Churches as First Amendment Institutions: Of Sovereignty and Spheres

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This Article offers a novel way of approaching the role of churches and other religious entities within the framework of the First Amendment. Beyond that, it offers a broader organizing structure for the legal treatment of "First Amendment institutions"—entities whose fundamental role in shaping and contributing to public discourse entitles them to substantial autonomy in organizing and regulating themselves. Drawing on the work of the neo-Calvinist writer Abraham Kuyper, it encourages us to think about churches, and other First Amendment entities, as "sovereign spheres": non-state institutions whose authority is ultimately coequal to that of the state. Under this model, a variety of spheres, including churches and other non-state institutions, enjoy substantial legal autonomy to carry out their sovereign purposes. The state is limited in its authority to intervene in these spheres. However, a sphere sovereignty conception of the legal order retains a vital role for the state, which mediates between the spheres and ensures that they do not abuse their power with respect to the individuals subject to their authority.

The Article provides a detailed introduction to both the general field of First Amendment institutionalism and the conception of sphere sovereignty offered by Kuyper. It argues that when these two seemingly disparate projects meet, the combination offers a richer understanding of our constitutional structure and the role of First Amendment institutions within it. It also argues that sphere sovereignty is closely related to many aspects of our existing constitutional history and to constitutional thought about the relationship between the state and non-state associations more generally. Finally, it offers a number of applications of this approach to current church-state doctrine, demonstrating that a sphere sovereignty-oriented approach to the treatment of churches as First Amendment institutions offers a legitimate, consistent, and conceptually and doctrinally valuable way of resolving some of the most pressing issues in the law of church and state.

> [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.
> — Justice Hugo Black[1]

> [The First Amendment] acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the

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[1] McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

> state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself.
> — Max L. Stackhouse[2]

I. INTRODUCTION

Movements need metaphors. Every age, in seeking "not merely the solutions to problems, but [also] the kinds of problems which are to be conceptualized as requiring solution,"[3] requires its own imagery and its own way of understanding and resolving the issues that beset it. Metaphors "shape as well as create political discourse."[4]

The United States Constitution and its constituent parts have been fertile ground for the production of metaphors.[5] The First Amendment has been a particularly fruitful source of metaphoric argument. Most notoriously, the Speech Clause has been the staging ground for an ongoing debate over the usefulness of the metaphor of the "marketplace of ideas."[6]

Metaphors are especially thick in the realm of law and religion. The most important and controversial organizing metaphor for understanding the interaction of church and state has been Thomas Jefferson's description of the Establishment Clause as "building a wall of separation between Church and State."[7] Scholars have argued over whether the "wall of separation" is best understood in Jefferson's largely secularly oriented sense, or in the religiously oriented sense of Roger Williams, who wrote of the dangers to religion of "open[ing] a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world."[8] And they have

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[2] Max L. Stackhouse, *Religion, Rights, and the Constitution*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

[3] J.G.A. POCOCK, POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 13 (1989), *quoted in* Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 HARV. L. REV. 1832, 1833 (1997).

[4] Note, *supra* note 3, at 1833.

[5] *See, e.g.*, Laurence H. Tribe, *The Idea of the Constitution: A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170 (1987).

[6] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). The phrase is generally traced back to *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of thought to get itself accepted in the competition of the market."). For critical discussion of the phrase, see, for example, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997). *See also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 821 (2008) (abstract) ("If any area of constitutional law has been defined by a metaphor, the First Amendment is the area, and the 'marketplace of ideas' is the metaphor.").

[7] Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* MICHAEL W. MCCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 42 (2d ed. 2006); *see* Daniel L. Dreisbach, *Origins and Dangers of the "Wall of Separation" Between Church and State*, IMPRIMIS, Oct. 2006, at 1 ("No metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson's 'wall of separation between church and state.'").

[8] ROGER WILLIAMS, MR. COTTON'S LETTER EXAMINED AND ANSWERED (1644), *reprinted in* 1 COMPLETE WRITINGS OF ROGER WILLIAMS, at 313, 319 (Reuben Aldridge Guild & James

argued over its usefulness for resolving conflicts between religious entities and the state.[9] Whatever one's position in this debate, it is easy to sympathize with the view that the "wall of separation" metaphor has become a figurative barrier to a deeper understanding of the rich and complex relationship between church and state.

In this Article, I seek a new metaphor. In so doing, I reach for a new way of thinking about issues of law and religion. In particular, I focus on an increasingly important topic within the broader field: the role and constitutional status of religious entities.

The area of constitutional law governing religious entities is commonly referred to as "church autonomy" doctrine.[10] Church autonomy has become an increasingly important site of contestation in the law of the Religion Clauses. Calling the question of church self-governance "our day's most pressing religious freedom challenge," Professor Richard Garnett has insisted that "the church-autonomy question . . . is on the front line" of religious freedom litigation.[11] Similarly, Professor Gerard Bradley has called the field "the least developed, most confused of our church-state analyses, both in the law and in informed commentary," and argued that church autonomy "should be the flagship issue of church and state."[12] Few writing on the issue today doubt that it is an area badly in need of revision and reconciliation. A literal re-vision—a new way of seeing a vital but confused area of law—is what I offer here.

The same metaphor may also enhance our understanding of an emerging field of constitutional theory in general, and the First Amendment in particular. That field, "First Amendment institutionalism,"[13] takes as its central idea that First Amendment doctrine goes astray when it takes an "in-

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Hammond Trumbull eds., 1963). Williams's version of the wall metaphor was most prominently retrieved and examined in MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (1965).

[9] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 104-07 (1985) (Rehnquist, J., dissenting) (analyzing scholarly debate).

[10] *See, e.g.*, Angela C. Carmella, *Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse About Religion Matters*, 29 SETON HALL LEGIS. J. 435, 442 (2005); Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 412 (2007); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1592 [hereinafter Esbeck, *Dissent and Disestablishment*]; 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 (1981).

[11] Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 521 (2006-2007) [hereinafter Garnett, *Pluralism, Dialogue, and Freedom*]. *See also* Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281, 292 (2007) [hereinafter Garnett, *Church, State, and the Practice of Love*].

[12] Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1061 (1989).

[13] *See, e.g.*, Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1518 (2007) [hereinafter Horwitz, *Universities as First Amendment Institutions*].

stitutional[ly] agnostic[ ]" position toward speech controversies, one that shows little "regard for the identity of the speaker or the institutional environment in which the speech occurs."[14] It argues that courts should adopt an approach to First Amendment issues that respects the vital role that various First Amendment institutions play in contributing to the formation of public discourse.[15]

For several reasons, religious entities fit naturally into the study of First Amendment institutions. First and most obviously, religious entities, like the press,[16] are recognized in the text of the Constitution itself.[17] Second, there can be little doubt that religious entities—churches, religious charities, and a variety of other bodies—have played a central role in our history[18] and continue to do so today. The growth in scope of both religious activity and governmental power ensure that religious entities will be increasingly important, and that they will be in greater tension with various regulatory authorities.[19]

Finally, the Supreme Court's increasingly neutrality-oriented approach to the Religion Clauses, which is exemplified by *Employment Division v. Smith*,[20] raises the question whether neutrality simplifies the Court's constitutional doctrine. Or do the courts, in seeking a seemingly elegant and uniform approach, cause more problems by "miss[ing], or mis-describ[ing], the role of institutions and institutional context" in religious life as it is experienced on a real-world basis?[21] The incoherence in this area makes it particularly ripe for exploration within the framework of First Amendment institutionalism. There are, in short, any number of reasons why students of First Amendment institutionalism should concern themselves with religious entities—and, conversely, why scholars who are interested in the legal status of religious entities should consider the lessons of First Amendment institutionalism.

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[14] Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 120 (1998) [hereinafter Schauer, *Principles*].

[15] *See, e.g.*, Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1142 (2008) [hereinafter Horwitz, *Three Faces of Deference*].

[16] *See generally* Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45 (2006) [hereinafter Horwitz, *[Blog]*] (examining the press as a First Amendment institution and exploring the relevance of this concept to the emergence of blogs and other new-media entities).

[17] U.S. CONST. amend. I.

[18] *See, e.g.*, Esbeck, *Dissent and Disestablishment*, *supra* note 10.

[19] *See* Thomas C. Berg, *Religious Structures Under the Federal Constitution*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 129, 129 (James A. Serritella et al. eds., 2006) ("Churches and other religious organizations are bound to interact with government. The conditions of modern America ensure that."); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 39 (2002).

[20] 494 U.S. 872 (1990).

[21] Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 284 (2008) [hereinafter Garnett, *Do Churches Matter?*].

As yet, however, this project has barely begun. Although a number of scholars have written powerfully on the nature of religious entities and the role of religious autonomy in the Religion Clauses, their insights are not tied to a broader understanding of the role played by a variety of First Amendment institutions.[22] First Amendment institutionalists, on the other hand, have not yet turned their full attention specifically to religious entities. Professor Richard Garnett has made an ambitious effort to begin applying the lessons of First Amendment institutionalism to religious entities.[23] Although his contributions to this area are essential, he modestly acknowledges that "[a] lot of work remains to be done."[24] This Article aims to push the project forward.

The primary source for the metaphor I offer here lies in neither American nor English constitutional thought. It is instead based in the theology and politics of nineteenth-century Holland. Its primary author is a figure who may be somewhat obscure to the American legal academy, but who is well known beyond it: the neo-Calvinist Dutch theologian, journalist, and politician Abraham Kuyper. The metaphor derives from Kuyper's signature intellectual contribution to the study of religion and politics—his doctrine of "*Souvereiniteit in Eigen Kring*," or "sphere sovereignty."

Sphere sovereignty is the view that human life is "differentiated into distinct spheres," each featuring "institutions with authority structures specific to those spheres."[25] Under this theory, these institutions are literally sovereign within their own spheres. Each of these spheres, which include religious entities but embrace others besides, has its "own God-given authority. [None] is subordinate to the other."[26] These institutions serve as a counterweight to the state, ensuring that it "may never become an octopus, which stifles the whole of life."[27] At the same time, they are themselves

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[22] *See, e.g.*, Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 [hereinafter Brady, *Religious Organizations and Free Exercise*]; Esbeck, *Dissent and Disestablishment*, *supra* note 10.

[23] *See* Garnett, *Do Churches Matter?*, *supra* note 21; 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*]; *see also* Garnett, *Church, State, and the Practice of Love*, *supra* note 11; Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007); Garnett, *Pluralism, Dialogue, and Freedom*, *supra* note 11.

[24] Garnett, *Do Churches Matter?*, *supra* note 21, at 284.

[25] Nicholas Wolterstorff, Abraham Kuyper on the Limited Authority of Church and State, Presentation at Federalist Society Conference: The Things That Are Not Caesar's: Religious Organizations as a Check on the Authoritarian Pretensions of the State 7 (Mar. 14, 2008) (transcript on file with the author) [hereinafter Wolterstorff, The Things That Are Not Caesar's]. I am grateful to Professor Wolterstorff for sharing this illuminating paper with me.

[26] Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486, 488 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) [hereinafter Cochran, *Tort Law and Intermediate Communities*].

[27] ABRAHAM KUYPER, LECTURES ON CALVINISM 96 (photo. reprint 2007) (1931) [hereinafter KUYPER, LECTURES].

limited to the proper scope of their authority.[28] Kuyper's sphere sovereignty approach thus does not treat church and state as antagonists. Rather, it sees a profusion of organically developed institutions and associations, including both church and state, operating within their own authority structures and barred from intruding into one another's realms. Although this appears to be a theory of a limited state,[29] it is also a theory of the limits of religious entities. Within this framework, the state plays a central role in maintaining boundaries and mediating between the various spheres.[30]

The theory of sphere sovereignty requires elaboration and unpacking. But this brief preview should be suggestive enough of the contribution that Kuyperian sphere sovereignty might make to an understanding of church-state relations and to the broader universe of First Amendment institutions.

The plan of the Article is as follows. In Part II, I offer a brief description of the project of First Amendment institutionalism. In Part III, I discuss Kuyper's theory of sphere sovereignty and note its similarity to some aspects of early and later American political and constitutional thought. Part IV ties the preceding sections together by assessing the ways in which sphere sovereignty might contribute to our understanding of churches as First Amendment institutions. Part V fills in the picture with a series of applications, examining some of the doctrinal implications of treating churches as "sovereign spheres" or First Amendment institutions. Part VI offers a brief conclusion.

II. First Amendment Institutionalism[31]

First Amendment institutionalism begins with an observation about the distinction between policy and principle,[32] or between legal and prelegal categories.[33] At times, "law's categories are parasitic on the categories of the

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[28] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 11 ("Kuyper thought that in a modern well-functioning society, the authority of an organization should be limited to activities within one particular sphere.").

[29] Some modern writers have found Kuyper appealing precisely because he seems to call for a relatively weak state. *See, e.g.*, Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 Cornell L. Rev. 856, 895 (1997). Although it is true that Kuyper's concept of sphere sovereignty opposes a totalizing state, it is far from clear that the state, in Kuyper's view, cannot be vigorous or activist. *See, e.g.*, Richard J. Mouw, *Some Reflections on Sphere Sovereignty*, *in* Religion, Pluralism, and Public Life: Abraham Kuyper's Legacy for the Twenty-First Century 87, 89 (Luis E. Lugo ed., 2000) ("[O]ne can make room [in Kuyper's description of the state] . . . for a fairly energetic interventionist pattern by government.").

[30] *See, e.g.*, Kuyper, Lectures, *supra* note 27, at 92-97.

[31] Much of what follows in this Part is spelled out at considerably greater length in Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. Rev. 461 (2005) [hereinafter Horwitz, Grutter*'s First Amendment*]; Horwitz, *Universities as First Amendment Institutions*, *supra* note 13; and Horwitz, *Three Faces of Deference*, *supra* note 15.

[32] *See, e.g.*, Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 564; Schauer, *Principles*, *supra* note 14, at 112.

[33] *See, e.g.*, Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. Rev. 1747, 1748-49 (2007) [hereinafter Schauer, *Institutions*].

prelegal and extralegal world."[34] Frequently, however, the law reaches "real things only indirectly, through categories, abstractions and doctrines."[35] The law's tendency is to seek to understand the world in strictly *legal* terms,[36] viewing the law through a lens of "juridical categories"[37] in which all speakers and all factual questions are translated into a series of purely legal inquiries.[38] In short, law's tendency is to seek an acontextual way of understanding and carving up the universe.

This tendency is especially apparent in the law of the First Amendment. Religion Clause doctrines, such as the Court's ruling in *Employment Division v. Smith*, which I noted above, are but one example of this tendency toward acontextuality and institution-agnosticism in First Amendment doctrine. It is apparent, too, in the Supreme Court's refusal to grant special privileges to the press,[39] despite the embarrassing presence in the constitutional text of the Press Clause. It is evident in the First Amendment doctrine of content neutrality, "the cornerstone of the Supreme Court's First Amendment jurisprudence,"[40] which by definition focuses on the content of the speech and not the institutional identity of the speaker. Indeed, this "reluctance with respect to institutional categories" replicates itself across a host of constitutional doctrines.[41] However, we can for now focus in particular on the Court's "pattern of treating First Amendment doctrine as institutionally blind."[42]

This institutional blindness has some salutary aspects for First Amendment doctrine. For example, the primary message of content neutrality doctrine is that "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[43] It makes government, not the speaker, the protagonist of the First Amendment drama.[44] If our concern is with discriminatory or censorious state action, then it might make sense to craft a doctrine that is institutionally insensitive. We would not want government to use the speaker's identity as a proxy for hostility to its message,[45] or to favor and disfavor particular institutions out of sympathy or antipathy to those institutions, rather than out of some more thoughtful and

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[34] *Id.* at 1748.

[35] Garnett, *Do Churches Matter?*, *supra* note 21, at 275.

[36] Horwitz, *Three Faces of Deference*, *supra* note 15, at 1063.

[37] Schauer, *Principles*, *supra* note 14, at 119; *see also* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. Rev. 773, 781-85 (1998).

[38] *See* Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 564.

[39] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972).

[40] Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill Rts. J. 647, 650 (2002).

[41] Schauer, *Institutions*, *supra* note 33, at 1756.

[42] *Id.* at 1754.

[43] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[44] *See, e.g.*, David McGowan, *Approximately Speech*, 89 Minn. L. Rev. 1416, 1423 (2005) (describing the view that "the intention of the government is the key to free speech analysis" as being "the most prominent free speech intuition").

[45] *See* Dale Carpenter, *The Value of Institutions and the Value of Free Speech*, 89 Minn. L. Rev. 1407, 1409-10 (2005).

sensitive analysis of their social role.[46] Every such "line[ ] of demarcation" might be "an opening for the dangers of government partisanship, entrenchment, and incompetence."[47]

At the same time, the government is not the only protagonist in First Amendment doctrine. First Amendment speakers, in all their obvious diversity, are also a vital part of the equation. And here, institutional blindness may create significant practical and doctrinal problems. Practically, it often may not be the case that all speakers are the same for all purposes. At times, it may matter that speech takes place in a particular institutional setting. As the Supreme Court observed in *Grutter v. Bollinger*,[48] "context matters."[49] Thus, the broad and largely institutionally insensitive categories of public forum doctrine may be "out of place" in the context of cases involving public libraries,[50] as well as in cases involving public broadcasters.[51] Or the content neutrality doctrine, which was meant precisely to apply across the panoply of human expression, may offer a poor fit where the speaker in question is a public arts funding body whose existence depends upon the making of content distinctions.[52]

In these circumstances, the practical difficulties lead ineluctably to doctrinal difficulties. The distinctions between various speech contexts and institutions may lead courts to be over- or under-protective of particular institutions in ways that do not serve either First Amendment values or the broader world of public discourse.[53] Another possibility is that this acontextual doctrinal approach will collapse when applied to a factual context.[54] The courts will bend and distort existing doctrine to take account of institutional variation, while still trying to preserve some sense of their attachment to acontextual legal categories. The result will be (and already is in the view of many) increasing doctrinal incoherence.[55]

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[46] *See id.* at 1410-11.

[47] *Id.* at 1411. Some writers have argued that this danger has already manifested itself in the "extreme institutional tailoring" of free speech doctrine with respect to prisons, workplaces, and public schools. *See* Scott A. Moss, *Students and Workers and Prisoners – Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine,* 54 UCLA L. REV. 1635, 1635 (2007); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999).

[48] 539 U.S. 306 (2003).

[49] *Id.* at 327.

[50] United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003).

[51] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-73 (1998).

[52] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[53] *See* Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1512; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270-73 (2005) [hereinafter Schauer, *Institutional First Amendment*].

[54] *See* Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1507.

[55] *See id.* at 1508-09; Schauer, *Institutional First Amendment*, *supra* note 53, at 1270-73; Schauer, *Principles*, *supra* note 14, at 86-87 (noting "an intractable tension between free speech theory [in general] and judicial methodology [in particular cases]" and suggesting that "the increasingly obvious phenomenon of institutional differentiation will prove progressively injurious to the Court's efforts to confront the full range of free speech issues"); *see also* Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250-51

First Amendment institutionalism seeks a way out of this fix by encouraging the rebuilding of First Amendment doctrine. It counsels a "bottom-up, institutionally sensitive approach that openly 'takes . . . institutions seriously.'"[56] It suggests that "in numerous areas of constitutional doctrine an institution-specific approach might be preferable to the categorical approach that now exists, or might at least be taken more seriously than it has been up to now."[57] To put it more theoretically, it argues that First Amendment doctrine must "generate a perspicuous understanding of the necessary material and normative dimensions of . . . [various] forms of social order and of the relationship of speech to these values and dimensions."[58] One implication of this approach is that the courts would be more willing to openly acknowledge that particular speech institutions—universities, the press, religious associations, libraries, and perhaps others—"play a fundamental role in our system of free speech."[59] They would understand that some speech institutions are key contributors to our system of public discourse and that "the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of," these institutions.[60]

The justification for giving special recognition to particular First Amendment institutions is ultimately both instrumental and intrinsic. Instrumentally, it argues that these institutions are important sites for the formation and promotion of public discourse; valuing these institutions thus enhances public discourse and, ultimately, freedom of speech for everyone. Intrinsically, it argues that these institutions are natural features of the social landscape and that the courts would do well to recognize this fundamental fact.[61]

(1995) (arguing that the Court's free speech doctrine is "internal[ly] incoheren[t]" and "will continue to flounder until it focuses clearly on the nature and constitutional significance of [particular social] practices").

[56] Horwitz, *Three Faces of Deference*, *supra* note 15, at 1142 (quoting Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 589). I take no firm stand on whether the doctrine that results would be highly particularistic and anti-formalist, or whether it would be as formalist as the current, institutionally agnostic version of First Amendment doctrine with different and more institutionally aware formal categories. I take it that Professor Schauer would prefer the latter. *See* Schauer, *Institutions*, *supra* note 33, at 1763-64. My own inclinations tend somewhat toward the former approach. What matters for both of our purposes is that the line-drawing that courts should engage in ought to be more institutionally sensitive and less reliant on purely legal categories.

[57] Schauer, *Institutions*, *supra* note 33, at 1758.

[58] Post, *supra* note 55, at 1280-81.

[59] Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 589. I should note that this is not the only possible version of First Amendment institutionalism. Professor Schauer, for example, suggests that an institutional approach should be more sensitive to institutions in general, and need not focus only on what I call "First Amendment institutions." *See* Schauer, *Institutions*, *supra* note 33, at 1757 n.51 ("[A] thorough institutional approach . . . would not require that the institutions marked out for institution-specific treatment be institutions, like universities, that are connected with some area of special constitutional concern.").

[60] Garnett, *Do Churches Matter?*, *supra* note 21, at 274.

[61] *Cf.* Schauer, *Institutions*, *supra* note 33, at 1762 ("[T]here may be some reason to believe that the very nature of institutions as institutions gives their boundaries a stickiness that we do not see in some of the other empirical aspects of legal rules.").

One other insight is important here, both because of its relationship to this Article's focus on religious entities and because it may allay some objections to the First Amendment institutionalism project. One possible concern about recognizing the particular value of specific First Amendment institutions[62] is that such an approach allows those institutions to become a law unto themselves. It is thus important to emphasize one other feature that characterizes most, if not all, First Amendment institutions: these institutions are already significantly self-governing. They operate within a thick web of norms, values, constraints, and professional practices that channel and restrain their actions.[63] Those institutional norms and practices are themselves often shaped in ways that serve public discourse. Thus, even in the absence of positive law we might expect institutional practices to serve the speech-enhancing and freedom-protective role that we now expect institutionally agnostic First Amendment doctrine itself to play. An institutionalist approach to the First Amendment that focuses on particular institutions would thus take as its starting point the norms, values, and practices of the institutions themselves.[64] This would in turn help to define the boundaries of such institutions and set appropriate constraints for them.

An institutionalist approach to First Amendment doctrine could take several possible forms.[65] At its weakest level, it might simply encourage the courts to "explicitly, transparently, and self-consciously" acknowledge the importance of institutions.[66] Under this approach, courts would incorporate a substantial degree of deference to the factual claims of those institutions in considering how present doctrine should apply to them.[67] Since the courts sometimes (if rarely) already do something of the sort, this is not a dramatic change in their current approach.[68]

Alternatively, courts could adopt a more stringent form of First Amendment institutionalism. On this approach, they would treat particular First Amendment institutions as "substantially autonomous . . . within the law."[69] This form of institutionalism would still allow for some constitutionally pre-

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[62] Again, not all versions of First Amendment institutionalism necessarily take this approach. *See supra* note 59 (discussing Schauer's broader account of First Amendment institutionalism).

[63] *See, e.g.*, Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 572-73; Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1511; *see also* Blocher, *supra* note 6, at 858-59, 864.

[64] *See* Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 573.

[65] *See, e.g.*, Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1516-23. I have also found useful Perry Dane's account of the numerous potential forms of abstention, deference, and recognition that make up religious autonomy. *See* Perry Dane, *The Varieties of Religious Autonomy*, *in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 117 (Gerhard Robbers ed., 2001).

[66] Horwitz, *[Blog]*, *supra* note 16, at 61.

[67] *See* Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1516.

[68] *See* Schauer, *Institutions*, *supra* note 33, at 1753-54; Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1516-17.

[69] Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1518.

scribed limits to the institutions' autonomy,[70] but it would be a distinct step up from a weaker form of First Amendment institutionalism.

Still more strongly, courts might employ an approach to First Amendment institutions that treats them as genuinely "jurisgenerative" institutions.[71] On this reading, they are sites of law in almost, or entirely, a formal sense. Their decisions would take on a jurisdictional character,[72] such that any decision taken by a First Amendment institution within the proper scope of its operation—a question that would itself be decided with some deference to that institution[73]—would be subject to a form of "de facto nonjusticiability."[74]

Under this approach, First Amendment institutions would be treated as "legally autonomous institutions [that] enjoy a First Amendment right to operate on a largely self-regulating basis and outside the supervision of external legal regimes."[75] Any limits to the scope of their autonomy would be largely organic; they would be shaped in ways that are informed by and reflect the institutions' own ends, norms, and practices. Courts would rely heavily on the propensity of the institutions to apply self-discipline, driven by their own institutional norms and their own internal enforcement mechanisms.[76]

This fairly brief summary cannot canvass all the possible variations on First Amendment institutionalism or the potential problems with such an approach.[77] But it is worth noting that First Amendment institutionalism is a growth stock in contemporary constitutional scholarship. It has been applied to universities,[78] the press,[79] private associations,[80] commercial and profes-

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[70] *Grutter*, 539 U.S. at 328; *see* Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1518.

[71] *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11-19 (1983).

[72] *See, e.g.*, Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 186-87 (2003); *see also, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) [hereinafter Esbeck, *Restraint on Governmental Power*]; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445 (2002).

[73] *See, e.g.*, Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1542; Horwitz, *Three Faces of Deference*, *supra* note 15, at 1129-30; *see also* Blocher, *supra* note 6, at 863.

[74] C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 819 (1988).

[75] Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1520.

[76] *See, e.g.*, Horwitz, *Three Faces of Deference*, *supra* note 15, at 1138; Horwitz, *Universities as First Amendment Institutions*, *supra* note 13, at 1555-56.

[77] For a response to some potential difficulties of First Amendment institutionalism, see Horwitz, *Universities as First Amendment Institutions*, *supra* note 13.

[78] *See* Horwitz, Grutter*'s First Amendment*, *supra* note 31; Horwitz, *Three Faces of Deference*, *supra* note 15; Horwitz, *Universities as First Amendment Institutions*, *supra* note 13; Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006).

[79] *See* Horwitz, *[Blog]*, *supra* note 16.

[80] *See* Hills, *supra* note 72.

sional speech,[81] election law,[82] state action doctrine,[83] securities regulation,[84] and a variety of other First Amendment topics.[85] It speaks to a dissatisfaction with the current, institutionally agnostic approach to First Amendment doctrine, and perhaps beyond that to an interest in the role that institutions might play across a range of constitutional doctrines.[86]

First Amendment institutionalism does not operate in isolation from other developing issues and trends in constitutional theory. Its concern with devolving regulation to smaller social units suggests a kinship with federalism scholarship, and with those scholars who have argued for an even greater degree of "localism" in legal discourse.[87] It should strike a sympathetic chord with those who have argued for the protection of intermediary associations,[88] and specifically scholars who have argued for the usefulness of the doctrine of subsidiarity.[89] First Amendment institutionalism emphasizes the ways in which courts might give regulatory authority to a variety of expert local actors rather than impose top-down legal norms. In doing so, it echoes the concerns of both "democratic experimentalism"[90] and theories of "reflexive" or "autopoietic" law, which envision society as consisting of a series of subsystems, each regulated primarily by "specifying procedures and basic organizational norms geared towards fostering self-regulation

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[81] *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008).

[82] *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

[83] *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).

[84] *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006).

[85] *See, e.g.*, Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005).

[86] *See generally* Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1463 (2007).

[87] *See, e.g.*, Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006).

[88] *See, e.g.*, Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).

[89] *See, e.g.*, Peter Widulski, *Subsidiarity and Protest: The Law School's Mission in* Grutter *and* FAIR, 42 GONZ. L. REV. 415 (2006-2007); Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67 (2007); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001).

[90] *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283-88 (1998) (arguing for "a new model of institutionalized democratic deliberation that responds to the conditions of modern life," in which judicial review and other devices of government would "leave room for experimental elaboration and revision to accommodate varied and changing circumstances" while still protecting individual rights); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 961, 978 (2003) (discussing the ways in which courts can "devolve[ ] deliberative authority for fully specifying norms to local actors" instead of "laying down specific rules" for the conduct of various public and private actors).

within distinct spheres of social activities."[91] Finally, First Amendment institutionalism might be seen as a specific application of constitutional decision rules theory. This theory argues that given the purported gap between constitutional "meaning" and constitutional "implementation," we should understand the Supreme Court's constitutional role and doctrine not as "a search for the Constitution's one true meaning" but as a "multifaceted one of 'implementing' constitutional norms."[92]

In short, First Amendment institutionalism is an increasingly vital and viable project. However, it is still a relatively new avenue of inquiry and more work needs to be done. Much more needs to be said about the role of religious entities as First Amendment institutions, which is the primary object of the remainder of this Article. But first, First Amendment institutionalism must be situated within the broader framework of constitutional law and theory.[93] To that end, let me turn to Kuyper and his theory of sphere sovereignty.

III. Sphere Sovereignty

A. Sphere Sovereignty Described

It may seem odd to construct a theory of American religious freedom, and American constitutional structure more generally, around the thinking of a Dutchman who did not visit the United States until the waning years of the nineteenth century.[94] Certainly a number of factors combine to minimize Kuyper's potential influence in American religious and political thought.[95]

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[91] William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. Pol. Phil. 81, 84 (2001); *see also* Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm (2002); Gunther Teubner, Law as an Autopoietic System (1993); Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 Cardozo L. Rev. 1987 (1998); Michael C. Dorf, *The Domain of Reflexive Law*, 103 Colum. L. Rev. 384 (2003); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 Law & Soc'y Rev. 256 (1983). For an expanded treatment of the relationship between First Amendment institutionalism and democratic experimentalism, reflexive law, and autopoiesis, see Horwitz, Grutter*'s First Amendment*, *supra* note 31, at 574-79.

[92] Richard H. Fallon, Jr., Implementing the Constitution 5 (2001). For citations to the relevant literature and a discussion of how constitutional decision rules theory intersects with First Amendment institutionalism, see Horwitz, *Three Faces of Deference*, *supra* note 15, at 1140-46.

[93] *See* Horwitz, *Three Faces of Deference*, *supra* note 15, at 1145.

[94] Elaine Storkey, *Sphere Sovereignty and the Anglo-American Tradition*, *in* Lugo, ed., *supra* note 29, at 189; *cf.* J. Budziszewski, Evangelicals in the Public Square: Four Formative Voices on Political Thought and Action 55 (2006) ("A Dutch theological liberal would seem unlikely to become a major influence on conservative American evangelicals of the following century, but Abraham Kuyper was an unlikely sort of person.").

[95] *See, e.g.*, Max Stackhouse, *Preface* to Religion, Pluralism, and Public Life: Abraham Kuyper's Legacy for the Twenty-First Century, *supra* note 29, at xi, xii-xiii; Wayne Allen Kobes, Sphere Sovereignty and the University: Theological Foundations of Abraham Kuyper's View of the University and Its Role in Society 2-3 (June 15, 1993) (unpublished Ph.D. thesis, Florida State University) (on file with author).

Nevertheless, Kuyper has enjoyed wide influence in many circles.[96] A number of scholars have addressed his call for sphere sovereignty in various fields of study, including not only theology but also social science and political theory.[97]

Kuyper has not been ignored by the American legal academy.[98] He has made scattered appearances in American legal writings—some at significant length,[99] some in passing,[100] and some only indirectly.[101] Still, citations to

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[96] *See, e.g.*, JOHN BOLT, A FREE CHURCH, A HOLY NATION: ABRAHAM KUYPER'S AMERICAN PUBLIC THEOLOGY xi (2001); PETER S. HESLAM, CREATING A CHRISTIAN WORLDVIEW: ABRAHAM KUYPER'S LECTURES ON CALVINISM 1-8 (1998); Nicholas P. Wolterstorff, *Abraham Kuyper (1837-1920)*, *in* THE TEACHINGS OF MODERN PROTESTANTISM ON LAW, POLITICS, & HUMAN NATURE 29, 63-64 (John Witte Jr. & Frank S. Alexander eds., 2007) [hereinafter TEACHINGS OF MODERN PROTESTANTISM].

[97] *See, e.g.*, RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 175 (1984).

[98] The most prominent students of Kuyper in the American legal academy are John Witte, Johan van der Vyver, and David Caudill. *See, e.g.*, JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 321-29 (2007) [hereinafter WITTE, REFORMATION OF RIGHTS]; David S. Caudill, *A Calvinist Perspective on Faith in Legal Scholarship*, 47 J. LEGAL EDUC. 19, 23 (1997); David S. Caudill, *Augustine and Calvin: Post-Modernism and Pluralism*, 51 VILL. L. REV. 299, 300-02 (2006) [hereinafter Caudill, *Augustine and Calvin*]; David S. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 333 (1987); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 344-46 (1991); Johan D. Van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, *in* Robbers, ed., *supra* note 65, at 645 [hereinafter Van der Vyver, *Sphere Sovereignty*]. Both Van der Vyver and Caudill are identified as much, or more, with the thinking of a student and intellectual descendant of Kuyper, Herman Dooyeweerd, as they are with Kuyper himself. *See, e.g.*, Caudill, *Augustine and Calvin*, *supra* note 98, at 301.

[99] *See, e.g.*, Armand H. Matheny Antommaria, *Jehovah's Witnesses, Roman Catholicism, and Neo-Calvinism: Religion and State Intervention in Parental, Medical Decision Making*, 8 J.L. & FAM. STUD. 293, 312-14 (2006); Jeffrey M. Bryan, *Sexual Morality: An Analysis of Dominance Feminism, Christian Theology, and the First Amendment*, 84 U. DET. MERCY L. REV. 655, 691-94 (2007); Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 302-08 (2006); Cochran, *Tort Law and Intermediate Communities*, *supra* note 26; Robin W. Lovin, *Church and State in an Age of Globalization*, 52 DEPAUL L. REV. 1, 9-10 (2002); Robin W. Lovin, *Religion and Political Pluralism*, 27 MISS. C. L. REV. 91, 97 (2007-2008); David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 EMORY L.J. 1471, 1506-09 (2008).

[100] *See, e.g.*, Kwame Anthony Appiah, *Global Citizenship*, 75 FORDHAM L. REV. 2375, 2388 (2007); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1181 [hereinafter Hamilton, *Religious Institutions*]; John Copeland Nagle, *The Evangelical Debate Over Climate Change*, 5 U. ST. THOMAS L.J. 53, 80 & 83 (2008); C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 J.L. & RELIGION 225, n. 22 (2006-2007); Peter Judson Richards, *"The Law Written in Their Hearts"?: Rutherford and Locke on Nature, Government and Resistance*, 18 J.L. & RELIGION 151, 181 (2002).

[101] *See, e.g.*, Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909, n. 9 (2004) (discussing sphere sovereignty without referring directly to Kuyper); David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205, n. 48 (1997) (same). In keeping with Van der Vyver's focus on Dooyeweerd rather than Kuyper, *see supra* note 98, he regularly discusses sphere sovereignty without referencing Kuyper. *See, e.g.*, Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT'L L. REV. 499, 518 & 525 (2005).

Kuyper amount to a mere handful over a span of decades, many of them brief in scope and shallow in treatment. Thus, it is understandable that David Skeel should write that "the use of his work in contemporary American legal scholarship has tended to be more impressionistic than sustained, and Christian legal scholars have not employed it as a base camp for a sustained normative account."[102] I would argue that scholars of any stripe have failed to provide a persistent analysis of Kuyper's work. This Part provides such a sustained account, focusing in particular on Kuyper's concept of sphere sovereignty.

Before proceeding any further, I should address a possible question: does it matter that Kuyper's concept of sphere sovereignty is a Christian, and specifically Calvinist, theory of the social structure? There are two potential objections: divorcing Kuyper's theory from its Calvinist context robs it of its force, and taking a "Christian" approach to the Constitution, even if it is only Christian in derivation, is either out of bounds or of interest to only a parochial few. I think these objections are mistaken. I offer up sphere sovereignty primarily as an organizing metaphor. As a metaphor, I hope to demonstrate, it is a valuable means of understanding the relationship between state, church, and society.

In response to the first objection, I acknowledge that there is a hint of "bricolage"[103] to this project. This Article shows that sphere sovereignty is a useful way of thinking about both First Amendment institutionalism and the constitutional relationship between state and non-state entities in general, even if the religious superstructure is stripped from the theory. Even those who wholeheartedly share Kuyper's neo-Calvinist religious perspective agree that sphere sovereignty can, and perhaps must, be adapted to changing circumstances. In fact, other readers of Kuyper have insisted that for sphere sovereignty to continue to thrive, we must "subject[ ] Kuyper's 'bits and pieces' to considerable refinement in the light of contemporary questions and concerns."[104] At the same time, the version of sphere sovereignty that I present retains much—including the importance of the church as one of society's sovereign "spheres"—that Kuyper prized.

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[102] Skeel, *supra* note 99, at 1508-09; *see also id.* at 1509 n.31 (noting that "several recent articles drawing on Kuyper's sphere sovereignty may foreshadow the kind of sustained treatment that the literature so far lacks" and citing Cochran, *Tort Law and Intermediate Communities*, *supra* note 26, as an example).

[103] *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1226-30 (1999) (noting the dangers of "'borrowing' . . . solutions developed in one system to resolve problems in another" and introducing the concept of "bricolage" in comparative constitutional analysis, which "assembl[es] . . . something new from whatever materials the constructor discover[s]").

[104] Mouw, *Some Reflections on Sphere Sovereignty*, *supra* note 29, at 88 (quoting Jacob Klapwijk, *The Struggle for a Christian Philosophy: Another Look at Dooyeweerd*, THE REFORMED J., Feb. 1980, at 15); *see also* Richard J. Mouw, *Culture, Church, and Civil Society: Kuyper for a New Century*, 28 PRINCETON SEMINARY BULL. 48, 55 (2007) (noting that sphere sovereignty "has much to offer contemporary discussions of civil society, but not without some serious reworking in the light of present-day conditions").

To the second objection, I can offer the easy answer that this Article adapts what is best of Kuyper's theory without requiring that its readers share Kuyper's religious views. But I would go further and say that it is ultimately unclear what such an objection means. If we adapt Kuyper's thought to our own time and place—to a religiously pluralistic society in which Kuyper's assumptions about the primacy of Calvinist thought cannot be assumed to hold—then it is not clear that it is a distinctly "Christian" legal theory.[105] In short, nothing in the Christian roots of Kuyper's theory should be threatening to non-adherents, and much of it should be appealing.

Kuyper's account of sphere sovereignty centers around the authority and coercive power of sovereignty: "the authority that has the right, the duty, and the power to break and avenge all resistance to his will."[106] Kuyper wrote in opposition to the predominant theories of sovereignty of his day: popular sovereignty, which he feared would end with "the shackling of liberty in the irons of State-omnipotence,"[107] and state sovereignty, which he believed led to "the danger of state absolutism."[108] For Kuyper, neither course was acceptable.[109]

Drawing on fundamental Calvinist principles,[110] Kuyper offered a different conception of sovereignty:

> This dominating principle [offered by Calvinism] was not, soteriologically, justification by faith, but, in the widest sense cosmologically, *the Sovereignty of the Triune God over the whole Cosmos,* in all its spheres and kingdoms, visible and invisible. A *primordial* Sovereignty which eradiates in mankind in a threefold deduced supremacy, *viz.,* 1. The Sovereignty in the *State*; 2. The Sovereignty in *Society*; and 3. The Sovereignty in the *Church*.[111]

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[105] For a useful discussion of these issues, see Mark Tushnet, *Distinctively Christian Perspectives on Legal Thought?*, 101 MICH. L. REV. 1858 (2003) (reviewing McConnell, Cochran, and Carmella, eds., *supra* note 26). *See also* William Brewbaker, *Who Cares? Why Bother? What Jeff Powell and Mark Tushnet Have to Say to Each Other*, 55 OKLA. L. REV. 533 (2002).

[106] ABRAHAM KUYPER, *Sphere Sovereignty*, *in* ABRAHAM KUYPER: A CENTENNIAL READER 1, 461, 466 (James D. Bratt ed., 1998) [hereinafter KUYPER, *Sphere Sovereignty*]; *see also* Bob Goudzwaard, *Globalization, Regionalization, and Sphere Sovereignty*, *in* RELIGION, PLURALISM, AND PUBLIC LIFE: ABRAHAM KUYPER'S LEGACY FOR THE TWENTY-FIRST CENTURY, *supra* note 29, at 325, 333 (noting that Kuyper's definition of sovereignty departs from the usual uses of the word).

[107] KUYPER, LECTURES, *supra* note 27, at 88.

[108] HESLAM, *supra* note 96, at 104.

[109] *See, e.g.*, KUYPER, *Sphere Sovereignty*, *supra* note 106, at 464.

[110] *See, e.g.*, Michael J. DeBoer, Book Review, 16 J.L. & RELIGION 855, 858 (2001) (reviewing POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY (James W. Skillen & Rockne M. McCarthy eds., 1991)) (noting the relationship between sphere sovereignty and the Calvinist tradition); Gordon Spykman, *Sphere-Sovereignty in Calvin and the Calvinist Tradition*, *in* EXPLORING THE HERITAGE OF JOHN CALVIN 163 (David E. Holwerda ed., 1976) (same).

[111] KUYPER, LECTURES, *supra* note 27, at 79; *see also* KUYPER, *Sphere Sovereignty*, *supra* note 106, at 466.

Kuyper thus sees divine authority as delegated to a threefold array of sovereigns: the state, society, and the church.[112] He emphasizes that these are "*separate spheres* each with its own sovereignty."[113] These concepts require some elaboration. But it is worth pausing to note the striking energy, diversity, and pluralism—the "multiformity"[114]—of human existence implicit in Kuyper's vision. As Nicholas Wolterstorff observes, "The picture one gets from Kuyper is that of human existence, seen in its totality, as teeming with creative vitality."[115]

What role does Kuyper envision for each of these spheres? Let us take them separately, beginning with "sovereignty in the sphere of Society."[116] Although he sometimes describes the social spheres as being as various as the "constellations in the sky,"[117] Kuyper's Princeton Lectures offer a somewhat more measured picture:

> In a Calvinistic sense we understand hereby, that the family, the business, science, art and so forth are all social spheres, which do not owe their existence to the state, and which do not derive the law of their life from the superiority of the state, but obey a high authority within their own bosom; an authority which rules, by the grace of God, just as the sovereignty of the State does.[118]

The picture is thus one of a set of "distinct social spheres of activity" centered around various commonly recognized social roles and activities.[119] This resembles Max Weber's description of modern existence as involving the differentiation of various spheres of activity,[120] although the animating spirit of Kuyper's vision is strongly different from Weber's own. These activities are mostly distinct,[121] although obviously there may be overlapping and blurring between them. They are all *social* and communal activities, from the smallest unit, the family, up to churches, "universities, guilds, [and] associations."[122] They may be functional in nature, and thus geographically widespread—a professional guild or social association, for instance—or geographically and sometimes politically distinct.[123]

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[112] *See* KUYPER, LECTURES, *supra* note 27, at 79.
[113] KUYPER, *Sphere Sovereignty*, *supra* note 106, at 467 (emphasis in original).
[114] *Id.*
[115] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 6.
[116] KUYPER, LECTURES, *supra* note 27, at 90.
[117] KUYPER, *Sphere Sovereignty*, *supra* note 106, at 467.
[118] KUYPER, LECTURES, *supra* note 27, at 90.
[119] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 7.
[120] *See id.*; *see also* Storkey, *supra* note 94, at 191 (citing MAX WEBER, 1 ECONOMY AND SOCIETY 41-62 (Guenther Roth & Claus Wittich eds., 1978)).
[121] *See* KUYPER, LECTURES, *supra* note 27, at 90-91.
[122] *Id.* at 96.
[123] *Id.* Kuyper thus adds that "the social life of cities and villages forms a sphere of existence, which arises from the very necessities of life, and which therefore must be autonomous." *Id.*

Autonomy is vital to this theory. Kuyper does not simply describe the *existence* of these spheres; he argues that they are truly *sovereign* spheres, which may not lightly be interfered with by any other sovereign. They are coordinate with the state, not subordinate to it:

> Neither the life of science nor of art, nor of agriculture, nor of industry, nor of commerce, nor of navigation, nor of the family, nor of human relationship may be coerced to suit itself to the grace of the government. The State may never become an octopus, which stifles the whole of life. It must occupy its own place, on its own root, among all the other trees of the forest, and thus it has to honor and maintain every form of life which grows independently in its own sacred autonomy.[124]

The state cannot intrude on these separate spheres, each of which shares in the same divine authority that animates the state itself.[125] It may "neither ignore nor modify nor disrupt the divine mandate, under which these social spheres stand."[126] For Kuyper, this is "the deeply interesting question of our civil liberties."[127]

Contrasted with society is the state, which Kuyper calls "the sphere of spheres, which encircles the whole extent of human life."[128] Although the social spheres arise from "the order of creation,"[129] the state is an artifact, albeit an essential one, of human sinfulness.[130] Government originated, not as "a natural head, which organically grew from the body of the people, but a *mechanical* head, which from without has been placed upon the trunk of the nation."[131]

Although the state is less organic than the social spheres, it still plays an essential role in ensuring that all the spheres operate harmoniously and according to their divine purpose—a role that Kuyper sees as evidence that Calvinism "may be said to have generated constitutional public law."[132] Kuyper describes the state as having three primary obligations:

> It possesses the threefold right and duty: 1. Whenever different spheres clash, to compel mutual regard for the boundary-lines of each; 2. To defend individuals and the weak ones, in those spheres, against the abuse of power of the rest; and 3. To coerce all

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[124] *Id.* at 96-97.
[125] *See id.* at 91.
[126] *Id.* at 96.
[127] *Id.* at 91.
[128] KUYPER, *Sphere Sovereignty*, *supra* note 106, at 472 (emphasis omitted).
[129] *Id.* at 469.
[130] *See* Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 13.
[131] KUYPER, LECTURES, *supra* note 27, at 92-93.
[132] *Id.* at 94.

> together to bear *personal* and *financial* burdens for the maintenance of the natural unity of the State.[133]

The state thus plays three central protective and boundary-maintaining roles.[134] The first category involves the state's "adjudication of *inter*sphere boundary disputes."[135] The state has the duty to ensure that each sphere is operating within its proper scope and not interfering with another.[136] The second involves "*intra*sphere conflict."[137] The state must not leave the members of various social spheres to fend for themselves, but may intervene to protect them from abusive treatment within a particular sphere. Finally, the state has the power to act for "*trans*spherical" purposes.[138] In modern terms, the state may take measures for the provision of public goods: infrastructure, military protection, and so on.

Given its sweeping regulatory authority, it is unsurprising that Kuyper should see the state as having a tendency "to invade social life, to subject it and mechanically to arrange it."[139] Conversely, the social spheres are bound to resist the state's authority. Thus, "all healthy life of people or state has ever been the historical consequence of the struggle between these two powers."[140] According to Kuyper, the proper cure for this is "independence [for each] in their own sphere and regulation of the relation between both, not by the executive, but under the law."[141] The sovereign state must learn to cooperate with the sovereign social sphere, so that both may achieve their delegated purposes.[142]

Finally, consider the sovereignty of religious entities. Although there is no doubt that Kuyper sees a vital role for churches,[143] he is adamant on two points: no single church should dominate, and the church is no more free than the state to intrude outside its own proper sphere. On the first point, although he acknowledges that Calvinism has at times asserted itself in ways that run against either religious pluralism or liberty of conscience,[144] he insists that the truest principles of Calvinism require liberty for "the multiform complex of all . . . denominations as the totality of the manifestation of the

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[133] *Id.* at 97; *see also* KUYPER, *Sphere Sovereignty*, *supra* note 106, at 467-68.
[134] *See* Mouw, *supra* note 29, at 89-90.
[135] *Id.* at 89 (emphasis in original).
[136] *Id.*
[137] *Id.* at 90 (emphasis in original).
[138] *Id.* (emphasis in original).
[139] KUYPER, LECTURES, *supra* note 27, at 93; *see also* KUYPER, *Sphere Sovereignty*, *supra* note 106, at 469.
[140] KUYPER, LECTURES, *supra* note 27, at 94.
[141] *Id.*
[142] *See id.* at 97-98.
[143] *See* Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 16 ("[Kuyper] regarded the church as fundamentally unique, and regarded its autonomy under God as more fundamental than that of any other institution.").
[144] *See* KUYPER, LECTURES, *supra* note 27, at 99.

Church of Christ on earth."[145] The state itself cannot interfere with religious pluralism because it lacks the competence to make determinations about who is the true church, and any interference with the church would fall outside its sovereign duties and thus violate the principle of sphere sovereignty.[146] It is only a coordinate sovereign, and cannot choose a privileged sect from among the churches, or resolve "spiritual questions."[147]

Just as the state is restricted to its proper sphere when it comes to either cooperation or conflict with the church, so too the church is restricted to its own sphere. Like all spheres, including the state, the church may tend to overreach.[148] Sphere sovereignty thus implies that churches, like all other spheres, must stay within their own province.

Finally, the church is bound not to overreach within its own sphere. In appropriate "intraspherical" instances, to use Mouw's term, the state may even be obliged to interfere: "The Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle; but on the other hand no citizen of the State must be compelled to remain in a church which his conscience forces him to leave."[149]

In sum, Kuyper's vision of sphere sovereignty is one of guided and divided pluralism. It is guided in that each sphere has "its own unique set of functions and norms,"[150] and all of them are expressions of God's ultimate sovereignty.[151] It is divided in that each sphere, provided that it acts appropriately, is to remain sovereign, untouchable by church, state, or other social institutions. Kent Van Til offers a metaphor that nicely captures Kuyper's vision:

> Imagine that a prism has refracted light into its multiple colors. These colors represent the various social spheres of human existence—family, business, academy, and so forth. On one side of the colored lights stand the churches—guiding their members in

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[145] *Id.* at 105. *See generally id.* at 99-105. Although Kuyper refers only to Christian sects, he should not be read too narrowly. In fact, Kuyper "insisted on the inclusion of Jews within the ambit of religious liberty," and at times suggested that all sects, and atheists too, are entitled to liberty of conscience. WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 323 n.7 (2007); *see also* STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 59 (1997) ("Kuyper decisively, explicitly rejected the creation of a theocracy where the state would promote Christian beliefs and values. Time and again he spoke in favor of, and when in political power worked for, a political order that recognized and accommodated the religious pluralism of society.").

[146] *See* KUYPER, LECTURES, *supra* note 27, at 105.

[147] *Id.* at 106.

[148] *See, e.g.*, Mouw, *Some Reflections on Sphere Sovereignty*, *supra* note 29, at 99 ("[Kuyper] was especially vocal . . . about the dangers of an overextended church."); *see also id.* at 106.

[149] KUYPER, LECTURES, *supra* note 27, at 108; *see also* Mouw, *supra* note 29, at 100.

[150] Mouw, *supra* note 29, at 100.

[151] Hence one of Kuyper's most famous phrases: "[N]o single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over *all*, does not cry: 'Mine!'" KUYPER, *Sphere Sovereignty*, *supra* note 106, at 488 (emphasis in original).

> the knowledge of God, which informs (but does not dictate) the basic convictions of each believer. On the other side of the spectrum stands the state, regulating the interactions among the spheres, assuring that the weak are not trampled, and calling on all persons to contribute to the common good. Neither church nor state defines the role of each sphere; instead, each derives its legitimacy and its role from God.[152]

B. Roots, Shoots, and Relatives of Sphere Sovereignty

Sphere sovereignty is an interesting enough concept to be worthy of examination on its own terms. But if a strong argument is to be made that it should inform our understanding of the American constitutional structure, it will be helpful to suggest ways in which Kuyper's vision is already immanent in American political and constitutional thought. As John Witte observes: "The American founders did not create their experiment on religious liberty out of whole cloth. They had more than a century and a half of colonial experience and more than a millennium and a half of European experience from which they could draw both examples and counterexamples."[153] Moreover, an argument for the usefulness of sphere sovereignty in understanding and reshaping constitutional law may be more persuasive if we can point to many similar approaches, both secular and religious, that have been offered for mapping the social and constitutional structure of liberal democracies.

In combing through history for the roots, shoots, and parallel visions of sphere sovereignty, however, we must begin by looking further back still, to the Calvinist philosopher Johannes Althusius.[154] In Althusius we find many of the roots of sphere sovereignty, and of some similar conceptions of the role of both the state and non-state associations.

For Althusius, the private association is an important part of the organizing structure of society. Each such association is fundamentally responsible for its own self-government: "Proper laws (*leges propriae*) are those enactments by which particular associations are ruled. They differ in

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[152] Kent A. Van Til, *Abraham Kuyper and Michael Walzer: The Justice of the Spheres*, 40 CALVIN THEOLOGICAL J. 267, 276 (2005).

[153] JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 1 (1st ed. 2000) [hereinafter WITTE, AMERICAN CONSTITUTIONAL EXPERIMENT].

[154] For relevant discussions, see Henk E.S. Woldring, *Multiform Responsibility and the Revitalization of Civil Society*, *in* Lugo, ed., *supra* note 29, at 175, 177-80; WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 143-207 (2007); BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650, at 71-79 (1982). Carl Esbeck argues that we can look back further still, to the fourth century, for the roots of religious autonomy. *See* Esbeck, *Dissent and Disestablishment*, *supra* note 10, at 1392.

each specie of association according as the nature of each requires."[155] These associations have distinct legal personalities. Members retain the right to exit them, but so long as they remain in an association, they "must yield to its internal norms and habits and must follow whatever internal processes and procedures may exist for changing them."[156] Althusius's approach was similar with respect to the church, which he treated in some of his writings "as a private voluntary association, whose members elect their own authorities and maintain their own internal doctrine and discipline, polity and property without state interference or support."[157]

Althusius does not rule out state regulation, by any means. The state can intervene where necessary to "defend the fundamental rights of every human being."[158] But the state's fundamental role is to encourage conditions that "make it possible for participants of each association together to . . . form a community that orders the life of participants through just laws of their own making."[159]

Althusius provides the seeds of Kuyperian sphere sovereignty. He establishes a vision of "a civil society that is characterized by a variety of private associations and a horizontal social order";[160] the state has an important role to play, but its power "is restricted with respect to nonstate associations on the basis of the latter's authority."[161] Although one must be cautious in assuming Althusius's influence on later thinkers,[162] there is at least some evidence that he did have an impact on a number of the thinkers we will encounter in this sub-Part. The roots of sphere sovereignty thus arguably lie deep in a historical tradition that predated and encompassed the American experiment in religious liberty.

A number of eighteenth- and nineteenth-century writers saw the Dutch experience, to which Althusius contributed, as "the beginning of modern political science and of modern civilization."[163] This included a number of key figures in the American revolutionary period, such as John Adams, Thomas Jefferson, and James Madison.[164] But the central set of American ideas that is rooted in Calvinism and therefore linked to Kuyper's own con-

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[155] Woldring, *supra* note 154, at 177 (quoting JOHANNES ALTHUSIUS, POLITICA 21-22 (1995) (reprint of 3d ed. 1614)).

[156] WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 187.

[157] *Id.* at 196. *But see id.* (noting other aspects of Althusius's vision of church and state that suggest a stronger alliance between the two).

[158] Woldring, *supra* note 154, at 178.

[159] *Id.* at 179.

[160] *Id.*

[161] *Id.* at 180.

[162] *See* WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 203-05.

[163] *Id.* at 203 (quoting Thorold Rogers, *Review of William E. Griffis*, Brave Little Holland, 10 NEW ENGLAND MAG. 517, 520 (1894)).

[164] *See* WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 203-04. Witte cautions, however, that the precise influence of the Dutch experience on the American revolutionary thinkers is "hard[ ] to document" and that, to the extent that Dutch history and ideas were well received in revolutionary America, those ideas "took on quite different accents and applications" there. *Id.* at 204.

cept of sphere sovereignty lies not with the central revolutionary figures but earlier still, with the early Puritan communities of colonial America. Kuyper sees these figures as the spring that set American religious and political liberty in motion.

Kuyper was right to see an important link between the Puritan mindset and his own, although he tended to overstate it.[165] John Witte has identified a number of strands of Puritan thought that complement the sphere sovereignty vision, and that we might thus see as embedding it in the American political and constitutional structure.[166] The Puritans' fundamental contribution to American constitutionalism was an understanding of rights and liberties based on the Calvinist doctrine of covenant.[167] Covenantal doctrine led the Puritans to see church and state "as two separate covenantal associations, two coordinate seats of godly authority and power in society."[168] For example, in 1648, the preamble to the *Laws and Liberties of Massachusetts Bay* pronounced: "[O]ur churches and civil state have been planted, and grown up (like two twins)."[169] "To conflate these two institutions would be to the 'misery (if not ruin) of both.'"[170] Church and state were each "an instrument of godly authority," and each had its own part to play in "establish[ing] and maintain[ing] the covenantal ideals of the community."[171]

We should be wary of drawing too close a comparison between Kuyper and the Puritans, even if Kuyper himself would have welcomed it. Although church and state in the Puritan vision "remained separate from each other in their core form and function,"[172] in many respects the material and moral support that each provided to the other were far greater than we would contemplate under either the mature system of American religious liberty or under Kuyperian sphere sovereignty itself.[173] Nevertheless, many of the parallels between Kuyper and the Puritans are striking. At least part of the Puritan conception of the state included a robust idea of associational liberty, drawn from the Calvinist doctrine of covenant. This conception allowed the church and other private associations substantial autonomy and saw them as coordinate sovereigns, along with the state, in the social order.

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[165] *See, e.g.*, JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 299 (1889) ("Someone has said that the American Government and Constitution are based on the theology of Calvin and the philosophy of Hobbes. This at least is true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787.").

[166] *See* WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 152, 205 & 324; John Witte, Jr., *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579, 594 (1987); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 50-51 (1990).

[167] *See, e.g.*, WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 287.

[168] *Id.* at 309.

[169] WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 309 (quoting LAWS AND LIBERTIES OF MASSACHUSETTS BAY A2 (1648) (Max Farrand ed., 1929)).

[170] *Id.* (quoting LAWS AND LIBERTIES OF MASSACHUSETTS BAY, *supra* note 169, at A2).

[171] *Id.* at 310.

[172] *Id.*

[173] *See id.* at 310-11.

The Puritan influence was reflected in the American revolutionary period by such writers and political figures as John Adams. Adams admired the Puritans' creation of "a comprehensive system of ordered liberty and orderly pluralism within church, state, and society"[174] and embraced at least some degree of religious autonomy when he drafted the Massachusetts Constitution of 1780.[175] That constitution guaranteed churches the right to select their own ministers without state interference, a right that is consistent with the concept of sphere sovereignty.[176] The early constitutions of Connecticut, Maine, and New Hampshire provided similar guarantees.[177]

The same pattern is apparent elsewhere in the history of the early Republic. Philip Hamburger observes that some members of the founding generation who supported religious exemptions might have refrained from arguing for a general constitutional right to such exemptions because, at the time, "the jurisdiction of civil government and the authority of religion were frequently considered distinguishable."[178] Michael McConnell notes that "[t]he key to resolving" church-state disputes in the Supreme Court during the antebellum period "was to define a private sphere, protected against state interference by the vested rights doctrine and the separation of church and state."[179] Thus, we might see the Puritans, among others, as having infused American thought with some of the same ideas that would culminate in Kuyper's writings on sphere sovereignty.[180] John Witte concludes his study of the Puritans' place within early modern Calvinist thought on a useful note:

> The fundamental ideas of Puritan Calvinism did, indeed, contribute to the genesis and genius of the American experiment in ordered liberty and orderly pluralism. American religious, ecclesiastical, associational, and political liberty were grounded in fundamental Puritan ideas of conscience, confession, community, and commonwealth. American religious, confessional, social, and po-

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[174] *Id.* at 277.

[175] *See id.* at 292-93.

[176] For discussion, see Joshua A. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2016 (2007).

[177] *See id.* at 2015-16.

[178] Philip A. Hamburger, *A Constitutional Right of Religious Exemptions: An Historical Analysis*, 60 GEO. WASH. L. REV. 915, 936 (1992); *see also* Thomas C. Berg, *The Voluntary Principle, Then and Now*, 2004 BYU L. REV. 1593, 1610; John F. Wilson, *Church and State in America*, *in* JAMES MADISON ON RELIGIOUS LIBERTY 97, 104-06 (Robert S. Alley ed., 1985) (arguing that church and state in the colonial and post-colonial period stood in a position of dual authority).

[179] Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 42 (2001).

[180] *See, e.g.*, Lupu & Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note 19, at 38 ("[The founders decided on] a new experiment—one that decoupled religious and civil institutions. This new government would have no jurisdiction over religious matters, thus ensuring the autonomy of religious institutions and simultaneously depriving these same institutions of any incentive to capture the organs of government to further their religious missions.").

> litical pluralism, in turn, were bounded by fundamental Puritan ideas of divine sovereignty and created order.[181]

That the Puritans' worldview did not fall on barren soil is evident from the writings of the most celebrated nineteenth-century observer of the American scene, Alexis de Tocqueville. A number of writers have noted the resemblance between Kuyper's pluralistic concept of sphere sovereignty and Tocqueville's description of American society in the nineteenth century.[182] Tocqueville argued that "[r]eligion in America . . . must be regarded as the first [ ] political institution[ ],"[183] and linked religious associations' influence in forming the moral character and political development of the nation with a vibrant conception of civil freedom and church-state separation.[184] He also noted the presence in America of an "immense assemblage of associations,"[185] and argued that they formed a fundamental part of the governance of a republic founded on notions of equality.[186]

Importantly, Tocqueville "describ[ed] a religious spirit which he quite specifically associated with Calvinist Protestantism—one which insisted on clear separation of church and state, but at the same time fostered a 'structured politics of involvement' in which religious conviction and political organization reinforced each other."[187] Thus, Tocqueville saw evidence in nineteenth-century America that the Calvinist Puritan ideal had taken root: in Kuyper's words, America had embraced a pluralistic system whose watchword was "[a] free Church in a free State."[188] As John McGinnis has argued, that spirit continues to influence the Supreme Court's contemporary rulings on federalism, freedom of association, and freedom of religion.[189]

Thus far I have argued that Kuyper's vision of sphere sovereignty, although it was not articulated until the late nineteenth century, had antecedents in European developments that might have influenced American thought. Moreover, it shares a close kinship with the sorts of social ideals that were prized by the American Puritans, and that continued to influence American thought well into the nineteenth-century America that Tocqueville visited. But we can also find evidence of a Kuyperian concern with the sovereignty of various non-state associations in a diverse array of other and

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[181] WITTE, REFORMATION OF RIGHTS, *supra* note 98, at 319 (internal quotations omitted).

[182] *See, e.g.*, Woldring, *supra* note 154, at 182-83; BOLT, *supra* note 96, at 133-86.

[183] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 305 (Alan Ryan ed., 1994) (1835).

[184] *See id.* at 304.

[185] ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 106 (Alan Ryan ed., 1994) (1835).

[186] *See id.* at 106-10.

[187] Elizabeth Mensch, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1100 (1991) (quoting GEORGE ARMSTRONG KELLY, POLITICS AND RELIGIOUS CONSCIOUSNESS IN AMERICA 27 (1984)).

[188] KUYPER, LECTURES, *supra* note 27, at 99.

[189] *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

later thinkers. If these thinkers were not directly influential in shaping the American worldview, they at least suggest the broader appeal of sphere sovereignty, or similar concepts, as a middle ground between statism and atomistic individualism.

Let me mention briefly two schools of thought, and linger a little longer on a third. First, consider the school of "British pluralism."[190] In keeping with Kuyper's effort to locate sovereignty in a panoply of social institutions, these writers attacked "unlimited state sovereignty," including the popular variety instituted by the French Revolution.[191] They instead insisted on a form of pluralism in which "self-governing associations" are vital in "organizing social life" and in which the state "must respect the principle of function, recognizing associations like trade unions, churches, and voluntary bodies."[192] British pluralists like John Neville Figgis stressed that the state is a sort of "society of societies, charged with the task of making the continued existence and mutual interaction of such associations possible through setting rules for their conduct."[193] Although the state might exercise regulatory power, it did so in a manner that was "bounded by the behavior of other groups, with law emanating from several sources."[194] It is easy to see echoes of Kuyperian sphere sovereignty in this language.[195]

More broadly, consider those writers who have argued for the importance of mediating or intermediary institutions, which "stand[ ] between the individual in his private life and the large institutions of public life."[196] Mediating associations, including such Kuyperian staples as "family, church,

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[190] For introductions to British pluralism, see, for example, THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI (Paul Q. Hirst ed., 1989) [hereinafter THE PLURALIST THEORY OF THE STATE]; DAVID NICHOLLS, THE PLURALIST STATE (1975); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 111-15 (2002).

[191] Paul Q. Hirst, Introduction to THE PLURALIST THEORY OF THE STATE, *supra* note 190, at 1-2.

[192] *Id.* at 2.

[193] *Id.* at 17. For language that echoes both Kuyper and Figgis, see W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW, *supra* note 19, at 3, 35 ("In a pluralistic world, protection of religious freedom requires allocating the ultimate 'competence of competences' to the secular state.").

[194] WEISBROD, *supra* note 190, at 112.

[195] For a modern example of a writer proceeding from a perspective of legal pluralism who reaches conclusions similar to those drawn here, see Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 AM. U. L. REV. 365 (2004).

[196] PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 2 (1977) (emphasis omitted); *see also* PETER L. BERGER, FACING UP TO MODERNITY: EXCURSIONS IN SOCIETY, POLITICS AND RELIGION 130-41 (1977); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991); SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995); Linda C. McLain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 309-10 (2000); Yael Tamir, *Revisiting the Civic Sphere*, *in* FREEDOM OF ASSOCIATION 214 (Amy Gutmann ed., 1998).

voluntary association, [and] neighborhood,"[197] are seen in this literature as playing a vital role in helping individuals form and maintain a sense of identity in the face of the crushing pressure of the unified state. Writers in this tradition emphasize the importance to the state of "protect[ing] and foster[ing] mediating structures," largely by leaving them alone, and of using mediating structures to effect public policy rather than imposing these policies directly.[198]

Finally, consider the Catholic concept of subsidiarity.[199] The concept of subsidiarity begins with an assumption that, rather than existing in isolation, "the individual realizes his fulfillment in community with others."[200] Thus, the state should not exercise its regulatory authority "to the point of absorbing or destroying [private associations], or preventing them from accomplishing what they can on their own."[201] Although the state retains some regulatory authority over associations, it should exercise that authority in a way that "protect[s] them from government interference, empowering them through limited but effective intervention, or coordinating their various pursuits."[202]

It would be going too far to argue that subsidiarity has directly influenced the historical development of American political thought. But, like sphere sovereignty, the doctrine of subsidiarity has antecedents in many of the thinkers who may have indirectly shaped the American landscape.[203] Subsidiarity can be understood and applied in ways that may help clarify and refine American constitutional doctrine in a wide variety of areas, including federalism, freedom of association, and religious liberty.[204]

A number of writers have noted the connection between subsidiarity and sphere sovereignty, which developed more or less contemporaneously.[205] Given the current popularity of subsidiarity as a tool in the legal literature, it may be worth pausing to note the ways in which it is distinct from sphere sovereignty. Perhaps the most crucial difference is that subsidiarity is often assumed to involve a vertical ordering of relationships. It describes a hierarchy of associations, from "higher" to "lower,"[206] with the state in the high-

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[197] BERGER, *supra* note 196, at 134.

[198] *Id.* at 138 (emphasis omitted).

[199] Leo XIII, *Rerum Novarum: Encyclical Letter on Capital and Labor* (May 15, 1891), *in* 2 THE PAPAL ENCYCLICALS 1878-1903, at 241 (Claudia Carlen ed., 1990). For a later description of subsidiarity that strongly resembles sphere sovereignty, see Paul VI, *Encyclical Letter Gaudium et Spes*, para. 76 (1965) ("[I]n their proper spheres, the political community and the Church are mutually independent and self-governing.").

[200] Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 43 (2003).

[201] *Id.* at 41.

[202] Duncan, *supra* note 89, at 72.

[203] *See* Carozza, *supra* note 200, at 40-41.

[204] *See generally* Duncan, *supra* note 89.

[205] *See, e.g.*, Mouw, *supra* note 29; Woldring, *supra* note 154; Van der Vyver, *Sphere Sovereignty of Religious Institutions*, *supra* note 98, at 657-58.

[206] *See, e.g.*, Duncan, *supra* note 89, at 73.

est practical position of authority and the church above the state.[207] Sphere sovereignty, by contrast, envisions a horizontal social order, in which the various spheres "do not derive their respective competencies from one another."[208] Given this horizontal ordering, the limited nature of state authority over other sovereign spheres is not just a matter of allowing the "lower" orders to do what they can. Rather, "the boundaries that separate the spheres are a part of the very nature of things. Neither the state nor the church has any business viewing the other spheres as somehow under them."[209]

Despite this difference, subsidiarity and sphere sovereignty are in some ways consistent. Their differences have certainly not prevented them from becoming "conversation partner[s]."[210] For one thing, subsidiarity itself has changed over time, in ways that deemphasize the hierarchical nature of the social order.[211] Moreover, sphere sovereignty itself, even if it treats all the sovereign spheres as resting on equal authority, nevertheless permits state intervention in appropriate cases, just as subsidiarity does.[212] Both emphasize the centrality of a variety of private associations, including the church, in our social order, and both would limit the state's intervention with respect to those associations to foster their flourishing.

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This Part has had two goals. First, it has offered a fairly detailed introduction to Kuyper's concept of sphere sovereignty. Second, it has argued that sphere sovereignty does not stand alone in social thought. Rather, it is part of a rich history of pluralistic conceptions of the state and of the role of various private associations, including the church. Some of those conceptions draw on the same roots that Kuyper did. Even if Kuyper's emphasis on the Puritan roots of American religious and political liberty attempted to brush a number of other influences on American constitutionalism out of the picture,[213] it is still true that the Puritans, who formed an influential strand of

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[207] *See, e.g.*, Mouw, *supra* note 29, at 93 (citing HERMAN DOOYEWEERD, ROOTS OF WESTERN CULTURE: PAGAN, SECULAR, AND CHRISTIAN OPTIONS 127 (Mark Vander & Bernard Zylstra eds., John Kraay trans., 1979)). Dooyeweerd, it should be noted, was a critic of subsidiarity for this reason, and so his description should not be taken as definitive.

[208] Van der Vyver, *Sphere Sovereignty*, *supra* note 98, at 655.

[209] Mouw, *supra* note 29, at 93.

[210] Stackhouse, *supra* note 95, at xv.

[211] *See* Sigmund, *supra* note 205, at 213; *see also* Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008) (manuscript at 22) *available at* http://ssrn.com/abstract=1125441 ("In common parlance, . . . one hears that subsidiarity is the principle that ruling power should devolve to the lower levels at which it can be exercised effectively. In Catholic social doctrine, however, subsidiarity means what [Jacques] Maritain refers to as the pluralist principle: Plural societies and their respective authorities must be respected.").

[212] *See* Woldring, *supra* note 154, at 186-87 (concluding that "the differences between subsidiarity and sphere sovereignty are in fact quite marginal").

[213] *See, e.g.*, James D. Bratt, *Abraham Kuyper: Puritan, Victorian, Modern*, *in* RELIGION, PLURALISM, AND PUBLIC LIFE: ABRAHAM KUYPER'S LEGACY FOR THE TWENTY-FIRST CENTURY, *supra* note 29, at 3, 19-20.

the American constitutional tradition, drew on the same sources and reached some of the same conclusions. This leaves us with the possibility that the ideas underlying sphere sovereignty are not alien but immanent in the American social and constitutional order. With that in mind, let us consider how sphere sovereignty might be said to shape that order, and in particular how it might influence the First Amendment institutional project.

IV. Combining Sphere Sovereignty and First Amendment Institutionalism

Having laid out in substantial detail two seemingly disparate theoretical projects—the study of First Amendment institutions and the neo-Calvinist theory of sphere sovereignty—it remains to weave them together. Let us begin with the contribution that sphere sovereignty might make to the constitutional landscape. To be sure, sphere sovereignty is not a programmatic vision.[214] Still, it offers a surprisingly coherent and detailed vision of a pluralistic constitutional regime. It describes a legal order in which both the presence and the importance of a host of intermediary institutions, ranging from the small domestic order of the family to the substantial institutional structure of the church, are central to a properly functioning society.

In doing so, sphere sovereignty serves as a valuable constraint on the state in two senses. First, although it is highly respectful of the state, seeing it as the "sphere of spheres," it does not enthrone the state as an absolute good. At the same time that it recognizes the fundamental importance of the state, it deemphasizes the state by describing it as just one among many sovereign legal orders. Second, it limits the role of the state, preventing it from becoming a suffocating octopus by limiting it to its proper sphere of activity. Its role is not all-encompassing, but neither is the state rendered either unnecessary or minimal. To the contrary, sphere sovereignty retains a central role for the state, both in mediating between the various spheres and in protecting the individual rights of the members of the spheres.

This approach is valuable for the development of individual and social rights and relations. Sphere sovereignty does not ignore "the sovereignty of the individual person."[215] Kuyper emphasized that each individual is necessarily "a sovereign in his own person,"[216] and argued that a proper understanding of Calvinism required respect for "liberty of conscience," "liberty of speech," and "liberty of worship."[217] This is apparent in his description of the state's central role in "defend[ing] individuals and the weak ones, in [the various] spheres, against the abuse of power of the rest,"[218] and in his reminder that both church and state alike must "allow[] to each and every

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[214] *See, e.g.*, Mouw, *supra* note 29, at 100-01.
[215] Kuyper, Lectures, *supra* note 27, at 107.
[216] *Id.* (quotations and citation omitted).
[217] *Id.* at 108 (emphasis omitted).
[218] *Id.* at 97.

citizen liberty of conscience, as the primordial and inalienable right of all men."[219]

At the same time, Kuyper does not repeat the frequent liberal mistake of being inattentive to mediating structures in a way that ultimately leaves "only the state on the one hand and a mass of individuals, like so many liquid molecules, on the other."[220] His picture of human life, and of the prerequisites for genuine human flourishing, is relentlessly social. It recognizes, as did Tocqueville, that institutions are essential for instrumental purposes that affect the individual on both a personal and a social level. Personally, it recognizes that "[f]eelings and opinions are recruited, the heart is enlarged, and the human mind is developed only by the reciprocal influence of men upon one another."[221] Socially, it acknowledges that associations serve as a vital means of community in an egalitarian and commercial democratic republic which might otherwise render human life intolerably atomistic.[222] But Kuyper's vision of the role of associations is not merely instrumental. Rather, it sees associations as an intrinsic part of the ordering of human existence, and honors these associations as a central and divinely ordered aspect of human life.

This vision of sphere sovereignty maps onto a variety of aspects of the constitutional structure. Writ small, it suggests something of the Court's doctrine of substantive due process rights for families in directing the upbringing of children,[223] the only remnants of the *Lochner* era to survive into the present day.[224] Writ large, it is consistent with our larger system of federalism, which divides various regulatory matters among a multitude of competing and cooperating sovereigns.[225] It also finds an echo in various theories of localism, which similarly emphasize the key structural role played in constitutional government by even smaller localities, such as cities.[226]

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[219] *Id.* at 108.

[220] BERGER & NEUHAUS, *supra* note 196, at 4 (internal quotations and citation omitted).

[221] 2 TOCQUEVILLE, *supra* note 185, at 108-09.

[222] *See id*. at 103 ("The Americans have combated by free institutions the tendency of equality to keep men asunder, and they have subdued it.").

[223] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[224] *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas: *"The Fundamental Right" That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1931 (2004).

[225] *See, e.g.*, Appiah, *supra* note 100, at 2388-89 (suggesting that sphere sovereignty "is an idea one of whose applications is federalism").

[226] *See, e.g.*, David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 *passim* (1999); David J. Barron, *The Promise of Tribe's City: Self-Government, the Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 812 (2008) (arguing, through the work of Laurence Tribe, for "an important constitutional vision in which urban centers are central to securing the kind of self-government that, at bottom, our founding charter is intended to promote"); David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 *passim* (2006); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1113-17 (1980); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 371-76 (2001).

However, for present purposes what is most significant about sphere sovereignty is the contribution it makes to our understanding of First Amendment institutionalism. First, it helps legitimate First Amendment institutionalism,[227] rooting a general intuition about the courts' failure to fully account for the important role of various associations in a broader and more firmly grounded theoretical structure. Second, it offers a surprisingly detailed set of justifications for First Amendment institutionalism and helps provide at least the rudiments of a set of boundaries that help define First Amendment institutions and their respective roles. It also offers a code of conduct both for the institutions themselves and for the state as a regulatory mechanism that mediates between them and protects the individuals within them. Finally, and most importantly for this Article, sphere sovereignty offers an especially full and persuasive account of religious entities as First Amendment institutions.[228]

We might ask more particularly what the picture we have drawn of sphere sovereignty has to offer First Amendment institutionalism. What precisely is the vision of institutionalism that sphere sovereignty offers? Drawing on Kuyper, we can describe it in this way: sphere sovereignty offers a vision of a vital, diverse, organic, and ordered legal pluralism.

Each of these terms has a particular meaning and implication for sphere sovereignty and First Amendment institutionalism. By "legal pluralism," I mean a regime in which it is recognized that a variety of "legal systems coexist in the same field," and in which "legal systems" can include not only judicial and legislative systems, but also "nonlegal forms of normative ordering."[229] Legal pluralism thus stands against any theory of the state that recognizes only one form of legal order, generally that of the state. It is vital, as Wolterstorff recognizes, because Kuyper views the spheres as "teeming with" creativity and energy.[230] It is diverse in the sense that Kuyper acknowledges a whole host of spheres of human activity, including but not limited to the church, the state, various private associations, the family, and even smaller governmental structures. Just as important, he recognizes that each of these spheres have a different purpose and function, and thus will not operate in the same way and to the same ends. It is organic because it does not simply take the value of the spheres as instrumental, or as artificial constructs of human activity, but views them as intrinsically valuable and naturally occurring. Finally, sphere sovereignty is ordered in that each sphere, having its own function and ends, also has its own role and its

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[227] *See* Horwitz, *Three Faces of Deference*, *supra* note 15, at 1145 (arguing that First Amendment institutionalism still needs to be legitimated as a "theoretically grounded alternative to current First Amendment doctrine").

[228] *See, e.g.*, Garnett, *Do Churches Matter?*, *supra* note 21, at 293.

[229] Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988); *see also* Cover, *supra* note 71, at n.36; John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 217 n.31 (1991).

[230] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 6.

own limits, and is substantially self-regulating according to the nature and traditions of the particular enterprise.[231]

Without wanting to overlook its attendant difficulties, it should be evident that this vision has many virtues. In both its broad outlines and its internal structure and limits, it threads a middle path that avoids both statism and atomistic individualism. It thus recognizes the "material and normative dimensions of . . . [various] forms of social order,"[232] but acknowledges that these forms of social order must also respect "the sovereignty of the individual person."[233] In Robert Cover's terms, it recognizes the "jurisgenerative" power of the spheres as sovereigns, while providing at least the general outline of a mechanism for guarding against both "[v]iolence at the hands of the state" and "violence [at the hands of] any nonstate community."[234]

All of these virtues combine well with First Amendment institutionalism. Sphere sovereignty provides a valuable organizing metaphor for First Amendment institutionalism in a variety of ways. Consider Kuyper's description of a fairly discrete and finite set of social spheres, centered around church, state, and society, each of which has an "independent character."[235] This organizing structure offers a valuable guide to the institutional variation and differentiation that the First Amendment institutional project requires. Its description of the "threefold right and duty"[236] of the state gives a greater shape to the sense of the scope and limits of institutional autonomy under an institutional First Amendment approach.

In two important senses, sphere sovereignty also helps legitimize the First Amendment institutional project. First, its depiction of the organic nature of the sovereign spheres—that is, its depiction of these spheres as both identifiable and naturally occurring—helps allay concerns regarding the difficulty of spotting or defining particular First Amendment institutions. Second, to the extent that concepts like sphere sovereignty are drawn from a set of ideas that also influenced the development of American constitutional thought, this suggests that there is some support for a First Amendment institutional approach in the fabric of American constitutional culture. Sphere sovereignty thus helps provide First Amendment institutionalism with a pedigree and a set of organizing principles.

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[231] For the same general concept, put in Kuyperian terms, see Spykman, *supra* note 110, at 167 ("Each sphere has its own identity, its own unique task, its own God-given prerogatives. On each God has conferred its own peculiar right of existence and reason for existence.").

[232] Post, *supra* note 55, at 1280-81.

[233] KUYPER, LECTURES, *supra* note 27, at 107 (emphasis omitted).

[234] Cover, *supra* note 71, at 51.

[235] KUYPER, LECTURES, *supra* note 27, at 91. *See also supra* notes 117-18 and accompanying text (contrasting his earlier discussion of sphere sovereignty, which seems to allow for an almost limitless number of spheres, with the discussion of sphere sovereignty in his Princeton lectures, which suggests the existence of a smaller and more distinct number of spheres).

[236] KUYPER, LECTURES, *supra* note 27, at 97.

What might the organizing principles of a First Amendment institutionalism that draws on sphere sovereignty look like? To begin with, we could expect a modified list of Kuyper's own version of the sovereign spheres to emerge. That certainly includes religious entities, universities, libraries, and various other private associations. The press' fundamental role as a counterweight to the state and its relatively well-established tradition of self-governance suggest that it should also be counted as a sovereign sphere. I have not included on this list families, business enterprises, or local governments. They are by no means completely excluded from an institutionally-oriented constitutional account, but that does not mean they would count as *First Amendment* institutions. As Frederick Schauer has written, most of us can recognize that "a certain number of existing social institutions . . . serve functions that the First Amendment deems especially important."[237] It is these institutions that are the focus of this account.

With this starting point, a court examining a First Amendment question[238] would not simply attempt to apply First Amendment doctrine in an institutionally agnostic manner. Rather, it would proceed from the assumption that some institutions are at least "socially valuable,"[239] and are also a natural and intrinsically worthy part of both social discourse and individual human flourishing. Accordingly, rather than engage in the kind of taxonomical inquiry it employs under current doctrine (Is this a state actor or a public speaker? Is this regulation content-neutral, viewpoint-neutral, etc.? Is this a limited-purpose public forum, a nonpublic forum, etc.?), a court would ask a different set of questions. First, is this litigant a recognizable First Amendment institution? In other words, is it an identifiable sovereign sphere whose fundamental role in the social order is to contribute to public discourse?

Second, a court would ask: what is the nature of this institution and its participation in public discourse? Not all sovereign spheres are exactly the same and neither are all First Amendment institutions. Although both the press and universities ultimately contribute to the formation of public discourse, they do not do so in the same way. Understanding the role and purpose of the institution under examination in a given case would give the court a sense of the boundaries and norms of that institution.

This inquiry would lead in turn to the third question: what are the appropriate occasions for state intervention in the affairs of such a First

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[237] Schauer, *Institutional First Amendment, supra* note 53, at 1274.

[238] I assume, for now, that courts would employ these principles in deciding questions involving First Amendment institutions. For more discussion on this point, see, for example, Hamilton, *Religious Institutions*, *supra* note 100, at 1195-97 (arguing, in the course of opposing religious autonomy altogether, that courts are ill-suited to make such determinations). *See also* Mark Tushnet, *Defending a Rule of Institutional Autonomy on "No-Harm" Grounds*, 2004 BYU L. REV. 1375, 1383 (responding that the arguments for institutional autonomy are more plausible than Hamilton recognizes, but suggesting that it is "a good idea to leave it up to legislatures to define the contours of the rules of institutional autonomy").

[239] Schauer, *Institutional First Amendment*, *supra* note 53, at 1275.

Amendment institution? Factors to consider include: whether there is an intersphere dispute between institutions, whether there is an intrusion on individual rights that calls for state intervention, and whether it is a transspherical dispute involving public goods and not the sovereign authority of the First Amendment institution.

These three questions might be filled out with a few observations. First, the fact that there are some appropriate occasions for state intervention does not render them the rule rather than the exception. My starting assumption is that the rule would be one of autonomy or sovereignty within the proper scope of each respective sphere or First Amendment institution. In each case, "the argument would be that the virtues of special autonomy [for these institutions] . . . would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural (or at least most comfortable) home within the boundaries of the First Amendment."[240]

Second, the fact that autonomy would apply within the proper scope of each sphere suggests why a court, following something like Kuyper's approach,[241] would need to inquire about the nature and purpose of each First Amendment institution. Similarly, in order to understand both the purpose of a First Amendment institution and the ways in which its self-regulation may substitute for formal legal regulation by the state, it is necessary to understand the fixed or evolving norms of self-governance driving each institution. To understand whether the press is acting sufficiently "press-like" to merit a continuing claim of legal autonomy, we would ask whether it is acting within something like its core purpose of discovering and disseminating information and commentary. We would also ask whether its professional norms serve the values that justify the existence and legal autonomy of this sphere, and that can serve as a proxy for the kinds of regulatory functions we might otherwise expect the government to undertake.

Finally, Frederick Schauer is right to argue that institutionalism need not be a creature of the First Amendment alone. Schauer argues that the use of institutional categories might involve not just what I have labeled First Amendment institutions, but any number of institutions that have "important institution-specific characteristics" that are germane to a variety of constitutional values, such as equal protection.[242] He also points out that while in some cases First Amendment institutionalism might lead to "more" protection for a particular institution, in other cases institutionalism might lead to "less" protection; some institutions might be "the loci of a range of dangers

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[240] *Id.* at 1274-75.

[241] These are not Kuyper's views alone, however. Thus, Robert Post writes of the possibility of the Supreme Court refashioning First Amendment doctrine according to the "local and specific kinds of social practices" that are relevant to the broader purpose of serving the underlying values of the First Amendment. Post, *supra* note 55, at 1272.

[242] Schauer, *Institutions, supra* note 33, at 1757 n.51.

which might militate especially strongly for restriction."[243] The important point in both cases is that constitutional analysis should proceed by way of institutional categories rather than institutionally agnostic doctrinal rules.

Given my focus on those "First Amendment institutions" that serve positively to shape and enhance public discourse, I have left these other institutions to one side. But the kinds of inquiries I have recommended courts undertake certainly would not be irrelevant in other constitutional fields. For instance, we might ask if the family serves particular interests, like privacy, conscience-formation, and the transmission of both shared civic virtues and localized diversity, that deserve protection under the Due Process Clause or some other constitutional provision.[244] Conversely, we might conclude that institutions such as businesses are spheres of social activity, but that their purpose does not require substantial legal autonomy. Or we might decide that state intervention is justified in a wider variety of circumstances involving businesses because their interaction with other spheres may create third-party victims who are not active participants in that sphere.[245]

In short, a sphere sovereignty approach to First Amendment institutionalism would recognize a broad autonomy for at least some institutions that are particularly recognizable and especially important for public discourse. The scope of that autonomy would ultimately be shaped by the nature and function of that institution and its capacity for self-regulation; the general boundaries of state intervention would be drawn in something like the tripartite manner that Kuyper suggests. For at least those institutions I have highlighted, the result would be a greater degree of legal autonomy under the First Amendment. Other institutions, like the family, might enjoy a substantial (but not unlimited) degree of autonomy, but this autonomy would not derive from the First Amendment itself.

Although this discussion applies to the whole array of First Amendment institutions, and perhaps to the constitutional treatment of institutions in general, it should be of special interest to the legal treatment of religious entities. It can hardly be doubted that religious entities fall within the category of entities that help form, shape, and propagate public discourse, which is the underlying justification for First Amendment institutions. Virtually all of the "activities of religious groups are bound up with First Amendment purposes."[246] They are thus fitting subjects for treatment as sovereign spheres under a First Amendment institutionalist approach.

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[243] Schauer, *Institutional First Amendment, supra* note 53, at 1276-77.

[244] *See* Mark Tushnet, *Defending a Rule of Institutional Autonomy on "No-Harm" Grounds*, *supra* at note 238, at 1381 & n.17 (suggesting that arguments for autonomy for religious institutions may overlap with arguments for autonomy for "families or other nongovernmental organizations").

[245] *See, e.g.*, Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, *supra* note 81; Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, *supra* note 84; Blocher, *supra* note 6.

[246] Brady, *supra* note 22, at 1710.

If we allow for Kuyper's religious focus but expand it to include other faiths,[247] this is a recipe for the constitutional treatment of religious entities as First Amendment institutions. There is some possibility that Kuyper's description of the sovereignty of the church might have to do primarily with the narrow categories of "worship, catechesis, and evangelism."[248] But this assumption was likely grounded on the understanding that a variety of parallel organizations, each of them operating within a particular "sphere," would operate under religious principles and for the achievement of religious ends—sectarian trade unions, political parties, universities, and so on. This principle of "pillarization"[249] is less pronounced in the United States than it was in nineteenth century Holland. Given the wide range of activities and organizations in the United States that have a religious mission or would consider themselves "religious," we can define "religious entity" fairly broadly.[250]

Under a sphere sovereignty approach to religious entities, the starting assumption would be the same as that which applies to other First Amendment institutions: they should generally be treated as sovereign, or autonomous, within their individual spheres.[251] They would coexist alongside the state, like other First Amendment institutions, serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse. At the same time, precisely because they are sovereign spheres, they would "live from their own strength on the voluntary principle."[252] Kuyper's belief that the state lacks the competence and the sovereign authority to authoritatively pronounce any sect to be the one true church suggests that, even if his vision of establishment might be substantially different from our own,[253] some version of non-establishment would

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[247] *See supra* note 145 and accompanying text (noting evidence that Kuyper's concern for liberty of conscience extended beyond Christian sects, such as to Judaism and non-religious individuals).

[248] KUYPER, LECTURES, *supra* note 27, at 99.

[249] *See, e.g.*, Panel Discussion*, Living With Privatization: At Work and in the Community*, 28 FORDHAM URB. L.J. 1397, 1417 (2001) (remarks of Cathlin Baker) (describing the Kuyperian theory of pillarization, under which "each religious and/or moral community would have its own schools, hospitals, and social service agencies; each faith and its own institutions would constitute a pillar"); MONSMA & SOPER, *supra* note 145, at 61-62 (discussing the development and fate of pillarization in the Netherlands).

[250] *See* Brady, *supra* note 22, at 1692-98 (arguing that because "the aspects of church administration that are quintessentially religious differ from group to group," particularly in a religiously diverse society such as the United States, "the only effective and workable protection for the ability of religious groups to preserve, transmit, and develop their beliefs free from government interference is a broad right of church autonomy that extends to all aspects of church affairs").

[251] *Cf.* EEOC v. Catholic Univ., 83 F.3d 455, 467 (D.C. Cir. 1996) (stating that churches have "a constitutional right of autonomy in [their] own domain").

[252] KUYPER, LECTURES, *supra* note 27, at 106.

[253] *See, e.g.*, Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 18 (arguing that Kuyper would regard our understanding of the Establishment Clause "as founded on untenable assumptions and hopelessly confused").

necessarily be woven into the fabric of this approach.[254] Thus, "a free Church, in a free State":[255] a set of independent and largely autonomous religious entities, operating according to their own purposes and within their own sphere, not entitled to state preferment but also substantially immune from state regulation.

All of this is consistent with the approach to First Amendment institutionalism that I outlined above. What sphere sovereignty adds to the picture is a fairly detailed depiction of both the scope and limits of autonomy for religious entities as First Amendment institutions, and historical support that stretches as far back as Althusius's time, and which certainly includes important strains in American constitutional history itself.

V. Churches as sovereign spheres and First Amendment Institutions: Some Applications

A. Introduction

In this Part, I consider some concrete applications of sphere sovereignty. My goal here is not to emphasize either the similarities or distinctions between such an approach and current doctrine concerning church-state issues. In some cases, the outcomes will not differ greatly, perhaps reinforcing the thesis that some version of sphere sovereignty is consistent with our constitutional framework. In other cases, this approach may lead to departures from current doctrine. Given the doctrinal confusion that reigns in this area,[256] a sphere sovereignty/First Amendment institutionalist approach provides, first and foremost, stability and a more powerful set of tools to address these pressing questions. This approach lends a coherent set of principles to the analysis of a wide array of problems in current religious liberty jurisprudence.

One may expect reasonable disagreement about what a sphere sovereignty/institutionalist approach demands in particular cases. Nevertheless, the resolutions I suggest below are attractive because they track each other across doctrinal lines and are consistent with how we might approach similar problems involving a range of other First Amendment institutions.

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[254] *See infra* Part V.E.
[255] Kuyper, Lectures, *supra* note 27, at 106.
[256] *See, e.g.*, Bradley, *supra* note 12, at 1061.

B. Core Questions of "Church Autonomy"

1. Church Property Disputes

Consider first the core problem of "church autonomy." Church autonomy comprises a number of possible issues.[257] Some hints of what the doctrine entails, however, are found in one of the earliest discussions of this doctrine. In *Watson v. Jones*,[258] the Supreme Court examined a property dispute between competing factions of the Presbyterian Church in Louisville, Kentucky, in the wake of the Civil War. In resolving the dispute, the Court provided a number of fundamental principles that have guided questions of church autonomy ever since.

The Court began by asserting that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[259] It declined to adopt any approach to church property disputes that would require the courts to determine whether a particular religious institution or its leadership had departed from established church doctrine.[260] Instead, it laid down rules of conduct that varied according to the form of church polity in question. Disputes within congregationalist churches independent of any higher authority would be decided "by the ordinary principles which govern voluntary associations."[261] Disputes within hierarchical religious organizations with established ecclesiastical tribunal procedures—such as the Roman Catholic Church—would be resolved by accepting the decisions of the highest of these church judicatories as final.[262]

This decision gave rise to a series of subsequent Supreme Court cases that ratified some version of a deferential understanding with respect to church disputes.[263] The Court has held that under the Religion Clauses, "the civil courts [have] *no* role in determining ecclesiastical questions in the process of resolving property disputes,"[264] and may not resolve "underlying controversies over religious doctrine."[265] It has also suggested that "courts may not make a detailed assessment of relevant church rules and adjudicate between disputed understandings,"[266] even if the underlying question is whether the ecclesiastical tribunal has acted consistently with its own law.[267] More recently, the Court has allowed for broader discretion in the applica-

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[257] *See* Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. Rev. 1715, 1733-34.
[258] 80 U.S. 679 (1871).
[259] *Id.* at 728.
[260] *See id.* at 729.
[261] *Id.* at 725.
[262] *Id.* at 727.
[263] Kent Greenawalt, 1 Religion and the Constitution: Free Exercise and Fairness 265 (2006).
[264] Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969).
[265] *Id.* at 449.
[266] Greenawalt, *supra* note 263, at 267.
[267] Serbian E. Orthodox Diocese v. Milivojevich, 429 U.S. 696 (1976).

tion of church property dispute doctrine. State courts may continue to follow the polity-centered rules the Court laid down in *Watson*. They may also adopt a "neutral principles" approach, in which the court applies standard legal doctrine to interpret authoritative church documents, provided that these documents do not require the court to examine and interpret *religious* language.[268]

These cases have generated their share of controversy,[269] but I want to bypass those debates and focus on two points. First, the church property disputes strike at the very heart of what Kuyper would have considered the sovereign territory of religious entities, as opposed to the sovereign territory of the state. In First Amendment institutionalist terms, these cases involve issues that are fundamental to the functioning of religious entities, and should be resolved by the norms of *self*-governance that apply within a particular religious institution, rather than by judicial resolution. Thus, the courts should allow religious entities to resolve their own disputes, according to the norms that they select to govern themselves.

Second, courts should avoid misinterpreting the language of "neutral principles" that the Supreme Court used in *Jones v. Wolf*. Perhaps because the language is similar to the Court's later discussion in *Employment Division v. Smith* of "neutral, generally applicable law[s],"[270] some writers have been tempted to treat the Court's invocation of "neutral principles" in both *Jones* and *Smith* as "undercut[ting] any argument that [the Court's cases in this area] guarantee a broad right of church autonomy."[271] Perry Dane argues persuasively, however, that "[o]ther than an unfortunate coincidence of language," the ideas in *Smith* and *Jones v. Wolf* "have little to do with each other and . . . cannot simply be strung together to suggest an erosion of religious institutional autonomy."[272] Rather, *Jones* recognized the profound difficulty that courts face in resolving what Richard Mouw would call "in-

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[268] Jones v. Wolf, 443 U.S. 595 (1979).

[269] *See, e.g.*, Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); Ira Mark Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378 (1981); John Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567 (1990); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 56 FORDHAM L. REV. 335 (1986).

[270] Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

[271] Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1987 (2007); *see also* Hamilton, *Religious Institutions*, *supra* note 100, at 1162-63 (characterizing the "neutral principles" approach as sounding in utilitarianism rather than church autonomy); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Laws to Religion*, 81 CORNELL L. REV. 1049, 1119 (1996) (characterizing both *Jones* and *Smith* as cases involving "governmental neutrality" and not church autonomy); W. Cole Durham, Jr., *Legal Structuring of Religious Institutions*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW, *supra* note 19, at 213, 220-21 (noting and criticizing this phenomenon).

[272] *See* Dane, *"Omalous" Autonomy*, *supra* note 257; *see also* Dane, *The Varieties of Religious Autonomy*, *supra* note 65.

trasphere" church disputes involving contending claimants to the title of "church." The Court's response in *Jones*—giving religious entities the opportunity to structure their own governing documents with secular language state courts can read and enforce—was simply a vehicle by which the Court could allow churches to "order[ ] [their own] private rights and obligations" in an enforceable manner that could "accommodate all forms of religious organization and polity."[273] *Jones* was, in short, an effort to *accommodate* church autonomy, not to eliminate it.[274] Whether or not the neutral principles approach is an especially helpful one in settling church property disputes, it should be clear that it does not contradict, but rather serves, the principle of church autonomy.

2. The Ministerial Exemption

Another broad category involving questions of "church autonomy" concerns the so-called "ministerial exemption." Under Title VII of the Civil Rights Act, religious entities are immune from civil rights litigation in cases concerning "the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[275] This provision does not exempt churches from civil rights cases involving other protected categories such as race or sex.[276] But the lower federal courts have widely agreed that the Religion Clauses require a broader scope of immunity than the statute provides, concluding that religious freedom "bars *any* inquiry into a religious organization's underlying motivation for [a] contested employment decision" if the employee would "perform particular spiritual functions."[277] The ministerial exemption is not just a legal defense to an employment discrimination action; it is a recognition by the courts that they lack the jurisdiction to examine these claims.[278]

The question of who qualifies for the "ministerial exemption" has provoked a good deal of discussion.[279] Several writers have argued that the

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[273] *Jones*, 443 U.S. at 603-04.

[274] *See* Dane, *"Omalous" Autonomy*, *supra* note 257, at 1743-44 ("What should be clear is that the neutral principles approach only makes sense . . . in the context of an effort to effectuate a religious community's effort to specify the form that community should take through some type of private ordering. . . . [T]o confuse neutral principles of law with *Smith*'s invocation of neutral, generally applicable law and, therefore, to employ it to reject claims of autonomy in the face of any secular and neutral regulatory regime . . . is just flat wrong."); *see also* Durham & Sewell, *supra* note 193, at 48 n.277 (same).

[275] 42 U.S.C. § 2000e-1(a) (2000).

[276] *See, e.g.*, Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985).

[277] Petruska v. Gannon Univ., 462 F.3d 294, 304 (3d Cir. 2006).

[278] *See, e.g.*, Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL'Y 387, 414 & n.200 (2005) (collecting cases).

[279] *See* Horwitz, *Universities as First Amendment Institutions, supra* note 13, at 1521 nn.142-45 and accompanying text (offering examples). Another issue in this area that has

exemption itself is not required by the Religion Clauses and should be eliminated, subjecting religious entities to civil rights laws in the same manner as any other employer.[280]

A First Amendment institutionalist approach supplemented by the concept of sphere sovereignty buttresses the arguments of courts and scholars in favor of the ministerial exemption. If religious entities are to function as sovereign institutions, they require a substantial degree of autonomy to make their own decisions about whom they hire and fire: "The Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle."[281]

One might argue that only those employment decisions that are truly *religious* fall within the proper sphere of religious sovereignty, and any decisions based on extrinsic factors such as race or sex fall outside the ambit of its sovereign sphere. That argument is mistaken for a number of reasons. First, the activity itself—hiring or firing an employee of a religious organization—remains squarely within the core activity of religious sovereignty, even if the grounds for such a decision are questionable. Second, to determine whether or not the religious institution's basis for hiring or firing someone is truly extrinsic to its religious activities would require courts to make determinations in cases where "the government lacks the data of judgment."[282]

Third, any state remedy would intrude on religious sovereignty—or, put differently, the religious entity's integrity and usefulness as a First Amendment institution. A court-ordered reinstatement of such an employee would require the religious entity to "tolerate" not just a member, but a minister or other core employee "whom [the church] feels obliged to expel from [its] circle."[283] This is equally true from a First Amendment institutionalist perspective. Since it assumes that religious and other First Amendment institutions are entitled to legal autonomy, it would be inappropriate for the state to usurp that privilege of self-regulation by selecting the people who present the institution's public face. Although an award of damages would be less harmful than reinstatement, it would still effectively penalize the religious entity for the exercise of the same privilege.

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attracted considerable attention is whether the ministerial exemption is rooted in the Free Exercise Clause, the Establishment Clause, or both. In part because my sphere sovereignty-focused institutional reading of the Religion Clauses ultimately flows from both Clauses, I do not address that issue here. For discussion and citation to representative positions on this issue, see Garnett, *Religion and Group Rights*, *supra* note 23, at 526-27 & nn.67-72. For a position closer to my own, see Dane, *supra* note 257, at 1718-19 ("If the truth be told, institutional autonomy is, strictly speaking, neither a matter of free exercise nor of establishment; rather, it can most sensibly be understood as a distinct third rubric, grounded in the structural logic of the relation between the juridical expressions of religion and the state.").

[280] *See, e.g.*, Rutherford, *supra* note 271; Corbin, *supra* note 271.

[281] KUYPER, LECTURES, *supra* note 27, at 108.

[282] *Id.* at 105.

[283] *Id.* at 108.

Thus, an institutionalist approach supports the courts' recognition of church immunity with respect to those employment decisions that involve, at least, the core decision to hire or fire "religious" employees. That immunity should be read broadly. Courts should not be required to examine too closely a religious institution's own claim that an employee is in fact a religious employee.

Furthermore, a sphere sovereignty or First Amendment institutionalist approach would favor extending current doctrine with respect to the ministerial exemption. As the law currently stands, Title VII permits religious entities to discriminate against any employee, but only for religious reasons. Conversely, the ministerial exemption forbids courts from examining cases involving discrimination on *any* protected basis, but only where ministerial employees are concerned. A more robust version of First Amendment institutionalism, however, would treat the question more categorically: churches *qua* churches are entitled to a substantial degree of decision-making autonomy with respect to membership and employment matters, regardless of the nature of the employee or the grounds of discrimination.

This raises the "*Bob Jones* problem": should religious entities be entitled to discriminate where other organizations cannot, even on forbidden grounds such as race?[284] One can, of course, deplore such acts of discrimination, especially when they are not deeply rooted in the religious policies of a particular institution. A somewhat half-hearted response to this concern is that *Bob Jones* itself did not simply involve internal affairs; it involved the external question of how to apply the nation's tax laws.[285] A Kuyperian or First Amendment institutionalist approach would go further and suggest that courts lack the jurisdiction to intervene in at least some cases. That does not mean religious entities themselves are immune to internal or external moral influence; it *does* mean that, absent extraordinary circumstances, these disputes should be self-regulated.

Deference to self-regulation, though disturbing in individual cases, is justified in light of the institutional or Kuyperian value of church autonomy. Moreover, the approach would place the doctrine on a firmer and clearer footing than the current approach, which implicitly attempts to balance the interests in each case. Arguments in favor of the ministerial exemption and other aspects of church autonomy doctrine tend to be instrumental in na-

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[284] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (upholding the denial of a tax exemption to a university that forbade interracial dating between students on religious grounds). *See generally* Cover, *supra* note 71. Although she does not mention *Bob Jones*, Laura Underkuffler's worries about church autonomy appear to stem from similar concerns. *See* Laura S. Underkuffler, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 BYU L. REV. 1773.

[285] *See* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & RELIGION 153, 153 n.5 (2006-2007) [hereinafter Brady, *Religious Group Autonomy*].

ture.[286] Instrumentalist justifications are important and certainly consistent with a First Amendment institutionalist account, but in a sense they may concede too much by putting the argument in instrumental terms. Moreover, they lend themselves to the kind of interest-balancing that has led courts to deal clumsily with questions such as whether a particular position is "ministerial" in nature.

The blunter and more emphatic spirit of the sphere sovereignty approach may have something to contribute here. Religious entities are protected as a part of the social landscape not simply because they are instrumentally valuable, but because they are intrinsically valuable, and a fundamental part of a legally pluralistic society. The state is precluded from interfering in church employment decisions not simply because it would be problematic, but because the church's affairs are not the state's affairs; it simply has no jurisdiction to entertain these concerns. A sphere sovereignty approach to the question of church autonomy thus has more in common with the approach offered by Carl Esbeck, who argues that the state is jurisdictionally disabled from addressing these questions.[287]

Do church employment decisions fall within the scope of any of the three occasions on which the state may interfere with the sovereignty of another sphere? One *could* argue that fired church employees must be protected "against the abuse of power" within the sovereign spheres.[288] But this takes Kuyper's exception too far. He recognized that the state may be forced to intervene when a citizen is "compelled to *remain* in a church which his conscience forces him to leave."[289] In other words, forcing an individual to stay in a religious community against her will violates the individual's own sovereign conscience. That is a different matter from church employment decisions, however, in which the church's own ability to select the composition of its members is at stake. From a strictly First Amendment institutionalist perspective, the result is the same. From a categorical perspective, what should matter to the court is that it has identified the defendant as a relevant First Amendment institution. Core decisions such as whom to employ

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[286] *See, e.g.*, Thomas C. Berg, *The Voluntary Principle, Then and Now*, 2004 BYU L. REV. 1593, 1613 (noting that courts often justify the ministerial exemption on the instrumental grounds of judicial incompetence, and disagreeing with this emphasis); Brady, *Religious Organizations and Free Exercise*, *supra* note 22, at 1699-1706 (focusing on the contribution that religious groups make to democratic deliberation); Brady, *Religious Group Autonomy*, *supra* note 285 (focusing on their contribution to the search for truth). This is an ungenerous characterization of Professor Brady's articles, whose broader argument is that our very inability to determine conclusively what is true or false requires a space for religious groups to contribute to this conversation, but it will serve for present purposes.

[287] *See, e.g.*, Esbeck, *Dissent and Disestablishment*, *supra* note 10; Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, *supra* note 72. For a similar approach, see Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155.

[288] KUYPER, LECTURES, *supra* note 27, at 97. For such an argument, *see, e.g.*, Rutherford, *supra* note 271.

[289] KUYPER, LECTURES, *supra* note 27, at 108 (emphasis added).

should be resolved principally by the self-governance mechanisms of the institution itself.

C. Sexual Abuse and Clergy Malpractice

Surely the most controversial issue that has arisen around claims of church autonomy is the growing scandal over sexual abuse by members of the clergy. Clergy sexual abuse has spawned an enormous volume of litigation, resulted in significant settlement payments and church bankruptcies, and caused some traditional legal defenses to buckle under the sheer weight of social disapproval.[290] It has also sparked some of the most vehement opposition to the general principle of church autonomy.[291]

While this Article cannot address all the complex issues that this issue has engendered,[292] a few words about the issue are important, because they serve as a reminder that sphere sovereignty is not an absolute license. Most writers who argue for church autonomy already strongly agree on this point,[293] but it is still worth stressing, lest critics of church autonomy advance a straw-man argument along these lines.[294]

Kuyper could not be clearer on this point: one of the occasions on which it is most appropriate for the state to exercise its own sovereignty and intervene in the sphere of religious sovereignty is when an institution has behaved abusively toward one of its own members.[295] In those circumstances, the state is obliged to act to ensure the protection of the individual "from the tyranny of his own circle."[296] Thus, sphere sovereignty, even in its strongest form, is not the equivalent of a general immunity from liability for the sexual victimization of minors and adults. From a First Amendment institutionalist perspective, however strong the interest in favor of institutional autonomy, it does not extend to cases involving these kinds of gross harms. Rather than serve the underlying spirit of valuing institutions that

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[290] *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1792.

[291] *See, e.g.*, Hamilton, *Religious Institutions*, *supra* note 100; Marci A. Hamilton, *Church Autonomy Is Not a Better Path to "Truth,"* 22 J.L. & RELIGION 215 (2006-2007); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007).

[292] In addition to Lupu & Tuttle's comprehensive and superb article, *supra* note 290, see Symposium, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 947 (2003) and TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008).

[293] *See, e.g.*, Lupu and Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note 19; Brady, *Religious Organizations and Free Exercise*, *supra* note 22; Durham & Sewell, *supra* note 193, at 80.

[294] *See, e.g.*, Marci A. Hamilton, *The Catholic Church and the Clergy Abuse Scandal: Act Three*, Apr. 10, 2003, http://writ.news.findlaw.com/hamilton/20030410.html ("The so-called church autonomy doctrine is not really a legal doctrine at all . . . . Rather, it is an insidious theory that invites religious licentiousness rather than civic responsibility.").

[295] *See* KUYPER, LECTURES, *supra* note 27, at 97.

[296] KUYPER, *Sphere Sovereignty*, *supra* note 106, at 468.

contribute to self-flourishing and public discourse, immunizing religious entities in such cases would choke off public discourse by imprisoning its victims behind a wall of silence.

In short, however stringent a sphere sovereignty-oriented vision of religious entities as First Amendment institutions may be, it does not include religious immunity from obviously harmful conduct. It does, however, suggest something about how we might go about intervening in these cases. We should adopt a measure of caution, preventing courts or juries from deciding numerous issues that range further afield from the abuse itself and closer to the heart of the First Amendment institution.[297]

Courts already recognize some of these dangers. Virtually every court, for instance, has denied claims based on "clergy malpractice" because those claims require courts to "articulate and apply objective standards of care for the communicative content of clergy counseling,"[298] striking at the heart of religious entities as sovereign spheres and embroiling courts in questions that they lack the competence to resolve.[299]

Professors Ira Lupu and Robert Tuttle take this caution a step further, applying a modified version of the Supreme Court's protective test in *New York Times v. Sullivan*[300] to the realm of civil suits against religious entities for sexual misconduct.[301] They suggest that courts should reject any regime of tort liability that "imposes on religious entities a duty to inquire into the psychological makeup of clergy aspirants,"[302] to avoid leading these institutions into a form of "self-censorship[ ] that is inconsistent with the freedom protected by ecclesiastical immunity from official inquiry into the selection of religious leaders."[303] By adapting the test of "actual malice" from *New York Times*,[304] they argue that religious officials should not be liable for abuse committed by an individual clergy member unless the institution "had actual knowledge of [its] employees' propensity to commit misconduct."[305] These and other measures would "give[ ] religious organizations 'breathing

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[297] Some possible issues include broad questions of entity responsibility, the manner of selecting or monitoring religious officials, and questions of church structure and bankruptcy.

[298] Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 290, at 1816.

[299] *See, e.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960 (Cal. 1988); William W. Bassett, W. Cole Durham, Jr. & Robert T. Smith, 2 Religious Ass'ns & L. (West) § 8:19 n.9 (2007) (listing cases).

[300] 376 U.S. 254 (1964).

[301] *See* Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 290, at 1859-84; *see also* Daryl L. Wiesen, Note, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291 (1995).

[302] Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 290, at 1860-61.

[303] *Id.* at 1861.

[304] 376 U.S. at 279-80.

[305] Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 290, at 1862.

space' within which to organize their own polities, select their own leaders, and preach their own creeds."[306]

This is consistent with my general approach toward religious entities as First Amendment institutions, or sovereign spheres. It treats these entities as lying largely beyond the jurisdiction of the state, and seeks to craft the law affecting them in ways that give them the utmost freedom to shape and regulate themselves. Two aspects of this method are worth underscoring. First, the immunity religious entities retain in these cases is limited; the state may intervene to protect church members in appropriate cases. Second, there is a difference between leaving open even a limited scope for religious immunity in these cases and arguing that religious entities ought to be free to do whatever they wish. First Amendment institutions are self-regulating institutions subject to internal critique and reform, non-legal public pressure, and reputational forces. There is therefore reason to believe that even a limited form of immunity would not prevent religious entities from self-regulating to avoid the risk of sexual misconduct. Certainly they have every incentive to do so, including the religious incentives that shape them and define the core of their sovereign concerns.[307]

D. Free Exercise Questions and Smith

I have already noted the Supreme Court's decision in *Employment Division v. Smith*.[308] Before *Smith*, religious claimants were entitled to put the government to a test of strict scrutiny for religious burdens even where they are caused by generally applicable laws. *Smith* dispensed with this test, concluding that generally applicable laws are entitled to no special level of scrutiny under the Free Exercise Clause.[309] Because the *Smith* Court cited its own prior church property dispute decisions for the proposition that "[t]he government may not . . . lend its power to one or the other side in controversies over religious authority or dogma,"[310] some courts[311] and commentators[312] have argued that at least some form of compelled religious accommodation for generally applicable laws involving religious groups survives *Smith*.[313]

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[306] *Id.* at 1860.
[307] *See id.* at 1864-65.
[308] *See supra* Part V.B.1.
[309] Employment Div. v. Smith, 494 U.S. 872, 885 (1990).
[310] *Id.* at 877 (citations omitted).
[311] *See, e.g.*, Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999), EEOC v. Catholic Univ., 83 F.3d 455, 462 (D.C. Cir. 1996).
[312] *See, e.g.*, Brady, *Religious Organizations and Free Exercise*, *supra* note 22; Dane, *supra* note 257.
[313] *But see* Laura S. Underkuffler, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1775 n.11 (arguing that none of the cases cited in *Smith* with respect to religious group autonomy "dealt with the central question in *Smith*, that is, religious exemptions from 'otherwise neutral' state laws").

First Amendment institutionalism might seem inapplicable to cases involving individual rather than entity claimants. I want to argue, however, that my sphere sovereignty approach does more than simply reinforce the argument that the legal autonomy of religious organizations survives *Smith*. It also substantially undercuts the very approach to Free Exercise questions, whether for religious entities *or* religious individuals, that the Court endorsed in *Smith*.

Institutionalist critics of the Court's First Amendment doctrine note a similar problem in other areas: the distorting effect of First Amendment institutional agnosticism, and its reliance on what it imagines to be serviceable general doctrine in place of a more particularistic consideration of the role and value of social practices that lie at the heart of the First Amendment. As Schauer notes, in *Smith* and similar cases "the Court has . . . said essentially nothing about any possible institutional variations among those claiming exemptions or among the various regulatory schemes from which exemptions were being claimed."[314] The Court's apparent view is that Free Exercise doctrine would become too complicated, permissive, and inconsistent with its institutional agnosticism in a host of other fields if it considered these questions in individual cases.

Sphere sovereignty calls this account into question. It suggests that *any* exercise of state authority that falls within the proper scope of a coordinate sovereign sphere, like a religious entity, is beyond the state's powers unless one of a limited set of exceptions applies. If this view is correct, then the reading of *Smith* that some commentators have offered must also be right: religious groups must be entitled to a presumptive right to an exemption from even generally applicable laws that intrude upon their sovereignty.

Sphere sovereignty allows for criticism of the rule in *Smith* even where individual claims for religious accommodation are involved. First, sphere sovereignty serves as a critique of the formation of constitutional doctrine in ways that attempt to erase or ignore basic questions of social fact. Second, as Kathleen Brady has demonstrated, it is hard to distinguish individual religious practice from group religious practice. In any communal religious setting, individuals derive their religious obligations from those of the religious community as a whole. Their practices, and the burdens they experience at the hands of generally applicable and neutral laws, are thus part of the broader fabric of the group religious experience.[315] It is difficult to argue in favor of the autonomy of religious groups without wondering whether the *Smith* Court's refusal to grant similar exemptions to individuals is untenable.

This argument reads *Smith* in a way that undercuts the decision itself; it does not lay to rest the Court's concern that granting individual exemptions from generally applicable laws would be "courting anarchy."[316] One can

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[314] Schauer, *Institutions*, *supra* note 33, at 1756.
[315] *See* Brady, *Religious Organizations and Free Exercise*, *supra* note 22, at 1675-76.
[316] Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

understand why Brady conserves her energy for an effort to preserve religious group autonomy without attacking the core ruling of *Smith* itself. Absent a change in the Court's general approach to the Free Exercise Clause, that argument is likely to prove futile. Nevertheless, an institutional or sphere sovereignty account of religious freedom calls into question *Smith*'s refusal to countenance similar accommodations for individuals. At the very least, we should ask whether, if the Court were more sensitive to the institutional context in which Free Exercise claims are made, it might also be more sympathetic to some individual Free Exercise claims. It might ask, for example, whether the use of peyote is tied to the central practices of a particular faith,[317] or how a government decision to build a road through the sacred lands of an American Indian tribe might affect the ability of that community to practice its religion as a whole.[318]

Would a group or individual claim to a Free Exercise exemption from a neutral, generally applicable law fall within the limited set of cases where state intervention is permissible? The answer, in most cases, will be no. Such cases do not generally involve significant third-party costs, and certainly do not involve the risk of a religious institution abusing its own members. One could attempt to describe the general applicability of law as a "public good," bringing such cases within the category of transspherical matters that would allow state regulation. Aside from its flawed assumption that the rule of law is too inflexible to allow for individual accommodations,[319] this argument seems rather far afield from Kuyper's description of such cases as instances in which the state can require everyone "to bear personal and financial burdens for the maintenance of the natural unity of the State."[320]

Smith is better understood as an example of interspherical conflict, in which the state can "compel mutual regard for the boundary-lines of each" sovereign sphere.[321] However, this argument presupposes that religion trespasses on the sphere of state activity, while the state does not trespass into the area of religious sovereignty. Nothing in the general account of sphere sovereignty tells us who should win in such a dispute. It leaves the state as the final arbiter of the dispute. That would be equally true in a regime in which the state cannot, absent a compelling reason, interfere with individual or group religious practices that fall within the core activities of the sovereign sphere. In such a regime, the hurdle would be higher, but the *arbiter* would remain the same.

In sum, a First Amendment institutional account of religious freedom, influenced by sphere sovereignty, would certainly limit the influence of

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[317] *See id.* at 878.

[318] *See* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988).

[319] *See, e.g.*, Ronald R. Garet, *Three Concepts of Church Autonomy*, 2004 BYU L. Rev. 1349, 1364-67.

[320] Kuyper, Lectures, *supra* note 27, at 97 (emphasis omitted).

[321] *Id.*

Smith in cases involving group religious practice. However, it would also ultimately counsel reexamining *Smith* altogether, even in cases involving individual claims of accommodation.

E. Establishment Clause Issues

1. Two Categories of Establishment Clause Issues

What impact would an institutionalist account of the First Amendment have on Establishment Clause cases? Some writers have argued that current Establishment Clause doctrine is in serious tension with a sphere sovereignty account of religious freedom. Johan Van der Vyver, for example, argues that the separationist strand of Establishment Clause doctrine proceeds on the mistaken assumption that "church and state, and law and religion, can indeed be isolated from one another in watertight compartments"; to the contrary, he argues, sphere sovereignty is based on "the encaptic intertwinement of fundamentally different social structures."[322] Nicholas Wolterstorff is even more blunt, arguing that Kuyper, who envisioned a system of state support for a variety of religious "pillars," would view the no-aid strand of Establishment Clause doctrine as "founded on untenable assumptions and hopelessly confused."[323]

Wolterstorff may be right that the Court's Establishment Clause doctrine is hopelessly confused; he would not be the only one to draw such a conclusion.[324] I am, however, less certain that either a sphere sovereignty-driven account or a First Amendment institutionalist account of religious freedom would mandate a significant shift in Establishment Clause doctrine. This is best seen by dividing the concerns arising under the Establishment Clause into two categories: cases involving equal funding and equal access to the public square for religious entities, and cases involving "symbolic support" for religious entities.[325]

Kuyper was most concerned with questions of equal funding and equal access for religious entities, especially "the equal funding of religiously-oriented schools."[326] One could argue that a thorough-going approach to sphere sovereignty or First Amendment institutionalism forbids any state support of any kind for religion, since churches are supposed to "live from

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[322] Van der Vyver, *Sphere Sovereignty*, *supra* note 98, at 662.

[323] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 18.

[324] *See, e.g.*, FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 1 (1995) (collecting examples); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 3-4 (1995) (same).

[325] A third category—the interaction of the Establishment Clause and the regime of tax laws and tax exemptions—will have to await another article.

[326] Wolterstorff, The Things That Are Not Caesar's, *supra* note 25, at 18; *see also* Kobes, *supra* note 95.

their own strength on the voluntary principle."[327] Religious entities are only one of the multitude of sovereign spheres, however. So long as those spheres—voluntary associations of all kinds—are entitled to share in the state's largesse, religious entities should be in a similar position, provided that government does not interfere too much in their internal operations. My account suggests that religious entities should be entitled to equal access to funding for various government programs that are available to secular entities, including school vouchers. Certainly, if we value religious entities as valuable contributors to public discourse, they should be as free to engage in public speech as any other group.

The law is already moving in this direction. The Supreme Court has recently shifted towards the view that government funds may flow to religious organizations, provided that aid is apportioned on an equal basis with aid to secular private education.[328] By this logic, any choice to avail oneself of state funding in order to attend a religious school is a product of true private choice.[329] Similarly, on equal access issues, the Court has emphasized that religious entities are as entitled as any secular entities to engage in speech in the public square, including the use of public fora such as after-hours public school programs.[330] Thus, the one area in which both a sphere sovereignty account and an institutionalist account might counsel a change in Establishment Clause doctrine is already changing.

Aside from the funding cases, the other major battleground in Establishment Clause litigation concerns "symbolic support": cases in which the government's allegiance and endorsement is sought for a variety of practices, such as the invocation of God in a public school setting[331] or the placement of public displays such as a crèche[332] or the Ten Commandments.[333]

On these questions, my account favors prevention over permissiveness. Both First Amendment institutionalism and sphere sovereignty agree with the basic principle that "[t]he sovereignty of the State and the sovereignty of the Church" are mutually limiting, and that both are harmed if they intertwine.[334] From a First Amendment institutionalist perspective, granting religious entities legal autonomy allows them to conduct and regulate their own practices, in part because religious entities can serve as a vital *indepen-*

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[327] KUYPER, LECTURES, *supra* note 27, at 106.

[328] *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000).

[329] *See Zelman*, 536 U.S. at 652; *Mitchell*, 530 U.S. at 810.

[330] *See, e.g.*, Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 220 (2004).

[331] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

[332] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

[333] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

[334] KUYPER, LECTURES, *supra* note 27, at 107.

dent source of ideas and public discourse.[335] On this view, religious entities, among other functions, "mark the limits of state jurisdiction by addressing spiritual matters that lie beyond the temporal concerns of government."[336] If the goal of First Amendment institutionalism is to preserve a strong set of institutions that promote free and open public discourse, it would be inconsistent with that goal to allow the state to openly side with or promote particular religious speech or expressive conduct.

Sphere sovereignty seems to point in the same direction. A government that truly "lacks the data of judgment" on religious questions and lacks the sovereign prerogative of "proclaim[ing] [a religious] confession as the confession of the truth"[337] has no business weighing in on religious questions or endorsing particular religious messages. Kuyper might have viewed the question differently. The best reading of sphere sovereignty's application in the American context, however, is that it should, if anything, support a reasonably robust view of the Establishment Clause in symbolic support cases, not a permissive one.

2. Coda: Of Standing, Structure, and Sphere Sovereignty

One final issue merits brief discussion: the law of standing as it relates to Establishment Clause challenges. The Supreme Court has generally denied standing in cases in which individuals assert nothing more than a "generalized grievance" in their capacity as taxpayers.[338] In *Flast v. Cohen*, however, the Court carved out a narrow exception to this practice in Establishment Clause cases involving Congress's expenditure of funds pursuant to its taxing and spending powers.[339]

This exception has been narrowly applied since *Flast*.[340] Recently, in *Hein v. Freedom From Religion Foundation, Inc.*,[341] the Supreme Court further signaled its skepticism about the narrow space carved out by *Flast*, giving rise to the possibility that the Establishment Clause exception to the rule will be narrowed or eliminated altogether.[342] The *Hein* Court held that, although the funds at issue had been provided by Congress as part of its gen-

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[335] *See, e.g.*, Brady, *Religious Organizations and Free Exercise*, *supra* note 22, at 1700-04.

[336] *Id.* at 1704; *see also* Bradley, *supra* note 12, at 1084-87.

[337] KUYPER, LECTURES, *supra* note 27, at 105-06 (emphasis omitted).

[338] *See, e.g.*, FEC v. Akin, 524 U.S. 11, 23 (1998); United States v. Richardson, 418 U.S. 166, 180 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974).

[339] *See* Flast v. Cohen, 392 U.S. 83, 105-06 (1968) ("[A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

[340] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (discussing the Court's "narrow application" of *Flast*).

[341] 127 S. Ct. 2553 (2007).

[342] *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom From Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115.

eral appropriation to the Executive Branch for day-to-day activities, that connection was too distant to bring the expenditure within the *Flast* exception. The spending, it said, "resulted from executive discretion, not congressional action."[343] Concurring in the judgment, Justice Scalia, joined by Justice Thomas, called the majority's distinction between executive and congressional expenditures unprincipled, and would have overruled *Flast* altogether.[344]

The approach to religious entities as First Amendment institutions that I have offered here would check the trend against taxpayer standing in Establishment Clause cases represented by *Hein*. This point has been examined most thoroughly by Professor Carl Esbeck, who argues that the recognition of standing for "non-Hohfeldian injur[ies]"[345] involving religion is appropriate if we understand the Establishment Clause as "a structural restraint on governmental power" that "negate[s] from the purview of civil governance all matters 'respecting an establishment of religion.'"[346] That view is consistent with the sphere sovereignty approach, and with the treatment of religious entities as First Amendment institutions. This approach treats religious entities as enjoying a form of legal sovereignty and immunity as a fundamental part of the legal structure rather than as a matter of state generosity. On this view, the sovereignty of First Amendment institutions is as much a part of our system of constitutional checks and balances as the sovereignty of states, and broad standing is necessary to curb "official action that undermines the integrity of religion."[347] Just as church autonomy is a non-waivable doctrine for reasons relating to the fundamental role of religious entities and other First Amendment institutions in the body politic, so citizens should have broad rights to enforce the fundamental principle that church and state should be maintained within their own separate jurisdictions. Ultimately, a sphere sovereignty approach to religious entities as First Amendment institutions would buttress taxpayers' ability to enforce the Establishment Clause precisely to preserve and maintain the integrity of religious entities as sovereign spheres.

VI. Conclusion

In this Article, I have argued for the usefulness of sphere sovereignty as an organizing metaphor for constitutionalism in general. Sphere sovereignty offers a coherent and attractive way of understanding the role and importance of a variety of nonstate institutions including religious entities and a

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[343] *Hein*, 127 S. Ct. at 2566.

[344] *Id.* at 2579, 2584 (Scalia, J., concurring).

[345] Esbeck, *Restraint on Governmental Power*, *supra* note 72, at 36. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 Yale L.J. 16 (1913).

[346] Esbeck, *supra* note 72, at 2.

[347] *Id.* at 40.

variety of other social spheres, and their relationship with a somewhat chastened state. In particular, I have argued that sphere sovereignty helps to legitimate and structure an institutionalist understanding of the First Amendment—one that breaks from the Supreme Court's institutionally agnostic approach to constitutional doctrine, and instead accords a good deal of legal autonomy to particular institutions that serve a central role in organizing and encouraging public discourse and human flourishing.

Certainly religious entities meet any reasonable definition of a First Amendment institution. Their fundamental social role cannot be denied; they are a well-established part of the social and constitutional structure and they are, for the most part, if not always, substantially self-regulating institutions whose own norms and practices often serve as a suitable substitute for state regulation. If religious entities are understood as sovereign spheres and as First Amendment institutions, we may find coherent, consistent, and attractive answers to a host of difficult doctrinal questions that continue to bedevil us and that may represent the newest front in the battle over church-state relations.

That contribution would be valuable enough. Perhaps, though, this approach offers even more. At the end of his classic article on nomic communities and the law, the late Robert Cover wrote strikingly:

> [J]ust as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.[348]

Kuyper might have said that those worlds are not new, but are as old as creation; a First Amendment institutionalist might add that they are long-standing and remarkably stable artifacts of public discourse. But Cover's words, and his advice, are nevertheless appropriate here. In thinking about churches and other First Amendment institutions as sovereign spheres, we encounter limits on the state's power to circumscribe; we invite new worlds.

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[348] Cover, *supra* note 71, at 68.