freedom which has consciously or unconsciously been based on a denial or a disregard of the essential Christian contribution to human freedom, which is the theorem of the freedom of the Church”).

⁹⁷ See *supra* Section I.B.

advance individual freedom, at least insofar as it presented an alternative to the form of servitude practiced in the medieval countryside. The medieval city allowed individuals to escape both the confines of the feudal system and the church hierarchy, establishing a separate jurisdiction within the city walls governed by its own law.⁹⁸ “City air makes you free” goes the German saying—literally, for the extended presence in the city transformed the serf into the citizen.⁹⁹ Moreover, the city’s insulation protected the rising merchant class and arguably allowed for the development of a non-religion-specific law merchant—an autonomous body of commercial law principles that served as a foundation for the rise of Western commercial capitalism.¹⁰⁰

The freedom of the city can thus be told in the same triumphal terms as the freedom of the church. Cities too engaged in a long-running power struggle in medieval Europe and established some degree of sovereignty, independent from the crown (and Church).¹⁰¹ And, in the same way that eleventh-century church sovereignty was arguably important for the development of Western notions of religious liberty, it can be argued that city freedom was necessary for the development of Western mercantilist or commercial enterprise.¹⁰²

The city-church parallel highlights a central weakness in the claim that church autonomy is or should be an animating principle of modern religious liberty. We would never contend that city sovereignty is a necessary precondition—conceptually or otherwise—for capitalism. Indeed, over the course of the eighteenth century and into the nineteenth, there was a profound shift away from the city as the locus of commercial activity and toward the private business corporation, a de-territorialized and de-jurisdictionalized legal fiction.¹⁰³ That history is instructive, not

⁹⁸ See Lewis Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects* 243–343 (1961); see also Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1083–90 (1980).

⁹⁹ See Frug, *supra* note 98, at 1125.

¹⁰⁰ See *id.* at 1083–84.

¹⁰¹ *Id.* at 1083; see also Berman, *supra* note 41, at 357–403.

¹⁰² Mumford, *supra* note 98, at 251–57.

¹⁰³ See Frug, *supra* note 98, at 1099–1101; see also Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870*, at 240 (1983). Mumford points out that “[e]ven in the New World, the Carpenters’ Company of Philadelphia operated as a medieval guild, along with many other such survivals, and medieval regulations of the market lingered everywhere, in some degree, till the end of [the eighteenth] century.” Mumford, *supra* note 98, at 272. Hartog describes how the Corporation of

only because it shows how legal and conceptual categories are contingent, but also because a similar process of de-territorialization and de-jurisdictionalization can describe the movement from sovereign church to individual conscience.

This process was ultimately democratizing in both instances, driven by the same republicanism that animated the late eighteenth-century political revolutions. Over time, the city changed from a closed corporation to a democratic polity—thus eliminating its market and political monopoly.¹⁰⁴ The Church, too, could have moved toward political accountability and become a more democratic institution. Instead, it eventually was forced to give up its political power and its market monopoly over conscience.¹⁰⁵ Thus, just as commercial enterprise was detached from its origins in city sovereignty, religious freedom was detached from its origins in the Church. These processes make for interesting reading, but an awareness that they took place does not suggest a return to the city's or the Church's former status.

Indeed, by replacing “church” with “city” in the arguments for freedom of the church, one can see how alien the invocation of medieval corporatism is to our current liberalism. That is not to say that citizens in cities should be denied the right to self-govern—not at all. But the reason that churches do not exercise sovereignty is the same reason that cities (via their states) *do*: we no longer think of our political and social world as divided into multiple, jurisdictionally autonomous spheres. As Professor Gerald Frug observes: “[T]he King, the church, the university and the medieval town were the principal examples of medieval corporations and . . . together with the feudal manor [were] the principal objects of liberal attack.”¹⁰⁶ Liberalism was thoroughgoing: it sought to undermine the power of *all* monopolistic, hierarchical, anti-democratic corporate entities,¹⁰⁷ replacing them instead with the twin concepts of individual liberty and the democratically-controlled state. The difference between the city and the church is that the city is public—it is an *instrumentality* of the state (and on republican political theory, decidedly sub-

the City of New York lost its monopoly status over the course of the eighteenth and nineteenth centuries. See Hartog, *supra*, at 92–93.

¹⁰⁴ See Frug, *supra* note 98, at 1101.

¹⁰⁵ See Southern, *supra* note 47, at 21 (“As soon as there were other states similarly equipped to rule, the church was on its way to becoming a voluntary association for religious purposes.”).

¹⁰⁶ See Frug, *supra* note 98, at 1088.

¹⁰⁷ *Id.* at 1089.

ordinate to the legislature)—and the church (and religious activity in general) is private. The respective rights and obligations of these two corporate entities flow entirely from that conventional distinction.

This conception of freedom has been repeatedly criticized, sometimes via an attack on the public/private distinction,¹⁰⁸ other times as a challenge to the “totalitarian” state, or finally, in the reemergence of medieval organicism itself. But it turns out to be extraordinarily difficult to preserve notions of individual freedom and autonomy while simultaneously deconstructing the foundational liberal bifurcation between state and individual. The public/private distinction has to be replaced with something else.

The most robust argument for church sovereignty suggests the church/state distinction as the replacement—as well it must. For if there is only public and private, then churches are not necessarily more unique than non-religious voluntary associations. They are assemblages of individuals, and their rights derive from those of the individuals who compose them. If religion is to be treated uniquely, however, its institutionalization must give rise to its own foundational bifurcation. Thus, the church/state distinction singles out churches not as a sub-category of private association, but as a category of one—sovereign all its own. Thus, one two-realm worldview is replaced by another. As Steven Smith has written: “[T]he commitment to special legal treatment for religion derives from a two-realm world view in which religion—meaning the church and later the conscience—was understood to inhabit a separate jurisdiction that was in some respects outside the governance of the state.”¹⁰⁹

Note the assimilation of the church to conscience. The notion here, we think, is to describe the church’s power in terms of the republican in-

¹⁰⁸ See, e.g., *id.* at 1138; see also Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. Rev. 144, 153 (2003). Professor Hills adopts a critical approach to the public/private distinction, arguing that state coercion underpins all transactions and that therefore the state cannot be coherently distinguished from “voluntary” or “private” associations. He claims that individual “rights” against the state are incoherent; a right is only a statement about whether a particular institution (state, family, church, university) is appropriate “in light of its structure” to coerce individuals in its sphere of competence: “Institutional theories of organizational rights require an assessment about whether an institution makes decisions appropriate to its social sphere.” *Id.* at 189. On this account, state and non-state actors are similarly situated; they are sovereign in their rightful spheres. *Id.* at 196. It is therefore not an oxymoron to speak of “private governments.”

¹⁰⁹ Smith, *supra* note 42, at 1883.

dividual's—to take Thomas Paine's "church of one"¹¹⁰ and use it to infuse the institutional church with all the moral authority and independence of the autonomous self. This is required in a world in which conscience has replaced sovereignty and in which mediating institutions no longer exercise governmental power. That they do not do so is a product of republican political theory.

The most radical republicanism is represented by Paine, smasher of institutional idolatry.¹¹¹ Republicanism demands that the people, acting through their legislatures, constitute the sovereign. It is skeptical of the exercise of unaccountable corporate power—whether by nobles, monopolies, labor unions, churches, universities, or cities. In short, it does not tolerate corporate entities that operate outside of and in defiance of the state. Group entities cannot constitute a separate law unto themselves.¹¹²

We do not want to be mistaken: there is nothing "natural" about this assertion of democratic control, nor about the distinction between public and private, state and association. As with all dualities, it is historically contingent and contestable. The medieval city was an association, a sovereign, a state-actor, a property-owner, and a profit-making venture all at the same time. So too the original church was an association (albeit a largely involuntary one),¹¹³ a sovereign, a state-actor, a property-owner, and a profit-making venture. The demand for individual rights and democratic participation forced both entities to choose a more constrained identity. The church was assimilated to the individual; the city was assimilated to the state.¹¹⁴

As already observed, the proponents of the institutional account of the separation of church and state resist this conventional liberal bifurcation. Critics argue that its roots in a particular form of Protestantism make it

¹¹⁰ See Thomas Paine, *The Age of Reason* (1794), *reprinted in* 8 *The Life and Words of Thomas Paine* 3, 5 (Williams M. Van der Weyde ed., 1925). For a discussion, see *infra* text accompanying notes 140–47.

¹¹¹ See Paine, *supra* note 110, at 277–80.

¹¹² Cf. Scott C. Idleman, *Why the State Must Subordinate Religion*, in *Law and Religion: A Critical Anthology* 175, 184 (Stephen M. Feldman ed., 2000) (observing how "the American legal system has generally been resistant to . . . the establishment of quasi-sovereign enclaves within its territorial jurisdiction").

¹¹³ Southern, *supra* note 47, at 18 ("For the vast majority of members of the church baptism was as involuntary as birth, and it carried with it obligations as binding and permanent as birth into a modern state, with the further provision that the obligations attached to baptism could in no circumstances be renounced.").

¹¹⁴ See Frug, *supra* note 98, at 1088, 1098–100.

suspect. Not all religions consider religious belief and practice to be: (1) a product of private choice; (2) a matter restricted to private conscience; or (3) an activity unconcerned with instantiating itself in the world.¹¹⁵ Most religions, in fact, do not recognize their cabined role in the private sphere. By imposing this vision, the state establishes a religious worldview, changes the nature of the religions that must operate within it, and undermines their authoritativeness. It would be better to dispense with formalistic divisions and instead deal directly with institutions in all their real-life complexity.

There are two responses to this. First, the work that the public/private distinction is doing is overstated. No doubt the *constitutional* privatization of religion is an explicit project of the liberal state. But at the same time the liberal state's commitment to association and participation supports the *publicization* of religion—the liberty to practice, publicly witness, proselytize, lobby, and articulate one's views (religious or otherwise) on equal terms as others. Moreover, the protection of the private sphere prevents what would otherwise be the rightful demand of the public to exercise democratic control over those institutions that exercise public authority. Institutions that purport to play a special or outsized role in society should be democratically accountable. The exercise of public power, of territoriality, of jurisdiction, demands democracy. The supposed “constraints” of liberal theory protect religion (and churches) from this democratic imperative, in the same way that these constraints force cities to comply with it. Republicanism is doing the work here, not a Protestant-imposed public/private distinction.

Second, the replacement for liberal theory—some variant on sovereign spheres or institutional rights—is ultimately unsatisfying and raises significant problems. The first problem is that there is no account of how these institutions arise and whether they are harmful or beneficial (though as we have seen they are often described as “natural” or “pre-political”). Second, the criteria for the “appropriate” exercise of these institutions' power remains opaque. How do we know what these institutions are supposed or authorized to do? Third, determining what is a church is no more tractable than determining what is a religion, or what is private and what is public. As we have already observed, “church” is not a category that is perspicuous on its face—one would have to make choices about when and when not to recognize the assertion of institu-

¹¹⁵ See Garvey, *supra* note 27, at 50–53; Sullivan, *supra* note 56, at 7–8.

tional autonomy. Indeed, sphere theorists do not escape the public/private distinction that they try so hard to undermine. Because they have to decide when to apply constitutional and democratic restraints on institutional action, they too must decide which institutions are “public” and which are “private.”

Finally, sphere theorists have difficulty accounting for individual rights exercised outside of institutions.¹¹⁶ The public/private distinction provides robust protections for individuals—something an institutional account of religious liberty does not. If we are worried about dissenters, limiting the coercive power of churches and championing freedom of conscience in all its forms is preferable to privileging a particular class of institutions.¹¹⁷

C. Unlimited Scope

The vulnerability of individual conscience suggests a further critique of religious institutionalism: It is not clear what principle could be invoked to *limit* church power, the scope of which is arguably quite vast.

The conventional view is that institutional autonomy consists of freely deciding a group’s membership, choosing one’s own leaders and employees, setting standards and rules for conduct and governance, disciplining members who do not meet those standards and rules, controlling one’s own assets, and choosing and making doctrine without outside interference.¹¹⁸ It may be possible to adopt a form of institutional autonomy along these dimensions in the context of certain First Amendment institutions. The notion of academic freedom in the university context seems to be an effort along these lines. The same might be said about efforts by newspapers to create a sphere of immunity for their reporters or to insulate employment decisions by invoking First Amendment principles.

The appropriate sphere of the church is much more diffuse, however. Indeed, churches—religious institutions—are often totalizing, in that they can and do assert competence and authority over every aspect of individual church members’ lives. The church feels itself competent to

¹¹⁶ One scholar has instead invented “the institution of the ‘unaffiliated individual,’” Hills, *supra* note 108, at 175—an obviously awkward formulation.

¹¹⁷ Cf. Smith, *supra* note 6, at 42–43 (conceding that freedom of the church would not protect those with secular claims of conscience).

¹¹⁸ See, e.g., Laycock, *Church Autonomy*, *supra* note 7, at 254 (“A church autonomy claim is a claim to autonomous management of a religious organization’s internal affairs.”).

dictate rules and standards not just for how its members operate with regard to the direct, practical mission of the institution, but also for how those members eat, sleep, have sex, raise children, work, play, engage in politics, act in the marketplace, etc.¹¹⁹ Moreover, churches often assert that their jurisdiction extends to non-members of the institution. Indeed, it may be a central doctrine of the church that it alone appropriately rules in all spiritual and temporal matters regardless of membership. Moreover, it may be the mission of the church to bring within its jurisdiction individuals who are currently non-members: the heathen, the fallen, the sinner.¹²⁰

What does religious institutionalism mean in the context of this totalizing aim and ambition? First, it means that there is no centrally defined core institutional mission of the church on which to build a *limited* account of institutional autonomy. What is the appropriate sphere of church sovereignty if the mission of the church is to save mankind? A doctrine based on the narrow aim of advancing civil discourse or limiting the reach of government certainly seems misapplied. The strong form of sphere sovereignty claims that churches have a special, unique, and exclusive mission to preach the Word, to convert the unconverted, and to glorify God.¹²¹ This is the nature of the jurisdictional claim at its heart, and stated in its baldest form, it seems to countenance very few limits on church immunity. The stakes are too high.¹²²

¹¹⁹ See Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* 2 (2000) (discussing various ways in which religious groups “want to restrict the lives of their members”).

¹²⁰ See, e.g., Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. St. Thomas L.J. 453, 470 (2005) (“As a result, ‘[n]o believer in Christ, no institution of the Church can avoid this supreme duty: to proclaim Christ to all peoples,’ inviting them to ‘open the doors to Christ’ and to *change their minds*.” (quoting Pope John Paul II, *Redemptoris missio*, No. 3 (Dec. 7, 1990), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html)).

¹²¹ Cf. Kuyper, *supra* note 33, at 66–68 (discussing the purpose of the Church).

¹²² Modern proponents of sphere sovereignty tend to eschew its Christian theological foundations, or at least deny that the theory requires religious premises. See, e.g., Horwitz, *supra* note 5, at 93–94. Without theological foundations, however, it is unclear what, if anything, justifies a particular distribution of spheres (or the form of sovereignty granted to them). The theory assumes a set of “natural,” pre-legal, and already existing institutions, which are entitled to deference and autonomy. But how should such spheres be identified? Consider, for example, Kuyper’s view, according to which nearly every aspect of society comprised a sphere unto itself—“the family, the business, science, art and so forth are all social spheres, which do not owe their existence to the state . . . but obey a high authority within their own bosom.” Kuyper, *supra* note 33, at 90. At the very least, a modern account

Second, it means that the member/non-member distinction has little force. Because the institution of the church is the church for all, and because saving souls is central to its mission, the church's jurisdiction can and must be extended to all. For some churches, outsiders are only outsiders temporarily, and their behavior is as much a concern of the church as its own members. Among world religions, Christianity and Islam are explicit about their claims to universality.¹²³

One hears repeatedly the argument that churches are vulnerable to state power. The anti-totalitarian strain of this argument asserts that churches are bulwarks against the overwhelming force of the state. And the story of Pope Gregory is often told as a victory of freedom over op-

of sovereign spheres must provide a theory for determining which institutions warrant deference. Without such a theory, proponents of sovereign spheres lack the normative resources to resist claims that morally odious institutions are "natural," organic, and pre-legal aspects of our political and social reality.

Two examples from Kuyper help to make this point. First, Kuyper's theory of sovereign spheres influenced the development of apartheid ideology among Boers in South Africa. See Saul Dubow, *Scientific Racism in Modern South Africa* 259 (1995) ("The impact of Kuyperian ideas on Afrikaner nationalism was considerable in the formative years . . ."). If race is a natural, organic, and pre-legal fact about the world, then it is not difficult to see how sphere sovereignty could be used to justify racial separation. See Richard J. Mouw, *The Challenges of Cultural Discipleship: Essays in the Line of Abraham Kuyper* 13–14 (2012) (noting the "racist tone" of Kuyper's comments about African blacks and suggesting that Kuyper's lack of clarity about what defines a sphere "can at least explain the basic move that Afrikaners made: the designation of race as a Kuyperian sphere"). Second, Kuyper argued that Jews were a separate people and that their assimilation, facilitated by Dutch liberals, made them disproportionately powerful in the Netherlands and throughout Europe. See Ivo Schöffers, *Abraham Kuyper and the Jews*, in *Dutch Jewish History* 237, 250, 254 (Jozeph Michman & Tirtsah Levie eds., 1984) (describing the "tone and reasoning" of Kuyper's essay as "clearly anti-Semitic," and noting his later defense of "discriminatory legislation directed against the Jews" in Eastern Europe, including his 1907 proposal for a "mass-displacement of the Russian Jews to solve problems over there" (citing Abraham Kuyper, *Liberalisten en Joden* (1978))). Denounced for anti-Semitism in his own time, Kuyper attacked the Jews for undermining "the separate Jewish nation" and for spreading a "Jewish spirit" of liberalism and modernism among non-Jews. See *id.* at 248–50. Whether the issue is black racism or anti-Semitism, for our purposes the point is the same: without a guiding theory for what counts as a "sphere," theories of sphere sovereignty are susceptible to moral abuse.

¹²³ See, e.g., Joseph Cardinal Ratzinger, *Truth and Tolerance: Christian Belief and World Religions* 84, 154, 171 (Henry Taylor trans., Ignatius Press 2004) (2003) (discussing the universality of Christianity); Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* 18, 21 (2002) (discussing the universality of Islam); see also Bernard Lewis & Buntzie Ellis Churchill, *Islam: The Religion and the People* 2–3 (2008) ("For both Christians and Muslims, their truths are not only universal but also exclusive and final, and it is their sacred duty not to keep them selfishly for themselves . . . but to bring them to all mankind, overcoming and removing or destroying whatever obstacles may be in the way.").

pression. But the state is not monolithic, and churches can be enormously powerful social institutions, ones that compete with multiple organs of government for power, authority, and allegiance.¹²⁴ And because the mission of the church might be vast, its claim to authority may be equally vast. In addition, churches often cater to and assert a special competence and authority over groups that are quite vulnerable—children, the elderly, the sick and infirm—and in arenas that are somewhat hidden from public view—the family, the confessional, the school, the camp.¹²⁵

Insular churches pose a special problem, for those who are most vulnerable to injury often have little means to challenge their authority.¹²⁶ For example, exit rights are difficult, if not impossible, for children and women to exercise in many insular religious communities.¹²⁷ But churches that are more permeable are also powerful; exit from one's traditions and culture is quite difficult, and norms of behavior are often coercive. As with all mediating institutions that oppress, we look to the state for protection—to enforce exit rights initially, and then to enforce substantive individual rights.

Current problems of church-state relations often revolve around these kinds of issues, as individuals bring claims against religious institutions on the ground that those institutions discriminated, abused, oppressed, or injured them. These are often vulnerable individuals, who may already receive special legal protection from the state. Or they are claims brought by the state on behalf of non-members, who argue that they are

¹²⁴ See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *Harv. L. Rev.* 1810, 1886–87 (2004) (noting how the arguments for deference to mediating institutions tend to contrast private associational life with the state, picturing the former as valuable and the latter as threatening, while ignoring or devaluing the different scales at which the state operates and the liberating possibilities of the civic community).

¹²⁵ See, e.g., Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 *BYU L. Rev.* 1099, 1169.

¹²⁶ This is an aspect of what is known in the multiculturalism literature as the problem of “minorities within minorities.” See generally *Minorities within Minorities: Equality, Rights and Diversity* (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001).

¹²⁷ See, e.g., Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* 149 (2001); Susan Moller Okin, *Is Multiculturalism Bad for Women?* 13 (1999); Oonagh Reitman, *On Exit*, in *Minorities within Minorities*, supra note 126, at 193; see also Gage Raley, Note, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 *Va. L. Rev.* 681, 707 (2011) (arguing that Amish communities rely on constitutional exemptions to raise barriers to exit).

being regulated by the church in ways that violate their rights.¹²⁸ Because there are competing individual rights at issue, the invocation of institutional autonomy (which pits the church against the state) tends to obscure more than it illuminates.

D. Not Unique

The objections to religious institutionalism that we have presented up to this point have focused mainly on the claim that churches are sovereign entities to which the state should grant substantial deference. But religious institutionalists are not only committed to a claim about deference; they also argue that churches have a distinctive place in our constitutional order. Religious groups are owed protections not extended to other expressive associations. They have—and *ought to* have—a special constitutional status, privileged among all other groups in civil society.¹²⁹

We take it that the central claim for institutional autonomy turns on the asserted values that religious institutions help to promote. The argument for institutional autonomy rests ultimately on the claim that religious institutions are *uniquely* beneficial, either because they advance particular First Amendment values, provide a site for counter-politics, serve as the basis for individual freedom of conscience, or contribute in some other way to human flourishing. Notice, however, that these kinds of arguments are importantly different from more general arguments that religion or a religious citizenry is good for society. The religious institutionalist has an extra step: she has to claim not only that religion is good but that *organized* religion facilitates, promotes, or is constitutive of that good.

Is any of this true? And, even if it is true, does the promotion of these values distinguish churches from other institutions or associations? And what if particular churches engage in behaviors that are not beneficial? Does the claim fail?

¹²⁸ See generally Kent Greenawalt, 1 Religion and the Constitution: Free Exercise and Fairness 290–376 (2006) (surveying cases involving claims against religious groups for tort liability, employment discrimination, and harassment); Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law, 75 Fordham L. Rev. 1965, 1973–77 (2007) (collecting cases involving the ministerial exception).

¹²⁹ See Garnett, Religion and Group Rights, *supra* note 5, at 532.

It will not do to list the documented sins committed by religious institutions over the course of human history (though those who object to religion never tire of doing so).¹³⁰ Nor will it do to assert the particular social benefits that churches or their members produce.¹³¹ We take it that defenders of institutional autonomy are not making an empirical claim about the contributions made to society by particular churches in particular times, but rather a constitutional claim (perhaps rooted in a sociological one) about the general benefits that religious institutional autonomy provides.

But even this more general claim can be disputed. One can easily assert that institutionalized religious groups—religious sects—are bad (or perhaps regrettable) because they: (1) are likely to generate political and social discord;¹³² (2) are likely to be aligned with or to seek alignment with the state;¹³³ (3) tend towards corruption;¹³⁴ (4) interfere with individuals' unmediated relationship to God;¹³⁵ or (5) injure their members or outsiders.¹³⁶

¹³⁰ The history of atheist literature is full of such accounts. For recent examples, see Richard Dawkins, *The God Delusion* (2008); Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (2004); Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (2007). In the twentieth century, the classic statement remains, of course, Bertrand Russell, *Why I Am Not a Christian* (1957).

¹³¹ But see generally Robert D. Putnam & David E. Campbell, *American Grace: How Religion Divides and Unites Us* 443–92 (2010); Sidney Verba et al., *Voice and Equality: Civic Voluntarism in American Politics* 18 (1995) (concluding that religious groups are unique in developing civic skills); Paul J. Weithman, *Religion and the Obligations of Citizenship* 36–66 (2002); John A. Coleman, S.J., *Public Religion and Religion in Public*, 36 *Wake Forest L. Rev.* 279, 281–93 (2001) (marshaling sociological evidence that churches “uniquely or disproportionately” generate social capital).

¹³² See David Hume, *Of Parties in General*, in *Essays: Moral, Political and Literary* 54, 61 (William Clowes & Sons, Ltd. 1903) (1741); James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *Writings* 29–36 (Jack N. Rakove ed., Library of America 1999) (1785); see also Steven G. Gey, *Life After the Establishment Clause*, 110 *W. Va. L. Rev.* 1, 11 (2007); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 *J. Contemp. Legal Issues* 357, 360 (1996); William P. Marshall, *The Other Side of Religion*, 44 *Hastings L.J.* 843, 859 (1993); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. Chi. L. Rev.* 195, 198 (1992).

¹³³ See generally Fred C. Luebke, *The Origins of Thomas Jefferson's Anti-Clericalism*, 32 *Church Hist.* 344 (1963).

¹³⁴ See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 *Wm. & Mary L. Rev.* 1831, 1849–76 (2009) (surveying various pre-Founding and Founding-era arguments about corruption of religion).

¹³⁵ *Id.* at 1872 (discussing the “religious individualism” of Baptists during the Founding era).

¹³⁶ See Hamilton, *supra* note 125, at 1177.

All of these criticisms of organized religion were well known at the time of the Founding. Madison's argument in Federalist Number 10 asserting that the paradigmatic cause of faction was "zeal for different opinions concerning religion" is only the most obvious.¹³⁷ Madison's solution to the problem of religious faction was the model for his solution to the problem of faction generally: "extend the sphere" and encourage a multiplicity of sects.¹³⁸ Madison presumed the dangers of religious groups—his structural solution was religious pluralism.¹³⁹

It is unremarkable to observe that the fear of sectarianism was palpable at the Founding. That does not mean that the history of religious disestablishment in the colonial or revolutionary period was based on a rejection of organized religion, though of course there are prominent examples of that as well. Consider Thomas Paine's *The Age of Reason*.¹⁴⁰ His opening salvo is well known: "I do not believe in the creed professed by the Jewish Church, by the Roman Church, by the Greek Church, by the Turkish Church, by the Protestant Church, nor by any church that I know of. My own mind is my own church."¹⁴¹ No doubt Paine's best-selling pamphlet was considered radical, but it nevertheless voiced a set of concerns that resonated in mainstream opinion.¹⁴² The Founding period witnessed a distrust of religious establishments,¹⁴³ ample awareness of the threat of sectarian strife,¹⁴⁴ a critique of the institutional church, in particular its tendency toward corruption, and for some, a skepticism of organized religion altogether.¹⁴⁵ This was much more so

¹³⁷ The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

¹³⁸ Id. at 83.

¹³⁹ See Schragger, supra note 124, at 1823–25 (discussing Madison's approach to religious pluralism).

¹⁴⁰ Paine, supra note 110.

¹⁴¹ Id. at 4–5. Paine continued: "All national institutions of churches, whether Jewish, Christian or Turkish, appear to me no other than human inventions, set up to terrify and enslave mankind, and monopolize power and profit." Id. at 5.

¹⁴² See Eric Foner, *Tom Paine and Revolutionary America* 247 (1976) ("Reprinted in countless editions and languages, *The Age of Reason* became the most popular deist work ever written. It brought ideas long common among the elites of the eighteenth century to a new popular audience."); John Keane, *Tom Paine: A Political Life* 396 (1995) (describing "feverish" demand for the *Age of Reason* in America).

¹⁴³ See generally Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (1994) (surveying responses to post-Revolution state establishments).

¹⁴⁴ See Frank Lambert, *Religion in American Politics: A Short History* 1, 15, 30 (2008).

¹⁴⁵ See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1595 (1989) (discussing Jefferson and Paine's anticlericalism); Kramnick & Moore, supra note 10, at 98–99 (discussing Jefferson's).

in France, whose revolution was in large part directed at the entrenched power of the Catholic Church.¹⁴⁶ The newly independent states already enjoyed the benefits of pluralism, so could content themselves with a structural solution that tolerated religious sects instead of overthrowing them.¹⁴⁷

None of this is surprising. Anti-clericalism is an important and powerful strain in Enlightenment thought, and it found expression within the American tradition of religious liberty.¹⁴⁸ Recall that Madison's approach to religious faction comes almost verbatim from David Hume, who viewed the clergy "as a self-identified cadre with both the organization and the interest to compete with government for the control of the underlying society."¹⁴⁹ Consider also Thomas Jefferson, who with unabashed anti-clericalism concluded that "[i]n every country and in every age, the priest has been hostile to liberty"¹⁵⁰—as succinct an indictment of organized religion as there could be.¹⁵¹

¹⁴⁶ See Jean Baubérot, *Secularism and French Religious Liberty: A Sociological and Historical View*, 2003 *BYU L. Rev.* 451, 459–61 (discussing history of French anticlericalism).

¹⁴⁷ Cf. Douglas Laycock, *American Religious Liberty, French Laïcité, and the Veil*, 49 *J. Catholic Legal Stud.* 21, 25–26 (2010) (comparing French and American revolutionary responses to established religion and explaining why the latter was not significantly anticlerical).

¹⁴⁸ See Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 *Emory L.J.* 777, 788 (1986) (noting the Founding-era influence of "Deist skepticism, with its strong anti-clerical tendency"); Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 *UCLA L. Rev.* 1, 4–8 (2008) (describing Founders' deist and anti-orthodox religious views, including examples of anti-clericalism); see also Lambert, *supra* note 144, at 21–22 (discussing "anticlerical ideas" of "New Light" Baptists); Sarah Barringer Gordon, *American Mortmain: Property, Schism, and the Rise of Individual Conscience in Antebellum America* 5–9, 18–19 (June 20, 2012) (unpublished manuscript) (on file with authors) (describing how antebellum nineteenth-century Americans adopted laws to restrict the power of the clergy).

¹⁴⁹ Marc M. Arkin, "The Intractable Principle": David Hume, James Madison, Religion, and the Tenth Federalist, 39 *Am. J. Legal Hist.* 148, 162 (1995).

¹⁵⁰ Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814), in 14 *The Writings of Thomas Jefferson* 118, 119 (Albert Ellery Bergh ed., 1907).

¹⁵¹ For more on Jefferson's anticlericalism, see Luebke, *supra* note 133, at 344 ("Cannibals - mountebanks - charlatans - pious and whining hypocrites - necromancers - pseudo-Christians - mystery mongers. These are among the epithets which Thomas Jefferson applied to the clergy of the Protestant denominations and of the Roman Catholic Church as well. It was they who 'perverted' the principles of Jesus 'into an engine for enslaving mankind'; it was the Christian 'priesthood' who had turned organized religion into a 'mere contrivance to filch wealth and power' for themselves; they were the ones who through-out history had persecuted rational men for refusing to swallow 'their impious heresies.'").

The history of American hostility to religious institutions goes beyond the founding period and into the nineteenth century. As Professor Sarah Barringer Gordon has recently shown, in antebellum America “disestablishment was a prelude to the broad-ranging, nation-wide attempt to limit the capacity of religious organizations to acquire and hold wealth, as well as strict state controls on church governance.”¹⁵² Religious institutionalists generally underplay this distrust of church hierarchy.

But even putting aside the history, the fact that there are highly plausible, well-rehearsed, and long-standing arguments critical of institutional religion raises questions about the contemporary justifications for church exceptionalism. Decentering conscience in favor of religious institutions is troubling if the church (in one form or another) turns out to be an enemy of conscience—if the church is indeed “hostile to liberty.”¹⁵³

We do not wish to overstate this claim. Whether the organized church is the enemy of conscience might be the subject of continuing theological controversy, and, if so, it is one that we would do well to avoid. The instrumental claim is more tractable—it asserts that churches provide non-theologically-based benefits to society. But this raises the question of whether churches do so uniquely.

Let us assume for a moment (contrary to Jefferson and Paine) that organized churches play a role in promoting civil society and bestow other benefits on all of us, whether we are religious or not. One might invoke Tocqueville on this side of the argument, as he famously highlighted Americans’ religiosity in praising the country’s fecund political and social activity.¹⁵⁴ Churches, on this account, are unique types of mediating institutions.¹⁵⁵

This assertion is mostly undefended, however. Indeed, for Tocqueville, church activity was not unique. He observed that nineteenth-century Americans were involved in any number of associations and

¹⁵² Sarah Barringer Gordon, *State v. Church: Limits on Church Power and Property from Disestablishment to the Civil War*, 162 U. Pa. L. Rev. (forthcoming Jan. 2014) (manuscript at 3) (on file with authors); see also Sarah Barringer Gordon, *The Landscape of Faith: Religious Property and Confiscation in the Early Republic*, in *Making Legal History: Essays in Honor of William E. Nelson* (Daniel J. Hulsebosche & Richard B. Bernstein eds., forthcoming 2013).

¹⁵³ See *supra* text accompanying note 130.

¹⁵⁴ Alexis de Tocqueville, *1 Democracy in America* 241–42 (Phillips Bradley ed., Henry Reeve trans., 1945) (1835).

¹⁵⁵ See Horwitz, *supra* note 5, at 104–05.

communal projects.¹⁵⁶ The building of churches was just one of them. Even proponents of institutionalism recognize this. They recognize many different First Amendment institutions as deserving of deference; they do not restrict protection to churches.¹⁵⁷ But if universities, libraries, and newspapers warrant deference, what about the Internet, elementary schools, the military, or the modern business corporation? Moreover, why choose some rather than others? Note that Kuyper, on whom some institutionalists rely,¹⁵⁸ thought almost every arena of society could be usefully divided into separate spheres.¹⁵⁹

This highlights the central difficulty: there seem to be no good or even generalizable criteria for determining which institutions count and which do not. The choice of churches leaves out numerous other conscience-supporting institutions. Moreover, the argument for church uniqueness is deeply essentializing; it assumes that the category of “church” has clear meaning. And yet a number of current-day religion clause battles revolve around competing characterizations of groups—around the question of whether a hospital, a student group, a university, or an elementary school is a *religious institution* deserving of protection for religion clause purposes. Adopting an institutionalized First Amendment would require not just making distinctions between churches and other kinds of institutions, but also distinctions between different types of activities that arguably fall under the rubric of the church.¹⁶⁰ To be truly contextual, one would have to assess each institutional setting on its merits. By itself, “church” is not a particularly useful category.

What seems to be animating the claim for institutional specificity is a factual assertion about the centrality of churches to particular forms of conscience-related or expressive activity. But, as should be obvious, such activity occurs in any number of settings, both within groups and outside of them. Moreover, what we know about religion in America is that church membership is increasingly fluid and that Americans feel

¹⁵⁶ Alexis de Tocqueville, 2 *Democracy in America* 106 (Phillips Bradley ed., Henry Reeve trans., 1945) (1840).

¹⁵⁷ See Horwitz, *supra* note 5, at 81–82; Schauer, *Towards an Institutional First Amendment*, *supra* note 18, at 1274–76.

¹⁵⁸ See Horwitz, *supra* note 5, at 83; Johan D. van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, in *Church Autonomy*, *supra* note 16, at 645, 650–54.

¹⁵⁹ Kuyper, *supra* note 33, at 90–99 (discussing sovereign spheres in “the family, the business, science, art and so forth”).

¹⁶⁰ See *infra* text accompanying notes 269–71.

quite competent to pick and choose their churches and mix and match their religious traditions.¹⁶¹ Americans are a religious people, but there is evidence that they also tend to take a consumerist attitude toward organized religion. If that is so, then it is difficult to argue that churches have some essential relationship to the protection of conscience, even when it takes a religious form.¹⁶²

Furthermore, as a sociological matter there seems to be little reason to favor churches over other expressive associations, or at least, none that institutionalists have claimed. For contemporary theorists of civil society, who emphasize the role of voluntary associations in promoting solidarity and civic participation, there do not appear to be decisive differences between churches and many other kinds of social groups. If one is concerned about fostering a robust civil society, one should pay attention not only to churches, but also to bowling leagues and to the Boy Scouts.¹⁶³

It is certainly possible that religious institutions are sociologically significant—akin to state, market, and family as an organizing principle of social life. In other words, our lives may revolve around churches to such a degree that they are deserving of special treatment. But this asser-

¹⁶¹ See Putnam & Campbell, *supra* note 131, at 159–60. A recent survey by the Pew Forum on Religion & Public Life interviewed more than 35,000 Americans age eighteen and older and found that twenty-eight percent of American adults have left the faith in which they were raised or currently favor another religion—or no religion at all. Pew Forum on Religion & Pub. Life, U.S. Religious Landscape Survey: Religious Affiliation: Diverse and Dynamic 5 (2008). When switches from one classification of Protestant to another are included in this category, the number of adults who have either switched affiliation, become unaffiliated, or moved from being unaffiliated to affiliated rises to forty-four percent. *Id.* As the survey demonstrates, “constant movement characterizes the American religious marketplace.” *Id.* at 7. Every significant religious group is shown to be both gaining and losing members, with those experiencing growth merely gaining adherents more quickly than they lose them. *Id.* Those moving from affiliated to unaffiliated outnumber those moving in the opposite direction by “more than a three-to-one margin.” *Id.* Religion in the United States is “a vibrant marketplace where individuals pick and choose religions that meet their needs, and religious groups are compelled to compete for members.” *Id.* at 22. Religious affiliation in the United States can be described as “both very diverse and extremely fluid.” *Id.* at 5.

¹⁶² It becomes increasingly difficult to argue that churches are essential institutions in the lives of Americans when roughly twenty-five percent of adults under the age of thirty are unaffiliated with any church, as the 2008 Pew Survey found. See Pew Forum on Religion & Pub. Life, *supra* note 161, at 36.

¹⁶³ Compare Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2001) (analyzing civic participation across a variety of associations and institutions over the last three decades), with Putnam & Campbell, *supra* note 131, at 35 (analyzing “how religion affects society,” particularly “whether religious Americans are better, or worse, citizens than those who are not religious”).

tion requires more support than a simple claim that churches are beneficial mediating institutions.

Moreover, in a world of religious and associational pluralism it is extraordinarily problematic to recognize and distinguish some conscience-based organizations over others. As a matter of political theory, such a distinction violates a central principle of equality. This is the lesson that critics of religious exceptionalism teach.¹⁶⁴

The emphasis on equality is reflected in First Amendment doctrine, which seeks in principle (though not always in practice) to avoid making overt distinctions between different kinds of speakers. For example, the neutrality principle has been applied to permit religious speakers access to public forums. The Court has found it impermissible to treat religious speakers worse than their secular counterparts.¹⁶⁵ Religious institutionalism, by contrast, would arguably counsel treating churches better than their secular analogs, on grounds that churches are of intrinsic social worth.¹⁶⁶ But in light of the long-standing critiques of the institutional church and the lack of any solid foundation for treating churches differently from other conscience-based associations, it is difficult to understand why. A central problem for institutionalists is providing a reason for treating churches as either beneficial or uniquely so.

III. CHURCHES AS VOLUNTARY ASSOCIATIONS

The stronger forms of the argument for church autonomy implicitly or explicitly challenge liberal theory. In particular, the prioritization of the church resonates with religious critiques of liberal individualism as well as with their less theological communitarian or post-liberal cousins. On this account, the church is pre-legal, organic, constitutive of the self.

¹⁶⁴ See generally Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 4 (2007); Brian Leiter, *Why Tolerate Religion?* (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 *U. Chi. L. Rev.* 1351 (2012).

¹⁶⁵ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

¹⁶⁶ One can also ask what happens when churches meet universities, another institution that some corporatists argue is of intrinsic social worth. See Paul Horwitz, *First Amendment Institutions* 107–43 (2013). Indeed, this points to a further objection, which is that spheres-based theories must provide some account of what happens when recognized spheres are overlapping and conflicting. For more on this problem, see Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Sphere*, 2014 *U. Ill. L. Rev.* (forthcoming) (manuscript at 10–18) (on file with authors).

There is a more conventional way to talk about church autonomy, however. While the “freedom of the church” is framed in terms of power and sovereignty, the usual way to talk about church autonomy is to understand it in terms of rights within the mainstream of liberal theory. Thus, the defense of church autonomy asserts that churches have free exercise rights. But this conventional formulation also requires justification: What do we mean when we say that churches enjoy the right of free exercise? What is the origin and nature of these corporate rights?

In this Part, we both defend the liberal account of church autonomy—namely its origins in voluntary association—and suggest how this account also falls short in justifying exceptional treatment for churches. (Indeed, it may be that the limits of the liberal account are one reason that proponents of church autonomy are seeking alternative (non-liberal) justifications.) Our argument is (1) that voluntary membership is a condition of church autonomy; (2) that the move from individual rights to associational self-governance does not create a corporate entity with rights that are not derived from the rights and interests of those who compose it; and—echoing our argument above—(3) that it is difficult, if not impossible, to distinguish churches as voluntary associations from other voluntary associations.

Finally, in the next Part, we argue that a general theory of conscientious objection takes care of the problems that the doctrinal concept of church autonomy seeks to address. We argue that there is no need for a specific jurisprudence of church autonomy (detached from individual religious liberty)—or at least that the doctrine is so deeply grounded in individual rights that it is not necessary to treat it as a separate category.

A. Voluntarism

We have raised the question “what is a church?” previously. It is a question that church autonomy proponents have to answer in two senses: First, what is it; that is, what comprises a church, or where does it come from? And second, how do we know when a particular entity, juridical being, or claimant is a “church”; that is, what are the essential characteristics of church-ness?

In the liberal tradition, perhaps the most influential answer given to this question is John Locke’s in his *Letter Concerning Toleration*. “A church,” Locke wrote, “I take to be a voluntary Society of Men, joining

themselves together of their own accord, in order to the publick worshipping of God I say it is a free and voluntary Society.”¹⁶⁷ This claim was radical at the time. Locke’s critics attacked his conception of the church as a voluntary association and asserted the government’s right and duty to force dissenters into believing the true religion.¹⁶⁸

This history is well-known, as are the arguments for toleration that Locke developed to support his voluntarist principle.¹⁶⁹ Nevertheless, voluntarism—whether justified in Lockean terms or within more contemporary liberal theories¹⁷⁰—often meets with resistance. From their internal point of view, religions often reject the idea that membership is voluntary.¹⁷¹ Membership in the religion may be a matter of birth,¹⁷² or it may be dictated by God, either to the exclusion of outsiders¹⁷³ or to the forced inclusion of them.¹⁷⁴ Indeed, the entire idea of choosing one’s religion may depend on a concept of free will that certain belief systems do not share.¹⁷⁵ A religion can discourage conversion, or alternatively,

¹⁶⁷ John Locke, *A Letter Concerning Toleration* 28 (James H. Tully ed., 1983) (1689).

¹⁶⁸ See Jonas Proast, *The Argument of the Letter Concerning Toleration, Briefly Consider’d and Answer’d*, in *12 The Philosophy of John Locke* 1, 6 (Peter A. Schouls ed., 1984) (1690). See generally Richard Vernon, *The Career of Toleration: John Locke, Jonas Proast, and After* 18 (1997).

¹⁶⁹ See Micah Schwartzman, *The Relevance of Locke’s Religious Arguments for Toleration*, 33 *Pol. Theory* 678 (2005) (summarizing Locke’s arguments for toleration).

¹⁷⁰ Locke’s voluntarist principle, or some version of it, is a defining feature of modern liberal theory. See Barry, *supra* note 127, at 148 (describing a commitment to voluntariness as “[t]he fundamental liberal position on group rights”); see also John Rawls, *Political Liberalism* 136 (1996) (contrasting voluntary membership in associations based on liberty of conscience with involuntary membership in the state).

¹⁷¹ See, e.g., Garvey, *supra* note 27, at 148–49.

¹⁷² See, e.g., Southern, *supra* note 47, at 18 (describing infant baptism and involuntary membership in the church).

¹⁷³ See Spinner-Halev, *supra* note 119, at 2–3 (discussing exclusionary religions).

¹⁷⁴ See generally Marina Caffiero, *Forced Baptisms: Histories of Jews, Christians, and Converts in Papal Rome* (Lydia G. Cochrane trans., University of California Press 2012) (2005).

¹⁷⁵ It is perhaps worth noting that Locke did not claim that individuals could *choose* what to believe—with respect to religion or anything else. Belief is not voluntary because it is not an act of will. Locke was an involuntarist about belief generally, and on more distinctively theological grounds, about religious beliefs in particular. See Schwartzman, *supra* note 169, at 691–92 (discussing Locke’s religious involuntarism). But deciding whether to be (or remain) a member of an association is a free choice in the sense that the state is prohibited from compelling it. For Locke, and for modern liberals as well, it is here where voluntariness attaches. See also John Rawls, *Justice as Fairness: A Restatement* 93 (Erin Kelly ed., 2001) (“Whatever comprehensive religious, philosophical, or moral views we hold are also freely accepted By this I do not claim that we do this by an act of free choice, as it were, apart from all prior loyalties and commitments I mean that, as free and equal citizens, wheth-

its theology may demand that members pursue converts (either coercively or not) on the ground that non-co-religionists are mistaken or are operating under a misapprehension about the true church.¹⁷⁶

There are also (more recent) non-theological critiques of voluntarism. Critics of liberalism have argued that the autonomous, freely-choosing self is an invention, that there is a psychological and social reality of group membership that makes it less than optional, that the “self” is defined or constituted by a web of interlocking social connections and that these shape and constrain our “choices” in myriad ways.¹⁷⁷ As a sociological matter, it may be that churches are more akin to those social groups that are bound by affective ties—the family is an oft-invoked example. Or finally, some might claim that religious communion is not experienced the same way as other forms of group activity—that religious communion is not understood or experienced as “voluntary” by those who have been called to it.¹⁷⁸

From the internal perspective of some religions, then, voluntarism is not a condition of religious membership. But from the state’s perspective, even those who reject the idea of voluntary membership must be treated *as if* they were voluntary participants in religious institutions. The acceptance of a non-voluntarist conception is virtually unthinkable, for once one begins to undermine the notion of individual choice, it is very difficult to figure out what freedom of conscience might mean. If churches are not freely chosen, then how do we distinguish between “coerced” membership and its opposite? And what role should the state play in a world in which the very concept of coercion is contested?

Imagine a government regime of religious liberty based on a conception of involuntary church membership. Could such a state allow churches to coerce membership? Could the state order belief on the grounds that such belief is not and never has been freely held? These

er we affirm these views is regarded as within our political competence as specified by the basic constitutional rights and liberties.”).

¹⁷⁶ See generally *Religious Conversion: Contemporary Practices and Controversies* (Christopher Lamb & M. Darrol Bryant eds., 1999) (surveying conversion practices in world religions).

¹⁷⁷ These criticisms were common themes of the “communitarian” critique of liberalism. See generally Daniel Bell, *Communitarianism and its Critics* (1993); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988); Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (1989); see also Stephen Mulhall & Adam Swift, *Liberals and Communitarians* (2d ed. 1996) (surveying and criticizing communitarian arguments).

¹⁷⁸ See, e.g., Garvey, *supra* note 27, at 148–49.

were the very strictures that Locke was resisting when he asserted that religious organizations are voluntary associations and that the state had no right to compel belief. The voluntarist principle thus underpins the main arguments for disestablishment and free exercise—for the principle asserts that church membership is a function of individual acts of conscience.¹⁷⁹ Indeed, as far as we can tell, no one advocating church autonomy rejects voluntarism understood as a *right of exit*—as an absence of state-enforced privilege and state-enforced compulsion.¹⁸⁰

The definition of the church as a voluntary association does two things: First, it disallows the state from assisting in coercing non-members while requiring the state to enforce exit rights; second, it is a necessary (but not sufficient) condition for providing the association with liberty from political constraints on its internal governance. It is the latter that provides the basis for church autonomy.¹⁸¹

None of this is particularly controversial today.¹⁸² In the United States, Americans cannot be coerced to join, identify, or associate with

¹⁷⁹ See Feldman, *supra* note 10, at 351.

¹⁸⁰ See Locke, *supra* note 167, at 28 (“No Man by nature is bound unto any particular Church or Sect, but every one joins himself voluntarily to that society in which he believes he has found that Profession and Worship which is truly acceptable to God.”). Although Mark Rosen criticizes our account as overly individualistic, he, too, accepts that any defense of religious institutional autonomy must provide for substantial individual exit rights. See Rosen, *supra* note 166, at 51–52.

¹⁸¹ Again, Locke provides an early illustration of this view, treating churches as a category of voluntary societies. See Locke, *supra* note 167, at 28–29 (“Forasmuch as no Society, how free soever, . . . (whether of Philosophers for Learning, of Merchants for Commerce, or of men of leisure for mutual Conversation and Discourse,) No Church or Company . . . can in the least subsist and hold together . . . unless it be regulated by some Laws, and the Members all consent to observe some Order . . . it necessarily follows, that the Right of making its Laws can belong to none but the Society it self, or at least (which is the same thing) to those whom the Society by common consent has authorized thereunto.”). But as noted above, see *supra* note 175 and accompanying text, the voluntarism principle is not limited to Locke’s account. It is a basic liberal commitment. See, e.g., Rawls, *supra* note 175, at 93 (“In a democratic society . . . the authority of churches over their members[] is freely accepted. In the case of ecclesiastical authority . . . those who are no longer able to recognize a church’s authority may cease being members without running afoul of state power.”); Barry, *supra* note 127, at 148 (making the same point).

¹⁸² A recent statement from the United States Conference of Catholic Bishops appears to treat churches as voluntary associations. See U.S. Conference of Catholic Bishops, *supra* note 4, at 5 (“Religious believers are part of American civil society, which includes neighbors helping each other, community associations, fraternal service clubs, sports leagues, and youth groups. All these Americans make their contribution to our common life, and they do not need the permission of the government to do so. Restrictions on religious liberty are an attack on civil society and the American genius for voluntary associations.”). But see Gar-

(or contribute to) any particular church, nor can they be prevented from leaving one church and starting another. The roots of church autonomy stem from this basal fact. As Professor Douglas Laycock has written in his seminal work on church autonomy (echoing Locke), “voluntary affiliation with the group is the premise on which group autonomy depends.”¹⁸³

Nevertheless, the grounding of church autonomy in voluntary association is worth emphasizing. Church autonomy—the “[r]ight of making its [l]aws”—is dependent in the first instance on the fact that the initial act of creating the church is “absolutely free and spontaneous.”¹⁸⁴ The claim is not that the church gets to rule because it is good, or benefits the wider society, or helps individuals actualize themselves, but rather because it is a product of free association. In other words, the institutional church—understood as a “voluntary society”—derives the right to choose, govern, and rule its own members from the voluntary nature of the association, that is from *consent*.¹⁸⁵ There are, of course, limits on how churches may treat their members. Consent alone cannot justify every action that a voluntary association might take. But we need not define the limits of church autonomy to establish that consent is a necessary condition of it.¹⁸⁶

Much follows from this basic idea. Consider why the church hierarchy gets to dictate the internal rules of the church and require adherence to them, even if the members of the church might disagree with those rules. The reason the state does not interfere is because the individual members are not compelled to remain in the church, that is, (a) the members do not need the church to be full members of the civic community, nor do (b) the members need the church to be full members of the economic community. It is the very *inconsequentiality* of the church for the political and social status of its members that allows it to be so

vey, supra note 27, at 142 (arguing that churches are not “transactional” voluntary associations).

¹⁸³ Laycock, Church Autonomy, supra note 7, at 1405.

¹⁸⁴ Locke, supra note 167, at 29.

¹⁸⁵ See Barry, supra note 127, at 148 (arguing that “individuals should be free to associate together in any way they like” provided (1) that “all the participants should be adults of sound mind,” and (2) “their taking part in the activities of the group should come about as a result of their voluntary decision and they should be free to cease to take part whenever they want to”).

¹⁸⁶ We discuss some limits in Part IV.

fully autonomous and free from state regulation.¹⁸⁷ Or to be more precise, the separation of church and state—the disentanglement of the church from the core political and economic liberties of the people—is what gives rise to and permits church autonomy. By way of comparison, the reason the city (that is, the state) does not enjoy freedom from constitutional and democratic constraints is because it does exercise political and economic authority over its members.

This is just a restatement of the public/private distinction. A condition of church autonomy must be that its members participate freely, by light of their own consciences. What follows from this is that the state will take special care of those whose consent is suspect (such as children) and further, that a religious organization “has no claim to autonomy when it deals with outsiders who have not agreed to be governed by its authority.”¹⁸⁸ Again: “No man by nature is bound unto any particular Church or Sect, but every one joins himself voluntarily to that Society in which he believes he has found that Profession and Worship which is truly acceptable to God.”¹⁸⁹ The church’s autonomy (or right to self-govern) is dependent on the free exercise rights (namely the choice to join or remain part of a voluntary association) of its members.

B. Deriving Corporate Rights

In light of the dominant conception of the church as voluntary association, what rights does the church qua church enjoy? U.S. courts have not really wrestled with this question—at least not formulated in this way—in large part because our religion clause doctrine has never been preoccupied with the difference between corporate entities and individuals. In this context at least, our courts do not normally ask whether a particular claimant is a legal or natural person, whether it has been registered (or recognized) as a corporation, or whether it asserts rights on its own behalf or on behalf of others. Churches are not any different in this regard than other associations, corporations, or groups that might assert claims in U.S. courts. They require no specific state recognition, no licensing, no particular legal status, and as with all other groups and insti-

¹⁸⁷ Cf. Rawls, *supra* note 170, at 31 (“On the road to Damascus Saul of Tarsus becomes Paul the Apostle. Yet such a conversion implies no change in our public or institutional identity . . .”).

¹⁸⁸ Laycock, *Church Autonomy*, *supra* note 7, at 1406.

¹⁸⁹ Locke, *supra* note 167, at 28.

tutions, for standing purposes, they simply have to assert a redressable injury.

It is useful to compare this relative quiescence with European courts' struggles with church status. The juridical status or legal personality of churches tends to preoccupy European courts in part because many European countries still have one or more state establishments, formal state recognition of defined religious groups, state-aided tax collections for recognized religious groups, or a tradition of ethno-religious group representation on state authorities, in state agencies, courts or schools.¹⁹⁰ European courts thus struggle with group claims for recognition in ways foreign to the American experience. For example, European courts have had to ask whether religious groups have a right to legal and/or religious entity status—that is, whether a group can gain formal state recognition in order to be included in state schemes that privilege religious societies. Relatedly, European courts have had to determine whether a claimant religious group has a recognized right to own property or a privilege to build places of worship or the right to be included as a group in programs that dispense government largesse.

At the same time, European courts can be formalistic about what rights religious institutions actually enjoy. Thus, the European Commission on Human Rights has held that churches have standing to bring claims under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but has stated quite clearly that the church does so only on behalf of its members.¹⁹¹ Religious institutions cannot claim that their own rights are violated, but only act as a proxy for the aggregate rights of the membership. Consistent with this approach, the Commission has held that a legal person (as opposed to a natural person) does not enjoy freedom of conscience under Article 9.¹⁹²

The contrast between European and American preoccupations with church status is instructive. Indeed, the absence of any felt need by U.S. courts to distinguish between natural and legal persons in the law of religious liberty should make us hesitant to begin assigning rights to churches as distinct corporate entities. First, we should consider whether the corporatist tradition in Europe that gives rise to “recognized” reli-

¹⁹⁰ See generally Church Autonomy, supra note 16 (collecting essays on church autonomy in European countries).

¹⁹¹ Brett G. Scharffs, *The Autonomy of Church and State*, 2004 *BYU L. Rev.* 1217, 1277–78.

¹⁹² *Id.* at 1278.

gious groups is consistent with our disestablishment tradition. In the United States, anyone can create a church, whether informally or formally under the non-profit corporation statutes of any state. Requiring the formal recognition of institutional rights begins to look a lot like the official state recognition or licensing of churches. European courts engage in these determinations because a great deal might turn on whether a religious or ethno-religious community is recognized officially and has access to legal or special entity status. In the United States, such official recognition for state-related purposes would likely constitute an establishment.

Second, we should be clear about what we mean when we treat churches as rights-holders. Advocates of religious institutionalism or freedom of the church do not specifically ground their claims for church autonomy in a theory of the rights of the collective or the group. Some urge that the church itself is a body that has dignitary (or, for that matter, divine) interests that should be protected by rights.¹⁹³ Others seem to assert (though it is difficult to tell) that because churches can and do exist independently of the state—are pre-legal or organic—that they too can possess the attributes of rights-holders. The corporatists seem to derive institutional rights from the fact that churches and other First Amendment institutions have existed for a long time and are important to human flourishing.¹⁹⁴

Under all these conceptions lurks some theory of group rights, including the rights not only of religious and ethnic groups, which have dominated the literature on multiculturalism,¹⁹⁵ but also the rights of corporate entities, including business organizations, non-profits, and other types of voluntary associations. Such theories of collective rights raise difficult conceptual and normative questions that we cannot address here, including the conditions of collective intentionality and group agency, the grounds for attributing moral responsibility to groups, and the circumstances under which it is appropriate to assign groups moral and legal rights.¹⁹⁶

¹⁹³ See Brennan, *Liberty of the Church*, *supra* note 31, at 10.

¹⁹⁴ See, e.g., Horwitz, *supra* note 28, at 1053.

¹⁹⁵ See, e.g., *Ethnicity and Group Rights: NOMOS XXXIX*, at 4–5 (Ian Shapiro & Will Kymlicka eds., 1997); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 4 (1995).

¹⁹⁶ There is a large and growing literature devoted to these questions. See generally Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (2011); Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for*

Nevertheless, supposing it is analytically and conceptually possible to make sense of group agency, there is nothing obviously incoherent about imposing legal duties on others that run to groups. In the United States, we have organizations, associations, corporations, and other entities that we treat as persons or as proper legal claimants under certain circumstances. Legal persons can sue and be sued, enter into contracts, enjoy property rights, and also in certain cases exercise First Amendment rights, including perhaps free exercise rights.¹⁹⁷ But those rights are not distinctive to *religious* groups or institutions, though religious institutions may benefit from them in certain cases.

Church autonomy claims, however, are sometimes couched in terms of the “human rights of religious associations,”¹⁹⁸ as one recent proponent has put it. We should be cautious, however, in treating churches as persons in this deeper sense.¹⁹⁹ The concept of dignitary or conscience-based rights attaching to groups is not well-defined and difficult to apply.²⁰⁰ How do such dignitary interests arise? Which groups enjoy them? How does one explain dissenters within a group? Moreover, the anthropomorphizing instinct in the church context tends toward religious chauvinism. Unaffiliated or loosely-affiliated religious practitioners or religions that do not share the concept of the church as a “living body” are either excluded from this form of group protection or granted something that they do not want. And finally, attributing human rights to institutions poses a potential danger to individual human rights. As an expressive matter, it may dilute the unique legal status of human beings as it is reflected in that concept. And as a legal matter, it implies that groups can assert competing claims of conscience against other individuals and against their members, thus undermining the protection for individuals.²⁰¹ The recognition of group rights “means that individuals in

Bureaucratic Society (1986); Peter A. French, *Collective and Corporate Responsibility* (1984); Patricia H. Werhane, *Persons, Rights, and Corporations* (1985).

¹⁹⁷ See generally James D. Nelson, *Conscience, Incorporated*, 2014 Mich. St. L. Rev. (forthcoming) (discussing conditions under which religious organizations can claim corporate free exercise rights).

¹⁹⁸ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* 33 (2010).

¹⁹⁹ See Jeremy Waldron, *Taking Group Rights Carefully*, in *Litigating Rights: Perspectives from Domestic and International Law* 203 (Grant Huscroft & Paul Rishworth eds., 2002).

²⁰⁰ See *id.* at 210–11, 220 (raising doubts about defining and applying group rights, even if they are analytically possible).

²⁰¹ See *Minorities within Minorities*, *supra* note 126, at 1–2.

the group *will be ruled* by those who can claim to speak in the name of the group.”²⁰²

To be sure, there may be contexts in which it may be appropriate for ethno-religious minority groups to be considered rights-holders, especially (or perhaps exclusively) when the state or forces within the state treat membership in those groups as involuntary or as highly salient for the individual’s equal participation in political and economic life.²⁰³ If group rights advance individual autonomy—for instance, by making the exercise of individual rights of conscience possible for otherwise oppressed minorities—then it may be plausible to recognize such rights. But the concept of group rights has a dangerous flip-side: isolation, enforced separatism, and the rejection of integration.²⁰⁴ These costs are high, and one would have to make a very strong showing that churches qua churches (absent other characteristics) are such good candidates for group rights that such costs should be borne.²⁰⁵

Finally, it seems obvious that what grounds the assertion of group autonomy in the religion context is not the dignitary or conscience-based rights of institutions—for what would those be?—but rather the fact that individuals’ dignitary and conscience-based rights can only be vindicated because they are exercised through institutions.²⁰⁶ Certainly, the individual rights of conscience and association encompass the right to gather together in a group, to decide the group’s purpose and doctrine, and to engage in group governance and decision-making in ways that advance

²⁰² Waldron, *supra* note 199, at 213.

²⁰³ Whether a liberal society should provide special protections for quasi-autonomous religious groups like the Amish is a question we do not address here. Compare William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* 19 (2002) (defending educational exemptions for the Amish granted in *Wisconsin v. Yoder*), and Spinner-Halev, *supra* note 119, 70–71 (advocating a policy of “nonintervention” into “[r]estrictive communities”), with Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* 236–40 (2000) (expressing skepticism about accommodating illiberal groups and arguing that eventually *Yoder* should be overruled).

²⁰⁴ For a critique of the concept of group autonomy and how it is employed to marginalize already marginalized individuals, see Richard C. Schragger, *The Limits of Localism*, 100 *Mich. L. Rev.* 371, 373–76 (2001); see also Schragger, *supra* note 124, at 1814 (“[T]he ghetto provides sanctuary It also seriously circumscribes liberty by physically defining the limits of toleration.”). For further discussion, see *supra* notes 124–25.

²⁰⁵ Cf. Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 1 *Utah L. Rev.* 47, 48–49 & n.5 (2010) (observing that despite academics’ continual “love affair” with group rights, the Court has never embraced such rights).

²⁰⁶ Lucy Vickers, *Twin Approaches to Secularism: Organized Religion and Society*, 32 *Oxford J. Legal Stud.* 197, 201 (2012).

one's aims (albeit within limits).²⁰⁷ As we argue in Part IV, these rights are sufficient to explain what is important about church autonomy. It is therefore a mistake to treat churches as if they had rights that are not derived from the rights of natural persons.²⁰⁸

C. Is Religion Special?

If the church is a voluntary association, and if it derives its right to self-govern from the individual freedom of association, then what makes it unique? We have addressed this question above, in criticizing the separate spheres or sovereignty approach to church autonomy.²⁰⁹ That approach tends to downplay the voluntarism of churches altogether. We instead hear sphere-based or organic arguments for the distinctive (pre-legal) place of churches in our social order. This effort to remake churches into "natural" features of the social landscape is sensible if one is trying to explain why churches get more space to self-govern than do other similarly situated non-religious, conscience-based associations, though (as we have argued above) we think the explanation fails.

The effort to distinguish churches from other associations is just as difficult (if not more so) for those who accept that church autonomy is premised on voluntary affiliation. That is because the only thing that seems to distinguish churches from other voluntary associations is their subject matter. This is not necessarily a small matter. Locke certainly did not believe that voluntary societies could only be churches if they "have in it a Bishop, or a Presbyter, with Ruling Authority derived from the very Apostles."²¹⁰ He did, however, believe that churches had a particular aim: "the publick worshipping of God . . . effectual to the Salvation of their Souls."²¹¹ This was Locke's answer to the second question we posed above—the association's aims and subject matter is what gives the church as voluntary association its essential "church-ness."

The difficulty with the subject matter distinction is that it has outlived its usefulness. Once religious toleration is expanded to the more universal freedom of conscience, it is difficult to justify the special treatment of religious dissenters over other kinds of dissenters or the special treat-

²⁰⁷ See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. Rev.* 839, 873 (2005).

²⁰⁸ But see Rivers, *supra* note 198, at 33.

²⁰⁹ See *supra* Part II.

²¹⁰ Locke, *supra* note 167, at 29.

²¹¹ *Id.* at 28.

ment of associations that deal in religious beliefs and activities from those associations that deal in non-religious beliefs and activities. In modern times, state coercion of all belief, thought or speech, is suspect. Moreover, the religious/non-religious line becomes quite difficult to police, not to mention indefensible on any theory of equality—as we (and many others) have already pointed out.²¹²

This is perhaps why the nascent institutionalist accounts of church autonomy treat churches as part of a larger category of institutions. If church rights are to have any traction at all, churches need to be assimilated into a more general theory of group or institutional rights.²¹³ Indeed, by analogizing the church to the family, to the tribe, to sovereign states, or to other First Amendment institutions, proponents of church autonomy concede that non-state governance²¹⁴ comes in all shapes and sizes, and that churches are just one of a number of forms in which group rights might exist and be recognized.

As we have already observed, however, this move toward group or collective rights is fraught with risk.²¹⁵ In the United States, religion tends not to coincide with entrenched territorial or ethnic cleavages. We have generally not sought to solve the problem of sectarian division and oppression through the adoption of a form of ethno-religious federalism, as have other countries with a different history of religious violence.

²¹² See Eisgruber & Sager, *supra* note 164, at 51–53; Leiter, *supra* note 164, at 66–67; Schwartzman, *supra* note 164, at 1353. But see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 164 (2008) (arguing that “[u]nder our Constitution, religion is special”). Professor Nussbaum’s conception of liberty of conscience is nevertheless deeply egalitarian, see *id.* at 19, and she recognizes the challenge posed by non-religious conscientious objectors. Nussbaum’s instinct is to “level-up” by expanding the definition of religion or by granting similar protections to some non-religious conscientious objectors, though she retains some attachment to the uniqueness of religious belief and action even if for pragmatic or evidentiary reasons. See *id.* at 164–74.

²¹³ See, e.g., Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 *Wis. L. Rev.* 99, 114–15 (basing religious group rights on an argument for group rights generally). But see Gedicks, *supra* note 205, at 48–50 & n.5 (disavowing his former defense of religious group rights).

²¹⁴ See Michael W. McConnell, *Non-State Governance*, 1 *Utah L. Rev.* 7, 7–8 (2010) (discussing various examples of non-state entities exercising authority over others).

²¹⁵ See, e.g., Waldron, *supra* note 199, at 203–04; James W. Nickel, *Group Agency and Group Rights*, in *Ethnicity and Group Rights: NOMOS XXXIX*, *supra* note 195, at 235; Susan Moller Okin, *Multiculturalism and Feminism: No Simple Question, No Simple Answers*, in *Minorities within Minorities*, *supra* note 126, at 86 (finding tension in democracy between the strengthening of group rights and the subordination of the rights of women within the group).

And recourse to such a structural solution to the problem of religious freedom would arguably be cause for regret.²¹⁶

The institutionalist may be seeking to defend a robust version of collective rights for religious groups or may be merely drawing attention to the specific institutional setting in which religious activity takes place. These are very different. One can distinguish collective bodies from individuals and treat collectives specially for all sorts of purposes without attributing rights to them. But in order to turn a descriptive claim (we sometimes treat these institutions, groups, or arenas of activity as distinctive) into a normative claim (we *should* treat these institutions or arenas of activities as distinctive), one needs to show why the protection of conscience, the right of association, and other individual rights of autonomy, privacy, and property do not take care of our institutional concerns. An argument for church autonomy needs to identify the essential attributes of the category that make it worthy of protection and persuade us that using these categories better protects the rights of conscience that ultimately animate the project.²¹⁷

IV. TOWARDS A GENERAL THEORY OF CONSCIENTIOUS OBJECTION

We now turn to the question of whether religious institutionalism—in either its corporatist or neo-medieval form—does any doctrinal work. In this Part, we will examine the core instances of church autonomy doctrine and ask whether an approach based on separate spheres or freedom of the church is necessary. We argue that it is not, that rights of conscience are doing all the relevant work, and that church autonomy is just a species of associational freedom more generally. We further consider whether a general theory of conscientious objection could account for most of the pressing issues involving religious groups, without any reference to church or religion.

²¹⁶ On the rejection of religious federalism, see Schragger, *supra* note 124, at 1814 (“American-style religious pluralism is not based on grants of territorial autonomy to religious groups, but is instead premised on accommodating religious belief and exercise right here in our midst.”). On regrettable federalism, see Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* 64–68 (2008).

²¹⁷ Of course, for institutionalists, rights of conscience might be subordinate to institutional freedom or some other value, say, the promotion of civil discourse. Most legal scholars, however, appear to argue that institutional freedom is compatible with individual rights of conscience.

A. What Is at Stake?

We start by asking: What is at stake in the new institutionalists' move from freedom of conscience to freedom of the church? Institutional claims are often expansively stated, though it is sometimes difficult to know what the rhetoric means. In particular, the language of sovereignty is often used,²¹⁸ in the sense that church and state are "coexisting sovereigns" with separate "spheres of interest";²¹⁹ that the state has subjects or citizens just as the church has adherents or laity; that civil government concerns itself with the secular, while the church deals with the sacred, with "[e]ach body in this relationship . . . understood to have a proper role and to occupy a certain sphere of responsibility";²²⁰ and that "citizens who are also adherents will have two loyalties: God and country."²²¹ The church, on this account, is a foreign sovereign.²²²

For the most part, this language seems to be metaphorical.²²³ Religious institutionalists cannot possibly mean that churches are literal and co-equal juridical entities with the power to exercise coercive authority. They cannot be advocating for the return of a religious law that is of equal weight and runs parallel to the civil law, enforced by religious courts under religious auspices.²²⁴ For what would that law *be* in a world of religious pluralism, and how could one justify its coercive application?

There still are nations in which religious law serves as the rule of decision for citizenry in certain subject matters. For example, Jews in Israel may be subject (whether they consent or not) to the Orthodox reli-

²¹⁸ See Dane, *supra* note 16, at 122–23; Garnett, *Freedom of the Church*, *supra* note 5, at 67–68; Horwitz, *supra* note 17, at 980; Smith, *supra* note 6, at 25–26.

²¹⁹ See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. Rev.* 1385, 1387.

²²⁰ *Id.* at 1390.

²²¹ *Id.* at 1391.

²²² See *supra* text accompanying note 59.

²²³ Horwitz has conceded this in his reply to this Article. See Horwitz, *supra* note 28, at 1055.

²²⁴ Even those who advocate civil enforcement of private religious arbitration decisions do not claim that religious courts can exercise direct coercive power over consenting adults if the exercise of that power would be contrary to public policy or would entail enforcing agreements that are unconscionable. See, e.g., Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 *N.Y.U. L. Rev.* 1231, 1288–1305 (2011). And certainly no one is advocating that religious arbitration panels be permitted to exercise jurisdiction over non-consenting co-religionists.

gious courts in matters of family law.²²⁵ But the idea of an autonomous, co-equal, parallel religious law is quite alien to our constitutional tradition, and it does not seem to be what religious institutionalists have in mind. Rather, by “sovereign,” they seem to mean either that our individual consciences are subject to a “higher law” or that the church’s internal decision-making—when it is adopting rules for its membership or creating doctrine to serve that membership—is immune from state interference. Sovereignty, as it is used in this sense, does not appear to mean the recognized authority to adopt laws that coerce all those within a territory or within a particular subject matter.

Churches no doubt exercise power, as do clubs, corporations, families, and gangs. That churches exercise power does not make them analogous to the state or believers analogous to citizens, however. Indeed, it trivializes the coercive and violent power of the state to argue that excommunication is equivalent to imprisonment. What the use of the term “sovereignty” must mean instead is that religion is special and that religious institutions are especially immune from government regulation. For our purposes, that is what we shall assume: not that the users of this language desire the adoption of an autonomous, parallel, coercive religious legal system, but rather that religious matters are, at least presumptively,²²⁶ outside the reach of civil law. The loose talk of sovereignty leads to too much confusion, however, and it would be better if it were either given more careful analytical treatment,²²⁷ or altogether abandoned.

If we are right that religious institutionalists are not seeking a concurrent coercive jurisdiction in a particular territory under the auspices of a church (or churches), then what are the doctrinal implications of their views? From what we can tell, what is at stake is well within the mainstream of current religion clause doctrine: the ministerial exception;

²²⁵ See Dane, *supra* note 16, at 124; Reitman, *supra* note 127, at 191.

²²⁶ We say “presumptively” because, even if limited to matters of internal governance, religious decisions that undermine the voluntariness of an association may be subject to state regulation. Although we cannot here elaborate a conception of voluntariness, this point is a necessary corollary from our claim above that voluntariness is a moral condition of freedom of association. See *supra* text accompanying notes 167–94; see also Barry, *supra* note 127, at 148–54 (discussing voluntariness and exit costs).

²²⁷ But cf. Dane, *supra* note 16, at 130 (distinguishing numerous conceptions of religious autonomy); Idleman, *supra* note 112, at 175, 190 (explicitly discussing the concept of sovereignty and the state’s unwillingness to permit religion to rise to the status of a sovereign); Shachar, *supra* note 126, at 88–145 (surveying various conceptions of “jurisdictional autonomy” and arguing for a theory of “transformative accommodation”).

non-interference in property disputes or other intra-religion disputes that implicate internal religious doctrine or governance; and exemptions from (some) laws that seek to regulate church matters.

In short, freedom of the church seems simply to be a more robust version of what already exists. For example, among religious institutionalists, no one appears to be advocating the restoration of church privileges such as “benefit of clergy,” which exempted clergy charged with criminal offenses from secular courts and instead allowed them to be tried by far more lenient ecclesiastical courts.²²⁸ No one is arguing that concentrated religious or ethno-religious groups should be granted governance responsibilities in particular neighborhoods, cities, territories, or regions, in which religious law would be co-extensive with municipal law.²²⁹ And no one is advocating that churches be given a legal monopoly on the regulation of marriage or family law or other spheres of conduct.

Some institutionalists might believe that freedom of the church requires limits on clergy malpractice claims or some degree of immunity for respondeat superior liability.²³⁰ Others might also be hoping that freedom of the church will reinvigorate the free exercise exemptions regime that was dismantled by *Employment Division v. Smith*.²³¹ Of course, that regime already existed without any need for the concept of *libertas ecclesiae*, and *Smith* itself has long been criticized for underappreciating the *individual* claim of conscience made in that case.²³² But it is possible that advocates see freedom of the church as creating an even broader regime of exemptions than existed in the pre-*Smith* days.

It is also not clear how religious institutionalism deals with Establishment Clause doctrines like the requirement that state monies not directly fund religious schools or the non-endorsement principle applied to

²²⁸ See Owen Chadwick, *The Reformation* 381–82 (1964) (describing the general demise of “benefit of clergy” in the sixteenth century); Hamilton, *supra* note 125, at 1122–35 (same).

²²⁹ But cf. *Kiryas Joel v. Grumet*, 512 U.S. 687, 691, 693 (1994) (holding that a New York statute carving out a separate school district for a village of practitioners of Satmar Hasidim violated the Establishment Clause of the First Amendment).

²³⁰ See, e.g., Horwitz, *supra* note 5, at 122–24; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 *BYU L. Rev.* 1789, 1822–23.

²³¹ 494 U.S. 872 (1990).

²³² The literature here is voluminous. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993, 1009 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 *U. Chi. L. Rev.* 1109, 1111 (1990).

government religious speech.²³³ Steven Smith has suggested that thinking about churches as foreign sovereigns may be useful in sorting out these questions.²³⁴ There is nothing preventing the state from offering aid to foreign states, or, for that matter, from endorsing the policies or principles of other governments. If the analogy holds, then, the state should be permitted to provide the same types of support for religious institutions.

But institutionalists should be wary about the foreign sovereign analogy. Although the practical notion of dual citizenship is widely accepted in the modern era, taken literally, the treatment of churches as if they were equivalent to sovereign states comes worrisomely close to inviting the ancient canard of dual loyalty—a problem that is solved by treating churches not as sovereigns but as important participant groups in civil society. Furthermore, despite the claim that the government can endorse foreign sovereigns, those sovereigns (and their agents) are subject to legal restrictions on the ways in which they can seek to influence domestic politics, especially in the context of campaigns and elections.²³⁵ In many cases, foreign nationals may also be prohibited from holding public office.²³⁶ Drawing out the foreign sovereign analogy to its logical conclusions suggests the imposition of serious legal constraints on clergy and church members—limits of a kind clearly rejected even by today’s most ardent political secularists.²³⁷

Given the drawbacks of the foreign sovereign analogy, perhaps there are other ways to explicate the meaning of freedom of the church for specific areas of the doctrine. Yet without a clear theory of what com-

²³³ Compare Horwitz, *supra* note 5, at 128–29 (arguing that sphere sovereignty theory allows for even-handed funding of religious organizations, but prohibits state endorsement of religion), with Smith, *supra* note 6, at 43–44 (arguing that freedom of the church allows state funding and endorsement of religion).

²³⁴ Smith, *supra* note 6, at 26–27.

²³⁵ See *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2001) (Kavanaugh, J.) (upholding the federal ban on campaign contribution by foreign nationals and stating that “the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process”).

²³⁶ Compare *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (“Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.”), with *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (invalidating state law disqualifying clergy from legislative office).

²³⁷ See, e.g., Robert Audi, *Religious Commitment and Secular Reason* 46 (2000).

prises church sovereignty and what exactly justifies it, doctrinal attempts to draw the relevant boundaries are likely to be highly indeterminate and potentially susceptible to serious abuse.²³⁸ This concern is only heightened by some institutionalists' attempt to displace or subordinate modern conceptions of freedom of conscience, which might otherwise serve to limit the jurisdictional claims of religious groups under one or another of the various institutionalist views described above.

B. Doctrinal Applications

We have already recited the standard doctrinal areas in which religious institutionalism seems most significantly implicated. These include hiring and firing and the regulation of ministers and other church employees; government regulation of church workplaces; property disputes between churches; and, most recently, the controversy over health care mandates. The doctrines that currently cover these controversies are well-known. At stake for proponents of freedom of the church is the theoretical basis for church assertions of immunity in these areas.

Here we ask: Is a general theory of conscientious objection sufficient to protect churches, or is something additional required? By general, we mean applicable to all claims of conscience, not just ones arising from membership in a church or from the practice of religion.²³⁹ In addressing the adequacy of a general theory, we are also asking whether there are cases that raise the problem of competing institutions (church vs. state), instead of competing rights. In other words, are there cases that are not reducible to rights or an aggregation of rights? Any claim of institutional sovereignty turns on this question. We think the answer is no.

1. The Ministerial Exception

Consider first the ministerial exception. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, decided this past Term, the Court held that the religion clauses provide religious organizations with a defense against liability under anti-discrimination laws for employ-

²³⁸ See supra text accompanying note 122.

²³⁹ Another way to think about this is to ask the following questions: (1) What kind of freedom is required to protect churches? (2) What kind of freedom is required to protect religion? (3) What kind of freedom is required to protect conscience? Our contention is that (3) takes care of (2) and (1). For those advocating freedom of the church, neither (2) nor (3) are sufficient. We take this to be the core claim of the institutionalist argument.

ment actions involving ministerial employees.²⁴⁰ Despite an avalanche of recent scholarly commentary both for and against the ministerial exception,²⁴¹ the decision was remarkably uncontroversial. Every Court of Appeals had recognized the exception and no Justice dissented from the decision.²⁴² In protecting the right of religious groups to select clergy, the doctrine has been remarkably stable.²⁴³

We point out this consistency not because we necessarily agree with the outcome of the case. The government plausibly argued that teachers of secular subjects with limited ministerial duties who assert a civil claim that is consistent with the religion's own moral teachings should fall outside the exception.²⁴⁴ Moreover, we are not persuaded by the Court's conclusory effort to distinguish *Employment Division v. Smith*, in which it held that religious activities could be subject to generally applicable neutral laws.²⁴⁵ The civil rights laws certainly are such laws, and the Court's perfunctory argument that those laws do not apply to the hiring of ministers is a significant (and mostly unexplained) exception to the *Smith* principle.²⁴⁶

Nevertheless, *Hosanna-Tabor* is no surprise.²⁴⁷ The ministerial exception fits quite comfortably within the Lockean justification for church self-governance and is fully explainable as a defense of the freedom of conscience for individuals within the church. As the Court recounted in its brief historical discussion, the battles over control of ministerial selection were waged by dissenters against established churches.²⁴⁸ Avoiding state control of the ministry was the goal; the reason to avoid it was

²⁴⁰ 132 S. Ct. 694, 705–06 (2012).

²⁴¹ Compare, e.g., Berg et al., *supra* note 3, at 175–76 (defending broad ministerial exception), and Horwitz, *supra* note 17, at 976 (same), and Christopher C. Lund, In Defense of the Ministerial Exception, 90 N.C. L. Rev. 1 (2011) (same), with Caroline Mala Corbin, The Irony of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 Nw. U. L. Rev. 951, 953–54 (2012) (criticizing the exception), and Leslie C. Griffin, The Sins of *Hosanna-Tabor*, 88 Ind. L.J. (forthcoming 2013) (same).

²⁴² *Hosanna-Tabor*, 132 S. Ct. at 705–06 n.2 (collecting circuit cases).

²⁴³ But see Lund, *supra* note 241, at 22–23 (discussing emerging areas of controversy over the ministerial exception).

²⁴⁴ *Hosanna-Tabor*, 132 S. Ct. at 706, 708.

²⁴⁵ 494 U.S. at 885.

²⁴⁶ *Hosanna-Tabor*, 132 S. Ct. at 697.

²⁴⁷ Cf. Barry, *supra* note 127, at 168 (rejecting the claim that “a religious body should be prohibited from acting on its own doctrines about the criteria for somebody’s being a candidate for the ministry,” and stating, “I am not aware of any political philosopher who has argued for that”).

²⁴⁸ 132 S. Ct. at 703–05.

presumably to protect individuals from religious oppression. By preventing the state from “lending its power to one or the other side in controversies over religious authority or dogma,”²⁴⁹ the religion clauses affirm the principle of religious voluntarism, which leaves to individuals the right to determine for themselves the appropriate form of religious belief and practice. This includes rules adopted to govern their common participation in associations formed to sustain, develop, and advance their faith. Thus, “[t]he 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.”²⁵⁰ Religious voluntarism is at the heart of the exception.

Note how these arguments do not require recourse to the “rights” of churches qua churches, or to sovereignty or separate spheres talk of any kind. Indeed, the *Hosanna-Tabor* Court did not mention “church autonomy” and, in a footnote, rejected the argument that the ministerial exception is jurisdictional.²⁵¹ Moreover, the Court did not adopt a per se rule that all decisions by religious organizations concerning their ministers are unreviewable. Chief Justice Roberts’ opinion is specific in not addressing whistleblower claims, contract claims, tort claims, and “general laws restricting eligibility for employment.”²⁵² Presumably, in cases involving such matters, some sort of balance will have to be struck between the assertion of the privilege to appoint ministers and the importance of contrary state interests.²⁵³ There is no suggestion that churches are completely immune from state regulation in this particular sphere. The freedom to appoint ministers is robust but not absolute.

Nor is this freedom of associational choice exclusive to churches. As the Government, the respondent, and amici argued in their briefs to the Court,²⁵⁴ and as Justice Alito observes in his concur-

²⁴⁹ Id. at 707 (quoting *Smith*, 494 U.S. at 877).

²⁵⁰ Id. at 703.

²⁵¹ Id. at 709 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).

²⁵² Id. at 710.

²⁵³ See Laycock, *Towards a General Theory*, supra note 7, at 1402 (“A church’s legitimate interest in autonomy has few natural limits, but at some point that interest becomes sufficiently attenuated, and the government’s interest in regulation sufficiently strong, that neutral regulation for secular purposes becomes consistent with free exercise.”).

²⁵⁴ See Brief for the Federal Respondent at 12, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Brief for Respondent at 35, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Brief for Law and Religion Professors as Amici Curiae Supporting Respondents at 30, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

rence,²⁵⁵ the ministerial exception is essentially a sub-set of a general right of expressive association. Religious groups may be the “archetype of associations formed for expressive purposes,”²⁵⁶ but they are not the only such associations. *Boy Scouts of America v. Dale*,²⁵⁷ which held that, under certain circumstances, anti-discrimination laws are not applicable to the employment decisions of expressive associations, is the clearest statement of that principle.²⁵⁸ The First Amendment generally protects associational activity, including religious associational activity.²⁵⁹ Again, this is not to say that *Boy Scouts* is rightly decided, only that it provides a general principle of conscientious objection.

Of course, the Court demurred when offered the opportunity to use the more general constitutional principle rather than a religion-specific one. Chief Justice Roberts’ opinion dismisses the argument from freedom of association on textual grounds.²⁶⁰ Obviously, he points out, the religion clauses deal with *religious* groups. But while the constitutional text might be a constraint, it is not a justification. *Boy Scouts* and *Hosanna-Tabor* appear to be justified by a similar set of arguments and are grounded in a similar concern for freedom of conscience. Whether these cases are rightly or wrongly decided, they do offer a non-religion-specific justification for group autonomy. The ministerial exception does not require a separate account of sovereign spheres or freedom of the church.

Here one might argue that freedom of conscience cannot explain the full scope of the existing doctrine.²⁶¹ This objection begins with the view

²⁵⁵ *Hosanna-Tabor*, 132 S. Ct. at 712-13 (Alito, J., concurring) (“[T]he First Amendment ‘gives special solicitude to the rights of religious organizations,’ but our expressive-association cases are nevertheless useful in pointing out what those essential rights are.” (citations omitted) (quoting *id.* at 706 (majority opinion))).

²⁵⁶ *Id.* at 713.

²⁵⁷ 530 U.S. 640 (2000).

²⁵⁸ *Id.* at 648 (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express The forced inclusion of an unwanted person in a group infringes the group’s expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”).

²⁵⁹ See Eisgruber & Sager, *supra* note 164, at 201; Corbin, *supra* note 128, at 1974-75 (recognizing that religious groups have rights of free association to select clergy consistent with their viewpoints).

²⁶⁰ *Hosanna-Tabor*, 132 S. Ct. at 706.

²⁶¹ See, e.g., Lund, *supra* note 241, at 34 (“[C]ourts and commentators have been wrong to limit the ministerial exception to the idea of religious conscience. Some of the strongest reasons for exempting religious organizations from the anti-discrimination laws have nothing to

that freedom of conscience can only be invoked in particular circumstances, namely, when believers claim that the law requires them to act contrary to some religious duty or obligation. Yet the ministerial exception requires no such showing. Religious groups are immune from liability in suits brought against them by ministers regardless of the reasons for their adverse employment actions. In other words, even if churches acted without any regard for their own requirements, they would still be protected. Obviously, then—goes the argument—conscience cannot explain the breadth of the immunity provided by the ministerial exception. Something else must be doing the work.²⁶²

We find this objection unpersuasive. First, and most importantly, it rests on an impoverished conception of the freedom of conscience. On this view, conscience is only implicated when a person is forced to choose between following a moral or religious duty and following the law. But, of course, the moral and religious duties that provide the content of one's conscience are not created *ex nihilo*. They are developed and refined through our many and complex interactions and relationships within various groups, especially including expressive associations.²⁶³ When the state regulates the internal affairs of those groups, it disrupts the process by which people come together in various ways to shape the content of their moral and religious views—which is to say it interferes with the *formation* of their consciences. In some cases, the state may have sufficient reason to justify such interference. But as we have been arguing, in a liberal society our presumption is generally against such intrusions, at least when associations are premised on voluntary participation.

In addition to recognizing this relational aspect of the freedom of conscience,²⁶⁴ a further reply to the doctrinal objection is that the expansive

do with conscience at all Even when churches agree with the employment discrimination principles in question, there are good reasons to exempt them.”).

²⁶² See *id.* at 31.

²⁶³ See Shiffrin, *supra* note 207, at 865 (“[A]ssociations and social connections are places where ideas are formed, shared, developed, and come to influence character Ideas are tested, developed, and accepted or rejected within social settings. The views one considers and comes to have are heavily influenced by who one interacts with and especially who one trusts and cares for.”); see also Nelson, *supra* note 197, at 12–19 (developing a social theory of conscience).

²⁶⁴ See Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* 44 (2010) (“The conditions necessary for conscience’s flourishing also encompass the processes of formation, articulation, and implementation, and these will generally occur in the context of relationships.”).

scope of the ministerial exception is justified largely on prophylactic grounds. As proponents of the ministerial exception have emphasized, litigation in the employment context often involves judicial inquiries into mixed motives, which devolve predictably into determinations about the plausibility of competing religious and moral views.²⁶⁵ This, of course, returns us immediately to concerns about state interference with the processes of conscience formation. Thus, to the extent the ministerial exception has a prophylactic aspect built into it, the freedom of conscience and the social conditions for its development are ultimately what the exception, however broadly construed, is meant to protect.

2. *Labor Regulations*

In addition to anti-discrimination laws, which are often at the center of religious employment disputes, the government may also attempt to impose standard labor regulations (for example, wage and hour laws, safety protocols, etc.) on churches as institutional employers. But again, this fact does not make churches unique. Employers can be individuals or groups or corporate entities. Some of these entities will assert an expressive or ideological purpose and some will not. Churches may be affected in their expressive missions by neutral and generally applicable employment laws—but that is no different from any other expressive association.

While no one seems to be advocating full immunity for church employers from all labor and employment laws, and while *Hosanna-Tabor* explicitly excludes these laws from its holding,²⁶⁶ some scholars have advocated for a fairly robust sphere of independence.²⁶⁷ Consent is sometimes used to explain this constitutional immunity.²⁶⁸ By treating a church's employees as akin (though not identical) to members of the church, they can be brought within the Lockean justification for associational self-governance. Claims for group autonomy are always at their strongest when voluntary associations are regulating their own membership.

²⁶⁵ See Brief for Petitioner at 56–57, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Lund, *supra* note 241, at 55–56.

²⁶⁶ *Hosanna-Tabor*, 132 S. Ct. at 710.

²⁶⁷ See Laycock, *Towards a General Theory*, *supra* note 7, at 1414, 1417.

²⁶⁸ See *id.* at 1405 (“Voluntary affiliation with the group is the premise on which group autonomy depends.”).

The problem is that consent also operates outside of the church context. And so relying on consent does not explain why religious employers are permitted to require that their employees waive generally-applicable labor protections while non-religious employers are not. The principle of consent cannot justify this asymmetry in the law.

If religious employers are somehow distinctive, however, consent coupled with that fact might be sufficient to generate special exemptions from labor laws. Religious employers are said to be different because they are engaged in a religious enterprise. And presumably we can capture that fact by measuring the intensity of the employees' religious responsibilities.²⁶⁹ Here, efforts are made to distinguish categories of employees: those who work for church-owned (non-religious) businesses, or non-religious support personnel in "intrinsically religious operations," or employees with "intrinsically religious responsibilities."²⁷⁰ This is a kind of "attenuation" inquiry. Employees that are closer to the expressive mission of the group can expect less government intrusion. Employees further away from the expressive mission of the group can expect more.²⁷¹

Yet this attenuation inquiry could easily be applied to non-religious employers. There is no reason that firms or corporations with expressive or conscientious missions (for example, newspapers or political parties) cannot also offer good reasons to be immune from employment laws. What seems to be operative in these cases—and what perhaps makes churches different from other expressive associations—is the *scope* of the asserted connection between religious doctrine and employment criteria. Some churches claim that *everything* they do—whether operating a homeless shelter, running an amusement park, or washing the church floor—is infused with religious significance.²⁷² But this assertion is not made by all churches, and it is certainly not an *intrinsic* difference be-

²⁶⁹ See *id.* at 1409–11 (describing religious intensity of regulated activity as one factor in balancing church autonomy against state interests). But cf. Laycock, Church Autonomy, *supra* note 7, at 266–67 (indicating that “[none] of the factors noted were necessarily wrong,” but now favoring categorical balancing for specific types of activity over “all-things-considered global balancing”).

²⁷⁰ See Laycock, Towards a General Theory, *supra* note 7, at 1410.

²⁷¹ See Laycock, Church Autonomy, *supra* note 7, at 267 (“[A]ctivities that judges perceive to be religiously significant get very strong protection, and other activities get no protection.”).

²⁷² See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 330 (1987) (upholding Title VII exemption for religious employment discrimination as applied to building engineer of a gymnasium).

tween churches and other expressive associations. It is just a claim made by particular churches, and one that—as we have argued above—militates against religious institutionalism, not in favor of it.²⁷³

Of course, exemptions from labor laws could be justified by abandoning the rule in *Smith*, which rejects judicially-created exemptions from otherwise neutral and generally applicable laws, in favor of something like the regime under *Sherbert v. Verner*,²⁷⁴ which requires courts to determine whether the state has compelling interests sufficient to overcome claims of conscience. For example, if a religious group (or individual, for that matter) has a conscientious objection to paying an employee's Social Security tax, the court could balance the free exercise rights of the group (or individual) against the state's asserted interests.²⁷⁵

Whether balancing leads to non-interference or exemptions for religious groups will be a matter of case-by-case—or perhaps more categorical—decision-making. Either way, however, the traditional approach to exemptions involves weighing rights and interests. It is not a contest between competing sovereigns, or competing institutions. If there are serious rights of conscience at stake (and there very well might be) and the government interest is not particularly strong, then an accommodation may be warranted. This approach applies to a religious individual who hires a person to mow her lawn, to an ideologically committed business that hires hundreds of employees, to a religious hospital, or to a non-religious non-profit. A general account of conscientious objection (even if it results in a *Smith*-style rejection of the claim) is the appropriate way to approach these questions. Unless all churches are divinely ordained or they all contribute distinctively to the exercise of conscience, their special categorical treatment has little support.

3. Church Property

As with the ministerial exception, the principle at the core of church property doctrine—which holds that courts should avoid making theological determinations in resolving disputes over church assets—has

²⁷³ See supra Section II.C.

²⁷⁴ 374 U.S. 398, 406 (1963) (applying strict scrutiny to claims for religious accommodation in the employment benefit context).

²⁷⁵ See, e.g., *United States v. Lee*, 455 U.S. 252, 254 (1982) (holding that Amish employer was not entitled to constitutional exemption from requirement to pay Social Security taxes).

been stable for quite some time,²⁷⁶ even if the doctrinal manifestations of that principle have evolved from a rule of deference to religious authority to an approach based on “neutral principles” of law.²⁷⁷ The ministerial exception and the church property cases are closely related. Again, the purpose of judicial abstention is to avoid forcing the state to pick sides in a religious dispute. By favoring one side over the other on theological grounds, the state would suppress one church to the benefit of another, undermining religious voluntarism and violating individual rights of conscience.

The property cases all involve collective ownership, and one could argue that the cases are “institutional” in that sense. But that would be mostly meaningless. The fact that one or more persons, organized in a corporation, association, entity, or group, own property collectively is unremarkable. There is nothing unique about religious groups in this regard.

What is unique about the property cases is that group identity is itself at issue. Both parties are asking the court to resolve the same question: Who belongs to the (rightful) church? That question is what the doctrine seeks to avoid, for the group’s identity should be determined exclusively by individuals within the association, coming together as consenting members—not by the state.

This principle is obviously consistent with the Lockean justification for religious autonomy and can be easily encompassed by a more general principle. The church property cases are really membership cases.

²⁷⁶ But see Michael A. Helfand, *Litigating Religion*, 92 B.U. L. Rev. 493, 535–37 (2013) (arguing that the “religious question” doctrine was invented by Justice Brennan in the 1960s). We are not persuaded of this doctrine’s novelty. The notion that the civil magistrate is incompetent to determine theological questions is ancient, going back at least as far as Locke. Helfand acknowledges the influence of Locke’s voluntarism on the Court’s church property cases, *id.* at 525, but Locke’s influence extends to the justification for voluntarism, which includes a set of claims about the magistrate’s fallibility and lack of authority in deciding theological matters. See Schwartzman, *supra* note 169, at 684–85 (discussing Locke’s arguments from equal authority and fallibility). Although we cannot develop the point here, we believe the early church property cases are easily read as reflecting these more fundamental claims about the limited power of the magistrate. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 732 (1871) (“The decisions of ecclesiastical courts . . . are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be *incompetent* judges of matters of faith, discipline, and doctrine.” (emphasis added) (quoting *German Reformed Church v. Seibert*, 3 Pa. 282, 291 (1846))).

²⁷⁷ See Laycock, *Church Autonomy*, *supra* note 7, at 254–59 (discussing changes in church property and labor relations cases).

The state generally does not dictate the contours of group membership for voluntary expressive associations, either through compelled inclusion, forced expulsion, or forced revelation. As the Court concluded in *Watson v. Jones*, “[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”²⁷⁸ The rights of association and conscience do all of the work here; the Court’s reluctance to define the relevant group—to pick and choose members—is the reason for avoiding theological determinations.

Of course, the principle of non-interference with the membership of voluntary associations always has limits. Non-interference ends when membership has implications for individuals’ economic or political citizenship, that is when the voluntary association is exercising more than merely private power.²⁷⁹ In such cases, the interests of the membership and the individual seeking appointment with the aid of the state must be balanced. But when separation of the voluntary association and the civil and economic rights of individuals is guaranteed—as (in theory) it is for religious associations—the balance works in favor of respecting associational autonomy.

4. *Contraception Mandates*

The recent controversy over the federal government’s requirement that certain religious institutions, including universities and hospitals, provide contraception coverage to their employees and students might be thought to implicate matters of church autonomy.²⁸⁰ Here again, however, the fact that large-scale religious institutions are involved does not alter the analysis. The claim to be free from state regulation is still a free exercise claim, and the church plaintiffs are still seeking exemptions

²⁷⁸ 80 U.S. at 728-29.

²⁷⁹ This may have helped to motivate Justice O’Connor’s view in *Roberts v. United States Jaycees*, 468 U.S. 609, 633-34 (1984) (O’Connor, J., concurring), which distinguished between expressive and commercial associations. When groups form for commercial purposes and significantly limit others’ economic chances through discriminatory means, the state has stronger reason to intervene for the purpose of promoting equality of opportunity. See Shiffrin, *supra* note 207, at 877 (“[R]egulation to promote inclusive membership is justified when applied to associations whose primary purpose is participation in the commercial milieu because of the central importance of fair access to material resources and mechanisms of power.”).

²⁸⁰ See *supra* note 4.

from what the government claims are otherwise neutral and generally applicable laws.²⁸¹ Unless churches have their own consciences (and we have already argued that they do not), the institutional context does not add anything to the plaintiffs' claims. Even if it turns out that religious groups are entitled to exemptions from the mandate, either under the Religious Freedom Restoration Act or under the religion clauses, the reason will be that the individuals composing those groups have been burdened in their free exercise of religion.

Ultimately the argument for institutional immunity has to be that through the state's regulation of the health care insurance market, it impinges on some protected sphere of individual autonomy, privacy, thought, or belief. That protected sphere includes a right of conscience, which encompasses determining for oneself matters of (religious) belief. That an institution is implicated in that exercise does not alter the underlying claim. Indeed, in the absence of some concern for an individual's freedom of conscience, what could the institutional interest possibly be?

CONCLUSION

The institutional turn in religion clause scholarship asserts the unique constitutional status of the "church" as a conceptual category for understanding religious liberty. There are weaker and stronger forms of this argument, but all appear to coalesce around the view that religious institutions should be treated specially by the state. The argument for special treatment is grounded in a number of different but often overlapping claims: the church is constitutive of and necessary to protect the religious freedom of individuals; it is the historical and conceptual limit on the power of the secular state; it promotes civil society; it is a sovereign; it is an independent rights-bearer. These kinds of claims require justification: What interests do churches have independent of their membership and—when there is not an underlying concern for an individual's liberty of conscience—why should we want to protect them? We have argued that the protection of conscience—and of religious freedom—does not require corporate rights, sovereign spheres, jurisdictional sov-

²⁸¹ Whether the so-called "contraception mandate" is, in fact, neutral and generally applicable is a matter of contention. We need not (and do not) enter into this aspect of the controversy to make our point, which is that the appropriate doctrinal (and normative) analysis focuses entirely on free exercise, which is centrally concerned with individual claims of conscience.

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ereignty, or church autonomy, understood as an independent institutional right that runs to churches qua churches.

We do not mean to imply that religious institutions are not important or that they do not form a part of civil society. But we do resist a narrative of religious freedom that divides society into organic spheres, that mislabels voluntary associations as sovereigns, or that treats institutions as conceptually prior to the people who participate in them. As we have argued, these claims are mistaken and unnecessary. Moreover, they pose dangers to religious freedom, both for churches and individuals.

Religious institutionalism might appear attractive in the context of a constitutional regime that does not provide special protection for the free exercise of religion. If the law does not allow sufficient accommodations for individuals, maybe there is yet room to protect institutions—and, a fortiori, those who are members of them. Although the motivation for this view is understandable, we remain skeptical of it. The history that has been invoked to support the institutional turn should inspire caution rather than confidence in the concept of freedom of the church. The meaning of that concept remains deeply ambiguous, and, in the end, we are not persuaded that it survives the many profound social and political changes that have occurred since its inception. Some concepts cannot be translated from one historical epoch to another without loss. And in this case, even if it were possible, there are good reasons to refrain from trying. Freedom of conscience is not an exhausted concept to be discarded in the face of increasing diversity and demands for broader social and political equality. It needs continual reinterpretation and support, both from the state and from voluntary associations (religious and not). But displacing it, let alone replacing it, is a radical proposal and is, in our view, unjustified.