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Churches As First Amendment Institutions: Of Sovereignty And Spheres

PAUL HORWITZ*

* Associate Professor of Law, University of Alabama School of Law. I am grateful to the Dean and Faculty of the University of Alabama School of Law for its support for this project. I thank the Institute for Constitutional Studies, Maeva Marcus, Judge Michael McConnell, Professor Mark Noll, and the participants in the 2008 ICS summer seminar for their contributions to an early stage of this project. Thanks also to Bill Brewbaker, Marc DeGirolami, Kelly Horwitz, Christopher Lund, and Nicholas Wolterstorff for their comments on drafts of this paper. Jennifer Michaelis provided excellent research assistance and generous whip-cracking, for which I am painfully grateful. Finally, special thanks to Angelen Brookshire, a 2008 graduate of the Notre Dame Law School, for introducing me to Kuyper. This Article is lovingly dedicated to Samantha Hope Horwitz, unquestioned sovereign in her own domestic sphere.

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Churches As First Amendment Institutions: Of Sovereignty and Spheres

ABSTRACT

This Article offers a novel way of approaching the role of churches and other religious institutions within the First Amendment framework. 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 to organize and regulate themselves without state interference. 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": nonstate institutions whose authority is ultimately coequal to that of the state. In the sphere sovereignty model, a variety of spheres, including the church and other non-state institutions, would enjoy substantial legal autonomy to carry out their sovereign purposes. The state would be limited in its authority to intervene in these spheres. A sphere sovereignty conception of the legal order retains a vital role for the state, however; the state mediates between the spheres and ensures that they do not abuse their power with respect to the individual subjects of their authority.

The Article provides a detailed instruction to both the general field of First Amendment institutionalism, and the conception of sphere sovereignty offered by Kuyper. It argues that these two seemingly disparate projects, when combined, offer a richer understanding of our constitutional structure and the role of First Amendment institutions, such as churches, 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. 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.

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Churches As First Amendment Institutions

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> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.
>
> -- Justice William Brennan, Jr.[1]
>
> [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[2]
>
> [The First Amendment] acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself.
>
> -- Max L. Stackhouse[3]

I. INTRODUCTION

Movements need metaphors. Every age, in seeking "not merely the solutions to problems, but the kinds of problems which are to be conceptualized as requiring solution,"[4] requires its own imagery, its own way of understanding the issues that beset it and the means to resolve those issues. This is true in politics no less than in any other human endeavor. Metaphors "shape as well as create political discourse."[5]

Unsurprisingly, the United States Constitution has been fertile ground for the production of metaphors.[6] In American popular and

1 *Corp. of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

2 *McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948).

3 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).

4 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)).

5 Note, *supra* note __.

6 *See, e.g.,* Laurence H. Tribe, *The Idea of the Constitution: A Metaphor-*

constitutional culture, the prevailing metaphors for the Constitution have largely fallen into two varieties: the mechanical and the organic.[7] Each metaphor reflects different needs and understandings. "[T]he machine metaphor" can be understood "as indicating a desire for static perfection, and the organic metaphor as favoring adaptiveness and change."[8] At times, the contest between the two metaphors, Michael Kammen writes, has been "not merely deliberate but intellectually aggressive."[9]

Just as the Constitution itself has been a site of metaphorical contestation, so too have its constituent parts. The First Amendment has been a particularly fertile source of metaphoric argument. The Speech Clause, most notoriously, has been the staging ground for an ongoing debate over the usefulness of the metaphor of the "marketplace of ideas."[10]

Metaphors are especially thick on the ground in the realm of law and religion. The most important, and controversial, organizing metaphor for understanding the interaction of church and state has been neither mechanical nor organic, but architectural. Americans have fought for over 200 years over Thomas Jefferson's description of the Establishment Clause as "building a wall of separation between Church and State."[11]

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morphosis, 37 J. Legal Educ. 170 (1987).

[7] *See generally* Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (1994); *see also* Note, *supra* note __; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 Harv. L. Rev. 1, 3 (1989).

[8] Note, *supra* note __, at 1837.

[9] Kammen, *supra* note __, at 19.

[10] *Lamont v. Postmaster General of U.S.*, 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, *e.g.,* 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.").

[11] Thomas Jefferson, *Letter to a Committee of the Danbury Baptist Association*, Jan. 1, 1802, in Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* 42 (2nd ed. 2006). *See* Daniel L. Dreisbach, *Origins and Dangers of the "Wall of Separation" Between Church and State*, Imprimis, Vol. 35, No. 10 (Oct. 2006) ("No metaphor in American letters has had a greater influence on law and policy

They 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 in 1644 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?"[12] And they have argued over its very usefulness.[13] 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 will 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.[14] 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.[15] 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."[16] Few writing on the

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than Thomas Jefferson's 'wall of separation between church and state.'").

[12] Roger Williams, *The Bloudy Tenet of Persecution* __ (1644). Williams's version of the wall metaphor was most prominently retrieved and examined in Mark DeWolfe Howe, *The Garden and the Wilderness* (1965).

[13] *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 106-07 (1985) (Rehnquist, J., dissenting).

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

[15] Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & Religion 503, 521 (2006-2007); *see also* Richard W. Garnett, *Church, State, and the Practice of Love*, 52 Vill. L. Rev. 281, 292 (2007).

[16] Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of*

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.

A metaphorical revision of church autonomy doctrine is not only of interest to scholars of law and religion, however. The same metaphor may also enhance our understanding of an emerging field of study of constitutional law in general, and *all* the central guarantees of the First Amendment – speech, press, and association, along with the Religious Clauses – in particular. I have labeled that field "First Amendment institutionalism."[17]

The study of "First Amendment institutions" takes as its central idea that First Amendment doctrine goes wrong when it takes an "institutional[ly] agnostic[ ]" position toward speech controversies.[18] It argues that courts should adopt an approach to various First Amendment issues that takes seriously the vital role that various "First Amendment institutions" play in contributing to the formation of public discourse.[19]

Religious entities fit naturally into the study of First Amendment institutions. First and most obviously, religious entities, like the press[20] but unlike some other institutions, are recognized in the text of the First Amendment itself, a fact that makes them particularly worthy of attention.[21]

Moreover, 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,[22] and continue to do so today. Indeed, the growth in scope of both religious activity *and* governmental power ensure that religious entities will be of increasing importance in our social

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Church and State?, 49 La. L. Rev. 1057, 1061 (1989).

17 *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*].

18 Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 120 (1998) [hereinafter Schauer, *Principles*].

19 *See, e.g.,* Paul Horwitz, *Three Faces of Deference*, 83 Notre Dame L. Rev. 1061, 1142 (2008) [hereinafter Horwitz, *Three Faces of Deference*].

20 *See generally* Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45 (2006) (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).

21 *See id.* at 58.

22 *See, e.g.,* Esbeck, *supra* note __.

environment, and that they will face increasing tension with various regulatory authorities.[23]

Finally, since the study of First Amendment institutionalism is the study of the courts' failure to acknowledge institutional variation in the face of their "deeply felt desire . . . to achieve noninstrumental certainty in the law,"[24] the study of religious entities may be an especially productive area of study. The increasing tendency of Religion Clause jurisprudence has been one of institutional agnosticism.[25] As Kent Greenawalt has observed, the Supreme Court has moved "away from robust interpretations of the Religion Clauses, under which religion must be treated as special . . . and toward principles of equal treatment and legislative discretion."[26] Under the Free Exercise Clause, the most prominent example of this trend is the Court's notorious decision in *Employment Division v. Smith*,[27] which announced a neutrality-oriented rule that rejected any Free Exercise claims to an exemption from "valid and neutral law[s] of general applicability."[28] In Establishment Clause jurisprudence, the trend is apparent in recent cases in which the Court has insisted that religious speakers must be treated the same as all other speakers,[29] and that public funds for private religious education cannot be withheld when those funds stem from neutral programs and are a

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23 *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) (to same effect).

24 Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 Harv. L. Rev. F. 173, 174 (2006), http://www/harvardlawreview.org/forum/issues/119/march06/hills.pdf.

25 *See* Frederick Schauer, *Institutions as Legal and Constitutional Categories,* 54 UCLA L. Rev. 1747, 1755-56 (2007) [hereinafter Schauer, *Institutions*].

26 Kent Greenawalt, *Quo Vadis?: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 390; *see also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 186-213 (2002); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L. Rev. 1 (2000); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489, 498-544 (2004); Dhanajai Shivakumar, *Neutrality and the Religion Clauses*, 33 Harv. C.R.-C.L. L. Rev. 505, 506-23 (1998).

27 494 U.S. 872 (1990).

28 *Smith*, 494 U.S. at 879 (quotation and citation omitted).

29 *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

product of true private choice.[30]

This trend has its academic supporters and elaborators, of course,[31] and its critics.[32] But the trend itself is unmistakable. It leads us to wonder whether the Court's increasingly neutrality-oriented approach to the Religion Clauses will leave any room for the distinct status of religious entities under the Constitution, or whether cases like *Smith* will crowd out those pockets of law that purport to treat them differently.[33] Looming above this is a broader question: whether the Court's current approach will rescue it from the general incoherence that its critics agree has long characterized Religion Clause jurisprudence[34] – or whether, in

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30 *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). For discussion, see, *e.g.,* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155 (2004).

31 *See, e.g.,* Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 5 (2007) (arguing for an "Equal Liberty" approach to religious freedom which denies that "religion has distinctive virtues that entitle it to special constitutional status").

32 *See, e.g.,* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Vill. L. Rev. 273, 288 (2008) [hereinafter Garnett, *Do Churches Matter?*]; *see also* Thomas C. Berg, *Can Religious Liberty Be Protected As Equality?*, 85 Tex. L. Rev. 1185, 1204-11 (2007) (reviewing Eisgruber and Sager, *supra* note __); Ira C. Lupu and Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 Tex. L. Rev. 1247, 1267-72 (2007) (reviewing Eisgruber and Sager, *supra* note __).

33 *Compare, e.g.,* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith*,* 2004 BYU L. Rev. 1633 (2004) (arguing that the Court's caselaw recognizing religious autonomy survives and is even supported by *Smith*), *with* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Laws to Religion*, 81 Cornell L. Rev. 1049 (1996) (arguing that religious autonomy does not survive *Smith*); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 Fordham L. Rev. 1965 (2007) (same); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. Rev. 241, 264-65 (1995) (arguing that if free exercise exemptions are abandoned, church autonomy doctrine is also undermined); Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 Hastings Const. L.Q. 275, 294 (1994) (arguing that an earlier Supreme Court case "sharply undermines any claim that the Free Exercise Clause confers a wide-ranging right of autonomy upon religious organizations.").

34 *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*

seeking a seemingly elegant and uniform approach, the Court will "miss, or mis-describe, the role of institutions and institutional context" in religious life as it is experienced on a real-world basis.[35] 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.

As yet, however, this project has barely begun. Although a number of scholars[36] have written powerfully on the nature of religious institutions and the role of religious autonomy in the Religion Clauses, their insights are not necessarily institutional in nature, nor are they tied to a broader understanding of the role played by a variety of First Amendment institutions. Most First Amendment institutionalists, on the other hand, have not yet turned their attention specifically to religious institutions.[37] Professor Richard Garnett has, in a number of recent works, made an ambitious effort to apply the lessons of First Amendment institutionalism to religious entities.[38] Although his contributions to this area are already essential, however, he modestly acknowledges that "[a] lot of work remains to be done."[39]

This Article aims to push the project forward. As we will see, the payoff for such an approach is twofold. Not only does it make greater sense of the highly contested subject of religious entities' legal role and rights, but it also helps to confirm and enlarge our intuitions concerning the legal status of a broader array of First Amendment institutions.

The metaphor I offer here partakes of both mechanical *and* organic aspects. But its primary source lies in neither American nor English constitutional thought. Of all places, it can be found 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,

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Religious Freedom 3-4 (1995) (same).

35 Garnett, *Do Churches Matter?*, *supra* note __, at 284.

36 *See, e.g.,* Brady, *supra* note __; Esbeck, *supra* note __.

37 *See, e.g.,* Horwitz, *Universities as First Amendment Institutions*, *supra* note __, at 1520-22 (article focusing on universities as First Amendment institutions, but pausing to note potential parallels between the legal treatment of universities and religious institutions).

38 *See* Garnett, *Do Churches Matter?*, *supra* note __; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment. 515 (2007); *see also* Garnett, *supra* note __; Garnett, *supra* note __; Richard W. Garnett, *The Freedom of the Church*, 4 J. Cath. Soc. Thought 59 (2007).

39 Garnett, *Do Churches Matter?*, *supra* note __, at 284.

and politician Abraham Kuyper.

Kuyper had his fingers in many pies. In his time, he was, variously, a church official, the founder of an influential newspaper, one of the organizers of the Antirevolutionary Party, "the country's first truly modern, mass-based political organization" – and, ultimately, prime minister, from 1901 to 1905.[40] More important for our purposes, though, is one of Kuyper's signal contributions 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, as a matter of divine nature, "differentiated into distinct spheres," each featuring "institutions with authority structures specific to those spheres."[41] Under this theory, each of these institutions is literally sovereign within its own sphere. These spheres, which include the church but embrace others besides, each have their "own God-given authority. [None] is subordinate to the other."[42] They serve as a counterweight to the state, which "may never become an octopus, which stifles the whole of life."[43] At the same time, they are themselves limited to the proper scope of their authority.[44] Kuyper's sphere sovereignty approach thus envisions 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,[45] it is also a theory of the limits of the

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40 James D. Bratt, *Abraham Kuyper: His World and Work*, in Abraham Kuyper, *Abraham Kuyper: A Centennial Reader* 1, 12 (James D. Bratt ed., 1998) [hereinafter Kuyper, *Reader*].

41 Nicholas Wolterstorff, *Abraham Kuyper on the Limited Authority of Church and State*, paper delivered at the Federalist Society, "The Things That Are Not Caesar's: Religious Organizations as a Check on the Authoritarian Pretensions of the State," March 14, 2008 (manuscript at 7) (on file with author). I am grateful to Professor Wolterstorff for sharing this illuminating paper with me.

42 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., and Angella C. Carmella eds., 2001).

43 Abraham Kuyper, *Lectures on Calvinism* 96 (1931) (reprinted 2007) [hereinafter Kuyper, *Lectures*].

44 Wolterstorff, *supra* note __, 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.").

45 Some modern writers have found Kuyper appealing precisely because he

church as well, and of the limits of other "spheres." Within this clockwork, the state plays a central, if "mechanical," role in maintaining boundaries and mediating between the various spheres.[46]

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 contribution that sphere sovereignty can make to our understanding of the First Amendment and First Amendment institutionalism is not merely a matter of metaphors. Nor is it just a matter of "borrowing" or "bricolage,"[47] although there is something to the latter charge. Rather, I will argue that sphere sovereignty has deep roots in the history of religious and political thought. Although Kuyper wrote in and about late nineteenth-century Holland, his approach was deeply rooted in Calvinist theology. His concept of sphere sovereignty surely involves a good deal of revision and adaptation of Calvinism; it is not just a faithful or mechanical rendering of Calvin's own thought. Still, sphere sovereignty theory finds parallels in the thinking of other offshoots of Calvinism, including some of the earliest American thinking and writing about the relationship between government and religion.

Thus, sphere sovereignty is not simply a transplant that I seek to wrench from Dutch soil into our own. It is, in some respects, immanent in American constitutional history and thought, and present in fundamental aspects of our constitutional design. Sphere sovereignty is, therefore, a promising and natural tool for understanding and reweaving the complex strands of American constitutional thought and legal doctrine respecting the role of religious institutions in our social

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]one can make room . . . for a fairly energetic interventionist pattern by government" in Kuyper's description of the state).

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

[47] *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]").

structure. But it may promise more than that. As both a metaphor and a tool, it may help to remap the broader universe of intermediary institutions in our society, and to help break down the classic tendency in American liberal thought to see the world in terms of two protagonists only: the state and the individual.[48]

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, across both the Free Exercise and Establishment Clauses, of treating churches as "sovereign spheres" or First Amendment institutions. Part VI offers a brief conclusion.

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? In raising this question, I can anticipate volleys from two different directions: those who believe that adapting Kuyper, as I do below, in ways that sometimes pay only glancing attention to his Calvinism is like putting on *Hamlet* without the prince; and those who believe that any "Christian" approach to the Constitution, even if it is only Christian in derivation, is either out of bounds or of interest only to a parochial few.

It would be out of character for me to reassure my readers *too* much; I would rather they slept a *little* uneasily than too well. But I think these objections, if any share them, are both mistaken. To both groups, I can point out that I offer up sphere sovereignty primarily as an organizing metaphor. *As* a metaphor, I hope to demonstrate, it is valuable means of understanding the relationship between state, church, and society, whatever one's perspective.

For members of the first group, I can acknowledge that there is a hint

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[48] *See, e.g.,* Carlton Morse, Note, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. Cal. L. Rev. 793, 815 (2007); *see also* Glen O. Robinson, *Communities*, 83 Va. L. Rev. 269, 343 (1997) (noting the tension between group rights and "the conventional framework of liberal rights based on individualism as the basis of moral value").

of bricolage 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 nonstate entities in general, even if some of what Kuyper would consider its essential religious superstructure is stripped from it. But even those who wholeheartedly share Kuyper's neo-Calvinist religious perspective agree that sphere sovereignty can, and perhaps must, be adapted to changing circumstances. Certainly 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."[49] Although Kuyper might bridle at an adaption of his views that is agnostic as to his theological positions, the version of sphere sovereignty that I present and adapt below retains much – including, specifically, the importance of the church as one of society's sovereign "spheres" – that Kuyper prized.

For members of the second group, I can offer the easy answer that, as bricolage, this Article adapts what is best in Kuyper without necessarily requiring that its readers share Kuyper's religious views. But I would go further and say that this objection is ultimately confused. 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.[50] But neither is it clear why it should be disturbing if it were. Stripped of any specifically sectarian implications for our legal order, sphere sovereignty remains a Christian legal theory in origin. But its broad pluralist perspective is, as I show below, also compatible with a variety of secular perspectives, including First Amendment institutionalism itself.

In short, nothing in the Christian roots of Kuyper's theory should be threatening to non-adherents, and much of it should be appealing. Conversely, Christian legal theorists may find something attractive in the use of Kuyperian thought to reshape our constitutional approach to the

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[49] Mouw, *supra* note __, 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) (sphere sovereignty "has much to offer contemporary discussions of civil society, but not without some serious reworking in the light of present-day conditions").

[50] 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 __); *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).

state and other social institutions. With all parties suitably mollified, let us turn first to a discussion of First Amendment institutionalism.

II. FIRST AMENDMENT INSTITUTIONALISM[51]

First Amendment institutionalism begins with an observation about the distinction between policy and principle,[52] or between legal and prelegal categories.[53] At times, "law's categories are parasitic on the categories of the prelegal and extralegal world."[54] Frequently, however, the law reaches "real things only indirectly, through categories, abstractions[,] and doctrines."[55] The law's tendency is to seek to understand the world in "strictly *legal* terms,"[56] viewing the law through a lens of acontextual "juridicial categories"[57] in which all speakers and all factual questions are translated into a series of purely legal inquiries.[58]

Although this observation applies to the law generally, it is certainly apparent in constitutional doctrine, particularly the law of the First Amendment. The Religion Clause doctrines I have 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, despite the embarrassing presence in the constitutional text of the Press Clause.[59] It is evident in the First Amendment doctrine of content neutrality, "the cornerstone of the Supreme Court's First Amendment jurisprudence,"[60]

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

52 *See, e.g.,* Schauer, *Principles, supra* note __, at 112; Horwitz, *Grutter, supra* note __, at 564.

53 *See, e.g.,* Schauer, *Institutions, supra* note __, at 1748-49.

54 *Id.* at 1748.

55 Garnett, *Do Churches Matter?*, *supra* note __, at 275.

56 *Id.*

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

58 *See* Horwitz, *Grutter, supra* note __, at 564.

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

60 Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill Rts. J. 647, 650

which by definition focuses on the content of the speech and not the identity of the speaker. Indeed, this "reluctance with respect to institutional categories" replicates itself across a host of constitutional doctrines.[61] For now, however, we can focus in particular on the Court's "pattern of treating First Amendment doctrine as institutionally blind."[62]

This institutional blindness has some salutary aspects for First Amendment doctrine. Take content neutrality doctrine. Its primary message is that "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[63] It makes government, not the speaker, the protagonist of the First Amendment drama.[64] 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,[65] or to favor and disfavor particular institutions out of sympathy or antipathy to those institutions, rather than out of some more thoughtful and sensitive analysis of their social role.[66] Every such "line[ ] of demarcation" might be "an opening for the dangers of government partisanship, entrenchment, and incompetence."[67]

But 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 problems, both practical and doctrinal. Practically, it simply 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.*

(2002).

[61] Schauer, *Institutions, supra* note __, at 1756.

[62] *Id.* at 1754.

[63] *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

[64] *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 "the most prominent free speech intuition").

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

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

[67] *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, *Prisoners and Students and Workers – Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine,* 54 UCLA L. Rev. 1635 (2007); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 Suffolk U. L. Rev. 441 (1990).

Bollinger,[68] a case with significant First Amendment undertones,[69] "context matters."[70] Thus, the Court may find that the broad and largely institutionally insensitive categories of public forum doctrine are "out of place" in the context of a case involving public libraries[71] or public broadcasters.[72] Or it may find that content neutrality doctrine, which was meant to apply across the panoply of human expression, offers a poor fit where the speaker in question is a public arts funding body whose existence depends upon the making of content distinctions.[73]

In these circumstances, the practical difficulties lead ineluctably to doctrinal difficulties. The distinctions between various speech contexts and institutions, if unrecognized by the courts, may lead them to be over- or underprotective of particular institutions in ways that do not serve underlying First Amendment values.[74] Another possibility is that, when factual context meets acontextual doctrine, the doctrine will collapse.[75] 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 – it *is* already, in the view of many – an increasing state of doctrinal incoherence.[76]

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[68] 539 U.S. 306 (2003).

[69] *See generally* Horwitz, *Grutter, supra* note __.

[70] *Grutter*, 539 U.S. at 327.

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

[72] *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

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

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

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

[76] *See id.* at 1508-09; Schauer, *Institutional First Amendment*, *supra* note __, at 1270-73; Schauer, *Principles, supra* note __, at 86-87 (noting "an intractable tension between free speech theory [in general] and judicial methodology [in particular cases] and suggesting that "[i]f freedom of speech . . . is largely centered on the policy question of institutional autonomy, but the Court's own understanding of its role requires it to stay on the principle side of the policy/principle divide, then 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 (1995) (arguing that the Court's free speech doctrine is "internal[ly] incoherent[t]" and "will continue to flounder until it focuses clearly on the nature and constitutional significance

First Amendment institutionalism seeks a way out of this fix by encouraging the rebuilding of First Amendment doctrine. It argues that rather than operate from a top-down, institutionally agnostic approach, the doctrine should be refigured in a "bottom-up, institutionally sensitive approach that openly 'takes . . . institutions seriously.'"[77] 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."[78] To put it more broadly and 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."[79]

One implication of this approach[80] would be that the courts would be more willing than they are now 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."[81] They would understand that some speech institutions are key contributors to our system of public discourse; that "the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of," these institutions.[82]

of [particular social] practices").

77 Horwitz, *Three Faces of Deference, supra* note __, at 1142 (quoting Horwitz, *Grutter, supra* note __, at 589). By referring to the bottom-up and institutionally sensitive nature of this approach, I take no firm stand on whether the doctrine that results would be highly particularistic and anti-formalist, or whether it would result in the redrawing of doctrine in a way that is as formalist as the current, institutionally agnostic version of First Amendment doctrine, but simply uses different and more institutionally aware formal categories. I take it that Professor Schauer would prefer the latter, see *Schauer, Institutions, supra* note __, at 1763-64. My own inclinations tend somewhat toward the former approach, although not firmly. 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.

78 Schauer, *Institutions, supra* note __, at 1758.

79 Post, *supra* note __, at 1280-81.

80 I should note that this is not the only possible version of First Amendment institutionalism. Frederick 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 __, 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.").

81 Horwitz, *Grutter, supra* note __, at 589.

82 Garnett, *Do Churches Matter?*, *supra* note __, at 274.

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.[83]

One other insight is important here, both because of its relationship to this Article's focus on religious institutions and because it may allay some anticipated objections to the First Amendment institutionalism project. One concern that may be raised about any version of First Amendment institutionalism that seeks to recognize the particular value of specific "First Amendment institutions"[84] 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. That is that 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.[85] Those institutional norms and practices are themselves often shaped in a way that serves public discourse. Even in the absence of positive law, then, institutional practices can serve the speech-enhancing and freedom-protective role that we now expect institutionally agnostic First Amendment doctrine itself to play. An institutional approach to the First Amendment that focuses on particular "First Amendment institutions" would thus take as its starting point the norms, values, and practices of the institutions themselves.[86] This would in turn help to define the boundaries of such First Amendment institutions, and set appropriate constraints for them.

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[83] *Cf.* Schauer, *Institutions, supra* note __, 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.").

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

[85] *See, e.g.,* Horwitz, *Grutter, supra* note __, at 572-73; Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1511; *see also* Blocher, *supra* note __, at 858-59, 864.

[86] *See* Horwitz, *Grutter, supra* note __, at 573.

An institutionalist approach to First Amendment doctrine could take several possible forms.[87] At its weakest level, First Amendment institutionalism might simply encourage the courts to "explicitly, transparently, and self-consciously" acknowledge the importance of First Amendment institutions.[88] Under this approach, courts would incorporate into present doctrine a substantial degree of deference to the factual claims of First Amendment institutions when considering how that doctrine should apply to them.[89] Since the courts sometimes, if rarely, already do something of the sort, this is not a dramatic change in their current approach.[90]

Alternatively, courts could adopt a more stringent form of First Amendment institutionalism. On this approach, courts would not simply accord deference to First Amendment institutions while maintaining an emphasis on institutional agnosticism. They would become institutional believers, as it were, treating particular First Amendment institutions as "substantially autonomous institution[s] within the law."[91] This form of institutionalism would still allow for some "constitutionally prescribed limits" to the institutions' autonomy,[92] but it would be a distinct step up from a weaker form of First Amendment institutionalism.

Still more strongly, one could envision an approach to First Amendment institutions that treats them as genuinely "jurisgenerative" institutions,[93] sites of law in almost, or entirely, a formal sense. Their decisions would take on a jurisdictional character,[94] such that any decision taken by a First Amendment institution within the proper scope

87 *See, e.g.,* Horwitz, *Universities as First Amendment Institutions, supra* note __, 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).

88 Horwitz, *supra* note __, at 61.

89 *See* Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1516.

90 *See* Schauer, *Institutions, supra* note __, at 1753-54; Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1516-17.

91 Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1518.

92 *Grutter*, 539 U.S. at 328; *see* Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1518.

93 *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 11-19 (1983).

94 *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); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & Politics 445 (2002).

of its operation – a question that would itself be decided with some deference to that institution[95] – would be subject to a form of "de facto non-justiciability."[96]

On this version, First Amendment institutions would be treated as "legally autonomous institutions, which enjoy a First Amendment right to operate on a largely self-regulating basis and outside the supervision of external legal regimes."[97] Any limits to the scope of their autonomy would be largely organic. That is, they would be shaped in ways that are informed by and reflect the institutions' own ends, norms, and practices. Courts could be expected to rely heavily not on judicially imposed norm enforcement of any kind, but on the propensity of the institutions to apply *self*-discipline, driven by their own institutional norms and their own internal enforcement mechanisms.[98]

This fairly brief summary cannot canvass all the possible variations on First Amendment institutionalism, or the potential problems with such an approach.[99] Even so, it is worth noting that First Amendment institutionalism is a growth stock in contemporary constitutional scholarship. It has been usefully applied to universities,[100] the press,[101] private associations,[102] commercial and professional speech,[103] election

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95 *See, e.g.,* Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1542; Horwitz, *Three Faces of Deference, supra* note __, at 1129-30; *see also* Blocher, *supra* note __, at 863.

96 C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other "Special Contexts,"* 56 U. Cin. L. Rev. 779, 819 (1988).

97 Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1520.

98 *See, e.g.,* Horwitz, *Three Faces of Deference, supra* note __, at 1138; Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1555-56.

99 For an attempt to respond to some potential difficulties of First Amendment institutionalism, see Horwitz, *Universities as First Amendment Institutions, supra* note __.

100 *See* Horwitz, *Universities as First Amendment Institutions, supra* note __; Horwitz, *Grutter, supra* note __; Horwitz, *Three Faces of Deference, supra* note __; Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. Colo. L. Rev. 907 (2006).

101 *See* Horwitz, *supra* note __.

102 *See* Hills, *supra* note __.

103 *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).

law,[104] state action doctrine,[105] securities regulation,[106] and a variety of other First Amendment topics.[107] Its apparent popularity speaks to a dissatisfaction with the current, institutionally agnostic approach to First Amendment doctrine, and perhaps beyond that to a interest in the role that institutions might play across a range of constitutional doctrines.[108]

Nor does First Amendment institutionalism 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.[109] It should strike a sympathetic chord with those who have argued for a greater legal concern for the protection of intermediary associations,[110] and specifically (as we will see) scholars who have argued for the usefulness of the doctrine of subsidiarity, which has its roots in Catholic thought but has also found expression in secular European law.[111] Its emphasis on the ways in which courts might give regulatory authority to a variety of expert local actors, rather than impose top-down legal norms, also echoes the concerns of both "democratic experimentalism," which has been advanced in a provocative series of articles by Michael Dorf and Charles Sabel,[112] and, more broadly, theories of "reflexive" or

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

[105] *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637 (2006).

[106] *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 Wm. & Mary L. Rev. 613 (2006).

[107] *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).

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

[109] *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).

[110] *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).

[111] *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).

[112] *See, e.g.,* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic*

"autopoietic" law, which envisions society as consisting of a series of subsystems regulated primarily by "specifying procedures and basic organizational norms geared towards fostering self-regulation within distinct spheres of social activities."[113] Finally, First Amendment institutionalism might be seen as a specific application of constitutional decision rules theory, which argues that we can understand the Supreme Court's constitutional role, and its doctrine, not as "a search for the Constitution's one true meaning," but as a "multifaceted one of 'implementing' constitutional norms."[114]

In short, First Amendment institutionalism is an increasingly vital and viable project. It is still a "relatively new avenue of inquiry,"[115] however, and more work needs to be done. In particular, much more needs to be said about the role of religious entities as First Amendment institutions. That is the primary object of the remainder of this Article. Beyond this, though, much still needs to be done to situate the First

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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).

[113] William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. Pol. Phil. 81, 84 (2001); *see also* Michael C. Dorf, *The Domain of Reflexive Law*, 103 Colum. L. Rev. 384 (2003); Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 Cardozo L. Rev. 1987 (1998); Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* (2002); Gunther Teubner, *Law as an Autopoietic System* (1993); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & Soc'y Rev. 256 (1983); Laurence Claus, *The Empty Idea of Authority*, Aug. 4, 2008, San Diego Legal Studies Paper No. 08-063, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1201862. For an expanded treatment of the relationship between First Amendment institutionalism and democratic experimentalism, reflexive law, and autopoiesis, see Horwitz, *Grutter, supra* note __, at 574-79.

[114] 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 __, at 1140-46.

[115] Schauer, *Institutional First Amendment, supra* note __, at 1273.

Amendment institutionalism project within the broader framework of constitutional law and theory.[116] 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 at first blush to construct a theory of American religious freedom, and American constitutional structure more generally, around the thinking of "one overweight Dutchman[ ]" who did not visit the United States until the waning years of the nineteenth century.[117] Certainly a number of factors combine to minimize Kuyper's potential influence in American religious and political thought: the unfamiliar language in which he spoke, the small country from which he came, his active involvement in local political issues, and the theological cast of most of his writing.[118]

Nevertheless, Kuyper has enjoyed a wide influence in many circles.[119] A number of writers have studied his call for sphere sovereignty in various fields of study, including theology but also branching into social science and political theory.[120]

Nor has Kuyper been ignored in the American legal academy. His most prominent epigones in American legal scholarship are John Witte Jr.,[121] Johan van der Vyver,[122] and David Caudill.[123] But Kuyper has

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[116] *See* Horwitz, *Three Faces of Deference, supra* note __, at 1145.

[117] Elaine Storkey, *Sphere Sovereignty and the Anglo-American Tradition*, in Lugo, ed., *supra* note __, at 189, 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.").

[118] *See, e.g.,* Max Stackhouse, *Preface*, in Lugo, ed., *supra* note __, 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 (1993) (unpublished Ph.D. thesis, Fla. St. Univ.) (on file with author).

[119] *See, e.g.,* 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); Peter S. Heslam, *Creating a Christian Worldview: Abraham Kuyper's Lectures on Calvinism* 1-8 (1998); John Bolt, *A Free Church, A Holy Nation: Abraham Kuyper's American Public Theology* xi (2001).

[120] *See, e.g.,* Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* 175 (1984).

[121] *See, e.g.,* Witte & Alexander, eds., *supra* note __; John Witte, Jr., *The*

made scattered appearances in other American legal writings – some at significant length,[124] some in passing,[125] and some only indirectly.[126]

Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism 321-29 (2007).

[122] *See, e.g.,* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 Emory Int'l L. Rev. 321 (1991); Johan D. van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, in Robbers, ed., *supra* note __, at 645.

[123] *See* David S. Caudill, *Augustine and Calvin: Post-Modernism and Pluralism*, 51 Vill. L. Rev. 299 (2006); David S. Caudill, *A Calvinist Perspective on Faith in Legal Scholarship*, 47 J. Legal Educ. 19 (1997). Both van der Vyver and Caudill identify as much with the thinking of a student and intellectual descendant of Kuyper, Herman Dooyeweerd, as they do with Kuyper himself. *See, e.g.,* Caudill, *supra* note __, at 301.

[124] *See, e.g.,* David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship,* 57 Emory L.J. 1471, __-__ (2008); Robin W. Lovin, *Religion and Political Pluralism*, 27 Miss. C.L. Rev. 91, __-__ (2007-2008); Jeffrey M. Bryan, *Sexual Morality: An Analysis of Dominance Feminism, Christian Theology, and the First Amendment*, 84 U. Det. Mercy L. Rev. 655, __-__ (2007); Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. St. Thomas L.J. 296, __-__ (2006); 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 (2006); Robin W. Lovin, *Church and State in an Age of Globalization*, 52 DePaul L. Rev. 1 (2002); Cochran, *supra* note __.

[125] *See, e.g.,* John Copeland Nagle, *The Evangelical Debate Over Climate Change*, 5 U. St. Thomas L.J. 53, __ (2008); Kwame Anthony Appiah, *Global Citizenship*, 75 Fordham L. Rev. 2375, __ (2007); C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 J.L. & Religion 225 (2006-2007); Jonathan Chaplin, *Toward a Social Pluralist Theory of Institutional Rights*, 3 Ave Maria L. Rev. 147, __ (2005); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. Rev. 1099, __; Peter Judson Richards, *"The Law Written in Their Hearts"?:Rutherford and Locke on Nature, Government and Resistance*, 18 J.L. & Religion 151 (2002).

[126] *See, e.g.,* Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. St. Thomas L.J. 909, __ (2004) (discussing sphere sovereignty without referring directly to Kuyper); Bainbridge, *supra* note __, at 203 (same); David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. Cal. Interdisc. L.J. 205, __ (1997) (same). In keeping with his focus on Dooyeweerd rather than Kuyper, see *supra* note __, van der Vyver 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, __ (2005); Johan D. van der Vyver, *Morality, Human Rights, and Foundations of the Law*, 54 Emory L.J. 187, __ (2005); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice,*

Still, citations to Kuyper amount to a mere handful over a span of decades, many of them brief in scope and shallow in treatment. David Skeel, assessing the current course of "Christian legal scholarship," writes that "the use of his work in contemporary American legal scholarship has tended to be more impressionistic than sustained, and Christian legal scholars" – I would add, legal scholars of any stripe – "have not employed it as a base camp for a sustained normative account."[127] This Part provides such a sustained account, focusing in particular on Kuyper's concept of sphere sovereignty.

Kuyper's account of sphere sovereignty was, as the term suggests, centered around sovereignty, which he defined in terms of its authority and coercive power: "the authority that has the right, the duty, and the power to break and avenge all resistance to his will."[128] Kuyper wrote in opposition to the popular theories of sovereignty of his day: popular sovereignty, which he feared would end with "the shackling of liberty in the irons of State-omnipetence,"[129] and state sovereignty, which he believed led to "the danger of state absolutism."[130] For Kuyper, neither course was acceptable, and both constituted the crisis and curse of modernity.[131]

Instead, drawing on fundamental principles of Calvinism,[132] 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

and National Self-Righteousness, 50 Emory L.J. 775, __ (2001).

[127] Skeel, *supra* note __, 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.") (citing, as an example, Cochran, *supra* note __).

[128] Abraham Kuyper, *Sphere Sovereignty*, in Kuyper, *Reader, supra* note __, at 461, 466 [hereinafter Kuyper, *Sphere Sovereignty*]; see also Bob Goudzwaard, *Globalization, Regionalization, and Sphere Sovereignty*, in Lugo, ed., *supra* note __, at 325, 333 (noting that Kuyper's definition of sovereignty departs from the usual uses of the word).

[129] Kuyper, *Lectures, supra* note __, at 88.

[130] Heslam, *supra* note __, at 104.

[131] *See, e.g.,* Kuyper, *Sphere Sovereignty, supra* note __, at 464.

[132] *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).

> threefold deduced supremacy, *viz.,* 1. The Sovereignty in the *State*; 2. The Sovereignty in *Society*; and 3. The Sovereignty in the *Church*.[133]

Kuyper thus sought to restore God as the only legitimate and ultimate sovereign.[134] Any purely human arguments for sovereign power, whether based on force of arms or on the social contract, are insufficient: "Authority over men cannot arise from men. . . . [A]ll authority of governments on earth originates from the Sovereignty of God alone."[135] This does not mean that the state is illegitimate; Kuyper, like Calvin before him, saw the rule of the "magistrates" as a divinely ordered means of governing postlapsarian humanity.[136] But its authority exists only because God "delegates his authority to human beings."[137] In particular, Kuyper sees divine authority as distributed among a threefold array of sovereigns: the state, society, and the church.[138] These are "*separate spheres*," Kuyper emphasizes, "each with its own sovereignty."[139]

These concepts require some elaboration. But it is worth pausing to consider two aspects of Kuyper's vision of creation. First, his vision is one of the striking energy, diversity, and pluralism – the "multiformity"[140] – of human existence. As Nicholas Wolterstorff observes, "The picture one gets from Kuyper is that of human existence, seen in its totality, as teeming with creative vitality."[141]

Second, and with some qualifications, his is ultimately an organically ordered diversity. The spheres of activity are mostly "organic phenomena of life,"[142] which arise naturally from God's plan of creation. Although they sometimes exist in tension with each other, each of these diverse spheres serves a particular purpose within the creation order.[143] The picture is one

[133] Kuyper, *Lectures, supra* note __, at 79; *see also* Kuyper, *Sphere Sovereignty, supra* note __, at 466.
[134] *See* Kuyper, *Lectures, supra* note __, at 90 (emphasis omitted).
[135] *Id.* at 82.
[136] *See id.* at 80-81.
[137] Kuyper, *Sphere Sovereignty, supra* note __, at 466. *See also* Wolterstorff, *supra* note __, at 9 ("Human authority, in all its forms, is at bottom divinely delegated authority.").
[138] *See* Kuyper, *Lectures, supra* note __, at 79.
[139] Kuyper, *Sphere Sovereignty, supra* note __, at 467 (emphasis in original).
[140] *Id.*
[141] Wolterstorff, *supra* note __, at 6.
[142] Kuyper, *Lectures, supra* note __, at 93.
[143] *See* Mouw, *supra* note __, at 95.

of a living, ensouled clockwork. In contrast to some of the metaphors for the Constitution that we saw in the Introduction,[144] Kuyper's understanding of social existence is thus both strikingly organic *and*, to some degree, mechanical:

> Our human life . . . is neither simple nor uniform but constitutes an infinitely complex organism. It is so structured that the individual exists only in groups, and only in such groups can the whole become manifest. Call the parts of this one great machine "cogwheels," spring-driven on their own axles, or "spheres," each animated with its own spirit. The name or image is unimportant, so long as we recognize that there are in life as many spheres as there are constellations in the sky and that the circumference of each has been drawn on a fixed radius from the center of a unique principle, namely, the apostolic injunction *hekatos en toi idioi tagmati* ["each in its own order:" 1 Cor. 15:23].[145]

What role does Kuyper envision for each of these spheres? Let us take them separately, beginning with "sovereignty in the sphere of Society."[146] Although Kuyper sometimes described the social spheres as being as various as the "constellations in the sky,"[147] his 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.[148]

The picture is thus one of a set of "distinct social spheres of activity" centered around various commonly recognized social roles and activities.[149] This resembles Max Weber's description of modern existence as involving the differentiation of various spheres of activity,[150] although the animating spirit of Kuyper's vision is somewhat different from Weber's own. These activities are mostly distinct,[151] 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."[152] They may be functional in nature, and thus geographically widespread – a professional guild or social association, for

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[144] *See supra* notes __-__ and accompanying text.

[145] Kuyper, *Sphere Sovereignty, supra* note __, at 467.

[146] *Id.* at 90 (emphasis omitted).

[147] Kuyper, *Sphere Sovereignty, supra* note __, at 467.

[148] Kuyper, *Lectures, supra* note __, at 90.

[149] Wolterstorff, *supra* note __, at 7.

[150] *See id.*; *see also* Storkey, *supra* note __, at 191 (citing Max Weber, 1 *Economy and Society* 41-62 (Guenther Roth & Claus Wittich eds., 1978)).

[151] *See* Kuyper, *Lectures, supra* note __, at 90-91.

[152] Kuyper, *Lectures, supra* note __, at 96.

instance – or geographically and sometimes politically distinct, so that Kuyper 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."[153]

This last concept – autonomy – is vital here. For 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.[154]

Thus, the state cannot intrude on these separate spheres, each of which shares in the same divine authority that animates the state itself.[155] It may "neither ignore nor modify nor disrupt the divine mandate, under which these social spheres stand."[156] Kuyper adds: "As you feel at once, this is the deeply interesting question of our civil liberties."[157]

Contrasted with the sovereign sphere of society is the sovereign sphere of the state, which Kuyper calls "the sphere of spheres, which encircles the whole extent of human life."[158] In describing the state, Kuyper shifts from organic to mechanical imagery.[159] Although the social spheres arise from "the order of creation,"[160] the state is an artifact, albeit an essential one, of human sinfulness.[161] 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."[162]

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153 *Id.*

154 Kuyper, *Lectures, supra* note __, at 96-97.

155 *See id.* at 91.

156 *Id.* at 96.

157 *Id.* at 91.

158 Kuyper, *Sphere Sovereignty, supra* note __, at 472.

159 *See, e.g.,* Kuyper, *Lectures, supra* note __, at 91 ("It is here of the highest importance sharply to keep in mind the difference in grade between the *organic* life of society and the *mechanical* character of the government.") (emphasis in original).

160 Kuyper, *Sphere Sovereignty, supra* note __, at 469.

161 *See* Wolterstorff, *supra* note __, at 13.

162 Kuyper, *Lectures, supra* note __, at 92-93.

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."[163] 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 together to bear *personal* and *financial* burdens for the maintenance of the natural unity of the State.[164]

The state thus plays three central protective and boundary-maintaining roles; these have been usefully redescribed by Richard Mouw.[165] The first category involves the state's "adjudication of *inter*sphere boundary disputes": the state has the duty to ensure that each sphere is operating within its proper scope and not interfering with another.[166] The second involves "*intra*sphere conflict."[167] 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.[168] 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."[169] 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."[170] Ultimately, the only 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."[171] The sovereign state must learn to cooperate with the sovereign social sphere, so that both may achieve their divinely delegated purposes.[172]

Finally, consider the sovereignty of the church. Although there is no

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163 *Id.* at 94.

164 *Id.* at 97; *see also* Kuyper, *Sphere Sovereignty, supra* note __, at 467-68.

165 *See* Mouw, *supra* note __, at 89-90.

166 *Id.* at 89 (emphasis in original).

167 *Id.* at 90 (emphasis in original).

168 *Id.* at 90 (emphasis in original).

169 Kuyper, *Lectures, supra* note __, at 93; *see also* Kuyper, *Sphere Sovereignty, supra* note __, at 469.

170 Kuyper, *Lectures, supra* note __, at 94.

171 *Id.*

172 *See id.* at 97-98.

doubt that Kuyper sees a vital role for the church,[173] 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 itself has at times violated religious pluralism and liberty of conscience,[174] 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 Church of Christ on earth."[175] 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.[176] It is only a coordinate sovereign, and cannot choose a privileged sect from among the churches, or resolve "spiritual questions."[177] In short, "only the system of a free Church, in a free State, may be honored from a Calvinistic standpoint. The sovereignty of the State and the sovereignty of the Church exist side by side, and they mutually limit each other."[178]

Just as the state is restricted to its proper sphere when it comes to either cooperation or conflict with the church, so the church is restricted to its own sphere. Like all spheres, including the state, the church may tend to overreach.[179] Sphere sovereignty thus implies that churches, like all other spheres, must stay within their own province.

Kuyper is thus clear that neither church nor state can intrude on other sovereign spheres. In his sphere sovereignty address, for example, Kuyper

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[173] *See* Wolterstorff, *supra* note __, at 16.

[174] *See* Kuyper, *Lectures, supra* note __, at 99.

[175] *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. *See* Witte, *supra* note __, at 323 n.7. *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.").

[176] *See id.* at 105.

[177] Kuyper, *Lectures, supra* note __, at 106.

[178] *Id.* at 106-07.

[179] *See, e.g.,* Mouw, *supra* note __, at 99 ("[Kuyper] was especially vocal . . . about the dangers of an overextended church."); *see also id.* at 106.

emphasizes that scholarship must "remain[ ] 'Sovereign in its own sphere' and . . . not degenerate under the guardianship of *Church* or State. Scholarship creates its *own* life sphere in which truth is sovereign. Under no circumstances may violation of its life-law be tolerated."[180] Thus, the church "must insist that learning never become a slave but maintain its due sovereignty upon its own ground."[181] Similarly, the state, even if it has some necessary role in funding and supervising the educational system, must "respectfully 'take[ ] the shoes off from its feet'" when it "crosses the boundary into the domain of scholarship."[182]

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."[183]

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,"[184] and all of them are expressions of God's ultimate sovereignty.[185] It is divided in that each sphere, provided that it acts appropriately, is to remain sovereign, untouchable by either church, state, or other social institutions. Kent Van Til, catching something of Kuyper's bug for metaphors, offers an arresting summary 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 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.[186]

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180 Kuyper, *Sphere Sovereignty, supra* note __, at 476 (some emphases added).

181 *Id.* at 477.

182 *Id.*

183 Kuyper, *Lectures, supra* note __, at 108; *see also* Mouw, *supra* note __, at 100.

184 Mouw, *supra* note __, at 100.

185 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 __, at 488 (emphasis in original).

186 Kent A. Van Til, *Abraham Kuyper and Michael Walzer: The Justice of the Spheres*, 40 Calvin Theological J. 267, 276 (2005).

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 can and should inform our understanding of the American constitutional structure, it may be helpful to suggest ways in which Kuyper's vision is, in fact, 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 counterarguments."[187] It would hardly be shocking if some of those examples echoed Kuyper's own arguments for sphere sovereignty. 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.

I do not want to overreach here. The sources I mention below are not the only traditions from which American political culture has drawn. They are only some of the threads in the fabric. Certainly it is hard to argue that Kuyper himself has been much of a source of inspiration in the United States outside particular and relatively insular circles.[188] All this is meant to sound a note of restraint, however, not resignation. As we will see, a sphere sovereignty-oriented approach to First Amendment institutionalism is not at all as alien as one might expect.

Kuyper himself certainly thought so. Kuyper often singled out the United States as an exemplar of his brand of Calvinist thought.[189] He argued that America's success lay in its "threefold constellation of unlimited political freedom, strict morality, and the faithful confession of Christianity points directly to the Union's Puritan origins, to the indomitable spirit of the

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[187] John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* 7 (1st ed. 2000).

[188] Elaine Storkey writes, "In sum, it would be fair to say that the decisive fact in Anglo-American culture has heretofore been the failure to grasp Kuyper's insights." Storkey, *supra* note __, at 193.

[189] *See, e.g.,* John Witte Jr., *The Biography and Biology of Liberty: Abraham Kuyper and the American Experiment*, in Lugo, ed., *supra* note __, at 243.

Pilgrim fathers, and to the spiritual legacy of Calvin."[190] Of course, this was hardly a perfectly accurate historical vision. We might say of Kuyper's America, like Kuyper's Calvinism, that it "was a work of art, a constructed country like Faulkner's Yoknapatawpha County: plausible, often compelling, but not necessarily representing historically documentable fact, and certainly not registering all the facts."[191] But the picture still captures *something* true.

In combing through history for the roots, offshoots, and parallel visions of sphere sovereignty, however, we must begin by looking further back still, to the Calvinist philosopher Johannes Althusius.[192] 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, an important part of the organizing structure of society was the private association. Each such association was fundamentally responsible for its own self-government. They differ[ed] in each specie of association according as the nature of each requires."[193] 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."[194] 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.[195]

Althusius did not rule out state regulation, by any means. The state could intervene where necessary to "defend the fundamental rights of every human being."[196] But the state's fundamental role is not to displace associations; instead, it should encourage conditions that "make it possible for participants of each association together to . . . form a community that

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[190] *Id.* at 292.

[191] Bratt, in Lugo, *supra* note __, at 18.

[192] For relevant discussions, see Henk E.S. Woldring, *Multiform Responsibility and the Revitalization of Civil Society,* in Lugo, ed., *supra* note __, at 175, 177-80; Witte, *supra* note __, at 143-207; Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150-1650* 71-79 (1982). Carl Esbeck argues that we can look back further still for the roots of religious autonomy, to the fourth century. *See* Esbeck, *supra* note __, at 1392.

[193] Woldring, *supra* note __, at 177 (quoting Johannes Althusius, *Politica* 21-22 (1995) (reprint of third edition of 1614).

[194] Witte, *supra* note __, at 187.

[195] *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).

[196] Woldring, *supra* note __, at 178.

orders the life of participants through just laws of their own making."[197]

In Althusius, in short, we see 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";[198] 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."[199] Although one must be cautious in situating Althusius's influence on later thinkers,[200] 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.

Althusius provides a link to our next subject of discussion, the American experience. 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."[201] This included a number of key figures in the American revolutionary period, such as John Adams, Thomas Jefferson, and James Madison.[202]

But the central set of American ideas that might be seen as rooted in Calvinism, and forming a sort of kinship with Kuyper's own concept of sphere sovereignty, lies earlier still, with the early Puritan communities of colonial America. These were the figures whom Kuyper saw as the spring that set American religious and political liberty in motion.

Although Kuyper's vision was deeply problematic at a historical level,[203] he was right to see an important link between the Puritan mindset and his own.[204] In his important work, John Witte has identified a number of

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197 *Id.* at 179.

198 *Id.*

199 *Id.* at 180.

200 *See* Witte, *supra* note __, at 203-05.

201 *Id.* at 203 (quoting Thorold Rogers, *Review of William E. Griffis*, Brave Little Holland, 10 New England Mag. 517, 520 (1894)).

202 *See id.* 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 accepts and applications" there. *Id.* at 204.

203 *See, e.g.,* Witte, *supra* note __, at 250-52 [Lugo book].

204 *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.")

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.[205] The fundamental contribution of the Puritans to American constitutionalism was to build an understanding of rights and liberties based on the Calvinist doctrine of covenant.[206] Covenental doctrine led the Puritans to see church and state "as two separate covenantal associations, two coordinate seats of godly authority and power in society."[207] Thus, 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."[208] "To conflate these two institutions would be to the 'misery (if not ruin) of both.'"[209] 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."[210]

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,"[211] 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.[212] Nevertheless, many of the parallels between Kuyper and the Puritans are striking – an unsurprising fact, given that both drew from the same Calvinist well. At least part of the Puritan conception of the state included a robust conception of associational liberty, drawn from the Calvinist doctrine of covenant, that allowed the church and other private associations substantial autonomy and saw them as coordinate sovereigns, along with the state, in the social order.

The Puritan influence was reflected in the American revolutionary period

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(quoted in Witte, *supra* note __, at 262).

[205] *See* Witte, *supra* note __ [Reformation of Rights]; Witte, *supra* note __ [American Constitutional Experiment]; John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 Emory L.J. 41 (1990); John Witte, Jr., *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*, 36 Emory L.J. 579 (1987).

[206] *See, e.g.,* Witte, *supra* note __, at 287 [Reformation of Rights].

[207] *Id.* at 309.

[208] *The Laws and Liberties of Massachusetts Bay* A2 (1648) (Max Farrand ed., 1929) (quoted in Witte, *supra* note __, at 309).

[209] Witte, *supra* note __, at 309 (quoting *Laws and Liberties of Massachusetts Bay, supra* note __, at A2).

[210] *Id.* at 310.

[211] *Id.*

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

by such writers and political figures as John Adams, who admired the Puritans' creation of "a comprehensive system of ordered liberty and orderly pluralism within church, state, and society,"[213] and who embraced some degree of religious autonomy when he drafted the Massachusetts Constitution of 1780,[214] a seedbed of ideas for the United States Constitution. That constitution guaranteed churches the right to select their own ministers rather than have them forced upon them by the state, a right that is consistent with the concept of sphere sovereignty.[215] Similar guarantees were provided in the early constitutions of Connecticut, Maine, and New Hampshire.[216]

The same pattern is apparent elsewhere in the history of the early Republic. Thus, Philip Hamburger observes that members of the founding generation who supported religious exemptions may 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."[217] 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."[218]

We might thus see the Puritans, among others, as having impregnated American thought with some of the same ideas that would culminate in Kuyper's writings on sphere sovereignty.[219] John Witte concludes his study

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213 Witte, *supra* note __, at 277.

214 *See id.* at 292-93.

215 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).

216 *See id.* at 2015-16.

217 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 B.Y.U. 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).

218 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).

219 *See, e.g.,* Lupu & Tuttle, *supra* note __, at 38 (arguing that the founders decided on "a new experiment – one that decoupled religious and civil institutions. This

of the Puritans' place within 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 political pluralism, in turn, were bounded by fundamental Puritan ideas of divine sovereignty and created order.[220]

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.[221] Tocqueville famously remarked upon the flourishing of both private associations in general and religious associations in particular in American society. As to religion, he argued that "[r]eligion in America . . . must be regarded as the first [ ] political institution[ ],"[222] 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.[223] Tocqueville also noted the presence in America of an "immense assemblage of associations,"[224] and argued that they formed a fundamental part of the governance of a republic founded on notions of equality.[225]

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."[226] Tocqueville thus saw in nineteenth America evidence that the Calvinist Puritan ideal had taken root.

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.").

220 Witte, *supra* note __, at 319 (internal quotations omitted).

221 *See, e.g.,* Woldring, *supra* note __, at 182-83; Bolt, *supra* note __, at 133-86.

222 Alexis de Tocqueville, 1 *Democracy in America* 305 (1835) (Alan Ryan ed., 1994).

223 *See* 1 *id.* at 304.

224 2 *id.* at 106.

225 *See* 2 *id.* at 106-10.

226 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)).

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.[227]

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, such as the thought of Althusius, 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 later thinkers. If they 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."[228] These writers, in keeping with Kuyper's effort to locate sovereignty in a panoply of social institutions, attacked "unlimited state sovereignty," including the popular variety instituted by the French Revolution, of which Kuyper was so critical.[229] In its place, they put a belief in a 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."[230] Like Kuyper, with his vision of the state as the "sphere of spheres," 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."[231] Although the state might exercise regulatory power, it did so in

227 *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485 (2002).

228 For introductions to British pluralism, see, *e.g., 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); David Nicholls, *The Pluralist State* (1975); Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* 111-15 (2002).

229 Paul Q. Hirst, *Introduction*, in Hirst, ed., *supra* note __, at 1, 2.

230 *Id.* at 2.

231 *Id.* at 17. For language that echoes both Kuyper and Figgis, see W. Cole Durham, Jr. & Elizabether A. Sewell, *Definition of Religion,* in Serritella, ed., *supra* note

a manner that was "bounded by the behavior of other groups, with law emanating from several sources."[232] Without straining too hard, it is easy to see echoes of Kuyperian sphere sovereignty in this language.[233]

More broadly, consider the host of writers who have argued for the importance of mediating or intermediary institutions.[234] These writers have argued for the importance to our social structure of institutions that "stand[ ] between the individual in his private life and the large institutions of public life."[235] Mediating associations, including such Kuyperian staples as "family, church, voluntary association, [and] neighborhood,"[236] are seen in this literature as playing a vital role in helping individuals to 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.[237]

I do not wish to draw too close a parallel between Kuyper and this literature. Among other things, the mediating institutions literature may have in mind a more instrumental justification for the importance of mediating institutions than Kuyper, with his vision of a divinely ordered pluralism following God's ordinances, would have accepted. It is enough to observe that this literature, too, suggests a widespread attraction to the kind of approach that Kuyper advocated.

Finally, consider a school of thought that, like Kuyper's concept of sphere sovereignty, is religiously derived: the Catholic concept of subsidiarity.[238]

__, at 3, 35 ("In a pluralistic world, protection of religious freedom requires allocating the ultimate 'competence of competences' to the secular state.").

232 Weisbrod, *supra* note __, at 112.

233 For a modern example of a writer proceeding from a perspective of legal pluralism, including that of the British pluralists, 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).

234 *See, e.g.,* Garnett, *supra* note __ [Henry Adams's Soul]; Peter L. Berger & Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (1977); Peter L. Berger, *Facing Up to Modernity: Excursions in Society, Politics and Religion* 130-41 (1977); *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society* (Mary Ann Glendon & David Blankenhorn, eds., 1995).

235 Berger & Neuhaus, *supra* note __, at 2 (emphasis omitted).

236 Berger, *supra* note __, at 134.

237 *Id.* at 138 (emphasis omitted).

238 *See* 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").

The concept of subsidiarity argues that, rather than existing in isolation, "the individual realizes his fulfillment in community with others."[239] 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."[240] 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."[241]

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, like Althusius, who may have indirectly shaped the American landscape.[242] Also like sphere sovereignty, 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.[243]

A number of writers have noted the connection between subsidiarity and sphere sovereignty, both of which developed more or less contemporaneously.[244] Given its current popularity in the legal literature, it may be worth pausing to note the ways in which it subsidiarity differs from sphere sovereignty.[245] 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,"[246] with the state in the highest practical position of authority and the church above the state.[247]

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239 Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 38, 43 (2003).

240 *Id.* at 41.

241 Duncan, *supra* note __, at 72.

242 *See* Carozza, *supra* note __, at 40-41.

243 *See generally* Duncan, *supra* note __.

244 *See, e.g.,* Mouw, *supra* note __; Woldring, *supra* note __; van der Vyver, *supra* note __ [Robbers ed.]; Paul E. Sigmund, *Subsidiarity, Solidarity, and Liberation: Alternative Approaches in Catholic Social Thought*, in Lugo, ed., *supra* note __, at 205.

245 *See, e.g.,* Mouw, *supra* note __, at 92 ("All things considered, though, the relationship between subsidiarity and sphere sovereignty is not an exact fit.").

246 *See, e.g.,* Duncan, *supra* note __, at 73.

247 *See, e.g.,* Mouw, *supra* note __, 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 was a critic of subsidiarity for this

Sphere sovereignty, by contrast, envisions a horizontal social order, in which the various spheres, including church and state, "do not derive their respective competencies from one another."[248] 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."[249]

We should not make too much of this distinction between subsidiarity and sphere sovereignty. For one thing, subsidiarity itself has changed over time, in ways that deemphasize the hierarchical nature of the social order.[250] Moreover, even if it treats all the sovereign spheres as resting on equal authority, sphere sovereignty nevertheless permits state intervention in appropriate cases, just as subsidiarity does.[251] The differences between the two concepts have certainly not prevented them from becoming "conversation partner[s]."[252] In short, sphere sovereignty finds a philosophical and theological cousin, though not an identical twin, in subsidiarity. Both emphasize the centrality of a variety of private associations, including the church, in our social order, and both would both limit the state's intervention with respect to those associations and seek to foster their flourishing.

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The 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 as Kuyper did. That includes the

reason, and so his description should not be taken as definitive.

248 Van der Vyver, *supra* note __, at 655.

249 Mouw, *supra* note __, at 93.

250 *See* Sigmund, *supra* note __, at 213; *see also* Patrick McKinley Brennan, *Differentiating Church and State (Without Losing the Church)*, April 2008, http://ssrn.com/abstract=1125441, at 22 ("In common parlance, . . . one hears that subsidiarity is the principle that ruling power should devolve to the lowers level 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.").

251 *See* Woldring, *supra* note __, at 186-87; *see id.* at 187 (concluding that "the differences between subsidiarity and sphere sovereignty are in fact quite marginal").

252 Stackhouse, *supra* note __, at xv.

Puritans, whose ideas drew on the same sources, reached some of the same conclusions, and formed an influential strand of the American constitutional tradition. This leaves us with the possibility that sphere sovereignty, or some form of it, is not simply an alien shoot, but can be said to be 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 potential contribution that sphere sovereignty makes to the constitutional landscape. As Part III of this Article has shown, that contribution is substantial. To be sure, sphere sovereignty is not a programmatic vision.[253] 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 not grudgingly recognized, but 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 or as the mystical culmination of human history. At the same time as it recognizes the fundamental and, to Kuyper, divinely ordained function 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. That does not mean the state is rendered either unnecessary or utterly 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. But its role is not all-encompassing.

[253] *See, e.g.,* Mouw, *supra* note __, at 100-01.

This approach is valuable for the development of both individual and social rights and relations. Sphere sovereignty does not ignore "the sovereignty of the individual person."[254] Indeed, Kuyper emphasized that each individual is necessarily "a sovereign in his own person,"[255] and argued that a proper understanding of Calvinism required respect for "liberty of conscience," "liberty of speech," and "liberty of worship."[256] 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,"[257] and in his reminder that both church and state alike must "allow[ ] to each and every citizen liberty of conscience, as the primordial and inalienable right of all men."[258]

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."[259] 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 an individual and a social level. Individually, it recognizes that "the human mind is developed only by the reciprocal influence of men upon one another."[260] 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.[261] 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 various aspects of the constitutional structure. Writ small, it resembles the Court's doctrine of substantive due process rights for families in directing the upbringing of children,[262] the only remnants of the *Lochner* era to survive into the

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254 Kuyper, *Lectures, supra* note __, at 107.

255 *Id.* (quotations and citation omitted).

256 *Id.* at 108 (emphasis omitted).

257 *Id.* at 97.

258 *Id.* at 108.

259 Berger & Neuhaus, *supra* note __, at 4 (internal quotations and citation omitted).

260 2 Tocqueville, *supra* note __, at 108-09.

261 *See* 2 id. at 103 ("The Americans have combated by free institutions the tendency of equality to keep men asunder, and they have subdued it.").

262 *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

present day.[263] Writ large, it is consistent with our larger system of federalism, which divides regulatory authority among a multitude of competing and cooperating sovereigns.[264] It finds an echo, too, in various theories of localism, which emphasize the key structural role played in constitutional government by even smaller localities, such as cities.[265]

For present purposes, however, what is most significant about sphere sovereignty is the valuable contribution it makes to our understanding of First Amendment institutionalism. First, sphere sovereignty helps legitimate First Amendment institutionalism,[266] 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 helps to flesh out the details of First Amendment institutionalism. It offers a detailed set of justifications for First Amendment institutionalism; it helps provide the rudiments for a set of boundaries that help define First Amendment institutions and their respective roles; and it 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.[267] Allow me to fill out these points in greater detail.

Let us begin by asking what, precisely, the picture we have drawn of

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263 *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).

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

265 *See, e.g.,* 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 (2006); Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 371-76 (2001); David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487 (1999); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980).

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

267 *See, e.g.,* Garnett, *Do Churches Matter?, supra* note __, at 293.

sphere sovereignty has to offer First Amendment institutionalism. To answer that question, we must ask what vision of institutionalism sphere sovereignty offers. Drawing on Kuyper, we might 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 which recognizes that a variety of "legal systems coexist in the same field," and in which "legal systems" include not only judicial and legislative systems, but also "nonlegal forms of normative ordering."[268] 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.[269] It is diverse because it recognizes a 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, each of these spheres has 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, 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 own limits, and is substantially self-regulating according to the nature and traditions of the particular enterprise.[270]

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 rootless individualism. At the same time, it does not treat given spheres as entitled to free rein. Although it gives them substantial autonomy, it also recognizes an important role for the state in mediating between the spheres and protecting the interests of individuals within the spheres in cases of severe abuse. It thus recognizes the "material and normative dimensions of . . . [various]

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[268] Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y Rev. 869, 870 (1988); *see also* John Griffiths, *What is Legal Pluralism?*, 24 J. Legal Pluralism 1 (1986); Cover, *supra* note __; Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 Yale L.J. 211, 217 n.31 (1991).

[269] Wolterstorff, *supra* note __, at 6.

[270] For the same general concept, put in Kuyperian terms, see Spykman, *supra* note __, 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.").

forms of social order,"[271] but acknowledges that these forms of social order must also respect "the sovereignty of the individual person."[272] 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."[273]

All of these virtues combine well with First Amendment institutionalism. In a variety of ways, sphere sovereignty provides a valuable organizing and legitimating metaphor for First Amendment institutionalism. 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."[274] This organizing structure offers a valuable approach to the institutional variation and differentiation that the First Amendment institutional project requires. Its description of the "threefold right and duty"[275] 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 legitimate the First Amendment institutional project. First, its depiction of the *organic* nature of the sovereign spheres – its depiction of these spheres as both identifiable and naturally occurring – helps allay concerns about 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 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 provides First Amendment institutionalism with a pedigree and a set of organizing principles.

What might the organizing principles of a First Amendment institutionalism that draws on Kuyperian sphere sovereignty look like in practice? Others may draw different conclusions. But I think they might come out in something like the following way.

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271 Post, *supra* note __, at 1280-81.

272 Kuyper, *Lectures, supra* note __, at 107 (emphasis omitted).

273 Cover, *supra* note __, at 51.

274 Kuyper, *Lectures, supra* note __, at 91.

275 *Id.* at 97.

To begin with, we might expect a modified list of Kuyper's own version of the sovereign spheres to emerge. That includes the church and various other private associations; the university; other centers of learning, perhaps including K-12 education and certainly including libraries; and, in some form or other, science and art. Although Kuyper did not mention the press in his central writings on sphere sovereignty, its 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 excluded from the list Kuyper's categories of families, business enterprises, or local governments. As we shall see in a moment, they are by no means completely excluded from an institutionally oriented constitutional account; but that does not make them *First Amendment* institutions as such. As a practical matter, most of us recognize that "a certain number of existing social institutions . . . serve functions that the First Amendment deems especially important."[276] It is these institutions that are the focus of this account.

With this starting point, a court examining a First Amendment question[277] would not simply attempt, as it now generally does, 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,"[278] and in a Kuyperian sense are also a natural, perhaps inevitable, 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 regulation content-neutral, viewpoint-neutral, etc.? Is this a limited-purpose public forum, a nonpublic forum, etc?, and so on, across a mind-numbing range of doctrinal sorting principles – it would ask a different set of questions. It would ask, first, is this litigant a recognizable First Amendment institution – or, in Kuyperian terms, is it an identifiable "sovereign sphere" whose fundamental part in the "social order" is to contribute to public discourse?

[276] Schauer, *Institutional First Amendment, supra* note __, at 1274.

[277] I assume, for now, that courts would employ these principles in deciding questions involving First Amendment institutions. For more discussion on this point, see, *e.g.,* Hamilton, *supra* note __, at __ (arguing, in the course of opposing religious autonomy altogether, that courts are ill-suited to making such determinations); Mark Tushnet, *Defending a Rule of Institutional Autonomy on "No-Harm" Grounds*, 2004 B.Y.U. L. Rev. 1375, 1383 (arguing that the arguments for institutional autonomy are more plausible than Hamilton gives them credit for, but suggesting that it is "a good idea to leave it up to legislatures to define the contours of the rules of institutional autonomy").

[278] Schauer, *Institutional First Amendment, supra* note __, at 1275.

Second, it would ask, what is the nature of this institution and its participation in public discourse?[279] Not all sovereign spheres are exactly the same, of course, and neither are all First Amendment institutions. Although both the press and the university, for instance, ultimately contribute to the formation of public discourse, they do not do so in the same way. A sense of the role and purpose of the institution under examination in a given case would thus give the court a sense of the institutional 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 "sphere," or First Amendment institution? Using Kuyper's terms, as adapted by Mouw: Is this a case involving an intersphere dispute between institutions? An intraspherical case involving the sorts of intrusion on individual rights that call for state intervention, either directly by the courts or through the enforcement of statues like the civil rights laws? Or is it a transspherical case that involves 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, whether under First Amendment institutionalism or under sphere sovereignty, is one of autonomy, or sovereignty, within the proper scope of each respective sphere or First Amendment institution. In each case, "the virtues of special autonomy [for these institutions] . . . would in the large serve important purposes of inquiry and knowledge acquisition, and [ ] 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."[280]

Second, the fact that autonomy would apply *within the proper scope of each sphere* suggests why a court, following something like Kuyper's lines,[281] would need to inquire about the nature and purpose of each First Amendment institution. Similarly, in order to understand both the

[279] *Cf. Silence of the Lambs* (Orion Pictures Corp., 1991) ("First principles, Clarice. . . . Of each particular thing ask: What is it in itself? What is its nature?").

[280] Schauer, *Institutional First Amendment, supra* note __, at 1274-75.

[281] 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 __, at 1272.

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. Thus, to understand whether the press is acting sufficiently "press-like" to merit a continuing claim of legal autonomy, we might ask both whether it is acting within something like its core purpose of discovering and disseminating information and commentary, and also whether its professional norms – ensuring accuracy, providing an opportunity for response by injured parties, and so on – 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, we can see why Frederick Schauer might be right to argue that institutionalism need not be a creature of the First Amendment alone, and how that might be consistent with Kuyper's vision, which argues for the treatment of the family and of business enterprises as sovereign spheres. 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.[282] He points out that while First Amendment institutionalism might lead to "more" protection for a particular institution, in other cases institutionalism might lead to "less" protection.[283] 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 for the courts certainly would not be irrelevant in other constitutional fields. We might ask of the family, for instance, whether it 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.[284] Conversely, we might conclude that other institutions, like businesses, because of their interaction with other spheres and the risk that they will create third-party victims who are not

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[282] Schauer, *Institutions, supra* note __, at 1757 n.51.

[283] *See* Schauer, *Institutional First Amendment, supra* note __, at 1276-77.

[284] *See* Tushnet, *supra* note __, at 1381 & n.17 (suggesting that arguments for autonomy for religious institutions may overlap arguments for autonomy for "families or other nongovernmental organizations").

active participants in that "sphere," require state intervention in a wider variety of circumstances.[285]

In short, a sphere sovereignty-influenced 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; and 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 singled out, 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, at least within their particular sphere; 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."[286] They are thus fitting subjects for treatment as sovereign spheres under a First Amendment institutionalist approach.

Consider again Kuyper's invocation of

> . . . the fundamental rule that the government must honor the complex of Christian churches as the multiform manifestation of the Church of Christ on earth. That the magistrate has to respect the liberty, *i.e.,* the sovereignty, of the Church of Christ in the individual sphere of these churches. That Churches flourish most richly when the government allows them to live from their own strength on the voluntary principle. And that therefore . . . only the system of a Free Church, in a free State, may be honored from a Calvinistic standpoint. The sovereignty of the State and the sovereignty of the Church exist side by side, and they mutually limit each other.[287]

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[285] *See, e.g.,* Siebecker, *supra* note __; Siebecker, *supra* note __; Blocher, *supra* note __.

[286] Brady, *supra* note __, at 1710.

[287] Kuyper, *Lectures, supra* note __, at 106-07.

If we allow for Kuyper's religious focus but expand it to include other faiths,[288] 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."[289] But this assumption was likely grounded on the understanding that a variety of sectarian organizations would exist within each social "sphere" – sectarian trade unions, political parties, universities, and so on. This principle of "pillarization"[290] is less pronounced in the United States than it was in Kuyper's own nineteenth century Holland, and we need not strain too hard at a similar approach here. Rather, given the wide range of activities and organizations in the United States that have a religious mission or would consider themselves "religious," I assume that we can define "religious entity" fairly broadly.[291]

Under a sphere sovereignty approach to religious entities as First Amendment institutions, 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."[292] They would coexist alongside the state, like other First Amendment institutions, serving a vital role in furthering self-fulfillment, the development of 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."[293]

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

289 *Id.* at 99.

290 *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 __, at 61-62 (discussing the development and fate of pillarization in the Netherlands).

291 *See* Brady, *supra* note __, at 1692-93 (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 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").

292 *Cf. EEOC v. Catholic Univ.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (churches have the "freedom to decide how [they] will govern [themselves]" and "a constitutional right of autonomy in [their] own domain.").

293 Kuyper, *Lectures, supra* note __, at 106.

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,[294] some version of non-establishment would necessarily be woven into the fabric of this approach.[295] Thus, "a free Church, in a free State":[296] a set of independent and largely autonomous religious entities, operating according to their own purposes and within their own sphere, substantially immune from state regulation except where one of Kuyper's three concerns is met, but also not entitled to state preferment.

All of this is consistent with the approach to First Amendment institutionalism that I outlined above. What sphere sovereignty adds to the picture, besides an expressly religious justification and an obvious and loving concern for the sovereignty and well-being of the church, 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 a sphere sovereignty-oriented vision of churches as First Amendment institutions. My goal here is not to emphasize too strongly 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 – a fact that, perhaps, reinforces the thesis that some version of sphere sovereignty is consistent with our constitutional framework. In other cases, it may lead to departures from current doctrine.

Given the doctrinal confusion that reigns in this area, however,[297] what

294 *See, e.g.,* Wolterstorff, *supra* note __, at 18 (arguing that Kuyper would regard our understanding of the Establishment Clause "as founded on untenable assumptions and hopelessly confused").

295 *See infra* notes __-__ and accompanying text.

296 Kuyper, *Lectures, supra* note __, at 106.

297 *See, e.g,* Bradley, *supra* note __, at 1061.

a sphere sovereignty/First Amendment institutionalist approach provides, first and foremost, is a more stable and powerful set of tools to address these pressing questions. This approach may offer a coherent and consistent resolution for a host problems in church-state law.

This treatment is not comprehensive, and the discussion is extended in a tentative spirit. One may expect reasonable disagreement about what a sphere sovereignty/institutionalist approach demands in particular cases. Nevertheless, I hope to show that the resolutions I suggest below are attractive, track each other across doctrinal lines, and are consistent with how we might approach similar problems involving a range of other First Amendment institutions.

B. Core Questions of "Church Autonomy"

1. Church Property Disputes

It makes sense to begin with the core problem of "church autonomy," which involves a number of subsidiary issues.[298] The usual starting point for discussion of this doctrine is *Watson v. Jones*,[299] in which 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."[300] It declined to adopt any approach to church property disputes that would require the courts to determine whether a particular church or its leadership had departed from established church doctrine.[301] Instead, it laid down rules of conduct that varied according to the form of church polity in question. Disputes within congregationalist churches that are independent of any higher authority would be decided "by the ordinary principles of governance for voluntary associations,"[302] while disputes within hierarchical church organizations, such as the Roman Catholic Church, with established ecclesiastical tribunal procedures, would be resolved by accepting "the decisions of the highest of these church judicatories as final."[303]

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[298] *See* Perry Dane, *"Omalous" Autonomy*, 2004 B.Y.U. L. Rev. 1715, 1733-34.
[299] 80 U.S. 679 (1871).
[300] *Id.* at 728.
[301] *See id.* at 729.
[302] *Id.* at 725.
[303] *Id.* at 727.

This decision gave rise to a series of subsequent Supreme Court cases that ratified some version of a "hands off" understanding with respect to church disputes.[304] 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,"[305] and may not "resolve underlying controversies over religious doctrine."[306] It has also suggested that courts may not "make a detailed assessment of relevant church rules and adjudicate between disputed understandings,"[307] even if the underlying question is whether the church's ecclesiastical tribunal has acted consistently with its own law.[308] More recently, the Court has left some play in the joints of church property dispute doctrine. While 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 in the church document.[309]

These cases have occasioned their share of controversy,[310] 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 the church, 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 church, rather than by judicial resolution. Thus, the courts should allow churches to resolve their own disputes, according to the norms – whether

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304 Kent Greenawalt, 1 *Religion and the Constitution: Free Exercise and Fairness* 265 (2006).

305 *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447 (1969).

306 *Id.* at 449.

307 Greenawalt, *supra* note __, at 267.

308 *Serbian Eastern Orthodox Diocese v. Milivojevich*, 429 U.S. 873 (1976).

309 *Jones v. Wolf*, 443 U.S. 595 (1979).

310 *See, e.g.,* John Garvey, *Churches and the Free Exercise of Religion*, 4 Notre Dame J. L., Ethics & Pub. Pol'y 567 (1990); 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); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 56 Fordham L. Rev. 335 (1986); Ira Mark Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Cal. L. Rev. 1378 (1981).

congregational, hierarchical, or based on some legal instrument – that the church selects to govern itself.

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],"[311] 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."[312]

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."[313] Rather, *Jones* recognized the profound difficulty that courts face in resolving what Richard Mouw would call "intrasphere" church disputes involving contending claimants to the title of "church." Its response – giving churches the opportunity to structure their own governing documents with secular language that can be read and enforced by state courts – 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."[314] *Jones* was, in short, an effort to *accommodate* church autonomy, not to eliminate it.[315] 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.

311 *Employment Division v. Smith*, 494 U.S. 872, 881 (1990).

312 Corbin, *supra* note __, at 1987; *see also* Hamilton, *supra* note __, at 1162-63 (characterizing the "neutral principles" approach as sounding in utilitarianism rather than church autonomy); Rutherford, *supra* note __, at 1119 (characterizing both *Jones* and *Smith* as cases involving "governmental neutrality" and not church autonomy); W. Cole Durham, Jr., *Legal Structuring of Religious Institutions*, in Serritella, ed., *supra* note __, at 213, 220-21 (noting, and criticizing, this phenomenon).

313 Dane, *supra* note __, at 1740; *see also* Dane, *supra* note __ [Robbers ed.].

314 *Jones*, 443 U.S. at 603-04.

315 *See* Dane, *supra* note __, 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 __, at 48 n.277 (same).

2. The Ministerial Exemption

Another broad category of caselaw involving questions of "church autonomy" concerns the so-called "ministerial exemption." Under Title VII of the Civil Rights Act, churches are immune from civil rights litigation in cases "with respect to 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."[316] This provision does not exempt churches from civil rights cases involving other protected categories such as race or sex.[317] But the lower federal courts have widely agreed that the Religion Clauses require a still broader scope of immunity than the statute itself provides: religious freedom "bars *any* inquiry into a religious organization's underlying motivation for [a] contested employment decision" if the employee in question would "perform particular spiritual functions."[318] The ministerial exemption is not just a legal defense to an employment discrimination action; it is a recognition on the part of the courts that they lack the jurisdiction to examine these claims altogether.[319]

The question of who qualifies for the "ministerial exemption" has spawned a good deal of discussion.[320] More broadly, several writers have argued that the exemption itself is not required by the Religion Clauses and should be eliminated, subjecting churches to the civil rights laws on the

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316 42 U.S.C. § 2000e-1(a) (2000).

317 *See, e.g., Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

318 *Petruska v. Gannon University*, 462 F.3d 294, 304 (3d Cir. 2006).

319 *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).

320 *See* Horwitz, *Universities as First Amendment Institutions, supra* note __, at 1521 nn.142-45 and accompanying text (offering examples). Another issue in this area that has 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, *supra* note __, at 527 & nn.69-73. For a position closer to my own, see Dane, *supra* note __, 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.").

same basis as any other employer.[321]

A First Amendment institutionalist approach to the ministerial exemption, supplemented by the concept of sphere sovereignty, buttresses the arguments of the courts and scholars in favor of the ministerial exemption. If churches are to function as sovereign institutions, they need to have a substantial degree of autonomy to make their own decisions about whom they hire and fire. As Kuyper wrote, "[t]he Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle."[322]

One might argue that only those employment decisions that are truly *religious* fall within the proper sphere of the church as sovereign, and any decisions based on extrinsic factors such as race or sex fall outside the ambit of its sovereign sphere. That argument is mistaken, however, 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 the church as sovereign, even if the grounds for such a decision are questionable. Second, to determine whether or not the church's basis for hiring or firing someone is truly extrinsic to its religious activities, and thus whether it falls outside the proper scope of its operations as a sovereign sphere, would require the courts to make determinations about matters for which "the government lacks the data of judgment."[323]

Third, even if such a judgment were possible, any suitable state remedy would intrude on the sovereignty of the church – or, put differently, its integrity and usefulness as a First Amendment institution. A court-ordered reinstatement of such an employee would require the religious entity to "tolerate as a member" – and not just a member, but a minister or other core employee – "one whom [the church] feels obliged to expel from [its] circle."[324] The church, Kuyper wrote, "possesses her own office-bearers,"[325] and should not be compelled to retain employees it has not selected and retained of its own volition. This is equally true from a First Amendment institutionalist perspective. Since it assumes that churches 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 church for the exercise of the same privilege.

Thus, an institutionalist approach supports the courts' recognition of

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321 *See, e.g.,* Rutherford, *supra* note __; Corbin, *supra* note __.

322 Kuyper, *Lectures, supra* note __, at 108.

323 *Id.* at 105.

324 *Id.* at 108.

325 *Id.* at 106.

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 and not narrowly. Courts should not be required to examine too closely the church's own claim that an employee is in fact a religious employee, lest they be forced into the same sorts of troubling inquiries I have just recounted.

More broadly still, a sphere sovereignty or First Amendment institutionalist approach would push in favor of extending current doctrine with respect to the ministerial exemption. As the law currently stands, Title VII permits discrimination with respect to all employees, but only with respect to religion. 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 what we might call the "*Bob Jones* problem" – should churches be entitled to discriminate where other organizations cannot, even on forbidden grounds such as race?[326] One can, of course, deplore such acts of discrimination, especially where they are not deeply rooted in the religious policies of a particular church. 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.[327] But it is important to be clear. A Kuyperian or First Amendment institutionalist approach to such questions would indeed suggest that courts lack the jurisdiction to intervene in at least some such cases. That does not mean churches themselves are immune to internal or external *moral* suasion; it *does* mean that, absent extraordinary circumstances, these disputes would be seen as a matter for *self*-regulation, and not for state intervention into the sovereign sphere of the church.

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[326] *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 __. 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 B.Y.U. L. Rev. 1773.

[327] *See* Brady, *supra* note __, at 153 n.5.

That approach, however disturbing it might be in individual cases, is still 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. These two points are ultimately intimately connected. Arguments in favor of the ministerial exemption and other aspects of church autonomy doctrine have tended to be instrumental in nature, focusing, for instance, on the contribution that religious groups make to democratic deliberation,[328] on their contribution to the search for truth,[329] or on the simple incompetence of the courts to resolve such issues.[330] These are important justifications, and they are certainly consistent with a First Amendment institutionalist account. But 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 Kuyper's argument may have something to contribute here. Churches, as a part of the social landscape, are protected not simply because they are instrumentally valuable, although they generally are. They are protected because they are *intrinsically* valuable, and are a fundamental part of a legally pluralistic society. The state may be precluded from interfering in church employment decisions not simply because it would be a bad idea on the whole for it to do so, but because the church's affairs are not *its* affairs; it simply has no jurisdiction to entertain them. In this sense, a sphere sovereignty approach to church autonomy has more in common with the approach offered by Carl Esbeck, who argues that the state is jurisdictionally disabled from addressing these questions.[331]

Do church employment decisions fall within the scope of any of the three occasions on which, under Kuyper's scheme, 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

[328] *See* Brady, *supra* note __, at 1699-1706.

[329] *See* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What is at Stake*, 22 J. L. & Rel. 153 (2006-2007). This is an ungenerous characterization of Professor Brady's article, 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.

[330] *See, e.g.,* Berg, *supra* note __, at 1613 (arguing against a purely judicial competence-based argument for religious autonomy) [BYU].

[331] *See, e.g.,* Esbeck, *supra* note __, at __; Esbeck, *supra* note __, at __. 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.

sovereign spheres.[332] But this takes Kuyper's exception too far. Kuyper 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.[333] In other words, forcing an individual to stay in a church against his will violates the individual's own sovereign conscience. But that is a different matter from church employment decisions, in which the church's own ability to select the composition of its members is at stake. From a First Amendment institutionalist perspective, the result is no different. From a categorical perspective, what should matter to the court is that it has identified the defendant church as a relevant First Amendment institution. Core decisions such as whom to employ 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 has to do with 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 such legal claims to buckle under the sheer weight of social disapproval.[334] It has also sparked some of the most vehement opposition to the general principle of church autonomy.[335]

I cannot do justice to all the complex issues that this issue has engendered.[336] But a few words about this issue are important, because they serve as a reminder that sphere sovereignty, like First Amendment institutionalism, is not an absolute license. Most writers who argue for

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[332] Kuyper, *Lectures, supra* note __, at 97. For such an argument, see, *e.g.,* Rutherford, *supra* note __.

[333] Kuyper, *Lectures, supra* note __, at 108 (emphasis added).

[334] *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. Rev. 1789, 1792.

[335] *See, e.g.,* Hamilton, *supra* note __; 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).

[336] In addition to Lupu & Tuttle's comprehensive and superb article, see also Symposium, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. Rev. 947 (2003); Timothy D. Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (2008).

church autonomy already strongly agree on this point.[337] But it is worth stressing this point, lest critics of church autonomy advance a straw-man argument along these lines.[338]

Kuyper himself could not be clearer on this point: one of the occasions on which it most appropriate for the state to exercise its own sovereignty and intervene in the sovereign sphere of the church is when a church has behaved abusively toward one of its own members.[339] In those circumstances, the state is obliged to act to ensure the protection of the individual "from the tyranny of his own circle."[340] Thus, it should be abundantly clear that 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 by churches. From a First Amendment institutionalist perspective, however strong the interest in favor of institutional autonomy may be, it does not extend to cases involving these kinds of gross harms. Rather than serve the underlying spirit of valuing institutions that 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 churches as First Amendment institutions may be, it does not embrace religious immunity from obviously harmful conduct such as sexual abuse. But it *does* suggest something about how we might go about intervening in these cases. It suggests that we should adopt a measure of caution, lest courts or juries be drawn into broad questions of entity responsibility, the manner of selecting or monitoring church officials, questions of church structure and bankruptcy, and other issues that range further afield from the abuse itself and closer to the heart of the First Amendment institution *qua* institution.

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,"[341] a question that strikes at the heart of churches as

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[337] *See, e.g.,* Lupu & Tuttle, *supra* note __, at __; Brady, *supra* note __, at __; Durham & Sewell, *supra* note __, at 80.

[338] *See, e.g.,* Marci A. Hamilton, *The Catholic Church and the Clergy-Abuse Scandal* 2 (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.").

[339] *See* Kuyper, *Lectures, supra* note __, at 97.

[340] Kuyper, *Sphere Sovereignty, supra* note __, at 468.

[341] Lupu & Tuttle, *supra* note __, at 1816.

sovereign spheres and embroils courts in questions that they lack the competence to resolve.[342]

Professors Ira Lupu and Robert Tuttle would take this caution a step further, applying a modified version of the Supreme Court's protective test in *New York Times v. Sullivan*[343] for defamation involving public figures to the realm of civil suits against churches for sexual misconduct.[344] Thus, they suggest that the courts should reject any regime of tort liability that "imposes on religious entities a duty to inquire into the psychological makeup of clergy aspirants,"[345] lest it lead churches 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."[346] And, adapting the test of "actual malice" from *New York Times*,[347] they argue that church officials should not be liable for abuse committed by an individual clergy member unless the church "had actual knowledge of [its] employees' propensity to commit misconduct."[348] These and other measures would "give[ ] religious organizations 'breathing space' within which to organize their own polities, select their own leaders, and preach their own creeds."[349]

This kind of approach is consistent with the general approach toward churches as First Amendment institutions, or sovereign spheres, that I have argued for here. It treats these institutions as distinct and valuable and as lying largely beyond the jurisdiction of the state. It thus seeks to craft the law affecting them in ways that give the utmost freedom to these institutions to shape and regulate themselves.

Two aspects of this approach are worth underscoring. First, church immunity in these cases is not unlimited: the state may intervene to protect church members in appropriate cases, even if it attempts to do so

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342 *See, e.g., Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988); William W. Bassett, *Religious Associations and the Law* § 8:19 n.9 (listing cases).

343 376 U.S. 254 (1964).

344 *See* Lupu & Tuttle, *supra* note __, 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).

345 Lupu & Tuttle, *supra* note __, at 1860-61.

346 *Id.* at 1861.

347 *New York Times*, 376 U.S. at 279-80.

348 Lupu & Tuttle, *supra* note __, at 1862.

349 *Id.* at 1860.

with due regard for the churches' status as sovereign institutions. Second, there is a difference between leaving open even a limited scope for church immunity in these cases and arguing that churches ought to be free to do whatever they wish. First Amendment institutions are *self*-regulating institutions, and as such they are subject to internal critique and reform, non-legal public pressure, and reputational pressures. Thus, there is reason to believe that even a *limited* form of immunity would not necessarily prevent churches from self-regulating to avoid the risk of sexual misconduct. Certainly they have every incentive to do so – including, perhaps most importantly, the religious incentives that shape them, and that define the core of their sovereign concerns.[350]

D. Free Exercise Questions and Smith

I have already noted the Supreme Court's decision in *Employment Division v. Smith*, which eviscerated the prior legal standard for Free Exercise claims, under which 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 "neutral, generally applicable law[s]" are entitled to no special level of scrutiny under the Free Exercise Clause.[351] 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,"[352] some courts[353] and commentators[354] have argued that at least some form of compelled accommodation for generally applicable laws that burden religious group freedom, as in the ministerial exemption cases, survives *Smith*.[355]

It might seem that First Amendment institutionalism has nothing to say about this case, at least in instances involving individual rather than entity claimants. I want to argue, however, that a sphere sovereignty approach

[350] *See id.* at 1864-65; *see also* Mark Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 Cath. U. L. Rev. 125, 150-51 & nn.138-39 (2003).

[351] *Employment Division v. Smith*, 494 U.S. 872, 881 (1990).

[352] *Id.* at 877 (citations omitted).

[353] *See, e.g., EEOC v. Catholic Univ.*, 83 F.3d 455, 460 (D.C. Cir. 1996); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999).

[354] *See, e.g.,* Brady, *supra* note __; Dane, *supra* note __.

[355] *But see* Underkuffler, *supra* note __, at 1774 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").

that treats religious entities as First Amendment institutions 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*.

Smith's problem is the same one noted by institutionalist critics of the Court's First Amendment doctrine in a number of areas: its institutional agnosticism, and its reliance on what it imagines to be serviceable general doctrinal rules 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 cases like it "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."[356] The Court's apparent view is that Free Exercise doctrine would become too complicated, too permissive, and too inconsistent with its institutional agnosticism in a host of other fields, if it took such questions under consideration in individual cases.

Sphere sovereignty, as we have seen, 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 its 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.

Beyond this, however, the sphere sovereignty account may also be cause for criticism of the rule in *Smith* even where it concerns *individual* claims for a religious accommodation. This is so for two reasons. First, and most importantly, the sphere sovereignty account itself serves as a critique of the formation of institutionally agnostic constitutional doctrine that attempts to erase or ignore basic questions of social fact. Second, as Kathleen Brady has demonstrated in the course of arguing that *Smith* does not alter the doctrine of autonomy for religious groups, it is hard to distinguish individual religious practice from group religious practice. In any communal religious setting, individuals take their religious obligations from those of the religious community as a whole. Their own practices, and the burdens they experience at the hands of generally applicable and neutral

[356] Schauer, *Institutions, supra* note __, at 1756.

laws, are thus part of the broader fabric of the group religious experience.[357] It is difficult to argue for the religious autonomy of religious groups without wondering whether the *Smith* Court's refusal to grant similar exemptions to individuals is itself untenable.

This is perhaps a more controversial argument. It reads *Smith* in a way that undercuts the decision itself; and it does not lay to rest the Court's concern that granting individual exemptions from generally applicable laws would be "courting anarchy."[358] One can 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 a dead end. Nevertheless, an institutional or sphere sovereignty account of religious freedom does call 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 church,[359] 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.[360]

Would a group or individual claim to a Free Exercise exemption from a neutral, generally applicable law fall within the limited set of cases in which Kuyper argues that state intervention is permissible? The answer, in most cases, will be no. Most such cases do not involve significant third-party costs, and certainly do not involve the risk of a church 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 in which Kuyper would allow state regulation. But, aside from its flawed assumption that the rule of law is too inflexible to allow for individual accommodations in cases that serve the underlying constitutional value of free exercise of religion,[361] 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."[362]

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[357] *See* Brady, *supra* note __, at 1675-76.

[358] *Smith*, 494 U.S. at 888.

[359] *See Smith*, 494 U.S. at 874.

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

[361] *See, e.g.,* Ronald R. Garet, *Three Concepts of Church Autonomy*, 2004 B.Y.U. L. Rev. 1349, 1364-67.

[362] Kuyper, *Lectures, supra* note __, at 97.

Perhaps a stronger argument could be made for the rule in *Smith* as an example of interspherical conflict, in which the state can "compel mutual regard for the boundary-lines of each" sovereign sphere.[363] But this argument presupposes that the church is trespassing on the sphere of state activity, rather than that the state is trespassing into the area of church sovereignty. Nothing in the general account of sphere sovereignty tells us who should win in such a dispute. It does leave the state as the final arbiter of the dispute. But 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 church as 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 *Smith* in cases involving group religious practice. But it would also ultimately require reexamining *Smith* altogether, even in cases involving *individual* claims of accommodation.

E. Establishment Clause Issues

1.Two Categories of Establishment Clause Issues

Finally, what impact would an institutionalist account of the First Amendment have on Establishment Clause cases? Some writers in the Kuyperian tradition 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 [ ] intertwinement of fundamentally different social structures."[364] Nicholas Wolterstorff is even blunter, 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."[365]

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363 *Id.*

364 Van der Vyver, *supra* note __, at 662 [Robbers ed.].

365 Wolterstorff, *supra* note __, at 18.

Wolterstorff may be right that the Court's Establishment Clause doctrine is hopelessly confused; he would not be the only one to draw that conclusion.[366] But I am less certain that either a sphere sovereignty-driven account or a First Amendment institutionalist account of religious freedom requires a significant shift in Establishment Clause doctrine. To see this, it would help to divide the concerns arising under the Establishment Clause into two categories: those involving equal funding and equal access to the public square for religious institutions, and those involving what I call "symbolic support" for religious institutions.[367]

Begin with questions of equal funding and equal access for religious entities. This was the area with which Kuyper was most concerned – especially "the equal funding of religiously-oriented schools.[368] Notwithstanding Kuyper's own views, which of course arose in a different context,[369] 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 their own strength on the voluntary principle."[370] But churches, as Kuyper also emphasized, are only of the multitude of sovereign spheres. So long as those spheres – voluntary associations of all kinds – are entitled to share in the state's largesse, churches should be in a similar position, provided that government does not interfere too much in the internal operations of the churches. Thus, my account suggests that churches *should* be entitled to equal access to funding for various government programs, including school vouchers, that are available to secular entities. And certainly, if we value churches from a First Amendment institutional perspective as valuable contributors to public discourse, they should be equally free to engage in public speech as any other group.

This is the direction in which the law is already moving. The Supreme Court in recent years has shifted increasingly to 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,

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[366] *See supra* note __ (collecting examples of commentators who have described the Court's Establishment Clause jurisprudence in precisely these terms).

[367] A third category – the interaction of the Establishment Clause and the regime of tax laws and tax exemptions – will have to await another Article. For a thorough discussion of this issue, see Kent Greenawalt, 2 *Religion and the Constitution: Establishment and Fairness* 279-97 (2008).

[368] Wolterstorff, *supra* note __, at 18; *see also* Kobes, *supra* note __.

[369] *See supra* notes __-__ and accompanying text (discussing the "pillarization" of Dutch society).

[370] Kuyper, *Lectures, supra* note __, at 106.

and that any choice to avail oneself of state funding in order to attend a religious school is a product of true private choice.[371] Similarly, on equal access issues, the Court has emphasized that religious entities are just as entitled to engage in speech in the public square, including the use of public fora such as after-hours public school programs, as secular entities.[372] Thus, the one area in which both a sphere sovereignty account and an institutionalist account might counsel a change in Establishment Clause doctrine has already changed of its own steam.

Aside from the funding cases, the other major field of battle in Establishment Clause litigation concerns what we might call "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,[373] or the placement of public displays such as a crèche[374] or the Ten Commandments.[375]

On these questions, my account tends to favor prevention rather than permissiveness. Both First Amendment institutionalism and sphere sovereignty tend to agree with the basic principle that "[t]he sovereignty of the State and the sovereignty of the Church" are mutually limiting principles, and that both are harmed if they intertwine.[376] From a First Amendment institutionalist perspective, the importance of granting religious institutions legal autonomy follows in part from the fact that religious entities serve as a vital *independent* source of ideas and public discourse.[377] On this view, religious institutions, among other functions, "mark the limits of state jurisdiction by addressing spiritual matters that lie beyond the temporal concerns of government."[378] If the goal of First Amendment institutionalism is to preserve a strong set of independent institutions that promote free and open public discourse, it would be

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

[372] *See, e.g, Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); Laycock, *supra* note __, at 220.

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

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

[375] *See, e.g., McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

[376] Kuyper, *Lectures, supra* note __, at 107.

[377] *See, e.g.,* Brady, *supra* note __, at 1700-04.

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

inconsistent with that goal to allow the state to openly side with or promote particular religious speech or expressive conduct.

Whatever he might have thought of the question of equal funding for religious schooling, and notwithstanding his words of praise for the role that government-supported religiosity played in the early American republic,[379] Kuyper's account of sphere sovereignty seems to point in the same direction. A government that truly "lacks the data of judgment" on religious questions and that lacks the sovereign prerogative of "proclaim[ing] [a religious] confession as the confession of the truth"[380] surely has no business weighing in on religious questions or endorsing particular religious messages. Kuyper himself might have viewed the question differently. But the best reading of sphere sovereignty's application in the American context 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 is worth brief discussion. Consider the law of standing as it relates to Establishment Clause challenges. The Supreme Court has generally denied standing in which individuals assert nothing more than a "generalized grievance" in their capacity as taxpayers.[381] In *Flast v. Cohen*,[382] however, the Court carved out a narrow exception to this rule in Establishment Clause cases involving Congress's expenditure of funds pursuant to its taxing and spending powers.

This exception has been narrowly applied since *Flast*.[383] Recently, in *Hein v. Freedom From Religion Foundation, Inc.*,[384] the Supreme Court further signaled its skepticism about even the narrow space carved out by *Flast*, giving rise to the possibility that Establishment Clause exception to the rule against taxpayer standing will be narrowed still further, or eliminated altogether.[385] The *Hein* Court held that although

[379] *See* Kuyper, *Reader, supra* note __, at 291.

[380] Kuyper, *Lectures, supra* note __, at 105-06 (emphasis omitted).

[381] *See, e.g., Federal Election Comm'n v. Akin*, 118 S. Ct. 1777, 1785 (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).

[382] 392 U.S. 83 (1968).

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

[384] 127 S. Ct. 2553 (2007).

[385] *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 B.Y.U. L. Rev. 115.

the funds at issue in that case had been provided by Congress as part of its general 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."[386] 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.[387]

The approach to churches as First Amendment institutions that I have offered here would resist the trend against taxpayer standing in Establishment Clause cases represented by *Hein*. This point has been worked out most thoroughly by Professor Carl Esbeck, who argues that the recognition of standing for "non-Hohfeldian injur[ies]"[388] 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.'"[389]

That view is consistent with the sphere sovereignty approach, and with the treatment of churches as First Amendment institutions. This approach treats churches as enjoying a form of legal sovereignty and immunity that is a fundamental part of the legal structure rather than 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 constitutional role of states, and broad standing is necessary to curb "official action that undermines the integrity of religion."[390] Just as church autonomy is a non-waivable doctrine[391] for reasons relating to the fundamental role of churches and other First Amendment institutions in the body politic, so citizens should have broad rights to enforce the fundamental principle that church and state must remain within their own separate jurisdictions. Ultimately, then, a sphere sovereignty approach to churches as First Amendment institutions would buttress taxpayers' ability to enforce the

386 *Hein*, 127 S. Ct. at 2566.

387 *Id.* at 2579, 2584 (Scalia, J., concurring).

388 Esbeck, *supra* note __, at 36; *see generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 Yale L.J. 16 (1913).

389 Esbeck, *supra* note __, at 2.

390 Esbeck, *supra* note __, at 40.

391 *See supra* note __ and accompanying text.

Establishment Clause, precisely to preserve and maintain the integrity of churches 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 churches and a 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 typically 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 churches meet any reasonable definition of a First Amendment institution. Their fundamental social role cannot be denied; they serve a well-established role in 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 churches are understood as sovereign spheres and as First Amendment institutions, we may find a coherent, consistent, and attractive answer to a host of difficult doctrinal questions, ranging across both the Free Exercise and Establishment Clauses, that continue to bedevil us and that may represent the newest front in the battle over church-state relations.

Perhaps, though, this approach offers a little more than that. 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.[392]

Kuyper might have said that those worlds are not new, but are as old as Creation; a First Amendment institutionalist might add that, whatever their origins, they are long-standing and remarkably stable artifacts of public discourse. But Cover's eloquent words are appropriate here just the same.

[392] Cover, *supra* note __, at 68.

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.